1936

CANADA LAW REPORTS

Supreme Court of Canada

REPORTERS
ARMAND GRENIER, K.C.
S. EDWARD BOLTON, K.C.

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1937

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

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

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. ERNEST LAPOINTE, K.C.

21016—1½

MEMORANDA

On the tenth day of March, 1936, the Honourable John Henderson Lamont, Puisne Judge of the Supreme Court of Canada, died.

On the twenty-fourth day of March, 1936, Albert Blellock Hudson, one of His Majesty's Counsel, was appointed a Puisne Judge of the Supreme Court of Canada.

ERRATA

Page 205, substitute for the first foot-note (6), foot-note (4) as follows: (4) (1841) 1 Q.B. 29.

Page 291, foot-note should read: (1912) 28 T.L.R. 505.

Page 370, at the 24th line, "vendor" should be "purchaser."

Page 372, foot-note (2) should be: [1921] 2 A.C. 91.

Page 405, foot-note (4) should be: [1915] A.C. 330.

Page 408, foot-note should be: [1896] A.C. 348.

Page 411, foot-note (1) should be: [1896] A.C. 348, at 359.

Page 412, foot-note (2) should be: [1912] A.C. 333.

Page 418, at the 24th line, *Montreal Park & Island Railway* v. *City of Montreal* should be *City of Montreal* v. *Montreal Street Ry. Co.*

Page 422, foot-note (1) should be: [1923] A.C. 695.

Page 424, strike out foot-note (4),—In text, at the fourth line from bottom, the foot-note reference (4) should be (2).

Page 425, foot-note (4) should be: [1932] A.C. 304.

Page 426, foot-note (1) should be: [1922] 1 A.C. 191.

Page 451, foot-note (2) should be: [1922] 1 A.C. 191, at 200.

Page 457, at the 11th line, "accomplished" should be "accompanied."

Page 462, at the 5th line, after the words "these Acts," add "(except as to section 6 of the *Minimum Wages Act*).

Page 479, foot-note should be: [1906] A.C. 542.

Page 495, at the 17th line, after the word "Act," add ", except as to section 6,"

Page 501, at the last line, after the words "in each case" add "(except as to section 6 of the *Minimum Wages Act*),"

Page 553, strike out foot-note.

Page 573, at the 8th line, "*Loss or damage for* * * *" should be "*Loss or damage from* * * *".

Page 642, foot-note (5) should be: [1892] P. 179.

ERRATA

Page 370, at the 24th line, "vendor" should be "purchaser."

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

Baldry v. *McBain and Jack* ([1936] S.C.R. 120). Leave to appeal refused, 28th April, 1936.

Begley v. *Imperial Bank of Canada* ([1935] S.C.R. 89). Appeal dismissed with costs, 28th April, 1936.

Canadian Surety Co. v. *Quebec Insurance Agencies Ltd.* ([1936] S.C.R. 281). Leave to appeal refused, 15th December, 1936.

Crosley Radio Corporation v. *Canadian General Electric Co. Ltd.* ([1936] S.C.R. 551). Leave to appeal refused, 16th July, 1936.

Forbes v. *Attorney-General of Manitoba.* [1936] S.C.R. 40). Leave to appeal granted, 1st May, 1936. Appeal dismissed, 19th December, 1936.

General Dairies Ltd. v. *Maritime Electric Co. Ltd.* ([1935] S.C.R. 519). Appeal allowed with costs, 8th February, 1937.

Glennie v. *McD. & C. Holdings Ltd.* ([1935] S.C.R. 257). Leave to appeal refused, 10th March, 1936.

King, The v. *Dominion Building Corp. Ltd.* ([1935] S.C.R. 338). Leave to appeal refused, 9th March, 1936.

McLaughlin v. *Solloway and Mills.* ([1936] S.C.R. 127). Leave to appeal and cross-appeal granted on terms, 13th July, 1936.

References in the matters of The Weekly Rest in Industrial Undertakings Act, The Limitation of Hours of Work Act, The Minimum Wages Act, The Employment and Social Insurance Act, The Natural Products Marketing Act, Section 498A of the Criminal Code, The Farmers' Creditors Arrangement Act, 1934, and The Dominion Trade and Industry Commission Act. ([1936] S.C.R. 363 to 538). Leave to appeal granted, 29th July, 1936.

References in the matters of The Weekly Rest in Industrial Undertakings Act, The Limitation of Hours of Work Act and *The Minimum Wages Act.* ([1936] S.C.R. 461 to 538). Act in each case is *ultra vires* of the Parliament of Canada, 28th January, 1937.

References in the matters of The Employment and Social Insurance Act, The Natural Products Marketing Act, Section 498A of the Criminal Code, The Farmers' Creditors Arrangement Act, 1934, and The Dominion Trade and Industry Commission Act. ([1936] S.C.R. 363 to 461). Appeals dismissed and cross-appeal in *The Dominion Trade and Industry Commission Act* allowed, 28th January, 1937.

Sin Mac Lines Limited v. *Hartford Fire Insurance Co.* ([1936] S.C.R. 598). Leave to appeal refused with costs, 25th February, 1937.

Southern Canada Power Co. Ltd. v. *The King.* ([1936] S.C.R. 4). Leave to appeal and cross-appeal granted, 17th July, 1936.

A TABLE

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

WILLIAM FRASER AND OTHERS.....APPELLANTS; 1936

AND *Jan. 24.

HIS MAJESTY THE KING.....RESPONDENT.

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

Appeal—Leave to appeal to Supreme Court of Canada—Criminal law—Conflict of judgments—Circumstantial evidence—Rule as to inference of guilt—Section 1025 Cr. C.

When the conviction of an accused is grounded exclusively on circumstantial evidence, the rule acted upon by the decisions of several courts of appeal throughout Canada has been that "in order to "justify the inference of guilt, the inculpatory facts must be incom- "patible with the innocence of the accused and incapable of any "other reasonable hypothesis than that of his guilt"; and when that principle is compared with the principle expounded in this case by the reasons of judgment of the appellate court, it must be *held* that there exists, between the above decisions and the judgment appealed from, the conflict required by section 1025 of the Criminal Code; and, therefore, leave to appeal to this Court should be granted, as such rule of law is of sufficiently general importance to justify such leave.

MOTION under section 1025 of the Criminal Code for leave to appeal to this Court from the judgment of the Court of King's Bench, appeal side, province of Quebec, upholding the conviction of the appellants. Leave to appeal was granted by the judgment now reported.

Aimé Geoffrion K.C. and *Lucien Gendron K.C.* for the appellants.

Charles Laurendeau K.C. and *James Crankshaw K.C.* *contra.*

* PRESENT:—Rinfret J. in chambers.

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RINFRET J.—Counsel for the appellants have moved for leave to appeal from the judgment of the Court of King's Bench (appeal side), upholding the verdict against the appellants in this matter.

My duty is to decide whether the judgment appealed from conflicts with the judgment of any other court of appeal in a like case in Canada; and, if so, whether the importance of the case justifies the granting of leave to appeal to the Supreme Court of Canada.

It is common ground that the conviction of the appellants was grounded exclusively on circumstantial evidence. In such cases, the rule laid down by Baron Alderson in *Hodge's* case (1) may be said to have been generally adopted that

> the jury must be satisfied not only that (the) circumstances were consistent with his (the prisoner) having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person.

Counsel for the appellants referred me to at least four judgments of other courts of appeal in like cases, where the rule so laid down was accepted and applied. They are: *The King* v. *Jenkins* (Court of Appeal for British Columbia) (2); *Rex* v. *Hyslop* (Appellate Division of the Supreme Court of Alberta) (3); *Rex* v. *Yok Yuen* (Appellate Division of the Supreme Court of Ontario) (4); *Rex* v. *Demetrio* (Appellate Division of the Supreme Court of Ontario) (5).

It may be added that this Court has also adopted the rule, amongst other instances, in the cases of *McLean* v. *The King* (6) and *Reinblatt* v. *The King* (7).

The result of that rule and of the decisions where it was applied is that

> in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of any other reasonable hypothesis than that of his guilt. (Wills, On Circumstantial Evidence, at p. 262).

Now, if we take the principle thus enunciated and acted upon by the several courts of appeal throughout Canada

(1) (1838) 2 Lewin's Crown's Cas. 227.
(2) (1908) 14 Can. Cr. Cases, 221.
(3) (1925) 43 Can. Cr. Cases, 384.
(4) (1929) 52 Can. Cr. Cases, 300.
(5) (1926) 46 Can. Cr. Cases 133.
(6) [1933] S.C.R. 688.
(7) [1933] S.C.R. 694.

in the cases referred to, and if we compare it with the principle expounded in the present case by the Court of King's Bench (appeal side), as it must be gathered from the reasons of judgment, it is difficult not to come to the conclusion that there exists between the two the conflict required by section 1025 of the Criminal Code.

The learned judge who gave the reasons for the Court expressed himself in the following way:

Aussi bien, les procureurs des appelants se sont-ils appliqués à mettre de l'avant, pour le cas où le dossier montrerait encore que leurs clients ont été mêlés à l'affaire, cette règle de droit bien connue qu'une preuve circonstantielle ne doit conduire à un verdict de culpabilité que si les circonstances entrevues ne s'adaptent pas de façon plausible à une autre hypothèse raisonnable.

As I read this sentence, I do not feel that it lays down the rule in the way in which it has been interpreted by the other courts of appeal in the judgments already mentioned. I think it was put down in a much stronger way than the words of the learned judge convey. The statement

qu'une preuve circonstantielle ne doit conduire à un verdict de culpabilité que si les circonstances entrevues ne s'adaptent pas de façon plausible à une autre hypothèse raisonnable

is not as favourable to the prisoner as the principle laid down by Baron Alderson (1) that the facts must be

such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person,

which, by the other courts, have been understood and interpreted to mean that there should be

no other possible explanation consistent with the evidence, except the guilt of the accused,

or that the evidence believed by the jury

must exclude every reasonable hypothesis of innocence and justify the verdict.

But, if I read further in the reasons of the Court of King's Bench, my conviction is strengthened that the principle whereby the Court measured the validity of the jury's verdict in the present case was different from that laid down by Baron Alderson and accepted by the other courts of appeal, for the learned judge says:

Je veux tenir compte de cette règle bien juste et bien logique, mais peut-on s'y attarder encore, s'il surgit un fait décisif et qui soit de nature à dissiper tout doute quant à la connaissance du but poursuivi et de

(1) (1838) 2 Lewin's Crown Cas. 227.

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l'intention de l'inculpé, et ainsi rendre incompatible l'hypothèse d'innocence.

What the learned judge says there is that one fact in a chain of circumstances may be found conclusive of a man's guilt, which is directly contrary to *The King* v. *Jenkins* (1).

The difference between the two is made still wider when one reads the sentence immediately following, in the reasons of the Court of King's Bench:

> On conviendra, je crois, qu'un tel fait, lorsqu'il se produit, doive mettre en *échec* la règle de droit susmentionnée.

To which may be added the following further statement in the reasons:

> Il est facile de dire qu'il faut, pour convaincre de culpabilité à raison d'une preuve circonstancielle, écarter d'abord toute autre hypothèse raisonnable * * * mais si la défense—pas plus au procès qu'en appel—n'a pu en imaginer, comment peut-elle se plaindre que le jury n'en ait vu aucune;

which apparently suggests that it was for the appellants to establish their innocence, and not for the Crown to prove their guilt.

Under the circumstances, I am respectfully of opinion that the appellants have proven the existence of the conflict; and the rule itself is of sufficiently general importance to justify me in granting leave to appeal.

Motion granted.

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*Apr. 24, 25, 26, 29, 30.

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*Jan. 15.

THE SOUTHERN CANADA POWER COMPANY LTD. (DEFENDANT)..... APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF).. RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Canadian National Railways—Railway embankment—Washed out by overflow of water and ice during spring—Construction of dam upstream—Interference of natural course of river—Derailment of train—Damages—Servitude—Riparian owner—Liability of owner of dam—Ruling as to various species of damages caused to the railway company—Water-Course Act, R.S.Q., 1925, c. 46, s. 12—Arts. 499, 500, 501, 503, 508 C.C.

The Crown, as owner of the Canadian National Railways Company, brought an action against the appellant company for the recovery

*PRESENT:—Lamont, Cannon, Crocket and Davis JJ. and Dysart J. *ad hoc*.

(1) (1908) 14 Can. Cr. Cas. 221, at 237.

of a sum of $81,523.20 for damages caused through the derailment of a train in consequence of a sudden washout of the railway embankment between the viaduct over the highway and the railway bridge crossing the St. Francis river, near Drummondville, P.Q. The Crown alleged that the loss and damage were the consequence of the construction, in 1928, of a large power house and dam, across the river about two and a half miles upstream from the embankment, which were owned, maintained and operated by the appellant company. The Exchequer Court of Canada maintained the respondent's action for the full amount claimed, less a sum of $600.

Held that the appellant company was liable, as the existence of the appellant's dam led directly to the washing out of the railway embankment, but that the amount of the damages awarded by the trial judge should be reduced to $31,418.03.

Held, per Cannon and Crocket JJ. and Dysart J. *ad hoc,* that, under the laws of Quebec, the appellant company could be held liable only for the damages caused by the injury to the enjoyment of the rights of the railway company as riparian owner; and thus it would not include the locomotive and rolling stock which happened to reach the site of the embankment after the washout. The statutory liability cannot be extended beyond what the law has fixed as the price of the servitude on riparian owners, i.e., the damage caused to the riparian owner, as such, of any property by the damming of the waters. Under the circumstances the failure of the railway employees to safeguard the train was a failure in an obvious duty and relieves the appellant from responsibility for all damages resulting directly or indirectly from the destruction of the dam. Consequently, the respondent was entitled to recover only the costs of repairs to tracks, $5,254.57, the costs of repairs to structure, $13,004.47, and the costs of diversion of train service and of special train service, $13,158.99, making a total sum of $31,418.03.

Per Lamont and Davis JJ.—In addition to the above-mentioned damages, a further sum of $30,235.78 should be awarded to the respondent for costs of repairs to the locomotive and the cars. The liability for damages resulting from the construction and maintenance of the works of the appellant was not confined to such damages as might reasonably have been anticipated by the appellant; when it is found that a man ought to have foreseen in a general way consequences of a certain kind it will not affect him to say that he could not foresee the precise course or the full extent of the consequence which in fact happened. If liability is once established by proof of the relation of cause and effect, then those damages that flow directly are recoverable. The appellant had lawful governmental authority to construct and maintain its works in and across the St. Francis river, but it took that authority subject to the obligation created by section 12 of the *Water-Course Act,* R.S.Q. 1925, c. 46, of becoming "liable for all damages resulting therefrom to any person, whether by excessive elevation of the flood-gates or otherwise." While the appellant was put by the statute into the position of being able lawfully to construct, maintain and operate its works, it was under the condition subsequent that it should, notwithstanding that there was no injuria, pay, under a liability imposed by the statute, for the damnum which should from time to time prove to have been

(1) [1934] Ex.C.R. 142.

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occasioned to any person therefrom; and the language of the statute embraces damages, whether they occur above or below the obstruction in the river, that result from any of such works.

Held that the respondent was not entitled to recover the sum of $19,592.35 for medical and hospital services to employees and passengers who were victims of the accident, for funeral and ambulance expenses, for indemnities to passengers and employees and for wages paid to disabled employees.

Judgment of the Exchequer Court of Canada ([1934] Ex.C.R. 142) varied.

APPEAL from the judgment of the Exchequer Court of Canada (1), maintaining the respondent's action.

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

J. L. Ralston K.C., Alphonse Décary K.C. and *Joseph Marier K.C.* for the appellant.

L. E. Beaulieu K.C. and *J. P. Pratt K.C.* for the respondent.

The judgment of Lamont and Davis JJ. was delivered by

DAVIS J.—On Easter Sunday, April 8, 1928, at about four o'clock in the afternoon, a passenger train of the Canadian National Railways bound for the city of Montreal from the city of Quebec was derailed near the town of Drummondville in the province of Quebec in consequence of the sudden washout of the railway embankment on the east side of the St. Francis river. The locomotive and the baggage car were thrown into the bed of the river and the second-class passenger coach fell upon the baggage car though its rear truck remained on the rails. The railway embankment was a little over 90 feet in length and about 20 feet in height. Railway men speak of this embankment as part of the bridge, but it was in fact a gravel embankment in use to carry the railway tracks to the level of the bridge proper that crossed the river. This embankment was suddenly washed out shortly before the arrival of the train at that point by a tremendous overflow of water and ice which had come down the St. Francis river. The tracks that had lain upon the embankment were left hanging over the gap caused by the washout of the embankment and the trainmen being unaware of this condition until a moment or so

(1) [1934] Ex. C.R. 142.

before reaching the place of the embankment, the calamity occurred. A woman residing in the vicinity who had been watching the movement of the water and ice in the river heard the whistle of the locomotive and realizing the danger ran along the tracks towards the approaching train and signalled the engineer to stop. The engineer immediately applied the emergency brakes and reduced the speed of his train as best he could but the distance was too short within which to bring his train to a stop and the locomotive and cars plunged into the bed of the river. The engineer was so seriously burnt in the cab of his engine that he died within the week as a direct result of the accident; two men in the baggage car were drowned; several passengers were more or less seriously injured; and the cars and the trackage were badly damaged.

The construction of the embankment dated back to 1887. It had been built in that year by the Drummond County Railway Company and when in 1899 the Government of Canada bought the railway and undertaking of the Drummond County Railway Company, the embankment became and remained the property of His Majesty and had been in continuous use since 1887 in connection with the railway line across the St. Francis river bridge. The embankment had been inspected regularly by the railway men and had been kept in what appears to have been a reasonably good state of repair. The railway at this point is part of what is known as the Canadian National Railway System owned by the Dominion Government and the loss and damage were attributed by those in charge of the operation of the railway to the existence of a large power house and dam constructed in 1925 across the St. Francis river about two and a half miles upstream from the embankment and owned, maintained and operated by the appellant, The Southern Canada Power Company, Limited.

His Majesty on information of the Attorney-General of Canada commenced proceedings in the Exchequer Court of Canada against the appellant to recover the loss and damages sustained by the railway. The total claim amounted to $81,523.20. His Majesty recovered judgment in the Exchequer Court of Canada for the full of the amount of the claims less only the sum of $600 being the amount of a gratuity made to the woman who had signalled the train to

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stop. The different items of damage in the claim may be conveniently divided for consideration into three general classes. Firstly, there is the damage involved in the destruction of the embankment and the damage to the tracks amounting in all to $18,259.04. Secondly, the cost of repairs to the locomotive and the cars and the cost of auxiliary and wrecking train service, and of the diversion of the train service. These items total $43,671.81. Thirdly, there is a class of items made up of disbursements for medical and hospital services, funeral and ambulance expenses, indemnities to passengers and employees, wages paid to the disabled conductor of the train and the $600 gratuity above referred to. These items in this class total $19,592.35. The appellant appeals to this Court from the judgment rendered against it in the Exchequer Court of Canada.

The quantum of damages in respect of each of the items in the claim is admitted but liability is denied in respect of the entire claim.

A preliminary objection was raised by the appellant at the trial and renewed before us that the Crown had no right to take these proceedings in the Exchequer Court of Canada, the contention being that the right of action was by statute vested in the Canadian National Railways Company and that that company could only sue in the ordinary courts and not in the Exchequer Court of Canada. The learned trial judge carefully reviewed the statutory law upon the subject and concluded, I think rightly, that the Crown was the owner of the railway and had never given up its right to sue for any claim it had in connection with the operation of the railway. The particular section of the railway in which the accident occurred has an interesting history as part of the old Intercolonial Railway, it having become the duty of the Government of Canada by virtue of sec. 145 of the *British North America Act* to provide for the commencement within six months after the Union of a railway connecting the river St. Lawrence with the city of Halifax in Nova Scotia, and for the construction of such railway without intermission and its completion with all practicable speed. It was in the fulfillment of that duty imposed upon the Government of Canada by the Act of Confederation that the undertaking of the Drumond County Railway Company was acquired in 1899, and thereafter

formed part of the Intercolonial Railway. It became and has continued to be the property of His Majesty in right of the Dominion of Canada. The ownership has never been conveyed to the Canadian National Railways Company, but to that company the management and operation of the railway have been entrusted by statute. While a right of action was given to the railway company by sec. 33 of the *Canadian National Railway Act*, R.S.C. 1927, ch. 172, and this action might have been taken in the name of the Canadian National Railways Company, His Majesty in right of the Dominion of Canada did not relinquish his right as owner to sue. That being so, there is no ground for the further objection that the action should not have been brought in the Exchequer Court of Canada. The learned trial judge has carefully and correctly reviewed and stated the pertinent statutory provisions and the authorities, and it is unnecessary to repeat them.

The real question is that of liability, and apart from considering the items in the three classes of claims in the light of the law applicable to each of these classifications taken separately, the general question of liability is very largely one of fact. The learned trial judge has very carefully reviewed the evidence in great detail and at considerable length and counsel before us readily conceded that the recital of facts was substantially accurate in all respects. It is unnecessary therefore to repeat them here except in so far as may be necessary to indicate in a general way the problem that confronts us in the consideration of this appeal.

Nothing further need be said for the moment as to the construction and state of repair of the railway embankment but some general remarks at the outset as to the construction and maintenance of the dam and power house of the appellant may be appropriate. There were in fact two dams of the appellant. One, with which we are only incidentally concerned, was situate about 1,100 feet upstream from the railway bridge. Its history goes back to 1896, when the town of Drummondville built a wooden dam at substantially the same point. In 1918 the appellant acquired the power plant of the town of Drummondville, including this old wooden dam, and erected a new dam a few inches higher than the old one and at a location approximately 50 feet

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below the old dam which was demolished. This dam of course constituted an obstruction in the river and no doubt had some effect upon the ordinary flow of the river in its natural state but standing alone would not, I think, have been charged with the cause of the accident. In 1925 the appellant built a large power plant and dam across the St. Francis river about two and a half miles upstream from the railway bridge at what was known as Hemmings falls. The appellant is a company incorporated under the Dominion *Companies Act* in 1913 with its chief place of business in the province of Quebec. Carrying on its operations in that province it became subject to the laws of that province and particularly to the *Water-Course Act,* R.S.Q. 1925, ch. 46, to which I shall later refer. The St. Francis river being a navigable river, it was necessary under federal legislation that the plans of the works to be undertaken in the river by the appellant should be submitted to and approved by the Minister of Public Works of Canada. While there is neither proof nor admission that such approval was obtained, it has been assumed throughout that there was such authority and no point has been made of any lack of governmental authority in connection with the construction and maintenance of the power house and the dams. The question of liability for damages that might result from the construction or maintenance of the works need not be discussed until we have a clear understanding of the facts. It is sufficient for the moment to state that under sec. 12 of the *Water-Course Act,*

> the owner or lessee of any such work shall be liable for all damages resulting therefrom to any person, whether by excessive elevation of the flood-gates or otherwise.

The real question, apart from any consideration of the statute, is a question of fact as to whether or not the damages claimed in the action resulted from the presence in the river of the works of the appellant.

Reverting then to the large dam at Hemmings falls, the construction of that dam raised the level of the water upstream 9·2 feet and created a basin about five and a half miles in length where previously there had been one not exceeding three and a half miles. The natural width of the river within the five and a half miles of basin was inevitably widened and at some point very considerably. At one point the width became almost doubled and reached a distance of

over half a mile. The dam itself was some fifty-four feet in height of solid concrete wall. This dam with the large power house stretches across the entire width of the river. There are, of course, sluice-gates and a spillway and on top of the spillway are placed removable flash boards seven feet high to further raise the level of the water when necessary. Farther upstream from Hemmings falls, a distance of about five and a half miles, was what was known as the Dauphinais rapids. The water level from the foot of the Dauphinais rapids downstream for a distance of about three and a half miles, before the construction by the appellant of the dam at Hemmings falls, gradually fell about one foot. Then from that point to a point approximately five hundred feet below the point where the dam now stands there was a drop in the level of nearly forty-five feet which was what was called the Hemmings falls. As a consequence of the erection of the dam the Hemmings falls rapids were entirely wiped out and about two-thirds of the Dauphinais rapids were wiped out, and the level of the river between the head of Hemmings falls rapids and the foot of the Dauphinais rapids was raised 9·2 feet.

The basis of the claim against the appellant is that the tremendous rush of water and ice that so suddenly washed out the railway embankment on the day in question was the direct result of the interference of the appellant with the natural condition of the St. Francis river by the obstructions caused by the erection and maintenance by the appellant of its two dams, the one built in 1918 about 1,100 feet upstream from the railway bridge, and, principally, the other dam, constructed in 1925 at Hemmings falls. Did the damage result from these works of the appellant? That is the real problem in this case. And it is almost entirely, if not entirely, a question of fact. The substantial defences to the action were: (1) That the events which took place on the occasion of the ice break of 1928 were brought about by causes of nature that were entirely abnormal and to which the existence of the dam had no reference. Great formations of ice, unusually heavy rainfall, sudden rise of temperature, were said to have united in creating such a combination of abnormal natural conditions as to cause the accident without reference to the existence of the dams. (2) That if the dam had in fact any influence upon the

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situation, it acted as a regulator and moderator controlling to some extent the spring floods and distributing their effect so as to reduce what would otherwise have been a worse condition. (3) That the railway had itself been negligent in continuing to use the old gravel embankment, having regard to the history of the conditions on the river which had occurred periodically during some years past, and which called for precautionary measures on the part of the railway company in the construction of a substantial structure to carry the tracks between the viaduct over an adjacent highway and the bridge in question. (4) That having regard to the known condition of the river during two or three days before the accident, the railway company should have taken heed of the probability of the embankment being washed out and have watched the place of the embankment to guard against any train passing over until satisfied that it was safe to do so. I purposely refrain for the moment from discussing other questions of defence that go to liability, if any, in respect of the different classes of claims treated separately. The basic problem is the general question whether or not the washout of the railway embankment resulted directly from the existence of the works of the appellant in the river. And that is a question of fact.

The learned trial judge put his conclusion in these words:

> After weighing carefully all the evidence, oral and literal, I can reach no other conclusion than that the dam of the defendant company at Hemmings falls was responsible for the washout of the railway embankment at Drummondville on Sunday, April 8, 1928.

The trial of the action took fourteen days. There are 959 pages of evidence besides 133 exhibits, including maps, plans, profiles, charts, photographs, records, water levels, records of flow, meteorological reports, vouchers, etc. More than one hundred witnesses gave evidence at the trial and over sixty per centum of the oral testimony was given in French. The learned trial judge, with his mastery of both the English and the French languages, was specially qualified to fully appreciate the oral testimony and has with great care minutely reviewed all the evidence in a judgment extending to fifty-eight pages. He heard and saw the expert witnesses and all the lay witnesses, the latter being mostly residents in the vicinity who described what they saw and told what they knew not only of the immediate events of the accident but of the happenings upon the

river over the past many years. On a question of fact as to whether the damage to the railway embankment was caused by the existence of the works of the appellant, the trial judge was in a particularly advantageous position to properly weigh the mass of contradictory testimony and it would need something very clear and definite in the evidence to satisfy any court of appeal that findings of fact of a trial judge in such a case should be reversed. Counsel for the appellant very ably presented to us their analysis of the evidence in support of their contention that the trial judge had upon the evidence reached a wrong conclusion. During a lengthy argument they raised in our minds at times certain doubts but the very nature of the problem is such that one cannot look for certainty and must be content upon the balance of probabilities as to whether or not there was any direct relation between the existence of the dam and the damage to the embankment. A careful study of the evidence in the light of the arguments presented to us by counsel for the appellant has failed to satisfy me that the trial judge was wrong in the conclusion that he reached on the general question of liability.

No useful purpose is to be served by reviewing again the evidence in the case. The main defence of the appellant was that the accident was simply the result of a combination of natural forces and should be attributed to the act of God. In the carefully prepared factum presented to this Court by counsel for the appellant it is stated that they believe they are

> in a position to successfully demonstrate that the evidence, although contradictory on many points, confirms

their contention. Where the question is one of fact and the evidence is admittedly " contradictory on many points," the findings of fact by the trial judge cannot lightly be disturbed. Counsel for the appellant in discussing the evidence complain that in their view the learned trial judge rejected as a whole the evidence adduced by the experts and improperly declined to accept the evidence of the appellant's expert witnesses; improperly, they say, because in their opinion the expert evidence on behalf of the appellant was consistent and the expert evidence on behalf of the respondent disclosed contradictory theories. There were three expert witnesses called by the respondent and four by the appellant. The evidence of all these witnesses

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was largely theoretical and we could quite appreciate the trial judge, if he had done so, disregarding such evidence and seeking a solution of the problem before him in the evidence of about one hundred lay witnesses who told from their own actual experiences and observations over a period of many years of the action of the St. Francis river at the time of spring floods and of the carrying off of the ice jams at the end of the winter seasons. But in point of fact the trial judge did not disregard the evidence of the expert witnesses. He has in his judgment carefully reviewed the evidence of these witnesses, taking first the expert evidence on one side and then the expert evidence on the other side. Having done that, he says that he found himself in a certain state of perplexity not only because the evidence of all the witnesses consisted largely in statements of theory but because these witnesses differed fundamentally among themselves. It was then that the trial judge turned to the evidence of the lay witnesses for an appreciation of the real facts in the case. Counsel for the appellant contend that a case of this nature should be determined largely upon evidence of witnesses who speak from certain precise data and known principles of science and that it is upon such evidence and not upon evidence of laymen who have not at their command such data or scientific knowledge that such a question as is involved in this action should be determined. In my view the trial judge approached the evidence, and I think rightly, in this manner: Having carefully reviewed and considered the evidence of all the expert witnesses and finding marked differences of opinion among them, he turned to the great mass of lay evidence and then accepted the theory of those experts that was consistent with the evidence of those lay witnesses whose evidence he accepted because of their practical experience and credibility. It is plain that the trial judge was much impressed with the evidence of one Mercure. Mercure lived for nearly fifty years in Drummondville alongside the river between the locations of the Drummondville dam and of the Hemmings falls dam. He had driven lumber down the river every spring for about forty years. He had a wide experience on the St. Francis river, at least in the section of it with which we are concerned. He had known the river in its different conditions, first in a state of nature, then with

the dam that the town of Drummondville erected in 1896, later with the dam the appellant built in 1918 replacing the wooden dam that the town had built in 1896, and finally with the large dam and power house built across the river at Hemmings falls by the appellant in 1925. The result of his evidence was that before the dam at Hemmings falls was built there had never been floods as considerable as the one of 1928 and that there had never been ice jams of the size of those which had formed since the construction of that dam. He stated that prior to the erection of the dam and power house in 1925 there were rapids with a drop of over thirty feet and that ice very seldom formed in those rapids and that, when it did, it was not solid. He said that the long and wide basin of deep and still water created by the dam upstream a distance of about five and a half miles was an ideal " vessel," to use his expression, for the formation of ice and the accumulation of frazil. Mercure had been accustomed, prior to the construction of the dam, to place logs during the winter months on the slope of the river bank to be taken away in the spring, and he said that if he had done the same in 1928 the logs would have been covered with at least twenty feet of ice. I quote the words of the trial judge:

> Mercure is not expounding theories, but relating facts whereof he has been witness. He has rafted logs on the St. Francis river since 1885; he knows all the holes and nooks in the river; he has seen the river in its natural state and also since it has been dammed at Drummondville and later at Hemmings falls; he witnessed all the ice break-ups and spring floods for over forty-five years and always took a keen interest in them, as every spring he was waiting for the river to get clear to start floating his logs. I believe his testimony is of great value to the Court * * * he impressed me as being frank and honest and I have no reason not to believe his testimony. Besides, Mercure is corroborated by a number of witnesses, particularly with respect to the greater seriousness of the floods and jams since the construction of the Hemmings falls dam and the fact that, prior to such construction, the ice below the Dauphinais rapids always left in the spring before the ice from upstream arrived.

The trial judge then directs attention in his judgment to particular portions of the evidence of thirteen witnesses in corroboration generally of Mercure's evidence, and concluded that he saw no reason to believe that the ice and water running down normally in the river in a state of nature, though somewhat more abundant than in previous years as a result of persistently mild weather, would have been sufficient to damage the railway embankment. That

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conclusion was reached after a careful review of all the evidence of both the expert and the lay witnesses, and is a conclusion that agrees entirely with the evidence of the expert witness, McLaghlan. McLaghlan is an hydraulic engineer who has been employed by the Department of Railways and Canals since 1907. He made a special study of the St. Francis river during the two months prior to the trial of the action. Asked directly,

> What is the cause of this washout suffered by the railway at Drummondville on the 8th April, 1928?

he answered:

> The accident to the Canadian National Railway was brought about by the state of the Hemmings falls dam without question. The building of that dam caused the jam to occur at a point it would not occur in nature. That jam was of such a nature that the people operating that plant could not control it, and it broke and went away at a time which shows itself the nature of the force on it.

And again he says:

> That jam was caused by the dam, and the impounding of the water was caused by the jam, all attributable to the building of the Hemmings falls dam. Why? Because that Hemmings falls dam transferred a jam from below the rapids where it impounded practically nothing to a point upstream where it impounded an enormous quantity of water.
>
> * * *
>
> That excess flow was caused by the jam, suddenly breaking; the jam itself was caused by the building of the Hemmings falls dam where it is * * * The whole accident is traceable directly to interfering with nature by building the Hemmings falls dam at a point which was not suitable to stowing the ice that comes out of that river in the break-up period.

Upon the evidence the learned trial judge said he could reach no other conclusion than that the dam at Hemmings falls was responsible for the washout of the railway embankment at Drummondville. But counsel for the appellant argue that it was not fair for the trial judge to accept the evidence of Mercure in that he had a personal interest in the claim the Mercure Company had against the appellant for damages resulting from the floods of 1927 and 1928 and had assisted financially or otherwise in support of two other claims against the appellant, and was therefore vitally interested in this litigation. That was undoubtedly something that had to be seriously considered by the learned trial judge in weighing the evidence of Mercure. It was a powerful basis of attack by the appellant upon the whole evidence of Mercure but the trial judge saw and heard the witness and was told the facts upon which the alleged bias

of the witness was asserted and notwithstanding this the trial judge said:

> I do not think that this can in the least affect the credibility of the witness; he impressed me as being frank and honest and I have no reason not to believe his testimony.

It seems to me quite impossible for us upon an appeal, accepting as we should the learned trial judge's view of the credibility of witnesses and his findings of fact on evidence that was admittedly contradictory both on theories and on facts, to set aside the finding made by the trial judge upon the main issue unless it is abundantly plain that he was obviously wrong in his conclusion. Not only do I think that there is nothing substantial to satisfy us that the trial judge was wrong but I think his conclusion was right.

Much stress was laid by counsel for the appellant upon their contention that having regard to the combination of abnormal natural forces it was really a case of *vis major* or *damnum fatale*. Great quantities of ice formed during the severe winter; heavy rainfall and high temperature followed in the spring; all of which were said to have constituted a combination of natural forces so unprecedented and beyond the control of the appellant as to relieve it of any liability. But all the evidence on this view of the action was carefully considered by the trial judge. This question involved a consideration of the evidence of other somewhat similar floods and ice jams in the St. Francis river at the same location in other years, particularly in 1887, 1913, 1915 and 1921, and a great deal of evidence was directed to these events, before the construction of the Hemmings falls dam, and to the severe flood and break-up in 1927 after the construction of the dam. Evidence was also given about the flood of 1932 (the accident in question in this case was in 1928). The trial judge was satisfied on the evidence that the three worst floods in the section of the river with which we are concerned were those of 1927, 1928 and 1932, and that the floods in 1887, 1915 and 1921 were lesser floods, and he found it difficult to think that this was a mere coincidence. I again quote the exact words of the trial judge:

> I am convinced that these dams, particularly and to a much greater extent the dam at Hemmings falls, had the effect of facilitating and increasing the formation of sheet ice and the accumulation of broken ice and frazil underneath or behind it. The five and a half mile basin above Hemmings falls dam impounded enormous quantities of water, ice and frazil. Such a state of affairs is unquestionably conducive to the formation

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of ice jams of large proportion. Jams may have formed at the foot of Hemmings falls rapids prior to the construction of the dam, but in no wise comparable to those which formed upstream after the dam was erected. And I am satisfied that a jam formed at the foot of the Hemmings falls rapids, under natural conditions, would have gone down during the break-up period in an open river, before any ice jams at Labonté's, at Dauphinais', at Ulverton rapids, at Richmond or at any other place upstream would have reached the Hemmings falls rapids, as it has been asserted by several witnesses, all of them well acquainted with the behaviour of the river prior to the construction of the dam.

That there was a combination in the spring of 1928 of natural forces of an unusual nature is apparent from the evidence but that does not, as a matter of law, entitle the situation to be treated at *damnum fatale* or *vis major*. In the House of Lords in *Greenock Corporation* v. *Caledonian Railway* (1), referred to by the learned trial judge in his judgment, it is laid down to be the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable. In that case a municipal authority, in laying out a park, constructed a concrete paddling pond for children in the bed of a stream and altered the course of the stream and obstructed the natural flow of water therefrom. Owing to a rainfall of extraordinary violence the stream overflowed at the pond, and, as the result of the operations of the authority, a great volume of water, which would have been carried off by the stream in its natural course without mischief, poured down a public street into the town and damaged the property of two railway companies. It was held that the extraordinary rainfall was not a *damnum fatale* which absolved the authority from responsibility, and that they were liable in damages to the railway companies. Lord Dunedin there quotes with approval the language of Lord Westbury, L.C., in *Tennent* v. *Earl of Glasgow* (2),

> If anything be done by an individual which interferes with natural occurrences, such as, for example, in *Lord Orkney's* case (3), throwing a dam across the course of a stream, it is undoubtedly the duty of that individual so to construct the work as to provide in an efficient manner, not only against usual occurrences and ordinary state of things, but also to provide against things which are unusual and extraordinary.

(1) [1917] A.C. 556.

(2) (1864) 2 M. (H.L.) 22.

(3) (1887) 20 D. 298.

The *Greenock* case (1) was a Scottish case but we find Lord Haldane in the House of Lords in the English case of *Attorney-General and others* v. *Cory Brothers and Company Limited* (2) referring to the *Greenock* case (1) in these words:

> The rainfall proved to have occurred at the period of the slide was no doubt unusually heavy, but it was of no unique character, nor of such as ought not to have been foreseen as possible. It could not be contended that it amounted to an "act of God," to what is called in the jurisprudence of Scotland, a *damnum fatale*. Indeed, were your Lordships inclined to take a different view, you would be precluded from doing so by the judgment of this House in the recent case of *Greenock Corporation* v. *Caledonian Railway Co.* (1).

The *Greenock* case (1) was subsequently referred to in the Privy Council in a Quebec case, *Montreal City* v. *Watt and Scott Limited* (3), in the judgment delivered by Lord Dunedin.

The evidence in this case, tested by the standard laid down in the *Greenock* v. *Caledonian Railway* case (1), was held by the learned trial judge not to constitute a *damnum fatale* or *vis major* and so relieve the appellant from liability. In that view of the evidence I entirely agree.

Then it was argued by counsel for the appellant that, in any event, the washout of the railway embankment was really due to the fault of the railway company itself in continuing to use the old gravel embankment instead of replacing it with a substantial modern structure, and it was suggested that if the alleged negligence of the railway company did not constitute a complete defence to the action, it at least constituted contributory negligence and would involve an apportionment between the parties of the amount of damages sustained. It is plain that the law of Quebec, unlike the law of England, as was admitted in *Canadian Pacific Railway Co.* v. *Fréchette* (4), and referred to by Lord Dunedin in the concluding paragraph of his judgment in the Privy Council in the *City of Montreal* case (3), enjoins apportionment of the damage where there has been a negligence of the plaintiff contributing to the accident and their Lordships in the Privy Council in the *City of Montreal* (3) case agreed that the doctrine is applicable to modify a liability established by article 1054 of

(1) [1917] A.C. 556.
(2) [1921] 1 A.C. 521, at 536.
(3) [1922] 2 A.C. 555, at 563.
(4) [1915] A.C. 871.

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the Civil Code. But this action is not founded, except incidentally as to the use of some dynamite and the operation of the gates in the spillway, upon the ground of negligence; it is in substance a case of nuisance. I cannot think that if what I have upon my property has adequately served my purpose for fifty years or more there is any duty in law upon me to protect it against what may be the result of the establishment and maintenance of a nuisance created by my neighbour upon his land. As between the owner of a dam and other persons, it may not be a question of negligence in construction or operation of the dam but the fact of the interference with the natural level and flow of the river caused by the obstruction in the river, that may give rise to a liability to the other persons to whom a duty lies not to interfere with the natural level and flow of the river, notwithstanding that there be no negligence in the actual construction or operation of the dam. Of course if statutory power is given to construct the works without reserving any remedy to private persons adversely affected, that is a different case as was pointed out by Lord Macnaghten in *East Fremantle Corp.* v. *Annois* (1).

Quite apart from the question of law, the fact is that the railway embankment had withstood all the spring floods and break-ups since the time it was built in 1887. The section of the railway line where the embankment was located was inspected daily by the railway as to the state of repair and the evidence satisfied the trial judge that the embankment was in good condition at the time the accident occurred. It undoubtedly would have been an act of wisdom, in the light of what happened, for the railway company to have discarded this old gravel embankment and substituted for it a substantial modern structure for carrying the tracks between the bridge and the viaduct over the highway. But if, as it has been found, the embankment was washed away by conditions which directly resulted from the obstruction in the river of the appellant's dam and power house, it is no answer to the respondent's claim for the damage to the embankment that the railway might have constructed something so substantial at that point as to withstand the force of the ice jam on the day of the accident. When the appellant undertook the construction

(1) [1902] A.C. 213.

and maintenance of its works in and across the St. Francis river, it is not disputed that it had lawful governmental authority to do so. But it took that authority subject to the obligation of becoming responsible for all damages that might result therefrom to any person. That is the effect of sec. 12 of the Quebec *Water-Course Act,* which I have set out above. It was argued that the words in that section, "whether by excessive elevation of the flood-gates or otherwise," only refer to damage that may occur upstream and not to damage that may occur downstream and that the words "or otherwise" should be confined to such things as flood-gates. But in my view that is too narrow an interpretation to put upon the section. It seems to me plain that the legislature intended that the words "all damages resulting therefrom to any person" should embrace damages whether they occur above or below the obstruction in the river that result from any of the works of the owner or lessee. It is true that the appellant was put by the statute into the position of being able lawfully to construct, maintain and operate its works but only under the condition subsequent that it should, notwithstanding that there was no injuria, pay, under a liability imposed by the statute, for the *damnum* which should from time to time prove to have been occasioned to any person therefrom.

A case against the appellant was incidentally attempted to be made on the ground of alleged negligence of the appellant in two respects. One was the fact that the appellant exploded about 200 pounds of thermite in the river on the morning of the day of the accident at a point some distance upstream from the Hemmings falls dam with the object of relieving the pressure. The other ground of alleged negligence was the manipulation of the sluice-gates by the appellant during the day before as well as during the day of the accident. Nothing much turned upon either of these complaints. The trial judge found that the explosion of the thermite had very little effect. As to the operation of the sluice-gates, he was inclined to think that the disaster might have been averted had the appellant manipulated its sluice-gates in such a manner as to lower the level of the water in the basin as much as possible by opening the four gates wider from the time the weather turned decidedly mild and the inflow increased (on Thursday preceding the

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Sunday of the accident) until after the final break-up on Sunday afternoon. The appellant operated the gates to keep the water at a certain level in order to use its turbines. But the trial judge treated this matter as of little, if any, practical importance, because of the conclusion he had reached that the dam itself, independently of the manner in which the sluice-gates had been operated, had been responsible for the washout of the embankment.

The amount of the claim for damages to the embankment is not questioned by the appellant, if there be liability. Therefore upon the grounds above stated I think the judgment must be sustained in respect of the items in what I described in opening as the first of the three classes of claims involved in the action. The first class as so described consists of items D and E in paragraph 8 of the Information, which items aggregate $18,259.04.

That brings us to a consideration of the items in what I have described as the second class of claims, being the cost of repairs to the locomotive and cars and the cost of auxiliary and wrecking train service, diversion of train service, and special train service resulting from the interruption to traffic on the railway line in the section in which the embankment was located. These are items A, B, C, G, H and I, aggregating $43,671.81. This branch of the case has given me a good deal of trouble. Almost at the moment that the embankment was washed out, the passenger train reached that point. Can liability properly be put upon the appellant for that portion of the respondent's damages that consisted in the destruction or damage of the locomotive and the cars and in the cost necessarily involved in rearrangement of train service? Is the liability for damage resulting from the construction and maintenance of the works of the appellant confined to such damages as might reasonably have been anticipated by the appellant? The authorities seem to establish that when it is found that a man ought to have foreseen in a general way consequences of a certain kind, it will not affect him to say that he could not foresee the precise course or the full extent of the consequences which in fact happened. If liability is once established by proof of the relation of cause and effect, then under the authorities as I understand them those damages that flow directly are recoverable.

The appellant alleges, however, that it was the respondent's own fault that the train in question was permitted to reach the point of the embankment at the time it did on the day in question, having regard to the notice or knowledge which it is argued the respondent had of the probability of the embankment being washed out that day. Emphasis is laid by counsel for the appellant upon the fact proved in evidence that a day or two before the accident the railway tracks at the village of Richmond, 25 miles away from Drummondville, were all under water, traffic interrupted there and the flood so great as to put the railway upon its guard against great ice jams and flood waters reaching the railway bridge with great force within a day or two and the probability of the washout that actually happened. Further it is argued that the respondent knew of the weakness of its gravel embankment to withstand a spring break-up of the extent that existed at that time. Much was made in the argument before us of a cavity in the embankment shewn on a photograph put in at the trial. Further it was argued that the respondent's railway officials at Drummondville should have been alert at least an hour or so before the embankment was washed out, and have given the train ample signals not to proceed across the St. Francis river unless satisfied that there was no danger. During the argument I was rather impressed with these contentions and I have given them anxious consideration. The destruction of the embankment itself was one thing. The damage to the locomotive and cars stands on a different footing. It is difficult to see how the loss of the embankment could have been avoided but it is not unreasonable to suggest that the train might have been stopped before it reached the point of the calamity. The trial judge carefully considered the facts upon which this contention was based and after all it is a question of fact. As to notice and knowledge of the respondent at Richmond, it seems to me that Richmond being 25 miles away it is too much to impose upon the respondent that the railway agents or servants at Richmond should have anticipated what actually happened a day or two later at the railway bridge at Drummondville. Those in charge of the power house and dam of the appellant at Hemmings falls were sufficiently alert to the existence of the ice jam and its probable move-

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ments the very day of the accident to go upstream and explode two hundred pounds of thermite at two different places in the basin, and if they had themselves expected that the railway embankment only two and a half miles downstream from the dam might be washed out, they undoubtedly would have notified the respondent's representative at Drummondville to be on guard. They did not foresee what actually happened and no blame is attached to them for not foreseeing the danger at the railway bridge and I cannot see that we would be justified in attaching blame to the officials of the respondent at Richmond 25 miles or more away. Then as to the cavity in the embankment, shewn in the photograph, as indicating the knowledge that the railway had or ought to have had of the risk of the embankment being carried away in any severe break-up. The evidence as to this photograph was all carefully considered by the trial judge. The photograph was taken in 1918, ten years before the accident, by an engineer named Dick of the contracting firm of Morrow & Beatty which was at that time engaged in building the appellant's first dam and power house at Drummondville—the dam that replaced the town's wooden dam in 1918 almost 1,100 feet from the bridge. Dick said the photograph was taken a day or two after the break-up of that year had occurred. It shews a cavity near the end of the embankment on the west side of the river looking from upstream. Dick was unable to give the dimensions of the cavity but a witness named Toupin said he saw the cavity in question, that it was about five feet long by two feet wide and that it seemed bigger on the photograph than it really was. In the opinion of Toupin, who had been a section foreman for the respondent, the cavity did not affect the solidity of the embankment. He said repairs were made three or four months later and it was the only cavity he had ever noticed. The trial judge inclined to the view that the cavity did not have as much importance as the witness Dick was disposed to ascribe to it and the trial judge was not convinced that the cavity was caused exclusively by the action of ice and water, but that the continual use of this part of the embankment by people desiring to go to the river may have been the origin of a hole in the embankment and once the surface had been broken it would take less and less force and time to wear

away the inner part of the gravel embankment. This being the view of the trial judge on the evidence as to the cavity that temporarily existed in 1918, it would be difficult for us to impute to the respondent any blame arising out of this incident. Then as to the failure of the officials of the respondent in the immediate vicinity of Drummondville to warn the oncoming train, there is no evidence to shew that any official of the respondent at or near Drummondville had any such notice or knowledge of the probability of the washout occurring as to put the blame for the destruction or damage to the locomotive and the cars upon the respondent itself.

The quantum of damages not being questioned in the appeal, the judgment in so far as it relates to the second class of items in the claim must for the reasons above stated, be affirmed.

Then as to the items of damages which I described for convenience as the third class, being items under F. in paragraph 8 of the Information, aggregating $18,992.35. These items consist of actual payments made by the railway for medical and hospital services, funeral and ambulance expenses, indemnities to passengers and to employees, compensation to the heirs of employees who were killed, wages paid to the disabled conductor, and a grant of $600 to the woman who flagged the oncoming train. All these items were allowed, except the $600 item for flagging the train. Now the railway was not an insurer of the lives of either its passengers or its employees. If it was the negligence of the railway company that caused the personal injuries or death of some of the passengers and employees on the train, the respondent could not succeed in the action. The whole case was brought by the respondent upon the basis that the appellant's works in the river had been the direct cause of the accident and that being so the respondent became under no legal obligation to either the passengers or employees on the train. The railway made these substantial payments as compassionate allowances on its part if its position in this action as to the liability of the appellant is right. These payments were made without any litigation between the parties and without any notice to or knowledge by the appellant. The respondent

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has not made out a case for these payments within article 1141 C.C. or established any agency, and these items in the claim cannot be allowed. They were allowed by the learned trial judge at $18,992.35 and the total amount of the judgment directed to be entered by the learned judge against the appellant in the sum of $80,923.20 must be reduced by the said sum of $18,992.35.

I would vary the judgment appealed from by reducing the amount thereof by the said sum of $18,992.35 and would allow the appellant its costs of this appeal.

CANNON J.—The facts that gave rise to this litigation are amply set forth in the very carefully prepared notes of my brother Davis. I feel that I should explain how I have reached a conclusion under the laws of Quebec, which are found in the following articles of the code:

Of real servitudes.

General provisions.

499. A real servitude is a charge imposed on one real estate for the benefit of another belonging to a different proprietor.

500. It arises either from the natural position of the property, or from the law, or it is established by the act of man.

501. Lands on a lower level are subject towards those on a higher level to receive such waters as flow from the latter naturally and without the agency of man.

The proprietor of the lower land cannot raise any dam to prevent this flow. The proprietor of the higher land can do nothing to aggravate the servitude of the lower land.

503. He whose land borders on a running stream, not forming part of the public domain, may make use of it as it passes, for the utility of his land, but in such manner as not to prevent the exercise of the same right by those to whom it belongs; saving the provisions contained in chapter 51 of the Consolidated Statutes for Lower Canada, or other special enactments.

He whose land is crossed by such stream may use it within the whole space of its course through the property, but subject to the obligation of allowing it to take its usual course when it leaves his land.

508. The law subjects proprietors to different obligations with regard to one another independently of any stipulation.

Chapter 51 of the Consolidated Statutes for Lower Canada, which was originally enacted as 19-20 Vict., ch. 104, and is now found in ch. 46 of the Revised Statutes of Quebec (1925), gives to the riparian owner the right to erect dams to utilize the stream but provides that such owner of any such works shall be liable for all damages resulting therefrom to any person, whether by excessive elevation of the flood gates or otherwise.

In *Jean* v. *Gauthier* (1), the Court of Review, composed of Stuart, Casault and Caron, JJ., considered the effect of this amendment to the common law, which the late Chief Justice Casault explains as follows:

Avant le 1er juillet 1856, l'emploi comme pouvoir moteur des rivières et des cours d'eau n'était permis aux propriétaires riverains qu'à la condition de ne faire aucun dommage aux propriétés voisines. Si les chaussées, les écluses ou les digues requises pour obtenir d'un pouvoir d'eau la force motrice nécessaire pour exploiter un moulin, une manufacture ou une usine faisaient déborder les eaux sur les propriétés voisines, ou y causaient d'autres dommages, celui qui les avait construites sur sa propriété avait violé la règle de droit qui met à la jouissance de sa chose la condition qu'il ne fera pas tort à celle du voisin.

Aussi le propriétaire du terrain qui souffrait de ces constructions avait, outre le droit de recouvrer les dommages qu'elles lui causaient, celui de les faire changer, et même détruire, quand la destruction seule pouvait mettre fin au tort qu'il en souffrait. A cette date, la législature a rendu licite ce qui ne l'était pas auparavant, et a permis, comme l'exercice d'un droit, ce qui jusque-là était la violation du droit d'autrui. L'acte 19-20 Vict., 104 (S.R.B.C. 51) a permis au propriétaire l'exploitation des cours d'eau sur sa propriété, en y construisant des usines, moulins et manufactures, et l'érection dans le cours d'eau, pour cette fin, de chaussées, digues, écluses et autres travaux; il n'a réservé aux propriétaires voisins qui en pourraient souffrir que le droit à une indemnité, et ne leur a conservé celui de demander la démolition des travaux que comme accessoire du premier, savoir, dans le cas seul où la compensation ne serait pas payée. C'est une servitude légale qu'a créée cette loi, servitude analogue à celle de mitoyenneté entre propriétés voisines, et à celle du passage pour l'enclave.

Les dommages et les indemnités que réserve la loi n'ont pas un caractère autre que le prix qu'est obligé de payer, pour la partie du terrain et du mur qui y est assis, le voisin qui veut en acquérir la mitoyenneté, ou que la valeur du terrain que l'enclavé veut affecter à son passage.

* * *

Mais, entre le propriétaire des travaux et celui de l'héritage qui en souffre, dommages signifient *indemnité* pour la *détérioration* que les constructions font subir à son bien. Cette indemnité ne peut par conséquent être demandée que par le propriétaire du fonds que la loi a fait servant à celui du fonds qu'elle a fait dominant, ou par celui de l'héritage détérioré à celui des travaux qui le détériorent.

In *Breakey* v. *Carter* (2), Casault, J., referred to *Jean* v. *Gauthier* (1) and said:

J'ajouterai, comme je l'ai fait dans cette cause de *Jean* v. *Gauthier* (1), qu'il ne peut y avoir ni délit ni quasi-délit dans l'exercice d'un droit, et que le recours pour le prix de son obtention, ou pour l'*indemnité* que doit payer pour son exercice le propriétaire du fonds dominant au fonds servant n'est pas soumis à la prescription de deux ans à laquelle le code (art. 2261) soumet le recours pour dommages résultat de délits ou de quasi-délits.

This case of *Breakey* v. *Carter* (2) came before this court which confirmed the opinion of Casault, J., that that chap-

(1) (1879) 5 Q.L.R. 138. (2) (1881) 7 Q.L.R. 286 at 287.

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ter 51 of the Consolidated Statutes of Lower Canada recognizes the right of a proprietor to erect works which may have the effect of damming back the water on a neighbouring property, the construction of a dam having that effect, could not be considered a *quasi-délit*, but rather as a right of servitude which gave to him who was injured by it a legal recourse for indemnity for the damage. (Cassel's digest, p. 464, 12th May, 1885).

In *Gale* v. *Bureau* (1), the present Chief Justice said, at p. 312:

> The effect of that decision (2) (by which this Court is bound) is that the right given by article 7295 (or the then Revised Statutes of Quebec), in so far as it justifies the penning back the waters of a stream upon the upper riparian proprietors, is to be regarded as a right of servitude to which is attached an obligation to indemnify the proprietor who is prejudiced by the exercise of it.

Another case, *Proulx* v. *Tremblay* (3), dealing with damages caused by the erection and operation of a dam to a proprietor below the dam may be considered as helpful to apply the provisions of the statutes to the present case where the damages claimed were caused by the respondent railway's embankment situate at some distance below the appellant's dams. Sir L. N. Casault says at p. 358:

> Il n'est pas douteux que cette disposition statutaire (S.R.B.C. ch. 51) a fait légal ce qui auparavant était illégal, et a permis de faire des eaux courantes un usage que le droit antérieur n'autorisait pas et une appropriation qu'il prohibait. Avant la passation de ce statut, le propriétaire inférieur eut pu forcer celui du fonds supérieur à enlever les barrages et les obstacles qui empêchaient les eaux communes d'arriver librement à son fonds. Quelles qu'utiles qu'eussent pu être, pour le propriétaire supérieur ou même pour le public, les usines ou les machines que ces barrages servaient à alimenter et à mettre en mouvement, le propriétaire du fonds inférieur ou supérieur n'était pas obligé d'en subir les inconvénients si petits qu'ils fussent; il pouvait exiger leur destruction. Cette loi ne leur a permis d'obtenir la démolition des ouvrages, qui retenaient les eaux sur les cours d'eau pour les besoins d'une usine ou d'une manufacture quelconque, que lorsque l'usinier ou le manufacturier négligeait l'accomplissement de la condition qu'elle mettait à l'exercice du privilège qu'elle conférait. Cette condition était le paiement des dommages que pouvait causer à autrui l'usage que faisait de l'eau le propriétaire des machines qu'elle servait. Elle est écrite à la section 2 de l'acte comme suit:
>
> Sect. 2. Les propriétaires ou fermiers des dits établissements resteront garants de tous dommages qui pourront en résulter ou être causés à autrui, soit par la trop grande élévation des écluses ou autrement.
>
> Cette dernière expression, *ou autrement,* ne laisse aucun recours à

(1) (1910) 44 S.C.R. 305.

(2) *Breakey* v. *Carter* (1881) 7 Q.L.R. 286.

(3) (1881) 7 Q.L.R. 353.

découvert, elle les comprend tous; et met aussi bien à couvert le dommage que peut causer la rétention de l'eau que celui qui résulte de son extension ou épanchement sur les propriétés voisines. Elle empêche la restriction aux dommages causés par la trop grande élévation des écluses des droits qu'elle sauvegarde, lors même que cette mention spéciale ne serait par là simplement pour exemple et qu'elle aurait une tendance limitative et exclusive qu'elle n'a pas.

* * *

J'ai déjà, dans la cause de *Jean* v. *Gauthier* (1), exprimé l'opinion que le statut 19-20 Vict., ch. 104, avait créé une servitude qui, comme toutes les servitudes légales qui s'acquièrent, ne peut s'exercer qu'en en payant le prix. Le défendeur ne peut appuyer que sur ce statut ou mieux celui qui le refond, le droit qu'il invoque de retenir pour les besoins de son moulin les eaux de la rivière Giasson; c'est là l'exercice de la servitude qu'a créée cette loi, il ne peut pas l'exercer au détriment des fonds servants sans leur payer l'indemnité qui en est le prix. Cette indemnité est pour le demandeur la valeur des dommages que lui cause la rétention de l'eau.

In the same case of *Proulx* v. *Tremblay* (2), Stuart, J., while agreeing with the views of Casault, J., that, before the passing of the statute, a dam could not legally be placed across rivers to retain the waters, goes even further, when he says:

The claim for damages must rest, not upon the act of erecting the dam, but upon its improper construction and the abuse of the licence which the law gave him.

* * *

The law of servitudes must necessarily affect the decision of a case like this, and may properly be referred to.

* * *

The plaintiff in this case is proprietor of the land on the lower level which is subject to the servitude of receiving such waters as flow from the land of the defendant which is on the higher land, naturally and without the agency of man. He complains not that the defendant aggravates his servitude, but that he arrest the flow for a time, by means of a dam established for his own utility. The prohibition which existed at common law to construct a dam attached to the proprietor of the *lower* level, not to the proprietor of the higher level. And the reason is manifest in the text. The certain result of a dam is to raise the level of the river and to cause a reflow of the waters upon the lands of all those above it, but it in no way aggravates the servitude to which is subject the land of the lower level. Even under the old law the plaintiff would not rest this action upon article 501, and would have to show a special damage irrespective of any falling within the purview of this servitude.

The preamble of the statute invoked shews it to have been called for by considerations of public expediency. "Vu que l'exploitation des "cours d'eau serait un grand moyen de prospérité pour le pays." 19 and 20 Vict., ch. 104, 1856. Its public design cannot be overlooked in its interpretation, and the interests of the country at large must prevail over private interests.

(1) (1879) 5 Q.L.R. 138. (2) (1881) 7 Q.L.R. 353.

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These views are discussed by Mignault, in "Droit Civil," vol. 3, pp. 25 and 26, and he concludes as follows:

> Je crois que le législateur a voulu préserver les droits en limitant toutefois le recours des autres riverains au paiement des dommages qu'il a pu éprouver.

From the perusal of the above authorities, it seems to me abundantly clear that the damages contemplated by the statute are those suffered by any person as riparian owner, either below or above the dam and would be limited to the actual damages caused to the owner of a riparian piece of land as a result of the construction and maintenance of the dam. Although there is no direct evidence of title to the riparian lots on which the embankment that was destroyed rested, I would assume that the Crown owns the property, is a riparian owner and is bound to receive in its natural state the waters after their use by the appellant for a purpose which must be considered as of public interest.

The latter must be held responsible for the damages to any property below the dam by the construction of its works. Although the evidence is somewhat perplexing, I cannot reach the firm conclusion that the trial judge was clearly wrong in his finding that the natural conditions of the river were altered by the construction of the dam and in his view that the ice jam which caused the enormous accumulation of water resulted from the longer, wider and deeper basin created by the appellant. The latter would, therefore, be responsible for the damages caused by the injury to the physical property of the riparian owner; but this would not include the locomotive and rolling stock which happened to reach the site of the embankment shortly after the accident.

The codifiers inserted the reference to chapter 51 of the Consolidated Statutes of Lower Canada (now embodied in chapter 46 of the Revised Statutes of Quebec) in title 4 of the Civil Code dealing with real servitudes and in its first chapter dealing with "servitudes which arise from the situation of property."

The obligation to indemnify would, under the statute, result from the sole and direct operation of law and would

be one of the obligations described in article 1057 C.C. See on this point the learned discussion by Sir Henry Strong, C.J., in *City of Quebec* v. *The Queen* (1).

The statutory liability cannot be extended beyond what the law has fixed as the price of the servitude on riparian owners, viz. the damage caused to the owner of any property by the damming of the waters. I would, therefore, award the cost of reconstructing the embankment and the railway track. I would also allow the cost of the temporary railway service during the necessary period of repairs to the embankment and railway track. This cost of maintaining the service may fairly be considered as a damage occasioned to the enjoyment of the right of the respondent as riparian owner. See *City of Quebec* v. *Bastien* (2).

The respondent also alleged two grounds of special negligence: the use of thermite to break the jam and the opening of the sluice gates which would have started the movement of a tremendous volume of ice and water washing out the railway embankment. The trial judge found that the explosions of the two cans of thermite did not have such effect. He does not find that the respondent's complaint about the opening of the sluice gates is well founded; on the contrary, he says that the four gates should have been opened wider in order to lower the level of the water in the basin.

These findings would eliminate the recovery of damages under article 1053 C.C. Article 1054 does not apply for the reasons given above. The water and ice were not legally under the care nor under the control of the appellant; the latter were in duty bound to restore it to its normal course down the St. Francis river; they are responsible for the mischief if the abnormal flow of the river when it reached the embankment can be traced back to the presence of the dam across the river 2½ miles above.

Pothier (éd. Bugnet) IV, p. 330, may be quoted:

235. Le voisinage oblige les voisins à user chacun de son héritage, de manière qu'il ne nuise pas à son voisin: *Domun suam unicuique reficere licet, dummodò non officiat invito alteri, in quo jus non habet:* L. 61, ff. *de Reg. jur.*

Cette règle doit s'entendre en ce sens, que, quelque liberté qu'un chacun ait de faire ce que bon lui semble sur son héritage, il n'y peut faire rien d'où il puisse parvenir quelque chose sur l'héritage voisin, qui

(1) (1894) 24 Can. S.C.R. 420, at 439, 440, 441, 443 and 446.

(2) [1921] 1 A.C. 265, at 269.

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lui soit nuisible; *In suo hactenus facere licet quatenus nihil in alienum immittat;* L. 8 §5, ff. Si serv. vind.

236. C'est sur ce principe qu'est fondée l'action *aquæ pluviæ arcendæ.* Il y a lieu à cette action de la part du propriétaire ou possesseur du champ inférieur contre son voisin propriétaire ou possesseur du champ supérieur, lorsque le possesseur du champ supérieur, par le moyen de quelque ouvrage qu'il a fait dans son champ, rassemble les eaux qui y tombent, d'où il les fait tomber dans le champ inférieur avec plus d'abondance et de rapidité qu'elles n'y tomberaient naturellement, et lui cause par ce moyen quelque dommage.

Mais lorsque c'est naturellement que les eaux tombent du champ supérieur dans le champ inférieur, le possesseur du champ inférieur ne peut pas s'en plaindre; car ce n'est pas en ce cas le possesseur du champ supérieur qui les y fait tomber, c'est le nature des lieux: *Si aqua naturaliter decurrat, actionem cessare;* L. 1, § 10, ff. *de Aqu. et aq. Non aqua, sed loci natura nocet;* eâd. L., § 14.

which would show that the only remaining ground in the Crown's case is not "*faute*" or negligence, but a breach of the duty imposed by the law, or in the nature of a quasi-contract, namely, the duty which is imposed upon the owner of the superior heritage, who executes works on his land or alters its natural state, to indemnify the owner of an inferior property if any damage should be caused by such works.

Moreover, the damages to the train equipment did not flow solely and necessarily from the presence of the dam in the river; other agencies intervened to cause this result, which, in my opinion, could and should have been avoided by the railway. The employees in charge did not show the zeal and diligence to be expected under the abnormal conditions facing them, as well as all proprietors along the St. Francis river, on that Sunday afternoon. I agree on this point with Dysart, J. *ad hoc.*

Even if the Crown had a recourse for repayment of what was disbursed to pay the railway's own debt for damages resulting from bodily injuries to the victims of the accident (employees and passengers), I believe that, under *Regent Taxi & Transport Coy.* v. *Petits Frères de Marie* (1), any action for bodily injuries caused by appellant's negligence was prescribed when brought on the 3rd of September, 1929, as to these special items. Art. 2262, C.C.; art. 1056, C.C.

I would, therefore, allow the appeal in part, with costs to the appellant, and restrict the recovery to the following items: costs of repairs to tracks, $5,254.57; costs of repairs

(1) [1932] A.C. 295. at 302.

to structure, $13,004.47; costs of diversion of train service and of special train service, $13,158.99, making a total of $31,418.03 with interest from date of the judgment of the trial court and costs.

The judgment of Crocket J. and Dysart J. *ad hoc* was delivered by

DYSART J. *ad hoc.*—The conclusions at which I have arrived in this case are in harmony, as they should be, with relevant Quebec jurisprudence as set forth in the judgment of Cannon, J., but while the conclusions harmonize, the considerations upon which they are founded may be different.

We are all in accord that the appellant must be held liable for some damages. The presence of the appellant's dam in the St. Francis river led directly to the washout of the respondent's railway embankment, and the appellant must, therefore, make compensation for all damage directly attributable to the washout. The only question on which there is difference of opinion is the extent of the damage for which compensation must be made to the Crown as the owner of the railroad.

For my purpose, it will be convenient to divide the claims of the railway company into four groups and to deal with the groups seriatim.

The first group will consist of two items,—"cost of repairs to tracks" ($5,254.57) and "cost of repairs to structure" ($13,004.47), a total of $18,259.04. These repairs were required in order to bring the embankment and track back to the condition of passability in which they were immediately before the washout, and do not include the permanent improvements to the embankment which were subsequently made. I agree with both that the appellant must pay this sum as compensation, because the damage is the direct and natural result of the injuries to the embankment.

The second group of claims will include two items covering "cost of diversion of train service" ($8,744.78) and "cost of special train service" ($4,414.21), aggregating $13,158.99. I would hold the appellant responsible for this group of damages. The evidence of the details of these

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items confirms what we had assumed, namely, that these two items of cost were incurred in an attempt to overcome the interruption to train service resulting from the destruction of the road bed,—an interruption which would inevitably have followed from the washout even if the train in question had not been wrecked. The washing away of the road bed by ice and water completely severed the line of rail communication and stopped the passage of all trains, resulting in an interruption which continued from Sunday, April 8, at 4.45 p.m. until Saturday, April 13, at 7.30 p.m. Instead of standing idly by until the necessary repairs could be made to permit of the resumption of train traffic over the embankment, the railway officials acting in the interest of all concerned—the public, the appellant and railway—provided substitute train service, thereby avoiding, as it was their duty to avoid, some of the loss which otherwise would have ensued. The substituted service took two forms: (1) "through traffic" between the cities of Quebec and Montreal which had previously been routed via the embankment, was diverted to another route, (2) "local traffic" for a necessary distance on each side of the washout was taken care of by a series of trains running to and from the washout. These train services were in no wise connected with the loss of the train which went down the embankment, and as I understand it, only that portion of the cost of the services has been charged which might be considered an extra cost occasioned by the washout.

The third group of claims includes items for "costs of repairs" to the locomotive and to two cars ($27,236.20) and an item for "cost of auxiliary and wrecking train service" ($3,276.62), a total of $30,512.82. The appellant should not be held responsible for these costs. I should state that my understanding of the facts in respect of these costs is that the auxiliary and wrecking train service was necessitated by, and devoted to, the recovery and removal of the damaged train, and not to the repair of the road bed, and that, but for the damage to the train, this service would not have been required. It is, therefore, so intimately associated with the damage to the train as to be properly included in the groups of items covering repairs to the train. This group of claims introduces a new link into

the chain of causation and calls for some extended comment. Here the conduct of the railway company must be taken into account, because if by the exercise of reasonable precautions on its part, the company which operates the railway could have avoided these damages, the Crown can not now recover for them.

In order to determine what, if anything, the railway employees should have done, we must look at the flood situation as it developed and culminated in the washout. The evidence on this point presents its own picture, the features of which should be noted. (1) Spring "break-ups" on the St. Francis river increased in violence after the erection of the dam at Hemmings falls in 1924,—in fact, the railway's case is based upon that fact; (2) the natural conditions during the first week of April, 1928, were particularly conducive to flooding and violent break-up,—unusually great quantities of snow were melted very rapidly in the exceptionally warm weather of that week, with the result that the river rose to almost unprecedented heights; at Richmond, for instance, twenty-five miles up stream, the river overflowed its banks and covered the railway yards and tracks to a depth of two or three feet, so that men had to be assigned by railway officials to watch and guard railway property at that place; (3) the swollen waters carried great masses of broken ice, and during the two or three days preceding the washout, the river for some miles above the dam was choked with millions of tons of ice; (4) this enormous mass of ice and water, always growing in quantity, slowly forced its way down the river, the ice grounding occasionally on ridges or shallows and halting until an increasing height of water floated the mass and forced it forward; (5) the forefront of the flood reached the broad basin immediately above the dam on Saturday, April 7th, where its progress was delayed for many hours by a large field of unbroken surface ice which covered that basin; (6) the basin ice was eventually lifted by the swelling waters and broken up and became part of the greater mass as that mass moved forward; (7) this final break-up occurred on Sunday, the 8th, and the whole mass of many millions of tons of ice and water rushed over the dam and down the river with terrific force and violence, carrying

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away the embankment in its mad career; (8) for some days prior to the washout, the local community was well aware of the condition of the river, and many citizens were watching the progress of the flood, and on Sunday, for several hours preceding the final burst, and during its progress, hundreds of citizens lined the banks, watchful and expectant. Although the railway company has, within a few hundred yards of the embankment, a station at which it maintains a staff, its railway officials or employees do not appear to have been on the scene. There is no suggestion that, at any time during the several days preceding the washout nor during the final critical hours, any steps were taken by them to safeguard the trains; (9) even when the washing out process began—and it continued for some little time before finally completed—the only person of all the throng to do anything effective in giving warning to approaching trains was a lady, who, when she heard the distant whistle of an approaching train, ran back along the track and flagged the train in time to enable it to slow down, but not completely to stop; she saved much, but not the engine and the two forward cars—these fell into the newly created cavity.

Common knowledge of the conditions which had been prevailing should have been sufficient to put railway officials on guard as to the possibility—not to say probability—of danger to the embankment and connecting bridge with all that such dangers entailed. The mere fact that the power company's employees did not call upon the railway employees to take precautions does not of itself relieve the latter from performance of their duty—nor mean that the need of precautions was not apparent. We may fairly suppose the appellant's employees were engrossed in trying to minimize the flooding and to protect their own property, and that they naturally assumed that the railway employees would look after the protection of railway property. In all these circumstances, the failure of the railway employees to safeguard the train was a failure in an obvious duty, and relieves the appellant from responsibility for all damage resulting directly and indirectly from the destruction of the train. This disposes of the third group of claims adversely to the claimant.

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The fourth and final group of claims consists of "payments" ($19,592.35) made by the railway company, for "medical and hospital treatment," for "ambulance and funeral expenses," for "indemnities" to injured passengers and employees, for "wages to disabled employees," and for some bounties. I fully agree that these claims cannot be allowed. My reason briefly is that these payments were occasioned by circumstances surrounding the wrecking of the train, and would not have been occasioned at all if the train had not been wrecked. Moreover, the payments were made without established legal obligation.

In the result, therefore, I would allow the appeal to the extent, but only to the extent, of reducing the judgment of the trial court to the sum of $31,418.03, on which interest should be allowed from the date of that judgment. The appellant should have the costs of this appeal.

Appeal allowed in part with costs.

Solicitors for the appellant: *Décary & Marier.*

Solicitor for the respondent: *L. E. Beaulieu.*

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* Feb. 12

THOMAS R. CORKINGS AND ANOTHER (PLAINTIFFS) ..... APPELLANTS;

AND

AMELIA COLLINS (PLAINTIFF)..... RESPONDENT;

AND

THE TORONTO GENERAL TRUSTS CORPORATION ..... DEFENDANT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Will—Administration—Intestacy—Deceased survived by widow without issue—Valuation of estate—Date of—Mining shares—Stock market value—Prima facie evidence—Not conclusive—Concurrent finding—Administration Act Amendment Act, 1925, c. 2, ss. 3 and 4—Administration Act, R.S.B.C., c. 5, s. 114, as amended by statute of 1925, c. 2, s. 4.

One G. H. Collins died intestate leaving a widow without issue. The chief asset of the estate was 256,017 shares in B.C. Nickel Mines,

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

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Limited. The appellants, nephew and niece of the deceased, claimed that they were entitled to share in the estate, which they alleged would exceed $20,000, on the ground that at the date of the death the market value of these shares was 29 cents per share. It was held by the trial judge and affirmed by the appellate court that the net value of the estate should be ascertained as of the date of the deceased's death and that 5½ cents per share was the outside price at which the shares could have been realized upon at that time and that the widow, now respondent, was entitled to the whole estate.

Held, affirming the judgment of the Court of Appeal (50 B.C. Rep. 122) that the finding of the trial judge as to the value of the shares (this being an issue of fact), in which the appellate court concurred, ought not to be set aside. The price at which shares are selling on the stock market might be regarded as *prima facie* evidence of the value of those shares but such evidence ought not to be accepted as conclusive by the courts. *Untermeyer Estate* v. *Attorney-General for British Columbia* ([1929] S.C.R. 84) discussed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) affirming the judgment of the trial judge, Murphy J. (2), on an issue between the parties on the question of the value of a deceased's estate.

D. K. MacTavish for the appellants.

R. S. Robertson K.C. for the respondent.

The judgment of the Court was delivered orally by

DUFF C.J.—It will not be necessary to call on you, Mr. Robertson.

This appeal concerns the application of section 114 of the British Columbia *Administration Act,* R.S.B.C. 1924, c. 5, as amended by statute of 1925, c. 2, s. 4. The controversy on the appeal relates to the value of certain shares in the British Columbia Nickel Mines Ltd. which constituted the estate of the deceased George Henry Collins. The enactment which is to be applied is that where a testator dies intestate leaving a widow but no issue, and the net value of the estate does not exceed $20,000, the estate shall go to the widow.

The learned trial judge held that these shares had a certain value on the relevant date, 6th August, 1933. There was an appeal taken from that to the Court of Appeal which was dismissed, one judge dissenting.

(1) (1935) 50 B.C. Rep. 122; [1935] 2 W.W.R. 550.

(2) (1935) 49 B.C. Rep. 398; [1935] 1 W.W.R. 295.

The sole question is whether the finding of the learned trial judge as to value, in which the Court of Appeal concurred, ought to be set aside. The rule, of course, is well settled and is that where there is a concurrent finding on an issue of fact this Court will not interfere unless some definite error is shown to affect the conclusion at which the courts below arrived.

The appeal is supported by reference to the judgment delivered by Mr. Justice Mignault in the case of *Untermeyer Estate* v. *Attorney-General for Bitish Columbia* (1). The controversy there related to the value of certain shares which had to be ascertained for the purpose of applying the *Succession Duty Act*. The phrase used in the statute was "fair market value," and the question at issue was as to the fair market value at the date of the death of the deceased. In the circumstances of that case, it was thought that the proper criterion of value was the price at which the shares were selling at the relevant date on the market.

What is laid down in the judgment of Mr. Justice Mignault there cannot be treated as establishing a general principle of law applicable to all cases. The words which we are to apply in this case are not identical with the words under consideration in that case, but, even if they were, the question being a question of fact, the determination in that case would not necessarily rule the decision in this case. What the courts below had to ascertain was the real value of the shares at the pertinent time. The price at which the shares were selling on the stock market might be regarded as *prima facie* evidence, but the British Columbia courts were quite right in declining to accept that as conclusive; and examining all the factors entering into the real value of the shares, there is no ground upon which concurrent findings of the courts could properly be disturbed.

The appeal is, therefore, dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *H. R. Bray.*
Solicitors for the respondent: *Savage & Keith.*

(1) [1929] S.C.R. 84.

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*May 10, 13, 14, 15.
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*Jan. 15.

FREDERICK FRANKLIN WORTHINGTON (DEFENDANT) ..... APPELLANT;

AND

THE ATTORNEY-GENERAL OF THE PROVINCE OF MANITOBA (PLAINTIFF) ..... RESPONDENT.

JAMES FORBES (DEFENDANT)..... APPELLANT;

AND

THE ATTORNEY-GENERAL OF THE PROVINCE OF MANITOBA (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Assessment and taxation—Constitutional law—The Special Income Tax Act, Man., 1933, c. 44 (Part I: Taxation of Wages)—Constitutionality—Direct or indirect taxation—Whether tax imposed on employee or upon wages in employer's hands—Application, effect, and validity of the Act as to pay, allowance, or wages, received by an officer of the permanent force of the active militia of Canada, or by a civil servant of the Dominion Government—B.N.A. Act, ss. 92 (2), 91 (7) (8).

The imposition of the tax on wages by Part I of *The Special Income Tax Act* of Manitoba, 1933, c. 44, is direct taxation, and is *intra vires*. The tax is imposed upon the employee; it is not in substance a tax on the employer's pay roll. Secs. 4, 5, 6 and the second part of s. 7 of the Act do not attempt to impose the tax as such upon the employer but merely provide for the collection and recovery of the tax.

The appellants, both resident within the province, one an officer of the permanent force of the active militia of Canada, the other a civil servant of the Dominion Government, were each held to be liable for the said tax in respect of the pay, allowance or wages received by him from the Government of Canada.

Abbott v. *City of Saint John*, 40 Can. S.C.R. 597, cited and applied.

Judgments of the Court of Appeal for Manitoba, 42 Man. L.R. 540, 569, affirmed.

Cannon and Crocket JJ. dissented.

Per Duff C.J.: (1) Even assuming everything in said ss. 4, 5, 6 and second part of s. 7 which imposes any duty or liability upon the employer to be struck from the Act as *ultra vires*, there would still stand enactments valid and complete for the purpose of making the taxes in question exigible from the taxpayer. (2) Said ss. 4, etc., read by the light of well settled and well known canons of construction, do not extend to the Crown or to the officers of the Crown in the right of the Dominion or of any province, other, at all events, than Manitoba, or to the revenues of the Crown in these respective

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

rights; and further, even if this were not so, the form and character of the legislation is such that the enactments, in so far as they relate to such governments and such revenues, must be treated as severable, and the enactments would still have their full operation as regards other employers and other revenues. (3) Sec. 11 of *The Manitoba Interpretation Act,* R.S.M. 1913, c. 105, precludes the extension of said ss. 4, etc., at least to the Crown in right of the Dominion or in right of any province other than Manitoba.

Per Cannon J. (dissenting): A provincial government cannot by a tax such as that in question affect the salary or wages paid, or the pay or allowance made, by the Government of Canada to a Dominion civil servant or a soldier of the permanent force. To do so would impair the status and essential rights of such civil servant or soldier, which are under exclusive Dominion authority. *Abbott* v. *City of Saint John (supra)* cannot be regarded as binding in the present case, owing to changes in conditions, and is distinguishable in regard to the nature of the tax there in question. *Caron* v. *The King,* 64 Can. S.C.R. 255, [1924] A.C. 999, is distinguishable, having regard to the nature of the position of the person there objecting to the tax. Moreover, it is at least doubtful if the pay and allowances to a soldier of the permanent force of the active militia of Canada are "wages" within the meaning of the Act in question, and in construing it (a taxing Act) the subject should be given the benefit of that doubt. Moreover, Part I of the Act attempts to strike first directly at the source of wages, before they reach the employee, expecting direct payment from the employer, and through him to reach the employee indirectly; such legislation is *ultra vires;* and, having regard to the design of the Act, the part so *ultra vires* cannot be severed from the provision in s. 7 for payment by the employee, so as to save the latter provision from invalidity (*Attorney-General for Manitoba* v. *Attorney-General for Canada,* [1925] A.C. 561, at 568).

Per Crocket J. (dissenting)—The primary purpose and effect of Part I of the Act is to impose the tax, not upon the employee or upon the income from wages received by him, but upon the earned and accruing wages of the employee in the hands of the employer before they are paid to the employee; and so far as its provisions seek to tax federal salaries or other pay or allowances in the hands of the Government of Canada they are entirely void and inoperative. The provisions of s. 7 purporting to impose upon the employee the liability to pay the tax only in the event of its not having been deducted from his wages and paid by the employer, cannot reasonably be severed, in an action brought against an employee of the Dominion Government, from the provisions of the previous sections, which in their application to the salaries, pay and allowances of civil and other employees of the Dominion Government are *ultra vires* of the legislature, the liability for payment of the tax having been primarily placed upon the employer and only secondarily or conditionally upon the employee. The secondary liability of the employee cannot fairly be held, in a taxing statute, to stand alone if the primary liability out of which it arises or for which it is substituted is unconstitutional and void.

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APPEALS by the defendants from the judgments of the Court of Appeal for Manitoba (1) dismissing their appeals from judgments in favour of the plaintiff in the County Court of Winnipeg.

The plaintiff, the Attorney-General of the Province of Manitoba, suing for and on behalf of His Majesty the King in the Right of the Province of Manitoba, claimed in each case from the defendant, under the provisions of *The Special Income Tax Act,* ch. 44 of the Statutes of Manitoba, 1933, a tax of two per centum upon certain sums alleged to have been "wages" within the meaning of said Act earned by the defendant from May 1, 1933, to December 31, 1933, and paid to him by the Government of Canada without the said tax having been deducted therefrom.

Both defendants were at all material times continuously resident within the province of Manitoba. The defendant Worthington was an officer of the permanent force of the active militia of Canada. The defendant Forbes was a civil servant employed by the Government of Canada in the Department of Agriculture. The sums in respect of which the tax was sought to be recovered were alleged by plaintiff to have been respectively earned by each defendant as such officer and as such civil servant respectively.

The defendants each denied any liability to pay the said tax.

The defendant Worthington claimed (*inter alia*) that his presence in Manitoba was solely in performance of his duties as an officer as aforesaid, and according to the duties and exigencies of his service to the King; that any sums in question in fact received by him were received by him from the King pursuant to royal warrant for the payment thereof, under sign manual of the Governor General of Canada, as the King's representative, from and out of moneys appropriated to His Majesty for the upkeep of His forces in Canada and in accordance with rates laid down by pay and allowance regulations for the militia of Canada; that in so far as the Act in question assumes or purports to declare such sums to be "wages" within the meaning of the Act and purports to tax the defendant upon said sums, it is *ultra vires* because: the taxes provided to

(1) 42 Man. L.R. 540; 569; [1934] 3 W.W.R. 658; 681; [1935] 1 D.L.R. 376; 410.

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be levied and collected under Part I of the Act are indirect taxation; the Act attempts to legislate in respect of the status, privileges and prerogatives of His Majesty the King as Commander in Chief of the militia of Canada and of the authority thereover exercised by His Excellency the Governor General of Canada as His Majesty's representative in that behalf; by various (specified) provisions of the Act the legislature has sought to impose certain duties and obligations and penalties on His Majesty and His said representative; by the Act the legislature attempts to interfere with and legislate in respect of the relationship between His Majesty the King and the officers and men of His militia in Canada; by Imperial and Dominion legislation and regulations, in force in Canada, it is provided that the pay of any officer or soldier shall be paid without any deduction other than the deductions authorized by *The Army Act* (Imperial) or any other Act to be enacted by the Parliament of Great Britain, or by any royal warrant for the time being. The defendant claimed that if Part I of the Act were construed as applicable to him it was *ultra vires;* and alternatively claimed that the sums alleged to have been received by him included the value of allowances for lodging, fuel and light, which sums were in fact never received by him, and that the provisions of the Act empowering the administrator to determine the monetary value of any such allowances were *ultra vires,* and constituted indirect taxation and taxation of property held by the King in right of the Dominion of Canada; that, should it be held that the Act was competently enacted, the King is not an "employer" within the Act.

The defendant Forbes claimed (*inter alia*) that he was not a person who would be liable to any such taxation; that he was not an employee as defined in the Act; that he had not received any moneys upon which any taxation could be levied by the provincial legislature; that the provincial legislature could not pass legislation intercepting or attempting to intercept moneys in the hands of the Dominion; that the statute is *ultra vires,* as providing for indirect taxation, and otherwise.

In the Court of Appeal, in the Worthington case, Dennistoun and Robson, JJ.A., dissented from the judgment

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of the Court dismissing the defendant's appeal; in the Forbes case, the Court was unanimous in dismissing the defendant's appeal.

In each case special leave to appeal to the Supreme Court of Canada was granted by the Court of Appeal for Manitoba.

H. Phillipps, K.C. for the appellant Worthington.

C. E. Finkelstein for the appellant Forbes.

I. Pitblado K.C. and *W. E. McLean* for the respondent.

DUFF C.J.—I agree entirely with the judgment of Mr. Justice Davis.

I must confess, I have never had any doubt upon the question raised by these appeals touching the construction and effect of the *British North America Act*. The legislative authority of the provinces, with respect to direct taxation within a province, does, admittedly, embrace the power to levy taxes upon the residents of the province in respect of their incomes; and it would seem to be axiomatic that a resident of the province is none the less so because he is an official, or an employee, or a servant, of the Dominion Government or Parliament, or a person in receipt of emoluments from that Government or Parliament.

In *Abbott* v. *City of Saint John* (1) it was held that there is nothing in the statute which exempts such persons, or the salaries, wages or emoluments received by such persons, from the jurisdiction of the provinces in relation to the subject of taxation. In that case, this Court had to consider the judgment of the very able judges who decided *Leprohon* v. *City of Ottawa* (2); and it may be worth while to devote a sentence or two to *Leprohon's* case (2).

The trial judge was Mr. Justice Moss (3) (afterwards Chief Justice of Ontario). He proceeded upon principles which had been laid down in judgments of the Supreme Court of the United States, notably in the judgment of Marshall C. J. in *McCulloch* v. *Maryland* (4), the effect of

(1) (1908) 40 Can. S.C.R. 597.

(2) (1878) 2 Ont. App. R. 522.

(3) His judgment is reported in 40 U.C.Q.B. at 480-484.

(4) (1819) 4 Wheat. 316.

which may be summed up in these words, quoted by Moss J. (1) from the judgment of Nelson J. in *Buffington* v. *Day* (2):

* * * there is no express constitutional prohibition upon the States against taxing the means or instrumentalities of the General Government; but it was held, and we agree properly held, to be prohibited by necessary implication, otherwise States might impose taxation to an extent that would impair, if not wholly defeat, the operations of the Federal authorities when acting in their appropriate sphere.

Mr. Justice Moss himself proceeds:

In this case the Central authority, in the exercise of its appropriate functions, appointed the plaintiff to a position of emolument. In the exercise of its proper powers it assigned to him a certain emolument. This emolument the plaintiff is entitled to receive for the discharge of duties for which the Central Government is bound to provide. I do not find in the *British North America Act* that there is any express constitutional prohibition against the Local Legislatures taxing such a salary, but I think that upon the principles thus summarized in the case which I have just cited there is necessarily an implication that such power is not vested in the Local Legislature.

The learned judges in the Court of Appeal for Ontario base their conclusions upon the same grounds.

In *Abbott* v. *City of Saint John* (3), four of the five judges of this Court were clearly of the view that this reasoning was not admissible for the purpose of determining the limits of the powers vested in the provinces by the *British North America Act.* Davies J. said (at p. 606):

Time and again the Judicial Committee have declined to give effect to this anticipatory argument or to assume to refuse to declare a power existed in the legislature of the province simply because its improvident exercise might bring it into conflict with an existing power of the Dominion.

At page 618, I observed,

* * * *Leprohon* v. *The City of Ottawa* (4) * * * was decided in 1877. Judicial opinion upon the construction of the *British North America Act* has swept a rather wide arc since that date; to mention a single instance only, it would not be a light task to reconcile the views upon which *Leprohon* v. *The City of Ottawa* (4) proceeded with the views expressed by the Judicial Committee in the later case of *The Bank of Toronto* v. *Lambe* (5). Indeed, although *Leprohon* v. *The City of Ottawa* (4) has not been expressly over-ruled, the grounds of it have been so thoroughly undermined by subsequent decisions of the Judicial Committee, that it can,—I speak, of course, with the highest respect for the eminent judges who took part in it,—no longer afford a guide to the interpretation of the *British North America Act.*

(1) 40 U.C.Q.B. at 484.
(2) (1870) 11 Wallace 113, at 123-124 (reported *sub nom.* *The Collector* v. *Day*).
(3) (1908) 40 Can. S.C.R. 597.
(4) 2 Ont. App. R. 522.
(5) (1887) 12 App. Cas. 575.

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Abbott v. *City of Saint John* (1) was approved in *Caron* v. *The King* (2) and both decisions are, of course, binding upon this Court.

In view of an argument addressed to us, one may, perhaps, observe that *Abbott* v. *City of Saint John* (1) was not founded on the decision of the Privy Council in *Webb* v. *Outrim* (3), a decision upon the Commonwealth Act of Australia. It proceeded, as plainly appears from the judgments, upon the view that the reasoning in *Leprohon's* case (5) had been swept away by subsequent decisions of the Judicial Committee of the Privy Council on the *British North America Act.*

I agree with Mr. Justice Davis that the provisions of sections 4, 5 and 6 and the last clause of section 7 are concerned with the collection and the recovery of the taxes imposed upon the employee by sections 3 and 7.

It is conceivable, no doubt, that a province might, while professing to act under clause 2 of section 92 of the *British North America Act,* attempt to invade the exclusive legislative authority of the Parliament of Canada under clause 8 of section 91 in respect of the

> fixing of * * * the salaries and allowances of civil and other officers of the Government of Canada.

Attempts on the part of both the Parliament of Canada and the legislatures of the provinces to employ their admitted powers for the purpose of legislating in a field from which they are excluded by the terms of the *British North America Act* have sometimes come before the courts. One of the most recent cases of the kind concerned an attempt on the part of the Dominion to make use of its powers in respect of taxation in order to exercise legislative control over a subject withdrawn from its jurisdiction by the *British North America Act.* The attempt failed for the reasons given by Lord Dunedin, speaking on behalf of the Judicial Committee, in *In re the Insurance Act of Canada* (4).

If a province should attempt to employ its authority in respect of taxation for the purpose of invading the field of jurisdiction marked out and exclusively appropriated to the Dominion by clause 8 of section 91, then such an attempt must necessarily fail. But there is in truth no reason

(1) (1908) 40 Can. S.C.R. 597.
(2) [1924] A.C. 999.
(3) [1907] A.C. 81.
(4) [1932] A.C. 41, at 52 and 53.
(5) 2 Ont. App. R. 522.

for imputing such a character to the legislation now before us. The statute, no doubt, specifically mentions wages earned by employees of His Majesty in the right of the Dominion or in right of any province of Canada, but there is no suggestion that there is any discrimination between such employees who are subject to the tax created by this statute. Nor could there be any ground for a suggestion, nor, indeed, does anybody suggest, that the purpose of this statute is anything other than that which is expressed in section 3 (1), viz., the levying of a tax for the purpose of raising a provincial revenue.

Counsel for the appellant emphasized sections 4, 5 and 6 and the second branch of section 7. The argument, if I understood it, appeared to be that these sections are *ultra vires* because they constitute an attempt to impose duties upon the Crown, or the officers of the Crown in the right of the Dominion, or of provinces of Canada other than Manitoba, with respect to the disposal of the revenues of the Crown in such rights; that these provisions are inextricably connected with those of sections 3 and 7, and that the whole of the series of enactments beginning with section 3 and ending with section 7 form a *unum quid* which is struck with invalidity because of the legislature's illegal assumption of authority in enacting sections 4, 5 and 6 and the second part of section 7.

There are, as I conceive, three conclusive answers to this contention. First of all, assuming everything in sections 4, 5 and 6 and the second branch of section 7 which imposes any duty or liability upon the employer to be struck from the statute as *ultra vires,* there would still stand enactments valid and complete for the purpose of making the taxes in question exigible from the taxpayer. I shall elaborate this later.

Second, the impeached enactments (sections 4, 5 and 6, and the second part of section 7), read by the light of well settled and well known canons of construction, do not, as it appears to me, extend to the Crown or to the officers of the Crown in the right of the Dominion or of any province of the Dominion, other, at all events, than Manitoba, or to the revenues of the Crown in these respective rights; and further, even if this were not so, the form and character of the legislation is such that the enactments, in so far as they

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relate to such governments and such revenues, must be treated as severable, and that the enactments would still have their full operation as regards other employers and other revenues.

Thirdly, section 11 of *The Manitoba Interpretation Act* (ch. 105, R.S.M. 1913) precludes the extension of sections 4, 5 and 6 and the second part of section 7 at least to the Crown in right of the Dominion or in right of any province other than Manitoba.

Reading sections 4, 5 and 6 without reference to the interpretation clauses, but in light of accepted rules of construction, it is clear that these sections must be construed as imposing duties and liabilities only upon employers within the territorial jurisdiction of the Legislature of Manitoba, and as dealing with moneys or revenues having a situs which would enable the Legislature to exercise control over them. The general rule, I think, is stated with perfect accuracy in the treatise on Statutes in Lord Halsbury's collection, Vol. 27, section 310, at p. 163,

> When Parliament uses general words it is dealing only with persons or things over which it has properly jurisdiction; it would be futile to presume to exercise a jurisdiction which it could not enforce.

The presumption in favour of this general rule is fortified in this case by the penal provisions of section 6, which become operative in any case in which an employer fails to observe the duty created by sections 4 and 5 to collect and pay over any tax imposed by Part 1, that is to say, by sections 3 and 7. Such penal provisions, expressed in general terms, ought not to be construed so as to bring within their sweep employers who are neither domiciled nor resident in Manitoba and whose moneys, out of which the wages are paid, are in their possession beyond the limits of that province, nor to acts or defaults of such employers committed outside the province (*MacLeod* v. *Attorney-General for New South Wales* (1)). Since subsection 1 of section 6 applies to all employers who fail to collect and pay over taxes under the provisions of Part 1, and subsection 2 applies to everybody who contravenes any provision of Part 1, this is solid ground for the inference that the duties imposed by sections 4 and 5, in respect of which section 6 provides the sanctions, are duties which the statute contem-

(1) [1891] A.C. 455.

plates shall be performed in the province. The last sentence of the first paragraph of section 4 ought not to be overlooked. It professes to provide for a discharge *pro tanto* of the obligation of the employer to pay the wages of the employee in the manner prescribed, that is to say, by payment of the tax to the province. Now the obligation of the employer would, as a rule, being a simple contract debt, have its situs at the residence of the employer; and the legislature of the province would be impotent to regulate the conditions of its discharge when the employer's residence is not in the province (*Royal Bank of Canada* v. *The King* (1)). This observation applies equally to subsection 3 of section 4.

This construction of sections 4, 5 and 6 receives powerful support by reference to the definition of "employer" in clause (*c*) of section 2 (1). It is in these words:

> 2 (1) (*c*) "Employer" includes every person, manager, or representative having control or direction of or responsible, directly or indirectly, for the wages of any employee, and in case the employer resides outside the province, the person in control within the province shall be deemed to be the employer;

The Legislature seems to have recognized that the enactments of Part 1, imposing duties upon employers and penalties for failing to perform them, could not be operative in respect of employers and their acts and property outside of the province. The last part of section 7 is not without its significance. It, by reference, makes the procedure established by sections 23, 23A and 24 of the *Income Tax Act* (C.A. 1924, ch. 91, as amended) available for the collection and recovery of the tax. They are made available for recovery and collection, not only from the taxpayer, the person on whom the tax is imposed, but, as well, for the enforcement of payment by the employer pursuant to the obligation created by section 4. Now, it is obvious from inspection that these sections of the *Income Tax Act* are only intended to apply to employers having goods in Manitoba susceptible to distress.

The provision upon which the argument of the appellant largely rests is that of section 2 (1) (*d*) (ii), which is in these words:

> (ii) the salaries, indemnities, or other remuneration of members of the Senate and House of Commons of the Dominion and officers thereof,

(1) [1913] A.C. 283.

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members of the Provincial Legislative Councils and Assemblies, members of municipal councils, commissions, or boards of management, and of any judge of any Dominion or provincial court, and of all persons whatsoever, whether such salaries, indemnities, or other remuneration are paid out of the revenues of His Majesty in right of the Dominion or in right of any province thereof, or any person;

The argument, as I understand it, proceeds thus: Where the word "wages" occurs in sections 4, 5 and 6, you must substitute therefor the explanatory phrases of the interpretation section. Now, in the first place, it is important to observe that under this interpretation section, these explanatory clauses only apply "where the context does not otherwise require" (sec. 2 (1)). I should have thought it reasonably clear, in view of the considerations I have mentioned, and especially in view of section 2 (1) (c), that the definition in section 2 (1) (d) (ii) could not properly be applied in such a way as to give to sections 4 and 5 the scope necessary to make them applicable to the payment of wages by, for example, a provincial government, other than that of Manitoba, or to an employee of that government. It is unnecessary to discuss the effect of the words "resident" and "residence" as applied to the Crown. The general principle of construction to which I have referred would, I should have thought, obviously have excluded from the scope of the general words of sections 4, 5 and 6 wages payable by the Crown in the right of another province and, necessarily, out of the revenue of that province and by authority of legislative appropriation or statute. Every consideration in favour of the rule which restricts the operation of the general words of a provincial statute, in such a way as to exclude from them property situate outside the territorial jurisdiction of the legislature and persons and the acts of persons outside that jurisdiction, applies with greatly multiplied force in favour of the view that these sections ought not to be construed as extending to the officials of the government of another province, or to the acts of such officials in dealing with the assets and revenues of the province. *A fortiori,* they ought not to be construed as attempting to impose legal obligations and duties on the Crown in the right of the Dominion, or the officials of the Crown in the right of the Dominion, or as assuming to direct under penal sanc-

tions the disposition of the revenues of the Dominion. No court ought, it seems to me, to attribute to the legislature of a province an intention to enact legislation so obviously beyond the scope of its legitimate action in absence of almost intractable words.

Again, subsection 3 of section 4 provides that the amount of the tax, after having been deducted and retained by the employer, shall be held in trust for His Majesty in the right of the province. This seems to be an illuminating provision. The term employer, must, as we have seen, receive some qualification. What is the qualification here? In the first place, the moneys deducted would in most cases where payable by the Dominion, or a provincial government, not have a situs in Manitoba, and that alone is sufficient for excluding such governments from the scope of the term. But beyond that, is it conceivable that a legislature of a province of Canada would assume to declare the Dominion Government or another provincial government a trustee of its revenues for that province? We cannot, I think, in the absence of some plain words, impute such an intention to the legislature.

Then, there is a special observation as regards section 5. By that section, the employer is required to keep "at some place in the province" a list of his employees with their residences. Obviously, such a provision is inoperative in relation to employers not domiciled or resident in the province. Plainly here effect must be given to the presumption excluding persons outside the jurisdiction of the legislature.

I now turn to the effect of section 11 of *The Manitoba Interpretation Act* (R.S.M. 1913, ch. 105) which contains this provision:

> No provisions or enactment in any Act shall affect in any manner or way whatsoever the rights of His Majesty, His heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby; * * *

By section 2 of the Act, there are certain cases in which section 11 does not apply. These cases are where that section,

> (*a*) is inconsistent with the intent and object of any such Act, or (*b*) would give to any word, expression or clause of any such Act an interpretation inconsistent with the context, or (*c*) is in any such Act declared not applicable thereto.

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There is nothing in the statute before us which declares section 11 to be inapplicable thereto, nor, in view of what I have said, can it, I think, be affirmed that section 11 is in any way inconsistent with the intent and object of the statute.

Can it be said then that section 11, if given effect to, "would give to any word, expression or clause" of the statute "an interpretation inconsistent with the context?" There is nothing in the context which is inconsistent with section 11 unless it can be discovered in the word "wages," reading that word by reference to the explanatory clause in the interpretation section 2 (1) (d).

It does not appear to be necessary to consider the question whether, by force of section 2, the word "employer" in these sections (sections 4, 5, 6 and the second part of section 7) should be extended to include His Majesty in right of the province of Manitoba. The statute as a whole is for the behoof of His Majesty in right of that province. On the other hand, the tone of the sections in question (4, 5, 6 and the enactments of the *Income Tax Act* referentially introduced by the second part of section 7), as well as the substance of some of the provisions of these sections, are not entirely consonant with the idea that they are intended to apply to His Majesty in any capacity.

It is, however, unnecessary to pass upon this point. Our concern is with the application of these provisions to His Majesty in right of the Dominion and of the other provinces of Canada. Is His Majesty in these capacities comprehended within the general term "employer"?

In re Silver Brothers, Ltd. (1) contains observations by Lord Dunedin, delivering the judgment of the Judicial Committee, valuable for our present purpose touching the effect of an enactment by the legislature of a province which, if operative, would prejudicially affect the rights of the Crown in relation to its revenues and assets under the control of another legislative jurisdiction in Canada. He says:

> The next point made was that the provisions of s. 16 do not apply when what is being done is not to affect the Crown prejudicially, but to give a benefit to the Crown, and along with this it is urged that there is only one Crown, and reference is made to the case of *Attorney-General for Quebec* v. *Nipissing Central Ry. Co.* (2). It is quite true that the

(1) [1932] A.C. 514, at 523-4. (2) [1926] A.C. 715.

section refers to cases where the Crown would be "bound," i.e., subjected to liability, and not to those where the Crown is benefited. But the fallacy lies in the application of this truth to the case in question. Quoad the Crown in the Dominion of Canada the Special War Revenue Act confers a benefit, but quoad the Crown in the Province of Quebec it proposes to bind the Crown to its disadvantage. It is true that there is only one Crown, but as regards Crown revenues and Crown property by legislation assented to by the Crown there is a distinction made between the revenues and property in the Province and the revenues and property in the Dominion. There are two separate statutory purses. In each the ingathering and expending authority is different.

I have already called attention to the fact that the legislature in the interpretation clause (s. 2 (1) (*c*)) seems to recognize the rule of interpretation which presumptively imputes to the legislature an intention of limiting the direct operation of its enactments to persons and things within its jurisdiction. When these sections are examined as a whole, the form, as well as the substance of them, enormously strengthens this presumption. The immediate context, therefore, offers no obstacle whatever to the application of section 11 to them. Indeed, these sections, read by themselves, in the absence of section 11 and in the absence of the interpretation clause, would be applied upon the footing that "employer" does not include His Majesty in right of the Dominion or of another province. Such being the case, it would appear that effect ought to be given to the introductory words of section 2 (1): "unless the context otherwise requires." It results, therefore, from the terms of section 11 of *The Manitoba Interpretation Act*, applied by the light of the general considerations adverted to above, and of the definition of the term "employer" in the interpretation section, that that part of clause (ii) of section 2 (1) (*d*) which refers to remuneration

> paid out of the revenues of His Majesty in right of the Dominion or in right of any province thereof

ought not, by reason of the restriction which must be placed upon the general term "employer," to be regarded as governing the interpretation of the term "wages" in these sections.

Apart from these considerations, it would appear that those parts of the definition of "wages" which relate to moneys payable out of revenues of the Dominion are severable from the other parts of the definition. If you excise these references, you do not affect the meaning of the enactments of sections 4, 5 and 6 in their application to other

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persons. Since the application of these enactments to His Majesty in the right of the Dominion, or His Majesty's officers, or to the revenues of His Majesty in the right of the Dominion, would be *ultra vires,* there seems to me no reason why, in treating that part of the statute as null, the validity of these enactments in other respects should be impeachable. In *Brooks-Bidlake and Whittal Ltd.* v. *Attorney-General for British Columbia* (1), the Judicial Committee, dealing with the statutory stipulation of a timber licence under the British Columbia *Crown Lands Act,* which provided that

> this licence is issued and accepted on the understanding that no Chinese or Japanese shall be employed in connection therewith,

held that, by reason of the *Japanese Treaty Act, 1913,* enacted by the Dominion Parliament, the stipulation as regards Japanese was void; but that it must prevail as regards the employment of Chinese. The words of the judgment (at p. 458) are:

> The stipulation is severable, Chinese and Japanese being separately named; and the condition against employing Chinese labour having been broken, the appellants have no right to renewal.

The present case seems clearly to fall within this rule.

In *Attorney-General for Manitoba* v. *Attorney-General for Canada* (2), the Judicial Committee had to deal with a case in which they were obliged to hold that an enactment which was *ultra vires* in some respects, but which would, in a separate enactment, have been valid in some other respects, must be treated as invalid as a whole, because, in view of the circumstances, it was quite impracticable for a court of law to effect the necessary division. The words of the judgment are,

> If the statute seeks to impose on the brokers and agents and the miscellaneous group of factors and elevator companies who may fall within its provisions, a tax which is in reality indirect within the definition which has been established, the task of separating out these cases of such persons and corporations from others in which there is a legitimate imposition of direct taxation, is a matter of such complication that it is impracticable for a court of law to make the exhaustive partition required. In other words, if the statute is *ultra vires* as regards the first class of cases, it has to be pronounced to be *ultra vires* altogether. Their Lordships agree with Duff J. in his view that if the Act is inoperative as regards brokers, agents and others, it is not possible for any court to presume that the Legislature intended to pass it in what may prove to be a highly truncated form.

(1) [1923] A.C. 450. (2) [1925] A.C. 561, at 568.

There can be no doubt, if in substance the severance of part of the legislation which is *ultra vires* from the statute as a whole would have the effect of "transforming it into one to which the legislature has not given its assent," then it would be beyond the province of any court to deal with the matter in that way (*Attorney-General for Ontario* v. *Reciprocal Insurers* (1). In view of what has already been said, such an objection would, as it appears to me, in the present case, be groundless.

Again, even if one could come to the conclusion that sections 4, 5 and 6 must be treated as inoperative as a whole, sections 3 and 7 are, in themselves, quite sufficient. Section 3 provides:

> 3. (1) In addition to all other taxes to which he is liable under this or any other Act, every employee shall pay to His Majesty for the raising of a revenue for provincial purposes a tax of two per centum upon the amount of all wages earned by or accruing due to him on or after the first day of May, 1933, which tax shall be levied and collected at the times and in the manner prescribed by this part;

It is the employee on whom it is to be imposed, but the tax is to be "collected at the times and in the manner prescribed by this part." Now, it is perfectly clear, as I have already pointed out, especially in view of section 2 (1) (*c*), that the legislature must have contemplated that sections 4, 5 and 6 would fail of application in many cases; in all cases in which the employer is resident outside of Manitoba, has all his assets and revenues outside of Manitoba, and has no representative in Manitoba who has any control or direction or responsibility in relation to the wages to be taxed. It would be quite inadmissible to hold that in such cases sections 3 and 7 have no application. The rule laid down by Lord Cairns in *Partington* v. *Attorney-General* (2) is this:

> If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

The operation of sections 3 and 7 is not in any way dependent upon sections 4, 5 and 6 or any of them taking

(1) [1924] A.C. 328, at 346. (2) (1869) L.R. 4 H.L. 100, at 122.

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effect against the employer. There is no ground for holding that, when the last mentioned sections do not affect the employer, because he and his assets are beyond the territorial jurisdiction of the legislature, the operations of sections 3 and 7 are in any degree impaired. Section 7 plainly includes such a case, which already falls within the words:

> In case the wages earned or accruing due to an employee are paid to him without the tax imposed thereon being deducted therefrom by his employer, * * *

And in all cases in which the employer is not within the general terms of sections 4, 5 and 6, section 7 equally applies.

The tax is imposed by section 3 and the obligation to pay the tax is created by that section and section 7, and which includes by reference section 25 (1) of *The Income Tax Act* (C.A. 1924, ch. 91, as amended) which, by section 7, applies in all cases within section 3,

> In addition to all other remedies herein provided, taxes, penalties and costs and unpaid portions thereof assessed or imposed under this Act may be recovered as a debt due to His Majesty from the taxpayer.

The appellants have, in my view, presented no answer to the claim of the Crown.

The judgment of Lamont and Davis JJ. was delivered by

DAVIS J.—These appeals were heard together as they raise substantially the same question. The appellant Worthington is an officer of the permanent force of the active militia of Canada, having been duly commissioned under the provisions of the *Militia Act* of Canada. The appellant Forbes is a civil servant employed by the government of the Dominion of Canada in the Department of Agriculture. Both appellants were at all material times continuously resident within the Province of Manitoba. Both appellants seek to escape from the imposition of an income tax upon them by the Province of Manitoba. While several grounds of escape were urged upon us by counsel for the appellants, the main contention was that the Province had no right to impose an income tax upon members of the permanent force of the Canadian militia or upon Dominion civil servants, as such imposition of income tax would result in diminution of the pay or salary of such persons and constitute interference with the conduct of the Federal Government in matters of militia and of the civil service of the Dominion. These two actions were brought

as test cases and we have had the benefit of full and helpful argument by counsel in the appeals.

Apart from the special considerations that may apply to persons holding office or employment in the two classifications with which we are specially concerned in these appeals, there can be no doubt of the general proposition that every province has a right to raise revenue for provincial purposes by direct taxation within the province. That power was very clearly given to the provinces by sec. 92, sub-head (2), of the *British North America Act*.

Turning then to the special legislation with which we are concerned, the Province of Manitoba has what may be called a general income tax, imposed under the provisions of *The Income Tax Act*, being ch. 91 of the Manitoba Statutes Consolidation of 1924 with subsequent amendments. By sec. 8 of that statute there shall be assessed, levied and paid upon the income during the preceding year of every person:—

(*a*) residing or ordinarily resident in Manitoba; or
(*b*) who remains in Manitoba during any calendar year for a period or periods equal to one hundred and eighty-three days;
(*c*) who is employed in Manitoba during such year;
(*d*) who not being resident in Manitoba is carrying on business in Manitoba during such year;
(*e*) who not being resident in Manitoba derives income for services rendered in Manitoba during such year otherwise than in the course of regular or continuous employment for any person resident or carrying on business in Manitoba;

a tax at the rates applicable to persons other than corporations and joint stock companies set forth in the first schedule of this Act upon the amount of income in excess of the exemptions provided in this Act; provided that the said rates shall not apply to corporations and joint stock companies, but shall apply to income of personal corporations, as provided for in 8B of this Act. (1931, c. 25, s. 11).

In addition to the taxes provided by the schedule there shall be assessed, levied and paid a tax of five per cent., on the tax payable by persons with an income of five thousand dollars or over, before any allowance is made for deductions and exemptions. (1932, c. 49, s. 8).

By the interpretation section of the statute (sec. 2 (*j*)) "taxpayer" is defined to mean

any person paying, liable to pay, or believed by the Minister to be liable to pay, any tax imposed by this Act.

For the purpose of the statute an extended meaning is given to the word "income" by sec. 3 and the word is used as

including the salaries, indemnities or other remuneration of all persons whatsoever whether the said salaries, indemnities or other remuneration are paid out of the revenues of His Majesty in respect of His government of Canada or of any province thereof, or by any person, and all

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other gains or profits of any kind derived from any source within or without the province whether received in money or its equivalent, with the exemptions and deductions hereinafter respectively set out.

A long list of detailed exemptions and deductions from taxation under the Act is provided by secs. 4 and 5, with none of which exemptions or deductions we are specially concerned in these appeals. Sections 23A, 24 and 25 of the statute deal with the collection and enforcement of the tax. It may be observed in passing that sec. 25 (1) provides that,

> In addition to all other remedies herein provided, taxes, penalties and costs and unpaid portions thereof assessed or imposed under this Act may be recovered as a debt due to His Majesty from the taxpayer.

In 1933 the Province of Manitoba passed an Act to impose a special tax on incomes. This Act is known as *The Special Income Tax Act,* and it is with this statute that we are particularly concerned. It is divided into two main parts. Part I is headed "Taxation of Wages" and Part II is headed "Taxation of Income other than Wages." The question before us falls to be determined mainly under Part I of this statute, it being admitted that the tax sought to be collected from each of the appellants has been imposed under Part I of the statute. To fully understand and appreciate the nature and scope of the taxation under Part I, it is necessary to study the provisions of Part II as well as the provisions of the general income tax Act above mentioned, being *The Income Tax Act* of 1924 with amendments.

Part II of *The Special Income Tax Act* imposes (sec. 8 (1)) upon every person other than a corporation an annual tax of two per centum upon the value of his taxable income, other than wages as to which a tax has been paid under Part I, and such tax shall be ascertained and collected in accordance with the provisions of this part. By sec. 8 (2) the tax imposed by this part shall apply in respect of all taxpayers, other than corporations, within the scope of *The Income Tax Act,* or who would be within the scope of that Act if no deductions or exemptions were allowed therein. I have set out above the definition of "taxpayer" in the general Act. *The Special Income Tax Act* having been assented to on May 4, 1933, it was provided by sec. 9 that the tax imposed by Part II for the year 1933 should be based on the income of the taxpayer for the year 1932 and the tax for each year thereafter on the income

for the previous year; and by sec. 12 (2) the tax imposed on a taxpayer by Part II shall be assessed and levied and payable annually at the same times as the annual income tax under *The Income Tax Act* is assessed, levied and made payable. The legislature of Manitoba, faced with the obvious delay in raising revenue under Part II of the special Act on the basis of an annual assessment, adopted for practical expediency a method of taxation whereby revenue would be raised at once in monthly payments on the basis of a tax of two per centum upon the amount of all wages earned or accruing due on or after the first day of May, 1933. This monthly assessment and collection of the taxes on wages was undoubtedly adopted as a matter of practical expediency to produce revenue at once without awaiting an annual payment on the basis of the provisions of Part II of the Act. It is to be recalled that by sec. 8 (1) of Part II the annual tax of two per centum upon the value of the taxpayer's taxable income excludes "wages as to which a tax has been paid under Part I." Now in Part I it is provided, sec. 3 (1), that in addition to all other taxes to which he is liable under this or any other Act, every employee shall pay to His Majesty for the raising of a revenue for provincial purposes a tax of two per centum upon the amount of all wages earned by or accruing due to him on or after the first day of May, 1933, which tax shall be levied and collected at the times and in the manner prescribed by this part. "Employee" by sec. 2 (1) (*b*) "means any person who is in receipt of or entitled to any wages"; and "wages" by sec. 2 (1) (*d*),

> includes all wages, salaries, and emoluments from any source whatsoever, including
>
> (i) any compensation for labour or services, measured by the time, piece, or otherwise;
>
> (ii) the salaries, indemnities, or other remuneration of members of the Senate and House of Commons of the Dominion and officers thereof, members of the Provincial Legislative Councils and Assemblies, members of municipal councils, commissions, or boards of management, and of any judge of any Dominion or provincial court and of all persons whatsoever, whether such salaries, indemnities, or other remuneration are paid out of the revenues of His Majesty in right of the Dominion or in right of any province thereof, or any person;
>
> (iii) personal and living expenses and subsistence when they form part of the profit or remuneration of the employee; and
>
> (iv) emoluments, perquisites, or privileges incidental to the office or employment of the employee which are reducible to a money value.

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It was argued that sec. 4 under part I indicates that the tax in substance is on the employer's payroll rather than on the employee and that the tax is therefore indirect and beyond the power of the province to impose. Sec. 4 is as follows:

4. (1) Every employer at the time of payment of wages to an employee shall levy and collect the tax imposed on the employee by this part in respect of the wages of the employee earned or accruing due during the period covered by the payment, and shall deduct and retain the amount of the tax from the wages payable to the employee, and shall, on or before the fifteenth day of the month next following that in which the payment of wages takes place, or at such other time as the regulations prescribe, pay to the administrator the full amount of the tax. No employee shall have any right of action against his employer in respect of any moneys deducted from his wages and paid over to the administrator by the employer in compliance or intended compliance with this section.

(2) Every employer shall, with each payment made by him to the administrator under this section, furnish to the administrator a return showing all taxes imposed by this part on the employees of the employer in respect of wages during the period covered by the return, which shall be in the form and verified in the manner prescribed by the administrator.

(3) Every employer who deducts or retains the amount of any tax under this part from the wages of his employee shall be deemed to hold the same in trust for His Majesty and for the payment over of the same in the manner and at the time provided under this part.

Sec. 4 is the machinery set up for the collection of the tax. For the purpose of carrying into effect the provisions of parts I and II of *The Special Income Tax Act,* it is provided by sec. 16 thereof that the Lieutenant-Governor-in-Council may make regulations governing the administration of the Act and that such regulations shall have the force of law as if made part of the Act. Turning to the regulations made by the Lieutenant-Governor-in-Council we find the following:

3. If an employer be satisfied that the total wages of an employee during a period of twelve months will not exceed a sum which entitled the employee to exemption under this Act, the employer shall not be obliged to collect or remit the tax. He shall, nevertheless, show the total amount paid such employee.

4. An employer shall not be liable to collect a tax from a person casually and not regularly employed where in any case he is satisfied that the wages of the employee during the period of twelve months will not exceed a sum which entitled the employee to exemption under this Act.

6. Every employer who levies and collects any tax imposed under said Act with respect to wages of any employee shall, as remuneration for his collection and payment thereof to the Provincial Treasurer, be entitled to deduct from the amount so paid two per centum of such payments and in no case shall such deduction be less than ten cents.

There is nothing to justify the contention of the appellants that the taxation of wages under the statute is in substance an indirect tax on the employer's payroll. Sec. 3 of Part I above set out is the charging section and as Lord Thankerton said in *Provincial Treasurer of Alberta* v. *Kerr* (1),

> The identification of the subject-matter of the tax is naturally to be found in the charging section of the statute, and it will only be in the case of some ambiguity in the terms of the charging section that recourse to other sections is proper or necessary.

Sec. 7 of Part I provides that in case the wages earned or accruing due to an employee are paid to him without the tax imposed thereon being deducted therefrom by his employer, it shall be the duty of the employee to forthwith pay the tax. That section does not impose a liability upon the employer for the tax. Sec. 6 (1) provides that, if an employer in violation of the provisions of Part I fails to collect and pay over any tax imposed by Part I, the administrator of the Act may demand and collect from him, that is the employer, as a penalty ten per cent. of the tax payable and in addition the employer is liable to a fine. Sec. 6 (2) draws the distinction between the tax payable and moneys in the hands of an employer.

> Nothing contained in this section nor the enforcement of any penalty thereunder shall suspend or affect any remedy for the recovery of any tax payable under this part or of any moneys in the hands of an employer belonging to His Majesty.

The somewhat inapt language used in sec. 7, that

> all the provisions of sections 23, 23A, 24 and 25 of "The Income Tax Act" shall, *mutatis mutandis*, apply to the collection and recovery of the tax so imposed from the employer and employee, or either of them.

cannot be read, having regard to the statute taken as a whole, as imposing the tax upon the employer. The collection and recovery of the tax, and not its imposition, is the substance of the language used.

The imposition of the tax upon the employee is clearly made in the charging section (sec. 3 (1)) and secs. 4, 5, 6 and 7 do not attempt to impose the tax as such upon the employer but merely provide for the collection of the tax by the employer, and in respect of which collection the employer is entitled, under regulation 6 above set out, to remuneration to the extent of two per centum of the amount collected and paid over by him to the Pro-

(1) [1933] A.C. 710, at 720.

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vincial Treasurer. The collection and recovery provisions are clearly within the competence of the provincial legislature.

My conclusion, therefore, is that the imposition of the tax on wages under Part I of the statute is direct taxation to raise revenue for provincial purposes within the province and valid under sec. 92, sub-head (2), of the *British North America Act.*

The appellant Worthington, an officer of the permanent force of the active militia of Canada, contends through his counsel, firstly, that the pay of a soldier is a gratuity from the Crown and cannot in any sense be regarded as wages, and secondly, that in any case a soldier is immune from income taxation by provincial governments, as such taxation involves a diminution in the pay and allowance of the soldier and constitutes an interference with national defence and is beyond the competence of any province. The *Militia Act,* R.S.C. 1927, ch. 132, sec. 48, provides in part as follows:

> (1) Officers, warrant officers and non-commissioned officers of the Permanent Force shall be entitled to daily pay and allowances at rates to be prescribed,

and the Regulations issued pursuant to the *Militia Act,* called Pay and Allowance Regulations, state (No. 43):

> In compliance with section 8 of the Militia Pension Act, a deduction of 5 per cent. will be made from the pay of every officer and warrant officer, and this will be calculated on his total emoluments, including the amounts granted for lodging, fuel, light, rations, and servant, as set forth in article 74, notwithstanding that he may be provided with these in kind instead of in money, but excluding any married allowance or allowances for forage, travelling or transfer.

The word "emoluments" is used. The word "wages" in *The Special Income Tax Act* is defined (sec. 2 (1) (*d*) as above set out) to include "all wages, salaries, and emoluments from any source whatsoever," and the definition is sufficiently wide to cover the pay and allowance of an officer in the militia. As to the second point, that this taxation by the province is unconstitutional as causing a diminution in the soldier's pay and interfering with national defence, the statute imposes a provincial tax of general application and cannot be construed as legislation respecting the salaries of soldiers as such. It is taxation aimed at citizens at large and there is no ground, in the absence of express provision, to protect the military

man from the incidence of the general tax. It is a tax upon persons within the province who are receiving wages within the broad definition of that word as used in the statute and the amount of the tax (2 per cent.) is not such as can be said to constitute any interference with the federal government in relation to its soldiers. The *British North America Act* has made two broad divisions in the distribution of legislative power, one Dominion and the other Provincial. Within these two divisions the different legislatures possess their own legislative jurisdiction. To the provinces have been given generally all matters of local municipal government. The execution of certain prescribed duties of a local character are entrusted to the provinces in relation to education, the establishment, maintenance and management of public and reformatory prisons, hospitals and asylums in and for the province, the administration of justice, municipal institutions, local works and undertakings, property and civil rights, and generally all matters of a merely local or private nature in the province. These public services entail enormous expenditures of money by the provinces, and when a general levy upon all its citizens is imposed by a province for the purpose of raising revenue by direct taxation within the province, it does not create any conflict between federal and provincial authority such as to entitle a military officer who actually resides in the province to escape from the incidence of the purely local taxation. There is nothing in the legislation directed against the salary of the military officer as such and he must, like all other good citizens, carry his burden of the local taxation of the province within which he resides.

This Court in *Abbott* v. *City of Saint John* (1) held that notwithstanding No. 8 of section 91, which provides that the Dominion Parliament shall have exclusive legislative authority over the fixing of and providing for the salaries and allowances of civil and other officers of the government of Canada, a civil or other officer of the government of Canada may be lawfully taxed in respect of his income, as such, by the municipality in which he resides, under the authority of provincial legislation. The

(1) (1908) 40 Can. S.C.R. 597.

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principle of that case applies to the facts of this appeal and is clearly binding upon us.

The appellant in the other case, Forbes, who is a Dominion civil servant, stands in no different position from that of the appellant Worthington.

Both appeals should be dismissed, but under the circumstances without costs.

Cannon J. (dissenting) delivered the following judgment in the Forbes appeal:

CANNON J. (dissenting).—In support of the competency of the provincial legislature to impose this 2 per cent. tax under *The Special Income Tax Act* upon the salary or wages of a Dominion civil servant who is within the province in the same manner as it is imposed upon all other persons of the province, the respondent invokes the decision in *Abbott* v. *City of Saint John* (1), which was applied in *City of Toronto* v. *Morson* (2), and approved by the Judicial Committee of the Privy Council in *Caron* v. *The King* (3). In this last case, their Lordships could see no reason in principle why any of the sources of income of a taxable citizen should be removed from the power of taxation of the Parliament of Canada. They also referred with approval to the judgment of Sir Louis Davies, J., in *Abbott* v. *City of Saint John* (1) as follows:

> He was dealing with the imposition of tax by the Province upon a Dominion official, which imposition, it was contended, contravened the provisions of head 8 of s. 91, a provision which gives to the Dominion "the fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada." He said: "The Province does not attempt to interfere directly with the exercise of the Dominion power, but merely says that, when exercised, the recipients of the salaries shall be amenable to provincial legislation in like manner as all other residents. * * * It is said," he continued, "the Legislature might authorize an income tax denuding a Dominion official of a tenth or even a fifth of his official income, and, in this way, paralyze the Dominion service and impair the efficiency of the service. But it must be borne in mind that the law does not provide for a special tax on Dominion officials but for a general undiscriminatory tax upon the incomes of residents and that Dominion officials could only be taxed upon their incomes in the same ratio and proportion as other residents. At any rate, if, under the guise of exercising power of taxation, confiscation of a substantial part of official and other salaries were attempted, it

(1) (1908) 40 Can. S.C.R. 597. (2) (1917) 40 Ont. L.R. 227.
(3) [1924] A.C. 999.

would be then time enough to consider the question and not to assume beforehand such a suggested misuse of the power."

Moreover, the Privy Council considered that the Dominion Income Tax Acts were not discriminating statutes. They were statutes for imposing on all citizens contributions according to their annual means regardless of, or, it may be said, not having regard to the *source* from which their annual means are derived. The appellant says:

> That case is clearly distinguishable from the one at bar for there the Court was dealing with a general income tax statute and held that a Dominion Government Official's salary should be included in computing his general income but that case was not one of a statute placing a tax upon his salary but was merely a general income statute.

I

Are Dominion civil servants entitled to retain the full salary which the Legislature of Manitoba is attempting to reduce by a tax as "wages" earned and paid within the province?

Without discussing, for the moment, whether or not the statute under consideration imposes a direct or indirect tax, it might be advisable to ascertain what is the meaning of the word "taxation" used in sections 91 and 92 of the *British North America Act*. A tax is an enforced contribution in *money* levied on persons, property or income by the proper authority for the support of government. The province is empowered to make laws in relation to direct taxation within the province in order to the raising of a revenue for provincial purposes. This is evidently confined to the levying of *money* and this taxation must be imposed equally on all citizens. No one is supposed to be conscripted into the public service under the guise of taxation. Can there be equality of taxation as between the ordinary citizen enjoying all the civil rights and liberties and privileges of free agents and a person living in the province who is in the service of the federal government? Does the civil servant enjoy the same liberties as the other subjects in the province? Has he the same rights to freedom of speech and discussion at public meetings? and especially, does he enjoy the right to strike or the right to withhold his labour, so long as he commits no breach of contract or tort or crime? See Halsbury, Laws of England, 2nd Edition, Vo. Con-

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stitutional Law, No. 437—pages 391-392. Can he, at will, leave the province to earn his living elsewhere? Has he, like other citizens, absolute freedom to use as he intends his working power or his earning capacity? In other words, is he, as far as his wages are concerned, to be considered as a free agent who can refuse to work?

The *Civil Service Act* (R.S.C. 1927, c. 22) contains these provisions:

44. The Commission shall by regulation prescribe working hours for each portion of the civil service, and there shall be kept and used in each branch of the civil service a book, system or device approved by the Commission for preserving a record of the attendance of the employees.

46. The deputy head may grant to each officer, clerk or other employee a yearly leave of absence for a period not exceeding eighteen days in any one fiscal year, exclusive of Sundays and holidays, after they have been at least one year in the service.

2. Every such officer, clerk or employee shall take the leave so granted at such time each year as the deputy head determines.

55. No deputy head, officer, clerk or employee in the civil service shall be debarred from voting at any Dominion or provincial election if, under the laws governing the said election, he has the right to vote; but no such deputy head, officer, clerk or employee shall engage in partisan work in connection with any such election, or contribute, receive or in any way deal with any money for any party funds.

2. Any person violating any of the provisions of this section shall be dismissed from the civil service.

Moreover, any permanent or temporary employment in the service of the Government of Canada disqualifies the holder thereof as a candidate to a seat in Parliament. See also article 160 of the *Criminal Code*—imposing special criminal liability on civil servants.

This means that the civil servant must give and is considered as having dedicated all his activities and work to the State and is entitled to receive in return the compensation fixed for the class in the civil service to which he belongs.

His activities are even restricted during his vacation or outside of his office hours. This appears clearly by the following Orders in Council:

(*a*) P.C. 1802, of the 7th day of August, 1931, which enacts that

Where any employee is known to be using any of his annual leave for the purpose of engaging in temporary employment in connection with the operation of any race track, exhibition, or in the selling of goods of any kind, thereby depriving wholly unemployed people of such temporary work, he shall, on the production of evidence proving the said offence to the satisfaction of the Deputy Head, be subject to immediate suspension,

investigation and appropriate discipline, except in cases where, for sufficient cause shown, the Minister of Labour shall have granted special permission authorizing such temporary employment.

(*b*) P.C. 95, of the 16th day of January, 1932:

Whereas section 2 of the Civil Service Superannuation Act, chapter 24 of the Revised Statutes of Canada, 1927, provides that:

"Civil servant" means and includes any permanent officer, clerk or employee in the Civil Service as herein defined,

(i) who is in receipt of a stated annual salary of at least six hundred dollars; and

(ii) who is required, during the hours or period of his active employment, to devote his constant attention to the performance of the duties of his position and the conditions of whose employment for the period or periods of the year over which such employment extends precludes his engaging in any other substantially gainful service or occupation.

And whereas the Secretary of State of Canada reports that "civil servants" within the meaning of the said Act have heretofore been accustomed to become candidates in municipal and civic elections, and thereafter, if elected, to accept municipal and civic offices, or to engage in other substantially gainful services and occupations, which preclude such civil servants from devoting their constant attention to the performance of the duties of their respective positions in the Civil Service of Canada;

Now therefore His Excellency the Governor General in Council, on the recommendation of the Secretary of State of Canada, is pleased to order and it is hereby ordered that anyone, who may now be or hereafter may become a civil servant within the meaning and intent of said Act, shall hereafter be precluded from becoming a candidate at any municipal or civic election, or *from engaging in any other substantially gainful service or occupation*, without first having obtained leave of absence, without pay, from his duties as such civil servant for the term of the municipal or civic office which he proposes to accept or for the period or periods of the year over which it is proposed that such other gainful service or occupation shall extend.

which was amended by

(*c*) P.C. 2463, of the 7th day of November, 1932, as follows:

Provided always that the Minister administering or in charge of any Department may, in his discretion, grant permission to any of his officers, clerks or employees, to accept a municipal or civic office which does not carry with it a salary, honorarium or other emolument exceeding five hundred dollars per annum, if, in the opinion of the Minister, the acceptance of such office does not interfere with the proper and regular performance of his duties as a civil servant.

It therefore appears abundantly that the federal civil servant is bound by law to render his service exclusively to the State. Contrary to the ordinary citizen, he is—towards the Government, in the public interest—in a state of servitude. He has accepted this "*capitis diminutio*" for an indemnity fixed by Parliament.

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II

Since the *Abbott* case (1), new elements have appeared in this constitutional problem. Parliament has imposed on federal employees the War Time Income Tax. It has even introduced the dangerous practice—which has found ready imitators—of disregarding the respectable principle of the sanctity of contracts by reducing by 10 per cent. the salaries by the unilateral action of one of the contracting parties claiming inability to pay.

Now, what is the position of a civil servant when a proportion of his salary is taken away by provincial legislation? Towards the State, he is not, and cannot be, in the same position as the ordinary taxpayer who is required to contribute his share in money for public purposes. The civil servant, if subject to this taxation, is required to contribute the same quota in money plus his services which must nevertheless be given to the nation gratuitously in the proportion of the deduction made from his salary by the impost. In this case, he would be bound by provincial legislation to give 100 per cent. services for 98 per cent. indemnity. I see nothing in the *British North America Act,* either in section 91 or 92, empowering any provincial government to compel any citizen to give gratuitously, in whole or in part, his services to the central government and to the public. Taxation under the *British North America Act* must be in money and not in money plus services.

Now in this case the effect of taxation on men bound to give all their working hours to the public is to discriminate against them by imposing a levy of money plus 2 per cent. of their services as a gratuitous extra contribution to the nation more than what the other citizens of the Province are called upon to contribute—for local purposes. Under the old system of serfdom the State had a direct claim upon the bodies, the goods, the time of the serfs. This has long ago disappeared; but the effect of this kind of legislation is to impose statutory labour upon public servants who, having to bear the disadvantages, disabilities and the reduction of their status as citizens, have a right to claim as their own, as intangible by no authority but that of Parliament, the compensation fixed for their work.

(1) (1908) 40 Can. S.C.R. 597.

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Common sense indicates that, in order to have a contented public servant, willing and ready to renounce some of the rights and privileges of ordinary citizens, he must feel that both his tenure of office and his salary are secure and not subject to reductions in proportion to the means and needs of the province or municipality where his superior officers may send him to perform his public duties.

It may be noted that in rendering judgment in *Abbott* v. *City of Saint John* (1), Sir Louis Davies expressly reserved to this court the faculty of reconsidering the question involved if confiscation of a substantial part of official or other salaries were attempted. *Rebus sic stantibus,* the decision was supposed to stand. But the situation is now entirely different. A small provincial or municipal tax in 1908, in the happy pre-war days, before any federal War Income Tax could be anticipated, when a 10 per cent reduction of the federal salaries was not within the realm of possibilities, before Canada plunged into the vortex of European militarism, when a world-wide depression did not threaten the municipalities and provinces with bankruptcy, may have seemed a negligible matter, and *de minimis non curat praetor.* But now we must face the situation as it is; the fact indisputedly is that the efficiency of federal services is threatened if they have to provide besides the exigencies of Parliament, to the pressing and ever increasing needs of the local administrations. As Sir Frederick Pollock says in 45 Law Quarterly Review (1929), pp. 293 and foll.:

> [The court] must find and apply the rule which in all the circumstances appears most reasonable * * * The duty of the court is to keep the rules of law in harmony with the enlightened common sense of the nation. Such a duty, being put upon fallible men, cannot be performed with invariable and equal success. It is a matter of judgment, knowledge of the world, traditional or self-acquired bent of opinion, and perhaps above all of temperament. Caution and valour are both needed for the fruitful constructive interpretation of legal principles. The court should be even valiant to override the merely technical difficulties of professional thinking, and also current opinions having some show of authority, in the search for a solution which will be acceptable and in a general way intelligible to reasonable citizens, or the class of them whom the decision concerns. * * * Discretion is good and very necessary, but without valour the law would have no vitality at all.

We are, therefore, free, notwithstanding the doctrine of *stare decisis,* and I deem it our duty, to reopen the broad question of the power of the legislature under the guise of

(1) (1908) 40 Can. S.C.R. 597.

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direct taxation within the province to interfere with the salaries fixed and provided for by the Parliament of Canada for its civil and other officers. Moreover, it may not be amiss to point out that Abott was a tide waiter in the outside service of the Department of Customs, at a salary of $600 per year; and it is not clear, from the report of the case, that in the year 1907 such employees were precluded from engaging in gainful occupation outside of official duties. He complained that the City of Saint John assessed his salary and attempted to levy the sum of $2.22 for county taxes and $11.30 for city taxes. The court of New Brunswick, relying on a decision of the Privy Council in *Webb* v. *Outrim* (1), affecting the Commonwealth of Australia, set aside the jurisprudence which had prevailed in Canada since Confederation and which had been very ably set forth and established in the powerful judgments of Spragg C., Hagarty C.J.C.P. and Burton & Patterson JJ.A. in *Leprohon* v. *Corporation of The City of Ottawa* (2). When the *Abbott* case (3) came before this court, Girouard, J., wrote a strong dissenting opinion and refused to set aside the consistent and almost unanimous doctrine of our courts on the sole authority of *Webb v. Outrim* (1).

It is difficult to understand why the considered conclusions of most eminent judges of our country, who, being in a better position to determine exactly the spirit and effect of the Confederation pact adopted in their lifetime, thought that, on this continent of America, the principles accepted by Chief Justice Marshall and other eminent judges of the Supreme Court of the United States with reference to the constitution of the neighbouring country and the reciprocal independence of National and State instrumentalities were to be adopted as a simple matter of common sense and propriety, should have been set aside to follow a decision of the Judicial Committee concerning the interpretation of the Australian constitution which is substantially different from ours, as appears in the judgments of the High Court of Australia when it subsequently refused to accept the Privy Council views in *Baxter* v. *Commissioners of Taxation, New South Wales* (4), and *Cooper* v. *Commissioner of Income Tax for the State of Queensland* (5).

(1) [1907] A.C. 81.
(2) (1878) 2 Ont. App. Rep. 522.
(3) (1908) 40 Can. S.C.R. 597.
(4) (1907) 4 Commonwealth Law Reports, 1087.
(5) (1907) 4 Comm. L.R. 1304.

It will be sufficient to quote sec. 107 of the Australian constitution to show the complete divergence with Canada as to the division of powers:

> Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

See Clement on the Canadian Constitution, 3rd ed., pages 375 and 642, and 23 Law Quarterly Review (1907) 373—about this much criticized decision.

In *Caron* v. *The King* (1), the appellant refused to pay the Dominion Income Tax on his salary as Minister of Agriculture for the province of Quebec and his indemnity as a Member of the Legislature. This Court said that the case was the converse of *Abbott* v. *The City of Saint John* (2), considered the authority of the Dominion to impose a tax on the salary of a provincial official and declared itself unable to distinguish the two cases.

With all due deference and diffidence, I would point out, however, that the facts in those two cases differed, because the Minister of Agriculture or a Member of the Legislature of the province of Quebec is not bound, for the salary or indemnity received as such, to devote his entire time or earning power to the province. These positions are not permanent and, as members of the Executive or of the Legislature, they are entirely free to enjoy all the civil rights of citizens; they are expected to have other gainful occupation and are not restricted as are members of the federal civil service. In view of this material difference as to the fundamental facts of the present case with those in *Caron* v. *The King* (3), I am of opinion that the judgments of this Court and of the Privy Council in *Caron* v. *The King* (3) are not binding on us in the premises.

The respondent has also quoted *City of Toronto* v. *Morson* (4), where the Appellate Division of Ontario held that the defendant, one of the judges of a county court, was not exempt from municipal taxation under provincial legislation in respect of his salary or income as such judge.

(1) (1922) 64 Can. S.C.R. 255.
(2) (1908) 40 Can. S.C.R. 597.
(3) 64 Can. S.C.R. 255; [1924] A.C. 999.
(4) (1917) 40 Ont. L.R. 227.

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The fundamental error of this finding is to be found in the reasons of Mulock, C.J., and Riddell, J., put tersely by the latter as follows (p. 232):

> As to the power of the province to tax such salaries, *Leprohon* v. *City of Ottawa* (1) decided that this power did not exist; and, had that decision stood, we should be bound to allow this appeal. But the Supreme Court of Canada, in the case of *Abbott* v. *The City of Saint John* (2), has deprived it of all authority; and, unless we are to disregard the Supreme Court decision we must hold that the power exists.

Clearly the learned judges in appeal assimilated one of His Majesty's judges to a civil servant. The exemption from taxation by provincial legislation of the salaries of judges would be based partly on different considerations than those that would apply to civil servants. Judges are not servants of the Crown; they are called to decide as between the subject and the Crown; and since the Act of Settlement their complete independence, economic and otherwise, has to be safeguarded in the public interest. Even Parliament, in order to reduce their salaries, had to impose a special tax whose validity is not to be affirmed or denied in the present case where the question does not arise. Suffice it to say that the case of *Abbott* v. *City of Saint John* (2) should not have been considered as a binding precedent by the Court of Appeal of Ontario when a substantially different question was before them. Therefore, the *Morson* decision (3) has nothing to do with the case we are now considering and, in any event, was based on a wrong appreciation of the subject-matter that was at the root of this court's decision in the *Abbott* case (2).

III

It has been said that both the Dominion Parliament and the Provincial Legislature have each been given sovereign powers within the scope of sections 91 and 92 of the *British North America Act*. The Imperial Parliament also gave to each of them the fixing of, and providing for, the salaries and allowances of civil and other officers for the respective government of Canada and of the provinces. These salaries or emoluments are attached to the position and are paid to the individual who happens to discharge

(1) (1878) 2 Ont. App. R. 522. (2) (1908) 40 Can. S.C.R. 597.
(3) (1917) 40 Ont. L.R. 227.

the commission or the public duties assigned to him. In this case, the salary is payable by the federal departments. If the Dominion, to carry on the nation's business, has one of its officials living in one of the provinces, can it be said that the salary attached to the position whose duties for federal purposes are carried out within the geographical limits of the province, becomes a "thing" within the province and may be taxed for local purposes for the sole reason that the remittance may reach the recipient outside of the Capital of the Country? It seems to me that the principle of extra-territoriality, as in the case of the representative of a foreign power, should apply *qua* salary to the mutual benefit and advantage of the officials of the two sovereign powers co-existing and organized in this country under sec. 91 (8) and sec. 92 (4) of the *British North America Act.*

In *Attorney-General for Ontario* v. *Attorney-General for Canada* (1), Lord Loreburn said:

> In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the *British North America Act,* if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act.

The purpose of the constitution was the creation of a new Dominion. Canada was intended to take its place among the free nations with such attributes and sovereignty as were consistent with its being still under the Crown. It is essential to the attribute of the sovereignty of any government that it shall not be interfered with by any external or internal power. The only interference, therefore, to be permitted is that prescribed by the constitution itself. A similar consequence follows with respect to the constituting provinces. In their case, however, the central government is empowered to interfere in certain prescribed cases. But under the scheme of the document, there are a number of subjects upon which the legislative power of both the Dominion and the provinces may be exercised. In such a state of things, if questions arise which interfere with the exercise of the sovereign power of the two sovereign

(1) [1912] A.C. 571, at 583.

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authorities concerned, then the doctrine *Quando lex aliquid concedit, concedere videtur et illud sine quo res ipsa valere non potest* applies, as it must be the construction of all grants of powers. It follows that a grant of a sovereign power includes a grant of a right to disregard any attempt by any authority to control its exercise. A remarkable illustration of the application of this maxim is afforded in *Attorney-General for Canada* v. *Cain* and *Attorney-General for Canada* v. *Gilhula* (1), where it was held that the doctrine might be applied so as to exercise said powers even beyond territorial limits.

This view is emphasized in *British Coal Corporation* v. *The King* (2).

Under section 91 of the *British North America Act*, the *exclusive* Legislative Authority of the Parliament of Canada extends to *all* matters coming within the classes of subjects next hereinafter enumerated; that is to say:

* * *

(8) The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada.

* * *

And any matter coming within any of the classes of subjects enumerated in this section *shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.*

Therefore, the Dominion Parliament alone can fix compensation to the Dominion civil servants and the same cannot be altered and no deduction made therefrom except by Parliament.

By the *Civil Service Act*, R.S.C. (1927), Cap. 22, as amended by the Act 22 and 23 Geo. V, Cap. 40, Parliament has enacted new legislation regarding the civil servants that come within that statute.

This remuneration is fixed under this statute, and sec. 10, subs. 1, provides as follows:

10. (1) The civil service shall, as far as practicable, be classified and compensated in accordance with the classification of such service dated the first day of October, one thousand nine hundred and nineteen, signed by the Commission and confirmed by chapter ten of the statutes of the year one thousand nine hundred and nineteen, second session, and with any amendments or additions thereto thereafter made; and references in this Act to such classification shall extend to include any such amendments or additions.

(1) [1906] A.C. 542. (2) [1935] A.C. 500, at 518.

This being an Act of Parliament, it is evident that no Provincial Legislature could interfere with, deduct from or pass any legislation compelling a Dominion civil servant to give up his salary or any portion thereof. It is Parliament and Parliament alone that can make any alterations in the law as it stands under the *Civil Service Act*. Even the Dominion Government itself could not without special enactment by Parliament change, alter or deduct from a Dominion civil servant any portion of the compensation to which he would be entitled and which has been set by the *Civil Service Act*.

IV

If *The Special Income Tax Act* of the Manitoba Legislature taxes and attempts to intercept in the hands of the Dominion a portion of the remuneration which is fixed by the Dominion Parliament as compensation to the Dominion civil servant, would this be within the legislative power of the Provincial Legislature? The answer must be in the negative.

Is the exemption from provincial interference by taxation or otherwise necessarily incidental to the exercise of the powers conferred upon the Parliament of Canada by head (8) of section 91? It is for the courts to lay down the line of necessity in this case. See: *Montreal Street Ry. Co.* v. *City of Montreal* (1), per Duff, J., at p. 229—with whom Chief Justice Sir Charles Fitzpatrick and Girouard, J., concurred, which decision was upheld in the Privy Council (2).

The same law which has prescribed bounds to the legislative power has imposed upon the judges the duty of seeing that these bounds are not overstepped. *L'Union St. Jacques* v. *Belisle* (3), per Duval, C. J.

Can it be denied that, under existing conditions in Canada since the war, the reduction of the salaries of Dominion employees in proportion to the needs of the provinces or municipalities, which in some cases are very great and are increasing alarmingly, would, if added to the reductions imposed by the Dominion Parliament, amount to confiscation of a substantial part thereof and would as a

(1) (1910) 43 Can. S.C.R. 197. (2) [1912] A.C. 333.
(3) (1872) 20 L.C. Jurist 29, at 39.

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necessary consequence seriously impair the efficiency, *morale* and economic independence of the national service? It is a patent fact to anyone conversant with Canadian conditions, and any attempt by a Province to confiscate even in part the stipend fixed by Parliament, whatever name may be given to the operation, under whatever disguise it may be presented, is an unauthorized assumption of a power which is essentially national in its scope and operation and is expressly denied to the Province by the last phrase of section 91. The Dominion alone can fix the salaries; and once fixed, they cannot be changed or reduced by the Province. According to elementary common sense, without the necessity of recourse to learned legal distinctions or disquisitions, a salary minus a tax of 2, 5 or 10 per cent. is a reduced salary *pro tanto*. Such reduction in the case of Dominion servants can be effected by Parliament only in the exercise of its exclusive jurisdiction under head (8) of 91. Now the respondent contends that the Act contemplates and contains such an interference. I quote from the factum of the Attorney-General:

> It is submitted that the Civil Servant is an "employee" and that which he receives, viz., salary, is "wages" within the meaning of the statute.
>
> The "employee," who is required to pay the tax imposed by section 3 of the Act, is defined by section 2 (1) (*b*) as meaning "any person who is in receipt of, or entitled to, any 'wages.'" The final determination, therefore, of who is an "employee," must depend upon the definition of "wages."
>
> The opening words of the definition of "wages" contained in section 2 (1) (*d*) are as follows:
>
> "'Wages' include all wages, salaries and emoluments from any source whatsoever * * * "
>
> It is submitted that no matter what term is used in describing the remuneration paid to a Civil Servant for his services, such remuneration will fall within the scope of that portion of the definition of "wages" quoted above. But the definition of "wages" is still broader in its scope for it continues:
> "including
>
> (i) any compensation for labour or services, measured by the time, piece or otherwise;
>
> (ii) the salaries, indemnities, or other remuneration of members of the Senate and House of Commons of the Dominion and officers thereof, members of the Provincial Legislative Councils and Assemblies, members of municipal councils, commissions, or boards of management, and of any judge of any Dominion or provincial court, and of all persons whatsoever, whether such salaries, indemnities, or other remuneration are paid out of the revenues of His Majesty in right of the Dominion or in right of any province thereof, or any person."

It is submitted on behalf of the respondent that the words "the salaries, indemnities or other remuneration * * * of all persons whatsoever," in the above quotation, plainly comprehend the salary or remuneration of the Civil Servant.

I should now come to the legislation submitted to our scrutiny, which provides in part:

PART I

TAXATION OF WAGES

3. (1) In addition to all other taxes to which he is liable under this or any other Act, every employee shall pay to His Majesty for the raising of a revenue for provincial purposes a tax of two per centum upon the amount of all wages earned by or accruing due to him on or after the first day of May, 1933, which tax shall be *levied* and collected at the times and in the manner prescribed by this part; * * *

4. (1) Every employer at the time of payment of wages to an employee shall levy and collect the tax imposed on the employee by this part in respect of the wages of the employee earned or accruing due during the period covered by the payment, and shall deduct and retain the amount of the tax from the wages payable to the employee, and shall, on or before the fifteenth day of the month next following that in which the payment of wages takes place, or at such other time as the regulations prescribe, pay to the administrator the full amount of the tax. No employee shall have any right of action against his employer in respect of any moneys deducted from his wages and paid over to the administrator by the employer in compliance or intended compliance with this section.

(2) Every employer shall, with each payment made by him to the administrator under this section, furnish to the administrator a return showing all taxes imposed by this part on the employees of the employer in respect of wages during the period covered by the return, which shall be in the form and verified in the manner prescribed by the administrator.

(3) Every employer who deducts or retains the amount of any tax under this part from the wages of his employee shall be deemed to hold the same in trust for His Majesty and for the payment over of the same in the manner and at the time provided under this part.

6. (1) If an employer, in violation of the provisions of this part fail to collect and pay over any tax imposed by this part, the administrator may demand and collect from him as a penalty ten per cent. of the tax payable, and he shall in addition be liable to a fine of ten dollars for each day of default, but not to more than two hundred dollars.

(2) Every person, who contravenes any provision of this part in respect of which no penalty is otherwise provided, shall be liable to a fine not exceeding five hundred dollars, and each day's continuance of the act or default out of which the offence arises shall constitute a separate offence; but nothing contained in this section nor the enforcement of any penalty thereunder shall suspend or affect any remedy for the recovery of any tax payable under this part or of any moneys in the hands of an employer belonging to His Majesty.

7. In case the wages earned or accruing due to an employee are paid to him without the tax imposed thereon being deducted therefrom by his employer, it shall be the duty of the employee to forthwith pay the tax, and all the provisions of sections 23, 23A, 24 and 25 of *The Income*

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Tax Act shall, *mutatis mutandis*, apply to the collection and recovery of the tax so imposed from the employer and employee, or either of them.

It would appear that section 7 makes the employee liable secondarily and conditionally, if—against the clear purpose of the legislator—the salary has been paid to him; the operation of the whole Act as contemplated by the legislature seems to strike at the employer first and directly for the recovery of the tax on his accruing obligation to pay wages; this is intercepting it and preventing its receipt by the officer to whom it is due. This, as pertinently remarked by Mr. Clement in his work on the Constitution, 3rd ed., p. 642, can be enacted by the federal parliament only. Moreover, if the employer pays the tax, it is expected, and in fact it is embodied in the Act, that he will recoup himself: "he shall deduct and retain the amount of the tax from the wages payable to the employee" to whom a right of action is denied by section 4 (1) against the employer in respect of any moneys so deducted and paid over to the provincial collector.

Now, direct taxes are those that are levied upon the very person who is supposed as a general thing to bear their burden. When a person pays one of these taxes, he is likely to bear the burden himself and is not likely to shift it to another. Indirect taxes are those that are collected from one person (the employer according to the operation of Part I of the Act) and then transferred in whole or in part by that person to another (in this case the employee). The distinction between direct and indirect taxation is made clear by considering the manner in which the tax is levied.

> Direct taxes are amongst those levied on permanent and recurring occasions and are assessed according to some list or roll of persons. The taxpayer is regarded as definitely and permanently ascript to the treasury. Indirect taxes, on the other hand, are levied according to a tariff on the occurrence of transactions and events which are not previously ascertainable as regards particular persons. The amount of a direct tax assessed in this way is certain and regular, while an indirect tax is uncertain and irregular, as regards individuals. (Nicholson).

Under Part I of the Act, no employee is required to make returns—only the employer. No penalty against the employee is enacted; but we find a heavy one against the employer who would dare not to disclose his payroll and deduct the tax.

Reading the whole *modum operandi* of this Part I, I feel inclined to classify it as a clear attempt by the legis-

lature to strike first directly at the source of these wages, before they reach the employee, expecting direct payment from the employer and indirectly by the wage earner; this would be *ultra vires* of sec. 92 (2), as understood and applied in a long line of decisions. But is it necessary to declare the Act *ultra vires* in its entirety? Would it be sufficient in this case to say that it cannot affect the salaries or "wages" or other remunerations paid out of the revenues of His Majesty in the right of the Dominion?

It seems obvious that the bones and sinews of Part I consist in the interception of wages in the hands of the employer. Now, as shown above, the respondent says that the "employer" referred to in the statute includes the Crown, but does not claim that the rights of the Dominion Crown can be or are affected by the collecting sections 4, 5, 6 and 7. The contract of employment by the Crown cannot be severed and if the salary cannot be intercepted in the hands of the government because it is earned and paid purely and solely to carry out the business of the country, it should also be left alone by provincial taxation after it reaches the employee. Section 7 must be read with the preceding sections, and if, admittedly, the Federal Crown cannot be forced to make returns and payments to the Province, the same protection should enure to the benefit of the other party to this particular contract of employment.

It would seem that the tax is "the exaction * * * of a percentage duty on services" of which Lord Cave said that it "would ordinarily be regarded" and should be classified "as indirect taxation"—*City of Halifax* v. *Fairbanks Estate* (1), quoted by Rinfret, J., in rendering judgment for this Court in *City of Charlottetown* v. *Foundation Maritime Ltd.* (2), where the authorities are very accurately and concisely reviewed.

V

The appellant does not claim protection as a resident of Manitoba, but as an instrumentality of the Dominion government. The present Chief Justice, in his judgment in the *Abbott* case (3), referred to *Bank of Toronto* v. *Lambe* (4). But we cannot at this date overlook the

(1) [1928] A.C. 117, at 125.
(2) [1932] Can. S.C.R. 589.
(3) (1908) 40 Can. S.C.R. 597.
(4) (1887) 12 App. Cas. 575.

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reasoning of the Privy Council in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1), where was declared *ultra vires* a provincial Act which interfered, directly and substantially, with the status and capacity conferred on certain companies by Dominion legislation *intra vires* under sec. 91. In this present case also, this legislation is not saved by the fact that all wage-earners in the Province are aimed at and that there is no special discrimination against Dominion employees. "The matter," says Lord Sumner at p. 268, "depends upon the *effect* of the legislation not upon its *purpose*." The effect in this case is clearly to impair the status and earnings of a class of persons who are entitled to look to the Dominion Parliament as the exclusive authority with power to fix and determine such matters. *A fortiori* in the case of a federal civil servant, should the words of Lord Sumner apply, *mutatis mutandis*, when he says at p. 267:

> As a matter of construction it is now well settled that, in the case of a company incorporated by Dominion authority with power to carry on its affairs in the provinces generally, it is *not competent* to the legislatures of those provinces so to legislate as to impair the status and essential capacities of the company in a substantial degree.

It is my firm view that, as a matter of fact, the Province of Manitoba, by the Act under consideration, does, in effect if not purposely, impair the status and essential rights of the civil service to receive whole and without reduction the salary fixed and voted by Parliament. By doing so, the statute is bound to affect and reduce the efficiency of the service for the reasons above given.

Now, if admittedly Part I of the statute is *ultra vires*, as applying to the employer, because the tax as collected would have to be charged back to the employee, can the illegal part of the statute be severed from the allegedly legal part, section 7? The answer is found in a judgment of the Privy Council in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (2), where Lord Haldane said:

> * * * If the statute is *ultra vires* as regards the first class of cases, it has to be pronounced to be *ultra vires* altogether. Their Lordships agree with Duff J. in his view that if the Act is inoperative as regards brokers, agents and others, it is not possible for any court to presume that the legislature intended to pass it in what may prove to be a highly truncated form.

(1) [1929] A.C. 260. (2) [1925] A.C. 561, at 568.

VI

This statute is designed to exact a percentage not from the total income, but from the "wages or salaries" at their source. This would be sufficient to distinguish this case from *Abbott* v. *City of Saint John* (1), in which, as pointed out by Sir Louis Davies, the statute did not provide for a special tax on the wages of Dominion officials, but was a general undiscriminatory tax upon the *total* incomes of all residents in the province. In this view, this appeal could be maintained, even if this Court considered itself bound by the rule *stare decisis.*

VII

The statute is essentially an attempt to reach the wage earner indirectly through the employer who, to all intents and purposes, is the taxpayer and the only one subject to penalties under the scheme of Part I of the Act. In this respect, this Part I of the statute providing for the interception before payment, with such provisions for recoupment as shown above, must be held to be obnoxious to the restrictions imposed upon the provincial authority.

I would, therefore, allow the appeal without costs, as agreed between the parties, and dismiss the action.

Cannon J. (dissenting) delivered the following judgment in the Worthington appeal:

CANNON J. (dissenting).—*Mutatis mutandis,* my reasons in the case of *James Forbes* v. *The Attorney-General of Manitoba* would apply to this case.

In addition, s. 91 (7) of the *British North America Act* confers exclusive authority to the Parliament of Canada on "Militia, Military and Naval Service, and Defence." The power was exercised by the enactment of the *Militia Act,* R.S.C. 1927, ch. 132. Section 32 of the latter provides for the fixing of pay and allowances of the officers and men of the permanent force which, under section 22, consist of such permanently embodied corps, enrolled for *continuous* service. Appellant, therefore, must give all his

(1) (1908) 40 Can. S.C.R. 597.

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time to the nation and cannot engage in any other gainful occupation. He is entitled to receive from the Consolidated Fund upon warrant directed by the Governor General to the Minister of Finance the emoluments granted to him for the dignity of the State and for his decent support. *Flarty* v. *Odlum* (1).

Sections 139, 140 and 141 of the *Militia Act* provide that "regulations for the organization, discipline, efficiency and good government" of the militia made by the Governor in Council shall, on publication, have the same force in law as if they formed part of the *Militia Act*. Accordingly, the following regulations may be noted:

35. Officers shall, on appointment in or promotion to the ranks or grades set forth in these Regulations, be entitled to receive the rates of pay therefor as herein prescribed, subject to such deductions, forfeitures or limitations as may from time to time be authorized by statute or by regulations duly approved by the Governor-General-in-Council.

46. Warrant officers, non-commissioned officers and men shall on enlistment in or promotion to the ranks or grades hereinafter specified be entitled to pay at the following daily rates, subject to such deductions, forfeitures or limitations as may from time to time be authorized by regulations duly approved by the Governor-General-in-Council.

In my opinion, no deductions from such pay may be lawfully made by any other authority, and the provisions of Part I of the Act in question, if they really, as the respondent contends, require deductions to be made in respect of "Pay and Allowances" of any officers, warrant officers, non-commissioned officers or men, are beyond the competence of the Legislative Assembly of the province of Manitoba to enact.

The Pay and Allowances prescribed, being matters of the King's bounty, are such as in the discretion of His Majesty will be sufficient for the maintenance of the position and dignity of the King's officers and soldiers. This is exemplified by considering the following regulation, which likewise has the force of law, namely:—

King's Regulations and Orders, Paragraph:

1006. (2) A subaltern with sufficient means to maintain himself and family in a manner befitting his position as an officer may, upon the recommendation of his Commanding Officer, be permitted by the Minister to marry.

Quite obviously, such law, denying the civil right of marriage to a subaltern officer, except with the approval

(1) (1790) 3 Term. Repts. 681 (100 E.R. 801).

of his Commanding Officer and permission of the Minister, is enacted for no other purpose than that no calls shall be made upon the "Pay and Allowances" of such subaltern officer beyond those which, in the opinion of constituted authority, such "Pay and Allowances" will enable him to discharge and still maintain himself in the position and with the dignity befitting an officer.

This, under our system, has always been considered as a matter of policy in the interest of the public weal.

Even if the Legislature were competent, it is at least doubtful whether or not the "pay and allowances" are "wages" within the meaning of Part I of the Act, and, therefore, as this is a matter of taxation, the appellant subject should be given the benefit of the doubt and should not be compelled to pay by straining the definition of the word. *The King* v. *Crabbs* (1).

I would agree with the conclusions of Mr. Justice Robson that the province could not by any means take away from the pay and allowances of military officers and, further, that the Act should not be read as intending to do so.

I would allow the appeal, without costs, as per agreement of parties, and dismiss the action.

CROCKET J. (dissenting).—As I read Part I of *The Special Income Tax Act* of 1933, with the provisions of its interpretation section, its primary purpose is to tax, subject to the exemptions set forth in s. 3, the wages of all employees in the hands of their respective employers.

While s. 3 (1) enacts that in addition to all other taxes to which he is liable "every employee shall pay to His Majesty * * * a tax of two per centum upon the amount of all wages earned by or accruing due to him on or after the first day of May, 1933," it specifically provides in the succeeding clause that this tax "shall be levied and collected at the times and in the manner prescribed by this part."

S. 4 then prescribes, not only the times at which and the manner in which the tax shall be levied and collected, but in the most explicit terms imposes upon every employer at the time of payment of wages to an employee

(1) [1934] Can. S.C.R. 523.

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the duty of levying and collecting the tax "in respect of the wages of the employee *earned* or *accruing due* during the period covered by the payment" by deducting and retaining "the amount of the tax from the wages *payable* to the employee," and of paying the full amount thereof to the administrator on or before the fifteenth day of the month next following that in which the payment of wages takes place or at such other time as the regulations prescribe. It then enacts that no employee shall have any right of action against his employer in respect of any moneys "deducted from his wages and paid over to the administrator by the employer in compliance or intended compliance with this section."

With all deference, I cannot think that these provisions of s. 4 (1) are mere provisions of procedure. Read in connection with the language of s. 3, as they are expressly required to be by the words of reference above quoted from that section, they are the vital provisions which specifically indicate the real incidence and effect of the tax, fixing not only the time or times at which the tax shall be paid and the manner in which it shall be levied and collected, but the particular moneys upon and from and out of which it shall be levied, deducted and paid, and the person (the employer) who shall so levy and deduct it and ultimately pay it to the income tax administrator.

If it is the normal or general tendency of the tax which is to be considered and the intention is to be inferred from the form in which the tax is imposed, as laid down in the *Fairbanks* case (1), quoted by Rinfret, J., in delivering the judgment of this Court in *City of Charlottetown* v. *Foundation Maritime Ltd.* (2), it seems to me to be perfectly clear that, notwithstanding the tax is described as imposed on the employee in respect of his wages, ss. 3, 4, 5 and 6 of Part I plainly demonstrate that the real purpose and intention, primarily at least, is to impose the tax, not upon the employee or upon the income from wages received by the employee, but upon the earned and accruing wages of the employee in the hands of the employer before they are paid to the employee. The words "upon

(1) [1928] A.C. 117, at 122.

(2) [1932] Can. S.C.R. 589, at 594-5.

the amount of all wages earned by or accruing due to him" in s. 3; the obligation so expressly imposed on the employer in s. 4 to "deduct and retain the amount of the tax from the wages *payable* to the employee" and "pay to the administrator the full amount of the tax"; the duty cast upon the employer by s. 4 (2) to "furnish to the administrator a return showing all taxes imposed by this part"; and the penalty provisions of s. 6 (1 and 2), it seems to me, all shew that this is the only fair and reasonable construction of these four sections.

The provisions of s. 7 completely accord with this conclusion, requiring, as they do, the employee to pay the tax only in the event of the employer paying over to the employee the wages earned or accruing due to him without deducting the tax imposed thereon, and prescribing, as they do by their reference to s. 25 of *The Income Tax Act* (C.A. 1924, c. 91, as amended), the only manner in which the tax may be recovered from the employee in such a contingency, viz., by action for its recovery as a debt due to His Majesty. This remedy obviously is not available against the employee if the employer has deducted and withheld the full amount of the tax from the employee's wages and paid it to the tax administrator, as he is explicitly obliged to do by the provisions of s. 4 (1), on pain of the fines and penalties prescribed by s. 6.

Considering the enactment, therefore, as a whole, I cannot for my part accede to the proposition so strenuously pressed upon us by the learned counsel for the respondent that its real intent and effect is to impose the tax upon the person of the employee in respect of his income. In my view, as I have already indicated, its normal and general effect is, not to impose the tax as a general income tax upon the employee personally, but to tax his earned and accruing wages as such in the hands of the employer before they are received by the employee. Earned and accruing wages, payable to an employee, but not in fact paid to him, cannot well be said to be income at all.

That the enactment was intended to apply to the salaries, pay and allowances of civil servants and other employees of the Dominion Government and of officers and men of the Militia of Canada, as well as to the salaries

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and wages of all other persons, is plainly shewn by s. 2 (1) (*b*), (*c*) and (*d*). S. 2 (1) (*d*), after defining "wages" as including "all wages, salaries and emoluments from any source whatsoever," specifically provides that the term shall include *inter alia* the salaries, indemnities or other remuneration of members of the Senate and House of Commons of the Dominion and officers thereof, and of any Judge of any Dominion or Provincial Court, and of all persons whatsoever "whether such salaries, indemnities or other remuneration are paid out of the revenues of His Majesty in right of the Dominion or in right of any province thereof, or any person."

Whatever may be said as to the constitutional right of a provincial legislature to impose, in addition to the increasingly burdensome federal income and other taxes, a tax of two per cent. upon earned or accruing wages in the hands of other employers, there can, I think, be no doubt that no provincial legislation can validly tax the funds of the Government of Canada, appropriated and held in its hands for the payment of the salaries, pay and emoluments of its own civil servants and other employees and the officers and men of the Militia of Canada, or compel the Government of Canada or any of its representatives by means of fines and penalties to withhold any portion of such salaries, pay and emoluments, from those to whom they are due and payable, and hand it over to a provincial tax receiver in payment of any provincial tax.

As regards the enactment now under review, I have, for my part, no hesitation in holding that, in so far as its provisions seek to tax federal salaries or other pay or allowances in the hands of the Government of Canada, they are entirely void and inoperative. The Dominion Government very properly ignored the Act, and the appellants Worthington and Forbes continued to receive their pay and salary cheques in full as before, the former as an officer of the Active Militia of Canada and the latter as a member of the Civil Service of Canada.

These actions were afterwards brought against them to recover the tax of two per cent. on all wages earned by them as employees of the Government of Canada, and paid to them respectively out of the revenues of His Majesty in right of the Dominion of Canada, monthly

between May 1 and Dec. 31, 1933, without the said tax having been deducted therefrom. They are, as the statements of claim in both cases clearly shew, actions for the recovery of the tax upon wages, not only "earned or accruing due," but upon wages "paid to the defendant without the said tax having been deducted therefrom," and as such clearly can be supported, if at all, only under the provisions of s. 7.

The question accordingly arises as to whether this section, which purports to impose upon the employee the liability to pay the tax only in the event of its not having been deducted from his wages and paid by the employer, can reasonably be severed, in an action brought against an employee of the Dominion Government, from the provisions of the previous sections, which in their application to the salaries, pay and allowances of civil and other employees of the Dominion Government are *ultra vires* of the legislature. In my opinion they cannot, the liability for payment of the tax having been primarily placed upon the employer and only secondarily or conditionally upon the employee. The secondary liability of the employee cannot fairly be held in a taxing statute to stand alone if the primary liability, out of which it arises or for which it is substituted, is unconstitutional and void.

For these reasons I concur in the conclusions of my brother Cannon that both these appeals should be allowed and the actions against the appellants dismissed.

Appeals dismissed.

Solicitors for the appellant Worthington: *Phillips, Gemmill & Smith.*

Solicitors for the appellant Forbes: *Finkelstein, Finkelstein & White.*

Solicitor for the respondent: *John Allen.*

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

Barristers and solicitors—Legal Profession Act, R.S.A. 1922 c. 206—Disbarment by Law Society—Powers of Society—Procedure—Lack of essential proceedings—Nullity of order of disbarment—Appeal not taken—Question as to acquiescence, waiver, or estoppel—Whether Law Society liable in damages.

Under the Alberta *Legal Profession Act,* R.S.A. 1922, c. 206, the benchers of the Law Society of Alberta were to appoint and maintain a "discipline committee," consisting of at least three members, who were to deal with complaints against any member of the Society, and might recommend that the benchers strike the name of the member off the rolls, and the benchers might order the same to be done. There were provisions for procedure before the discipline committee. The member might appeal "from the decision of the committee and of the benchers" to the Appellate Division of the Supreme Court of Alberta, the appeal to be by notice to the benchers and "founded upon a copy of the proceedings before the said committee and the benchers, the evidence taken, the committee's report and the order made by the benchers thereon.

The benchers had appointed R. as chairman, and all the other benchers as members, of the discipline committee. On complaints lodged against plantiff (a member of the Law Society), R. appointed three benchers as a special committee to examine into them, receive evidence, and report. They held meetings, of which notice was given plaintiff, who had full opportunity to, and did, hear the evidence, cross-examine, and adduce evidence. This special committee then reported to the convocation of benchers that they had found the complaints proven, that plaintiff had been guilty of improper professional conduct, and they recommended that his name be struck from the rolls of the Society. This recommendation was received and adopted by the convocation on July 5, 1923; it was further recorded that plaintiff was found to have been guilty of improper professional conduct; and it was ordered that his name be, and it was, struck off the rolls. Plaintiff did not appeal. In 1924, 1926, 1927, and 1930, he applied for reinstatement. He did not know until 1925 that the committee before which he had appeared was not the official discipline committee. In 1928 he sued the Law Society of Alberta, alleging that his name had wrongfully and without legal right been struck off the rolls, and praying for a declaration that he was still a member of the Society, entitled to practise, and claiming damages.

Held: (1) Plaintiff was entitled to have his name restored to the rolls. The benchers' order striking it off was null and void. Under the Act such an order could be made only after investigation and recommendation by the discipline committee, which never took place. The fact that the official discipline committee comprised all the benchers who eventually received and adopted the recommendation of the special committee, could not, even apart from the fact that those benchers adopt-

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

ing it had made no investigation of their own, overcome the statutory requirement of the acting by the discipline committee as a distinctive body. (*Per* Duff C.J.: The discipline committee, in ascertaining the facts, may proceed through the agency of one or more of its members for the purpose of taking evidence and getting the facts. But in deciding upon their recommendation the discipline committee must, under the Act, give the member charged an opportunity of appearing before them and presenting his defence. It might be that, had plaintiff been heard in his defence by the benchers in convocation, the report of the special committee, notwithstanding the form of the proceedings, might have been considered as adopted by the benchers, sitting as a discipline committee, after hearing plaintiff, as the Act requires; and that the proceedings might have been considered as conforming in substance to the statutory procedure. The error of substance was in not giving plaintiff a hearing before the members comprising the discipline committee; and this defect sterilized the proceedings as regards legal consequences).

It was not a case where plaintiff should have appealed under the Act, because (1) there was no recommendation of the discipline committee from which he could appeal, and (2) the benchers' order was a nullity. Nor could plaintiff by his conduct be taken to have abandoned by waiver or consent his rightful objections to the validity of the proceedings and of the order; moreover, since the benchers' lack of power deprived the order of any effect, and the legislation in question must be looked at from the viewpoint of public interest, estoppel on the ground of acquiescence could not be invoked.

(2) The act of the benchers, obviously done in good faith, was not such as would entail any liability on defendant in damages. In exercising their power of striking a member's name from the rolls, the benchers perform a function not merely ministerial, but discretionary and judicial. In this case they were intending, in what they did, to do what they were entitled to do, viz., to perform their statutory public duties. They made the order in what they *bona fide* believed to be the exercise of a judicial discretion, and they, or the defendant society which they represented, were not subject to an action in damages because the report which they adopted as the foundation of their order happened, without their actual knowledge, to lack authority and validity (*Partridge* v. *General Council of Medical Education*, 25 Q.B.D. 90).

Judgment of the Appellate Division, Alta., [1935] 1 W.W.R. 735, dismissing the action, reversed in part.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta (1) reversing and setting aside the judgment of Simmons C.J.T.D. at the trial.

The action was brought against the Law Society of Alberta for a declaration that the plaintiff is still a member of the Society and is entitled to practise as a barrister and solicitor, and for damages for causing the plaintiff's name to be struck off the rolls of the Society.

(1) [1935] 1 W.W.R. 735; [1935] 2 D.L.R. 583.

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By the judgment at trial it was ordered and adjudged that the resolution passed by the Benchers of the Law Society of Alberta on July 5, 1923, whereby the plaintiff's name was struck from off the rolls of the Society, and the striking of his name from off the rolls, were null and void; that he was entitled to have his name restored to the rolls in the same condition and for all the same purpose and effect as if it had never been removed or struck off on July 5, 1923; that plaintiff has been ever since, and including, July 5, 1923, and is still a member of the Society, and entitled to practise as a barrister and solicitor; and that he recover from the defendant $1,500 (damages), and costs.

By the judgment of the Appellate Division the plaintiff's action was dismissed, and defendant was given costs of the appeal and in the Trial Division.

The plaintiff was given by the Appellate Division special leave to appeal to the Supreme Court of Canada.

The question involved was the validity and effect of the proceedings which led to plaintiff's name being, and by which it was, struck off the rolls of the Society. The material facts of the case are sufficiently stated in the judgment of Rinfret J. now reported, and are indicated in the above headnote. By the judgment of this Court, now reported, the plaintiff's appeal was allowed, and the judgment of the trial Judge restored, with the modification that plaintiff is not entitled to recover damages against the defendant; the plaintiff to have costs of his appeal to this Court and his costs in the trial Court, but the defendant to have its costs of appeal to the Appellate Division.

O. M. Biggar K.C. for the appellant.

A. Macleod Sinclair K.C. for the respondent.

DUFF C.J.—I concur with the judgment of my brother Rinfret.

It is clear, I think, that the authority of the Benchers to order the name of a member to be struck from the rolls is conditioned upon a report by the Discipline Committee, recommending that that should be done, having been before the Benchers and considered by them (s. 32 (2)). By the same subsection it is the Discipline Committee which, primarily, has the responsibility of dealing with and investigating charges and complaints regarding members of the Society.

And if the Committee considers that the evidence warrants a recommendation to the Benchers that the member implicated shall be struck from the rolls, the next step is a report by the Discipline Committee containing such a recommendation. A Discipline Committee in being, therefore a decision by that Committee, a recommendation by it, would appear to be essential before an order striking a name from the roll can be validly made by the Benchers.

At the pertinent time, the Committee consisted of all the Benchers. I think it is plain that this Committee, which was the only Discipline Committee, never investigated the charges against the appellant. Three gentlemen were named by the Chairman of the Committee to perform this duty and these three gentlemen reported as the Discipline Committee to the Benchers; and it was upon this report that the Benchers acted.

Now, I should not wish to be understood as intimating that the procedure of the Discipline Committee must conform to the rules that would prevail if they constituted a court of justice. I have no doubt that the Discipline Committee, in ascertaining the facts, may proceed through the agency of one or more of its members for the purpose of taking evidence and getting the facts. Nevertheless, in deciding upon their recommendation, the Discipline Committee, by force of subsection 7, must give the member charged an opportunity of appearing before them and presenting his defence.

As it is the Committee as a whole, or a proper quorum of it, which is to make the recommendation upon which the Benchers may act, the member concerned is obviously entitled to appear before the Committee, at a meeting properly convened, to deal with the charges against him. The appellant was not heard before any such meeting.

At first sight it might appear to be rather pedantic to draw a distinction between the Benchers and the Discipline Committee who consisted of the same persons. It may become, however, matter of substance in the strict sense when, as here, the essential step prescribed by the statute just mentioned, giving notice to the accused member and an opportunity of being heard before a properly convened meeting of the Benchers in their capacity of Discipline Committee, has been omitted. The rule of law is correctly stated,

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I think, in Craies' Statute Law, at p. 355, in this sentence:

* * * when a statute confers jurisdiction upon a tribunal of limited authority and statutory origin, the conditions and qualifications annexed to the grant must be strictly complied with.

The authority of the Benchers, as well as that of the Discipline Committee, rests in its entirety upon the statute; and the authority of the Benchers, as already intimated, to make an order pursuant to the recommendation of the Committee is conditioned upon a recommendation by the Committee after a proper hearing. There is no authority given to the Benchers to consider a charge against a member except upon such a recommendation by the Committee. It follows that the appellant is entitled to a declaration that the order striking him off the roll is made without authority and that his name should be restored.

I am disposed to think that, if the appellant had been heard by the Benchers in his defence in convocation, the report of the Committee, notwithstanding the form of the proceedings, might have been considered as adopted by the Benchers, sitting as a Discipline Committee, after hearing the appellant as the statute requires; and that the proceedings might have been considered as conforming in substance to the statutory procedure.

In the procedure actually followed, however, it is impossible to say that the appellant was given an opportunity of exercising his statutory right to appear before the Discipline Committee and present his defence. That is a defect *in substantialibus*, a defect that sterilizes the proceedings as regards legal consequences.

As to the right of appeal, it presupposes a decision by the Discipline Committee as well as by the Benchers. The Benchers are not in the position of a tribunal such as a Superior Court, which has (speaking generally) jurisdiction to decide finally, subject to appeal, upon any question touching its own jurisdiction (*In re Padstow Total Loss and Collision Assce. Ass'n.* (1). Its decision upon that question —the question of its own jurisdiction—is necessarily reviewable collaterally for the purpose of determining whether or not it is operative in law in the absence of statutory provision to the contrary. The provision in the statute giving a right of appeal neither expressly nor by implication negatives this right.

(1) (1882) 20 Ch.D. 137.

These matters in themselves have been fully dealt with by my brother Rinfret in a manner with which I entirely concur; I have adverted to them solely as introductory to what I have to say on the subject of the claim for damages.

The determination of that branch of the appeal is, I think, governed by the decision in *Partridge's* case. That case came before the Court of Appeal on two occasions; first, (*ex Parte Partridge*) (2) in an appeal from the Queen's Bench Division who had granted a mandamus against the General Council of Medical Education requiring the restoration of the name of Partridge to the Dentists Register from which, it was alleged, it had been illegally erased. The appeal failed.

The Council was invested by statute with power to erase a name from the register by section 13 of the *Dentists Act*; and, by section 15, the procedure in such cases was prescribed. By section 13, the Council was empowered to erase any entry which had been fraudulently or incorrectly made. Partridge's name had been properly entered upon the register. They also had authority under that section to erase the name of a dentist convicted of crime or found guilty of infamous or disgraceful conduct in a professional respect; and by section 15 it was provided that for the purpose of exercising this power they must "ascertain the facts * * * by a Committee," and that as to the facts the report of the Committee should be final. The proper committee reported upon the facts.

The facts reported were that Partridge's diploma had been withdrawn by the Royal College of Surgeons in Ireland on the ground that, in violation of an undertaking by him, he had resorted to advertising. On this report the Council directed the name to be erased.

The Council, before directing the erasure of Partridge's name, did not call upon him or give him an opportunity for an explanation and did not find that any of the conditions had arisen under which alone they were entitled to take such action.

In these circumstances, as already mentioned, it was held that Partridge's name had been erased without legal authority, and a mandamus requiring its restoration was granted.

(2) (1887) 19 Q.B.D. 467.

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Partridge then brought an action for damages against the Council, alleging that they had unlawfully and maliciously removed his name from the register. The trial judge, Huddleston B., acquitted the Council of the charge of malice and dismissed the action. The Court of Appeal (*Partridge* v. *The General Council of Medical Education*) (1) dismissed the appeal from this judgment on the ground that, since the power to erase a name from the register under section 13 was not a ministerial but a judicial power, and the Council having intended to act, and believed they were acting, in exercise of their powers under the statute, no action would lie in the absence of malice. The Master of the Rolls said: (2)

It appears to me that a body such as the defendants can only be made subject to an action for things which they have done erroneously without malice in carrying out their duties under the Act, if it can be shewn that they were acting merely ministerially * * * They seem to me all to shew that such an action as this cannot be maintained except where the duty intended to be exercised is only ministerial.

Now, it must be observed that the error committed by the Council was not merely an error of fact, it was an error of law. They had been erroneously advised as to their powers under the statute. Nevertheless, acting, as they conceived themselves to be acting, in exercise of the discretionary power conferred upon them in the public interest and acting *bona fide,* they were not liable to an action. Fry L.J. says, at p. 98:

The conclusion I arrive at upon the facts is that the council, desiring, as I have said, to do their duty under the Act in this case, thought that the register must in such a case automatically follow the qualification in Ireland, and, when that was withdrawn, the register must be corrected accordingly; and that, that being so, they had power to order such correction by giving a special direction under s. 11. In that view they were wrong; but they were, as it seems to me, in making that error exercising a discretion. They were doing what they thought right in the exercise of the discretionary power given them over the register by the statute.

Lopes L.J. says (pp. 98-99):

It must be taken, I think, that the defendants acted bonâ fide and without malice, but that they improperly erased the name of the plaintiff from the register. They acted honestly, but they made a mistake in their mode of proceeding. They thought, as it appears to me, that, without calling on the plaintiff for an explanation, they were justified in erasing his name from the register, because the qualification in Ireland had been withdrawn which originally entitled him to be placed on the register. The question is whether an action can, under those circumstances, be maintained against them for what they did. It is not disputed that the defend-

(1) (1890) 25 Q.B.D. 90. (2) 25 Q.B.D. at 96.

ants were performing a public duty; and that they intended to act under the statute. The point contested was whether they were in fact acting judicially or merely ministerially in what they did. If they were acting under s. 13, it cannot be disputed that they were acting judicially. But it is said that they were acting under s. 11 alone; and that acting under that section they were acting only ministerially. I will not refer to s. 11 at length. The effect of the section is that the council have power to give special directions to the registrar to which he is bound to conform. That being so, they have, in my opinion a discretion as to the directions they should give, and, therefore, in giving such directions they are acting judicially. The result is, as it seems to me, that whether they were acting under s. 13 or s. 11 only, they were acting judicially, and, as they were so acting and they acted without malice, according to the cases the action is not maintainable.

I cannot find any distinction in substance between *Partridge's* case (1) and that now presented to us for decision. The Benchers obviously acted under an erroneous view either of the facts or the law; probably as to the facts. It is unlikely that they had present to their minds the fact that they as a whole constituted the Discipline Committee: in any event, it is certain that they assumed the three gentlemen on whose report they acted to be in some way qualified to investigate the complaint and to report upon it as the Discipline Committee. Obviously, they acted in entire good faith. The error of substance, as I have said (which was present in *Partridge's* case (1)), was in not giving the appellant a hearing before all the Benchers at convocation when the report was considered. That error was the natural consequence of the assumption that the three gentlemen who had heard the appellant were invested with the functions of the Discipline Committee.

Consistently with *Partridge's* case (1), the respondents cannot be held liable in an action for damages.

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

RINFRET, J.—The question involved in this appeal is the validity of the proceedings taken against the appellant before the Benchers of the Law Society of Alberta, the appellant having been by resolution declared unworthy to practise as a lawyer, and he having been disbarred.

In 1923, the appellant was a member of the Law Society of Alberta. Complaints were made against him by several

(1) 25 Q.B.D. 90.

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of his clients that he had rendered himself guilty of conduct unbecoming a barrister and were lodged with the secretary of the society. The secretary brought these complaints to the knowledge of Mr. Geo. H. Ross, K.C., as Chairman of the Discipline Committee, stating that it became necessary for him to " select a Committee and appoint a date for the sitting of same."

Thereupon, Mr. Ross, of his own initiative, appointed three Benchers to examine into the complaints, receive evidence thereon and report.

The three Benchers so appointed met together on certain dates, after having notified the solicitors for the complainants and the present appellant; they proceeded to inquire into the complaints; they received evidence thereon in the presence of the appellant, who was given full opportunity to cross-examine and to adduce evidence on his own behalf —and who availed himself of the opportunity.

The three Benchers then reported to the Convocation that they had found the charges or complaints proven; that the appellant had been guilty of improper professional conduct; and they recommended that the Convocation strike the name of the appellant from the rolls of the Society. This recommendation was received, accepted, approved and adopted by the Convocation on the 5th of July, 1923; it was further recorded that the appellant was found to have been guilty of improper professional conduct; and it was ordered that his name be, and the same was, struck off the rolls.

The appellant did not appeal from the recommendation of the three Benchers who heard the complaints and evidence, nor from the decision of the Convocation. On the contrary, on February 29, 1924, on July 6, 1926, and again on July 5, 1927, and still later, on October 31, 1930, the appellant applied for reinstatement as a member of the Law Society. The applications of 1924, 1926 and 1927 were refused. The application of 1930 was referred to an investigating committee which went into the matter very minutely and made an elaborate report recommending that the application should be granted and the name of the appellant should be restored to the rolls; but the recommendation of the committe does not appear to have been entertained by the Benchers in Convocation.

As a matter of fact, the appellant then (since January 10, 1928) had already entered suit against the respondent, alleging that his name had wrongfully, and without legal right, been struck off the rolls of the Law Society, and praying for a declaration that he was still a member of the Society, entitled to practise as a barrister and solicitor before the courts of Alberta, and to exercise and enjoy all the rights and privileges of a barrister and solicitor; and also claiming damages for the loss of remuneration, at the rate of $500 per year, for all the years that had already elapsed or that would elapse before final determination of this action.

The defence was that the appellant had been properly and rightfully disbarred, and that, at all events, by his conduct, he had waived all irregularities, he had acquiesced in the decision of the Benchers and he was estopped from disputing its validity.

The Supreme Court of Alberta (Simmons C.J.) declared that the resolution passed by the Benchers of the Law Society of Alberta in Convocation on the 5th day of July, 1923, was absolutely null and void; that the appellant was entitled to have his name restored to the rolls of the Society "in the same condition and for all the same purpose and effect as if the same had never been removed"; that the appellant was and "has been ever since, and including, the 5th day of July, 1923, and is still a member of the Law Society of Alberta, and entitled to practise as a barrister and solicitor * * * and to exercise and enjoy all rights and privileges of a barrister and solicitor;" and that the appellant is entitled to recover from the respondent the sum of $1,500 with costs.

The Appellate Division, however, reversed this judgment on the ground that the resolution of the Benchers striking off the appellant from the rolls was not void, but merely voidable; that a special remedy, viz., an appeal to the Court of Appeal in the province, was provided for by the statute, of which the appellant had failed to avail himself; that such remedy was exclusive in the circumstances; and that, moreover, the appellant, "after knowledge of the defect of the proceedings before the Benchers, instead of questioning their validity, had, in effect, acquiesced in them by his applications for restoration to the rolls, not on the ground

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of his name having been improperly removed therefrom, but through the indulgence of the Benchers."

By order of the Appellate Division of Alberta, the appellant was granted special leave to appeal to this Court.

As must have appeared from the foregoing statement of the facts and of the reasons in the courts of Alberta, the result of the appeal turns upon the question whether the proceedings had before the Benchers of the Law Society were absolutely void, as found by the trial judge, or merely voidable, as held by the Appellate Division.

In order to decide the point, reference must first be made to the *Legal Profession Act,* being chapter 206 of the Revised Statutes of Alberta, 1922, as it stood at the material dates.

Under that statute, which applies to the respondent, the Society is governed by a body composed of some of its members designated Benchers (sec. 7).

It is the duty of the Benchers, from time to time, to appoint and maintain a committee of their own body, to be known as the Discipline Committee, consisting of at least three members. The Benchers may alter the number, the constitution and the tenure of office of such committee (sec. 32 (1)). Then comes subsection 2 of section 32 of the Act, which ought to be quoted in full:

(2) The discipline committee shall deal with and may investigate every written charge or complaint against or regarding any member of the society who has been convicted of an indictable offence, or who is known or reported to be guilty of or who is charged with dishonourable, disgraceful, infamous, unbecoming, improper or criminal conduct, professional or otherwise; and if the committee considers the charge or complaint warrants it may recommend that the benchers strike the name of the said member from the rolls, and the benchers may order the same to be done.

The other subsections of section 32 deal with the result of a decision ordering that the name of a member should be struck from the roll. They empower the benchers, in the alternative, merely to reprimand or to suspend an offending member, or to order that he should pay a penalty.

Then, subsections 6 to 12 deal with the procedure that must be followed before the discipline committee in the investigation of a charge or complaint against a member of the society. The committee may have such legal or other assistance as it may think necessary, and so may the member whose conduct is the subject of the inquiry have the right to be represented by counsel or agent.

The discipline committee

may meet to take evidence or otherwise ascertain the facts concerning any such complaint or charge, but notice in writing of any such meeting shall be served personally or in such other manner as may be ordered by a judge of the Supreme Court, upon the member whose conduct is the subject of enquiry, at least two weeks before the time fixed for such meeting, setting out the written charge or complaint with such particulars as may be necessary to inform the person charged or complained of fully of the substance and effect of the charge or complaint against him, and specifying the time and place of such meeting (subsec. 7).

There are provisions for procuring the compulsory attendance of witnesses, for the taking under oath of their testimony, for " cross-examination of all witnesses called, with the right to adduce evidence in defence and reply"; and it is stated that

the rules of evidence on such enquiry and the proceedings and penalties in the case of disobedience shall be the same as obtain in civil cases in the Supreme Court.

The discipline committee is empowered to proceed with the subject-matter of the enquiry in the absence of the member whose conduct is challenged or complained of, upon proof of personal service, or of such substituted service as may have been ordered, of the notice to the said member, in accordance with the provisions of the Act.

We think the provisions dealing with the right of appeal from the decision of the discipline committee and of the benchers should be quoted verbatim, in view of the opinion based upon those provisions expressed by some of the Judges of the Appellate Division:

(1) Any member, whose name has been ordered to be struck from the rolls or who has been ordered to be suspended under the powers hereby conferred, may appeal from the decision of the committee and of the benchers to the said Appellate Division or such other Court as may from time to time exercise the functions of a Court of Appeal in the Province, at any time within six months after the date of the order complained of, or within such further time as a judge of the Appellate Division shall allow, and such Court may, upon hearing said appeal, make such order, either confirming the action of the said committee and the benchers or varying or reversing the same or for further enquiries by the committee and the benchers or otherwise and as to costs as may to it seem meet.

(2) The said appeal shall be by notice in writing to the benchers to show cause, which said notice shall be served not less than ten days before the hearing thereof, and shall be founded upon a copy of the proceedings before the said committee and the benchers, the evidence taken, the committee's report and the order made by the benchers thereon.

(3) The secretary of the society shall upon the request of any member desiring so to appeal, furnish to such member a certified copy of such proceedings, report, order and papers without expense.

But before we proceed to examine the particular provisions of the statute above referred to and to apply them

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to the circumstances of the present case, a few additional facts must be adverted to:

In obedience to the Act, the benchers of the Law Society of Alberta had, on the 4th January, 1923, appointed Mr. Geo. H. Ross, K.C., as chairman and all the other benchers as members of the discipline committee.

The resolution appointing them was still in force throughout the proceedings had before the specially selected committee of three benchers appointed by Mr. Geo. H. Ross to investigate the charges against the appellant and also at the time when the benchers adopted the recommendation and made the order to strike off the rolls the name of the appellant.

The three benchers who inquired into the charges made against the appellant were not appointed as a discipline committee, but were selected by Mr. Ross as a special committee.

The members of the discipline committee appointed on the 4th of January, 1923, and still in existence at the time of the investigation into the complaints against the appellant, were never notified of the charge, nor called upon to inquire into them and to deal with them as members of the discipline committee.

Mr. Ross, duly appointed chairman of the discipline committee, did not sit on the investigating committee, nor was he called upon to do so.

The only report, or recommendation, made to the benchers upon the charges against the appellant, came from the special committee, and none was ever made by the discipline committee.

The appellant had no knowledge of the fact that the special investigating committee before which he appeared was not the official discipline committee. He was made aware of that fact only in 1925.

Upon those facts, the question is whether the proceedings now in question were absolutely void, or only voidable, and what were the rights of the appellant after he found out the irregularities to which he had been submitted?

The *Legal Professional Act,* the essential parts of which we have outlined, and more particularly the sections of the Act we have quoted as bearing directly upon the matters at issue, show that the Law Society of Alberta, or the benchers of that society, are not vested with a general and

unqualified control of the members of the Society in respect of any "dishonourable, disgraceful, infamous, unbecoming, improper or criminal conduct, professional or otherwise" with which they are charged, or of which they may be found guilty. It is important to keep in mind, therefore, that we are not dealing with a body invested with the plenary authority of a common law court, but a body to which has been given only limited statutory authority. The authority which is given to the benchers is such that it may not be exercised without the conjunctive co-operation of another body, which is the discipline committee. It is really so that the two bodies must act in order properly to deal with charges or complaints of a nature to entail the striking of the name of a member from the rolls and his consequent disbarment. One body may not act without the other and the action of one alone is insufficient to obtain the required result in conformity with the statute and consistently with the authority there conferred.

This is rendered still clearer by the provision dealing with the right of appeal to the Appellate Division and whereby the appeal is contemplated "from the decision of the committee and of the benchers." It may even be pointed out that the power and duty to investigate the charge or complaint is delegated, not to the benchers, but to the discipline committee; and it is only upon the recommendation of that committee that the benchers are authorized to order the consequential disbarment. The authority to make the order is not given the benchers, except upon the recommendation of the discipline committee.

In this case, the discipline committee, though in existence, never dealt with or investigated any charge or complaint; nor was there any recommendation from that committee. Further, although an investigation was not the province of the benchers, at all events, no investigation is proven to have been made by them; and they merely adopted the recommendation of a committee appointed by Mr. Geo. H. Ross and for the existence of which no provision appears in the statute.

It is to no purpose to argue that the official discipline committee, as originaly appointed in the premises, comprised all the benchers who eventually received and adopted the recommendation of the special committee.

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Quite apart from the circumstance that the benchers who were present at the meeting when that report was adopted had, in fact, made no investigation of their own, the statute clearly provides for two distinctive bodies: the discipline committee and the benchers; and each body is given separate and distinct duties to perform.

On the charges made against the appellant, only one body acted; and that body was not empowered to act alone—indeed, it had no power to enter into the case at all until after the other body had previously acted. It follows that, in our view, the trial judge was right in treating the order made by the benchers alone as an absolute nullity and completely void of any operative effect. It was not only an erroneous decision, still less a decision only affected by procedural irregularities or mere absence of machinery; it was a decision given where there was no authority to give it.

The benchers simply could not make the order without the anterior investigation and recommendation of the discipline committee. The report on which the order of the benchers was founded was not even that of a sub-committee appointed by the benchers among themselves; it was the report of three benchers named without authority by Mr. Geo. H. Ross, and who had no power to deal with the matter in the way it was done. As pointed out by the learned Chief Justice of the Supreme Court of Alberta, the appellant was deprived of the undoubted right he possessed "to make his full defence before the statutory body which then had power to hear his case, to wit: the discipline committee composed of all the benchers at that time."

He never had a chance to explain or vindicate himself before the discipline committee; and each of the members of the discipline committee, or, in the circumstances, each of the benchers, was not given the opportunity, which he was bound to have, of fulfilling the duty of weighing the evidence for or against the appellant.

We, therefore, think the order of the benchers of the 5th July, 1923, was made outside the scope of the powers of the benchers. As such, it was completely null, and not only voidable.

As a consequence, this was not a case where the appellant ought to have availed himself of the provisions of the statute in respect to appeal. In the first place, there was no recommendation of the discipline committee from which

he could appeal; and, besides, the order of the benchers was a nullity and deprived of any conclusive effect (*Toronto Railway Company* v. *Corporation of the City of Toronto* (1)).

Nor could the situation be rectified by waiver, or consent, on the part of the appellant. There could be no effective consent on that point while the proceedings were going on and up to the time when the order was made by the benchers, for the appellant was not then aware of the fact that he had not been called before the discipline committee. On the contrary, the circumstances rather led him to believe that he was before the regular body. It was only in 1925 that he was put in possession of information which suggested in his own mind some question of the validity of the investigation and of the order made against him.

Never in any of his applications for reinstatement did he raise the question of the validity of the proceedings. Certainly he never indicated any express intention of waiving any rights that he had; and he cannot be taken to have abandoned his rightful objections to the validity of the proceedings and of the order.

But moreover and in point of law, the lack of power in the benchers deprived the order of any effect, and particularly since a question of this kind may not be treated as a mere private matter and the legislation we are now considering is, to a large extent, intended for the protection of the general public and must be looked at from the viewpoint of public interest, we do not think estoppel on the ground of acquiescence can be invoked here by the respondent. The defence on this line of reasoning, therefore, fails; and the judgment of the trial court declaring that the resolution passed by the benchers, whereby the name of the appellant was struck from the rolls, is now and always was null and void, and that the appellant is entitled to have his name restored to the rolls, ought to stand.

We may add that the case of *Hands* vs. *The Law Society of Upper Canada* (2), much relied on at the argument, does not help the respondent. In that case, the questions in dispute turned upon the failure to observe some requirements of procedure, while, in the present case, the appellant

(1) [1904] A.C. 809.

(2) (1888) 16 Ont. Rep. 625;
(1889) 17 Ont. Rep. 300;
(1890) 17 Ont. App. Rep. 41.

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was not called before the proper forum, and the statutory body pretending to deal with the whole matter was not legally constituted.

But, in addition to declaring that the resolution of the benchers was absolutely null, that the appellant was still a member of the Law Society of Alberta, entitled to practice as a barrister and solicitor and to exercise and enjoy all rights and privileges as such, the Court ordered that the appellant do recover from the respondent the sum of $1,500 damages.

We do not think, under the circumstances of this case, the respondent is liable in damages.

We say nothing of the fact that the claim was brought by the appellant, not against the benchers who formed the special committee, or against the whole of the benchers acting in convocation, but against the Law Society of Alberta, for the Society undoubtedly adopted the order as its own. The Society acted upon it. The name of the appellant was struck from the rolls and he was effectively prevented from practising his profession. Before the courts, the Society undertook to defend the act of the benchers and no question was raised as to its full responsibility therefor.

Of course, the learned Chief Justice very properly refused to allow damages as from the date when the appellant acquired knowledge of the facts leading to the invalidity of the order; but, in our view, the act of the benchers was not such as would entail any liability in damages of the Law Society. The learned judge found that the benchers acted without malice. He said:

> The evidence is quite convincing, from my viewpoint, that the benchers themselves thought that a committee had a right to hear the evidence and make a report to the benchers. I am satisfied that is what was done in this case. I am satisfied that they heard the evidence and made what they believed an honest report on the evidence. In fact, I may go a little further and say that I am satisfied that if the whole of the benchers had heard the evidence they might have reached the same conclusion.

It is obvious that the benchers were acting in good faith. They were only " endeavouring to do their duty to the public and the profession." Now, provided they take the proper course, and within the conditions specified by the statute, the benchers have the power to order the striking of the name of a member from the rolls of the Society. In

the exercise of those powers, they perform a function not merely ministerial, but discretionary and judicial.

Like the trial judge, we are convinced, upon all the circumstances disclosed in the record, that the benchers honestly believed they were adopting the report of a properly constituted committee; they "were intending in what they did to do what they were entitled to do, viz., to perform the public duties imposed upon them by the Act." They gave the order in what they *bona fide* believed to be the exercise of a judicial discretion, and they, or the Law Society which they represent, are not subject to an action in damages, because the report which they adopted as the foundation of their order happened, without their actual knowledge, to lack authority and validity. On this point, this case comes within the rule laid down in *Partridge* v. *General Council of Medical Education* (1).

The appeal will, therefore, be allowed, and the judgment of the trial judge shall be restored with the modification that the appellant will not be entitled to recover from the respondent the sum of $1,500.

The appellant should have his costs of the appeal to this Court. However, in view of the partial success of the respondent in obtaining the modification of the judgment of the trial Court in respect of damages, the respondent must have its costs of the appeal to the Appellate Division of the Supreme Court of Alberta, but it should pay the appellant's costs in the trial Court, including the costs of the examination for discovery.

Appeal allowed in part, with costs.

Solicitor for the appellant: *A. W. Miller.*

Solicitors for the respondents: *A. Macleod Sinclair & Walsh.*

(1) (1890) 25 Q.B.D. 90.

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* Oct. 22, 23.
* Nov. 7.

CANADIAN TERMINAL SYSTEM, LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

THE CORPORATION OF THE CITY OF KINGSTON (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Agreement between company and city for construction and operation of elevator by company—Bonds deposited by company as security for due construction and completion—City to convey to company lands for elevator site—Failure to complete elevator—Lands not conveyed to company owing to obstacle of title—Interpretation and effect of agreement—Conveyance of lands a condition precedent—Company's right to return of bonds—Waiver—Estoppel.

The question on the appeal was the plaintiff company's right to compel defendant city to return certain bonds. A company (plaintiff's assignor) and the city made an agreement dated October 13, 1930, whereby (*inter alia*), the company was to construct by October 1, 1932, and operate for at least ten years, a grain elevator on certain lands; the city was to transfer to the company (for the elevator's site and operation) part of certain water lots, which the city had applied for to (but not as yet obtained from) the Crown, and certain "lands shown in black" on a plan, which lands included certain golf club land, on which the city had secured an option, and a small piece of land thought to belong to the golf club (and to be covered by said option) but in fact still in the Crown; and the company was to deposit certain bonds (those in question) as security for the due construction and completion of the elevator "in the event of" the city conveying to the company the said lands shown in black, "and in the event of the failure" of the city to convey said lands, "then, as security for the purchase" by the company from the golf club of certain lands in accordance with an agreement between the company and the golf club whereby, in the event of the city failing to exercise its said option (which, however, it did exercise), the company was to purchase certain lands from the club. By a "deposit agreement" of October 13, 1930, the company deposited the bonds as security to the city for the due completion of the elevator "provided the [city] conveys" to the company the said lands shown in black, and it was provided that "should the [city] convey" said lands to the company and should the company fail to complete the elevator within the time and in the manner provided for, the bonds should be forfeited as liquidated damages, and that "should the [city] convey" the said lands to the company, then upon due completion of the elevator the bonds were to be delivered back to the company. (By said deposit agreement, the bonds were deposited with the city "and the golf club," and if the city failed to convey said lands to the company, the deposit was to be as security to the club for the company's performance of its said purchase from the club, and the bonds were to be forfeited to the club if the company

* PRESENT:—Duff C.J. and Rinfret, Lamont, Davis and Kerwin JJ.

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did not, and were to be delivered to the company if it did, carry out that purchase. Owing to the city's exercise of its said option from the club, the club ceased to have any interest in the bonds). Until default by the company, it was to receive the bond interest coupons. (It did receive those maturing before October 1, 1932).

Before or upon execution of the agreements, some work was done on construction, but the company later found itself without sufficient funds to complete the work. The city did not convey the lands—the Crown delayed granting the water lots, and an obstacle came to light against the Crown's granting its said piece of land included in said "lands shown in black," which obstacle also prevented its grant of the water lots. In answer to enquiry by the city in September, 1931, as to completion, the company replied that reorganization was being effected, and, shortly after, a new company, the plaintiff, took over the company's assets, but did nothing to complete the elevator. On enquiry by the city in February, 1932, plaintiff replied to the effect that it was making efforts to interest new capital. In September, 1932, plaintiff wrote asking for an extension of two years, and in this letter mentioned that the city had not conveyed the lands. Later plaintiff sued, claiming (*inter alia*) return of the bonds.

Held: Plaintiff was entitled to return of the bonds. Under the terms of the "deposit agreement," even in the light of the other documents and all the circumstances, the city's right to retain them was dependent upon it conveying said "lands shown in black." There was in evidence no conduct of the company which could be considered as a waiver of its right to return of the bonds, or as an estoppel against it. The mere fact that the company itself was in default did not prevent its insisting upon such return (*Mayson* v. *Clouet,* [1924] A.C. 980).

Per Duff C.J., Rinfret and Davis JJ.: The proviso that the city should convey the lands to the company was a condition precedent to the city's right to retain the bonds; the intention of the parties in this respect being clearly shown by the nature of the subject matter; it was the very basis or essence of the contract whereby the company undertook to deposit the bonds with the city, that the city should convey to it the lands, which were essential in the elevator scheme.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario allowing the defendant's appeal from the judgment of Makins J. ordering the defendant to deliver certain bonds to the plaintiff and reserving rights to the parties to proceed for damages. The judgment of the Court of Appeal dismissed the action, without prejudice to any claims of the plaintiff (or its assignor) if it could thereafter be shown that the defendant was in default, and without prejudice to claims of any party for damages, and declared that nothing in the judgment should be construed as a declaration that the bonds in question were forfeited to the defendant.

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The agreements in question and the material facts of the case are sufficiently set out in the judgment of Kerwin J. now reported, and are indicated in the above head-note. The appeal to this Court was allowed and the judgment of the trial judge was restored with costs throughout.

R. S. Robertson K.C. and *Sir William Hearst K.C.* for the appellant.

D. L. McCarthy K.C. and *T. J. Rigney K.C.* for the respondent.

DUFF C.J.—I concur in the judgments of Mr. Justice Davis and Mr. Justice Kerwin.

RINFRET J. concurred with Davis J. and Kerwin J.

LAMONT J. concurred with Kerwin J.

DAVIS J. (Concurred with by Duff C.J. and Rinfret J.)—Were it not for the fact that we are reversing a unanimous judgment of the Court of Appeal I should be content merely to record my concurrence in the conclusion of my brother Kerwin that the appeal must be allowed and the judgment of the trial judge restored with costs throughout.

The point in the appeal is a very simple one. A. delivers certain securities to B. in pursuance of an agreement in writing between them whereby the securities are to be held by B. as security for the completion by A. of a certain grain elevator provided B. conveys or causes or procures to be conveyed to A. certain specified lands for use in connection with the operations of the proposed elevator. B. frankly admits that it has never conveyed nor tendered a conveyance of the lands to A. To me, is it plain that B. cannot retain the securities. The proviso that B. should convey the lands to A. was clearly a condition precedent. No precise form of words is necessary to constitute a condition, and the question whether a particular stipulation in a contract is a condition or not depends entirely upon the proper construction to be placed upon the words in which the particular stipulation is expressed. The intention of the parties is clearly shewn in this case by the nature of the subject-matter to which the stipulation relates. It was the very basis or essence of

the contract whereby A. undertook to deposit the securities with B. that B. should convey the lands to A. It is inconceivable that A. would have contracted to deposit these securities on the footing that the conveyance of the lands could be enforced by a cross action for damages only. It was argued that, even if the stipulation be regarded as a condition precedent, A. waived performance of the condition. But there is nothing in the evidence of any conduct by A. that could fairly be calculated to induce B. to believe that the condition need not be performed. The lands in question were essential to the operation of the proposed elevator and I cannot understand the suggestion that there was a waiver of performance of what was plainly an essential in the scheme of the proposed elevator.

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

KERWIN J. (Concurred in by Duff C.J. and Rinfret and Lamont JJ.)—The Corporaiton of the City of Kingston and The Canadian Terminal System Limited, being desirous that the latter should erect an elevator in Cataraqui Bay to the west of the city's limits, carried on negotiations which resulted in three agreements of October 13, 1930. So far as material to this action, the lands bordering on the bay are lots 15 and 16 and the broken front of lots 15 and 16, all in the first concession in the township of Kingston, while the water lots are known as the water lots fronting upon lots 15 and 16. The lots are numbered from west to east. A road known as the front road runs westerly between lot 16 and the broken front of lot 16 and between part of lot 15 and part of broken front lot 15, and then skirts the north shore of the bay where the waters encroach on lot 15. Prior to the date of the agreement, the city had applied to the Provincial Department of Lands and Forests for title to the water lots in front of lots 15 and 16, which title was in the Crown in the right of the province. The city had also secured an option from the Cataraqui Golf and Country Club Limited to purchase all the golf club land, being part of the broken front of lot 16. The title to the small piece of land forming the broken front of lot 15 adjoining the club's lands was thought to

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be in the club, or perhaps it is more accurate to state that both parties considered that the club lands extended to the dividing line between lots 15 and 16 in the first concession; but it subsequently transpired that the title to this small piece was also in the Crown in the right of the province and was subject to the provisions of an Ontario statute of 1881 (44 Vict., cap. 38).

By the first of the three agreements of October 13, 1930, known as the "City Agreement" and made between the city and The Canadian Terminal System Limited, after reciting the desire of the parties to enter into an agreement whereby the city would undertake to convey or cause or procure to be conveyed certain lands and lands covered by water to the company, if and as acquired, as a site for the elevator, and to grant or procure a fixed assessment thereon, and whereby the company would agree to construct a grain elevator upon certain parts of the said lands covered by water, and the city would agree to apply to the Legislative Assembly of the Province of Ontario for a special Act to provide for the fixed assessment and to authorize and validate the agreement; it was provided:—

1. The company shall construct a transfer and storage elevator of modern design and substantial construction with a storage capacity of not less than 2,500,000 bushels of grain upon that part of the water lots for which application has been made by the corporation to the Crown and fronting upon Lots 15 and 16 in the First Concession of the Township of Kingston, in the County of Frontenac, more particularly described in paragraph 5 hereof, on or before the first day of October, 1932.

2. The company shall operate and maintain the said elevator for a period of at least ten (10) years immediately after completion, providing such operation and maintenance is not prevented by the intervention of an act of God, vis major, fire, lightning, flood, tempest, explosion, or other cause beyond the reasonable anticipation or control of the company.

* * *

5. Subject to such legislative authority and/or approval, if any, as may be necessary, the corporation shall and will transfer, or cause or procure to be transferred or granted to the company, that part of the water lots for which application has been made by the corporation to the Crown and fronting upon Lots 15 and 16 in the First Concession of the Township of Kingston, County of Frontenac, bordering upon Cataraqui Bay, which may be described as follows: (here follows a description of the proposed site of the elevator).

A satisfactory deed, grant or conveyance of said portion of said water lots shall be delivered to the company when and so soon as the company has duly executed this agreement and has furnished the bonds provided for in paragraph 7 hereof. The corporation further agrees to likewise transfer and convey, or cause or procure to be transferred and conveyed,

to the company the lands shown in black on the said plan attached hereto and described as follows: [here follows a description which takes in not only the northwesterly part of the golf club lands but also the small piece of land forming the broken front of lot 15] provided . . . . a by-law to be submitted by the corporation to the ratepayers of the municipality under the provisions of the Municipal Act for the purchase of certain lands is duly approved by the said ratepayers.

The corporation further agrees to transfer and convey to the Crown in the right of the Dominion of Canada for dredging purposes for the proposed elevator, such parts of said water lots as it may acquire, as are shown coloured green on the plan hereto attached and marked.

Provided, however, that the Cataraqui Golf and Country Club, Limited (hereinafter referred to as the "Golf Club") shall have the right to use and occupation of those parts of said Lot Sixteen (16) now owned by said golf club until the first day of December, 1931, free of charge.

* * *

7. The company shall deposit with the corporation and the golf club sixty thousand dollars ($60,000) par value twenty-year first mortgage (leasehold) sinking fund gold bonds, Series A, of National Utilities Corporation, Limited, the property of the company, free of all liens and charges, duly endorsed by the company to the corporation and the golf club, as security for the due construction and completion of said elevator, together with the necessary wharfage and dockage facilities for the proper operation and use of the same, *in the event of the corporation conveying or causing or procuring to be conveyed to the company the lands coloured black on the plan attached hereto as provided for in paragraph 5 hereof; and in the event of the failure of said corporation to convey or cause or procure to be conveyed to the company said lands as aforesaid then, as security for the purchase by the said company from the golf club of the lands mentioned in a certain agreement between the said city and the said golf club bearing even date herewith in accordance in all respects with the provisions of said agreement; such bonds to be deposited subject to all the terms, conditions and provisions particularly set forth in a Deposit Agreement, bearing even date herewith, between the company, the corporation and the said golf club.*

8. The corporation or its nominee shall have the right of free use of any railway siding now or hereafter constructed in common with the company, upon entering into a satisfactory agreement in respect of such joint use.

9. The corporation shall make application to the Legislative Assembly of the Province of Ontario at the next session thereof for a special Act granting or making provision for granting a fixed assessment of the said elevator and the lands, trackage, and docks connected therewith, including business assessment, for the period of ten years next following the first day of January after the completion of said elevator, at the sum of fifty thousand dollars ($50,000) (but this shall not apply to or affect taxation for school purposes or local improvements) and dispensing with all provisions requiring the submission of a by-law to the electors of said corporation of any other municipality for the purpose of so fixing said assessment. In the event of said assessment not being so fixed by special Act, the corporation will through its council submit to the electors of the municipality and endeavour to secure the passage of a proper by-law under the provisions of the Municipal Act for the purpose of so fixing the said assessment.

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10. The corporation shall also make application to the Legislative Assembly of the Province of Ontario at said next session thereof for the enactment of provisions in said special Act or in another special Act, authorizing, validating and confirming this agreement and all the terms and provisions thereof and all things done and to be done pursuant thereto or in connection therewith.

The second of the agreements of October 13, 1930, known as the "Golf Club Agreement," was made between the club and the company, and, after reciting the option granted by the club to the city, provided:—

1. In the event of the corporation failing to exercise its said option with the club for the purchase of the lands therein described, then and in such case said club hereby agrees to sell and convey the said lands covered by said option and certain water lots hereinafter referred to, to the company and the company agrees to purchase the same for the price or sum of fifty thousand dollars ($50,000) cash.

2. The lands to be conveyed by the club to the company in the event of the corporation failing to exercise its said option, as aforesaid, may be more particularly described as follows: that is to say: Those parts of the broken front in front of Lots Numbers Fifteen and Sixteen (15 and 16) in the First Concession of the Township of Kingston, County of Frontenac, lying south of the travelled road now owned by the club, and all such water lots as the club may be entitled to have conveyed to it by the said corporation under an agreement bearing even date herewith, between the club and the said corporation, a copy of which agreement is hereto attached as Schedule "B" to this agreement, subject, however, to the right which is hereby expressly reserved for the free use and occupation by the club of said part of Lot Sixteen (16) to December 1, 1931, with the exception of such portion of said lot as lies in the immediate vicinity of the present eleventh green as may be required for the purposes of dredging for the proposed elevator. Provided also that the club shall have the right to remove any of the soil it may see fit to remove before the completion of the purchase without compensation to the company.

It is to be noted that, if this agreement became operative by reason of the city failing to exercise its option, the old company was entitled to purchase for $50,000, not merely the northwesterly part of the broken front of lot 16 (which is all it was entitled to under the last part of clause 5 of the City Agreement), but all of said broken front lot 16 owned by the club. It must also be remembered that, while clause 2 of the "Golf Club Agreement" mentions lots 15 and 16, there follows the words "now owned by the club."

Clause 3 of the "Golf Club Agreement" is as follows:—

3. The company shall deposit with the corporation and the golf club sixty thousand dollars ($60,000) par value twenty-year first mortgage (leasehold) sinking fund gold bonds, Series A, of National Utilities Corporation Limited, the property of the company, free of all liens and charges, duly endorsed by the company to the corporation and the golf

club (as security for the due construction and completion of said elevator, together with the necessary wharfage and dockage facilities for the proper operation and use of the same in the event of the corporation conveying or causing or procuring to be conveyed to the company the lands coloured black on the plan attached to a certain agreement bearing even date herewith between the said corporation and the company; and in the event of the failure of said corporation to convey or cause or procure to be conveyed to the company said lands as aforesaid, then, as security for the purchase by the said company from the golf club of the lands mentioned in a certain agreement between the said city and the said golf club bearing even date herewith in accordance in all respects with the provisions of said agreement, such bonds to be deposited subject to all the terms, conditions, and provisions particularly set forth in a Deposit Agreement, bearing even date herewith, between the company, the corporation and the said golf club.

The agreement referred to as schedule "B" is dated September 16, 1930, and was made between the city and the golf club, and provides that, in consideration of the club waiving its rights to patents to certain water lots adjacent to lot 16 in the first concession in favour of the city, the latter agrees that in the event of its failure to exercise its option to purchase the golf club land, it would transfer to the club all the water lots that it should acquire from the province lying east of the westerly limit of lot 16 except such part as the city has by agreement of even date agreed to transfer to the Canadian Terminal System Limited and to the Dominion for dredging purposes.

The progress of the negotiations is evidenced by the reference to an agreement "of even date," whereas as a matter of fact, the "City Agreement," as has been shown, was not dated until October 13, 1930. The necessity of the agreement of September 16, 1930, was that the Crown would not grant title to any water lots except to the riparian owners or their nominees and the club had so nominated the city.

The third agreement of October 13, 1930, called the "Deposit Agreement," is between the company, the city and the club. As the first point argued before us depends largely upon the construction of this document, it is imperative to consider all its terms which are as follows:

Whereas by agreement bearing even date herewith, between the company and the corporation (which said agreement is hereinafter referred to as the "City Agreement"), the company has agreed to construct an elevator with a storage capacity of not less than 2,500,000 bushels on the lands in said agreement described, together with the necessary wharfage and dockage facilities for the proper operation and use of the

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same, on or before the first day of October, 1932, subject to the terms, provisoes, conditions and stipulations in said agreement contained, a copy of which Agreement is attached hereto as Schedule "A" to this Agreement.

And whereas by Agreement bearing date the 25th day of August, 1930, between the golf club and the corporation (which said Agreement is hereinafter referred to as the "Option Agreement"), the said golf club granted to the corporation an option or right to purchase certain lands of the said golf club in the Option Agreement described at the price and upon the terms in said Option Agreement set forth, a copy of which Option Agreement is attached hereto as Schedule "B" to this Agreement.

And whereas by Agreement bearing even date herewith, between the said company and the said golf club (hereinafter referred to as the "Golf Club Agreement"), it is provided that in the event of the corporation failing to exercise said option, the golf club shall sell and convey to the company, and the company shall purchase the lands covered by said option and certain water lots in said Golf Club Agreement referred to, at and for the price or sum of fifty thousand dollars ($50,000) cash, a copy of which Golf Club Agreement is attached hereto as Schedule "C" to this Agreement.

And whereas the company has agreed to and with the corporation and the golf club to deposit sixty thousand dollars ($60,000) par value of twenty-year first mortgage (leasehold) sinking fund gold bonds, Series A, of National Utilities Corporation Limited, as security for the due construction of said elevator in the event of the corporation conveying or causing or procuring to be conveyed to the company the lands shown in black on the plan attached to said City Agreement in the manner provided in said City Agreement, and in the event of the city failing to convey said lands as aforesaid, as security for the purchase by the company from the golf club of the lands mentioned in said Golf Club Agreement in accordance in all respects with the provisions of said Golf Club Agreement.

Now this Agreement witnesseth:

1. That the company hereby delivers to and deposits with the corporation and the golf club sixty thousand dollars ($60,000) par value of twenty-year first mortgage (leasehold) sinking funds gold bonds, Series A, of National Utilities Corporation Limited, which said bonds are the property of the company free of all liens and charges, as security to the corporation for the due completion by the company of said elevator, together with the necessary wharfage and dockage facilities for the proper operation and use of the same in the manner and within the time provided for by said City Agreement provided the corporation conveys, or causes or procures to be conveyed to the company, the said lands shown in black on the plan attached to said City Agreement in the manner provided in said City Agreement, and in the event of the failure of the corporation to convey said lands to the company, in accordance with the provisions of said City Agreement, then and in such case as security to the golf club for the purchase by the company from the golf club of the lands mentioned in said Golf Club Agreement in accordance in all respects with the provisions of said Agreement.

2. Should the Corporation convey, or cause or procure to be conveyed to the company, the lands mentioned in the preceding paragraph hereof in accordance with the porvisions of said City Agreement, and should the company fail to complete said elevator, together with the necessary wharfage and dockage facilities for the proper operation and

use of the same, within the time and in the manner provided for in the said City Agreement, then and in such case said bonds shall become forfeited to and be the absolute property of the corporation as and by way of liquidated damages and not as a penalty. Should the corporation fail to convey said lands to the company as aforesid and should the company fail to complete the purchase of the lands referred to in the Golf Club Agreement as in said Golf Club Agreement provided, then and in such event said bonds shall become forfeited to and be the absolute property of the golf club as and by way of liquidated damages and not as a penalty.

3. It is distinctly understood and agreed between the parties hereto that the company shall not be or be deemed to be in default in any way under said Golf Club Agreement unless and until the corporation fails to exercise the option in said Option Agreement provided and one month's notice of such failure has been given to the company in the manner hereinafter provided. It being the intention and meaning of this Agreement that said bonds shall at the expiration of one month from the giving of the aforementioned notice, cease in any way to be the property of the company unless within that period the company has performed and discharged all its obligations with respect to the purchase of the said lands mentioned in said Golf Club Agreement as provided for by said Golf Club Agreement.

4. The company shall have the right and privilege at any time before default on its part in any of the conditions herein contained to have said bonds delivered to it upon depositing with the corporation and the golf club in lieu thereof, the sum of forty thousand dollars ($40,000) in cash or a satisfactory surety bond for a like amount, such cash or surety bond to stand in the place of said bonds and be subject to all the conditions and stipulations herein contained.

5. Should the corporation convey to the company the said lands in manner aforesaid, then and in such case upon the completion of said elevator, together with the necessary wharfage and dockage facilities for the proper operation and use of the same in the manner and within the time provided for in said Agreement, the corporation and the golf club shall deliver to the company said bonds, or said cash or surety bond deposited in lieu thereof under the provisions of the preceding paragraph hereof, free and discharged of and from all claims and demands of the corporation or the golf club, or either of them. Should the corporation fail to convey said lands in manner aforesaid and the company perform and discharge all its obligations with respect to the purchase of said lands mentioned in said Golf Club Agreement, as provided for by said Golf Club Agreement, then and in such case the corporation and the golf club shall immediately upon the completion of said purchase by the company, deliver to the company said bonds or said cash or surety bond free and discharged of and from all claims and demands of the corporation or the golf club, or either of them.

6. Until default shall occur on the part of the company, the company shall be entitled to have delivered to it the interest coupons attached to said bonds when and as the same shall become due and payable, and in case of the substitution of cash for said bonds, such cash shall be deposited with some bank or trust company in a special account in the name of the corporation and all interest payable in respect of said moneys shall be paid to the company until default shall occur hereunder.

7. Any notice required to be given hereunder may be given by registered letter addressed "The Canadian Terminal System Limited, Canadian Pacific Building, Toronto, Ontario."

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8. This Agreement shall be binding upon and enure to the benefit of the parties hereto and their respective successors and assigns.

Even before the execution of the agreements of October 13, 1930, the company had entered into an agreement with a contractor under which the latter transported certain material for the erection of the elevator to a spot presumably near the site of the proposed elevator. If not prior to October 13, 1930, certainly immediately afterwards, the contractor commenced work on the foundations and continued until severe winter weather set in. For this, the company paid the contractor a very substantial sum of money.

The city council submitted to the ratepayers a by-law to authorize the purchase of the golf club lands, and, upon it being carried, exercised its option, and on December 29, 1930, obtained a conveyance of these lands from the club. The city had also continued to press its application to the Crown Lands Department for the grant of part of the water lots to itself and for a grant of the remainder of the water lots to the Crown in the right of the Dominion so that the Dominion Department of Public Works might complete the dredging operations which it had already commenced.

Matters were in this position when the Provincial Minister of Lands and Forests was advised in a letter from the solicitors of the village of Portsmouth of certain claims by that municipality on behalf of its residents for access to Cataraqui Bay over broken front lot 15, and apparently based on the provisions of the statute of 1881. This claim effectively prevented, and still prevents, the granting of the city's application for conveyances of the water lots, and also brought to light the fact that the title to broken front lot 15 was still in the Crown in the right of the province, subject to whatever privileges arose under the statute. The city, however, did secure a special Act of the Legislature, validating the agreements and extending the limits of the city so as to include the site of the proposed elevator and other adjoining lands and water lots but was unsuccessful in having included therein the authority to grant a fixed assessment. The city also paid the sum of $2,665.50 to the Department of Lands and Forests for the water lots.

The coupons on the bonds deposited by the company with the city and golf club that were payable on March 15, 1931, were sent by the city to the company in April of that year. The company found itself without sufficient funds to complete the project, although, so far as appears, not as a result of any difficulty to obtain title to broken front lot 15 or to the water lots upon which the foundations of the elevator had been constructed. On September 14, 1931, the city clerk wrote the company stating that the citizens were anxious that the elevator should be completed and asked for information. The reply pointed out that a reorganization was being effected. This materialized when by an agreement of September 17, 1931, the plaintiff company in this action took over all the assets of the old company, including whatever rights the latter had in the bonds. The new company has done nothing to complete the elevator. The coupons on the bonds that were payable in September, 1931, were sent to the new company on November 7, 1931.

Possibly because of the uncertainty as to the completion of the elevator, a by-law to grant a fixed assessment was not submitted to the ratepayers of the municipality at the time of the 1931 municipal elections, and on February 15, 1932, the city clerk wrote the new company for information, to which the president replied on February 16, 1932, to the effect that the company was making efforts to interest new capital. In April and September of that year, the half-yearly coupons on the bonds were sent to the new company, and in the interval the Crown Lands Department was asked by the city as to what progress was being made in connection with the city's application for conveyances of the water lots.

Finally on September 29, 1932, the company wrote the city asking for an extension of two years to complete the elevator, and although the former manager of the old company stated at the trial on cross-examination that on several occasions he had asked the city for title to the golf club lands, this is the first letter in which appears the statement that while the bonds had been deposited, the city had not conveyed the lands.

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The request for an extension of time was submitted to a committee of the city council and referred to the city solicitor, but what decision was arrived at does not appear; the last notification, according to the evidence, being that the solicitor notified the company that he had reported to the city and would require its instructions before replying further. This was followed by a demand for the return of the bonds.

In its pleading, the plaintiff makes a number of claims, but at the trial, the sole question entertained was as to the right of the plaintiff to obtain the bonds from the defendant. It is true that was done against the objection of counsel for the defendant, but the Court of Appeal has similarly dealt with the matter and that is all, therefore, that falls to be determined in this appeal.

The document that specifically deals with the deposit of the bonds is the "Deposit Agreement" of October 13, 1930. The final recital speaks of the company's agreement to deposit the bonds

as security for the due construction of said elevator in the event of the Corporation conveying or causing or procuring to be conveyed to the Company the lands shown in black on the plan attached to said City Agreement in the manner provided in said City Agreement, and in the event of the City failing to convey said lands as aforesaid, as security for the purchase by the Company from the Golf Club of the lands mentioned in said Golf Club Agreement in accordance in all respects with the provisions of said Golf Club Agreement.

Clause (1), after providing for the deposit of the bonds as security for the completion by the company of the elevator, etc., continues:—

provided the Corporation conveys, or causes or procures to be conveyed to the Company, the said lands shown in black on the plan attached to said City Agreement in the manner provided in said City Agreement, and in the event of the failure of the Corporation to convey said lands to the Company, in accordance with the provisions of said City Agreement, then and in such case as security to the Golf Club for the purchase by the Company from the Golf Club of the lands mentioned in said Golf Club Agreement in accordance in all respects with the provisions of said Agreement.

The "City Agreement" provides for the conveyance to the company of part of the golf club lands and part of broken front lot 15. It is quite true that the conveyance could not be made until title should be acquired and the necessary legislative authority secured, but it will be observed that the bonds were deposited only in connection

with the lands shown in black on the plan. If the city did not exercise its option from the golf club, then it would have no further interest in the bonds which would remain with the club as security for the purchase by the company of the latter's lands (presuming for the moment that the "Club Agreement" refers only to lands "now owned by the club" as stated, and not to any part of broken front lot 15 which the club did not own). In that event, upon the company paying $50,000, it would secure all the club's lands and all the water lots that the club might secure from the city, and would be entitled to the return of the bonds. By reason of the city exercising its option, the golf club ceased to have any interest in the bonds. The city owns all of broken front lot 16 which it agreed to convey to the company, but no title to broken front lot 15. The company has neither bonds nor title. With great respect, I consider the terms of the "Deposit Agreement," even in the light of the other documents and all the circumstances, to be clear that the city's right to retain the bonds is dependent upon it giving a grant of the lands shown in black on the plan.

The company having a right to the bonds under the agreement, I am unable to find that anything that has transpired could be considered as a waiver of that right. Waiver must be based on new contract or estoppel. No new agreement has been suggested, and in fact, a request by the new company for an extension of time to complete the elevator was not granted by the city. As to estoppel, neither company made any representations, verbal or written or by conduct, and certainly none that were acted upon by the city to its prejudice. After the construction of the foundations of the elevator, all parties endeavoured to have the title to the various parcels of land and the water lots transferred to the designated grantees, but no obligation rested upon either company to demand earlier than was done that the city hand over the bonds. The mere fact that the company itself is admittedly in default does not prevent its insisting upon the return of the bonds. *Mayson* v. *Clouet* (1).

(1) [1924] A.C. 980.

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It may be that the city and the old company have valid claims for damages against each other, but with that we are not concerned in this action; and on the argument the appellant abandoned any claim for specific performance.

The appeal should be allowed with costs in this Court and the Court of Appeal, and the judgment of the learned trial judge restored.

Appeal allowed with costs.

Solicitors for the appellant: *Hearst & Hearst.*

Solicitor for the respondent: *T. J. Rigney.*

GEORGE E. BALDRY (PLAINTIFF).....APPELLANT;

AND

JAMES McBAIN AND ERNEST E. JACK (DEFENDANTS).....RESPONDENTS.

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*Oct. 2, 3.

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*Jan. 15.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Patent—Alleged infringement—Validity of patent—Means and methods of underpinning buildings—Lack of patentable improvement—Sufficiency of disclosure—Appeal—Presentation of matter after argument.

Plaintiff appealed from the judgment of the Court of Appeal for Manitoba, 43 Man. R. 245, affirming judgment of Adamson J. (*ibid*) dismissing his action for alleged infringement of patent of invention relating to means and methods of underpinning buildings.

Held: Appeal dismissed. Having regard to the state of the art at date of the patent, the methods and devices in respect of which protection was claimed involved no patentable improvement.

Remarks, but no decision, on respondent's contention that, since, admittedly, the patentee's procedure would only be operable in soil of suitable consistency and condition, and since there was nothing in the patent defining, either by reference to soil composition or to locality, the places in which it would be operable, the patent was void for want of sufficient disclosure.

A communication advancing suggestions on a point, and in effect requesting reargument thereon, addressed to the Court after conclusion of the argument, without special leave given at the argument or subsequent to it, cannot properly be considered by the Court.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Manitoba (1), dismissing (Trueman J.A. dissenting) his appeal from the judgment of Adamson J. (2), dismissing his action for an injunction, damages,

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

(1) 43 Man. R. 245; [1935] 2 W.W.R. 593; [1935] 4 D.L.R. 160.

(2) 43 Man. R. 245, at 245-248.

etc., for alleged infringement of patent of invention relating to means and methods of underpinning buildings. The appeal was dismissed with costs.

R. S. Smart K.C. for the appellant.

F. Heap K.C. and *J. R. Crawford* for the respondent.

The judgment of the court was delivered by

DUFF C.J.—The invention to which the patent relates, in respect of which the controversy on this appeal arises, is thus described in the appellant's factum:—

> The means and methods of underpinning buildings covered by the patent provide for the creation of reinforced concrete piers directly under the footings of buildings. This is accomplished by first making a limited excavation under the footing of a building, then by means of a boring tool fitted to a jointed rod and handle, boring a hole downward from such excavation to a firm foundation, and the use of the excavation and hole so created as a forming for the concrete. Reinforcing material is then placed in the hole and excavation as may be required and the whole filled with concrete, and a pier head formed by the filling of the excavation under the footing. When the concrete in the pier and pier head is set, the space of a few inches between the pier head and foundation is filled with concrete tamped in so as to effectually fill the space and take the weight of the foundation.
>
> The operators are enabled thus to create such pier working from the side of the wall of the foundation and the shaft of the boring tool is equipped with a guiding member, thus insuring a perfectly vertical hole. This results in the creation of a solid concrete pier being placed vertically under an existing foundation by a means which is claimed to be much less expensive and more effective and can be constructed much faster than by the old methods heretofore in use, such as digging down and putting in caissons before attempting to create a pier.

I have come to the conclusion that the learned trial judge and the three judges of the Court of Appeal who agreed with him were right in their view that, having regard to the state of the art at the date of the patent, the methods and devices in respect of which protection is claimed involved no patentable improvement. The learned trial judge in a short judgment expressed his findings and conclusions in these words:—

> There is nothing new or novel about underpinning foundation walls by making a hole by digging or boring and filling it with concrete or other substance. There is nothing novel in using a boring tool with a guiding member to make such a hole. There is nothing new in using an operating line in sections where there is not plenty of headroom. The only thing in this patent which was relied on as being patentable was the use of an "operating line comprising a number of similar detachable sections connected one to the other by universal joints."

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BALDRY v. McBAIN ET AL.

Duff C.J.

> It would seem to me that this is one of the very things which the universal joint itself is designed for and intended to do. A guiding member has been used with a boring tool driven by an operating line in sections. As shown in "Modern Underpinning" by White and Prentis (John Wiley & Sons, Inc., New York, and Chapman & Hall, Ltd., London) the universal joint has been used with augers to muck out sectional steel pipe piles when being put in place to underpin old walls. Can this be said to be an invention simply because concrete or cement is put in the hole instead of a driven steel pipe? The method described in this patent is simply doing exactly what has been done before except that the power is not applied or transmitted in a direct line. Now, this is the universal joint itself which was invented long ago.

I quote this passage in full because, it is very clear, I think, that there is ample evidence to support these findings; and, looking at the matter in a reasonable and practical way, they seem to be virtually conclusive against the appellant.

What was done, apparently, was to apply for the first time successfully in Winnipeg a very convenient procedure for underpinning buildings. The three most important features of this method consisted in the use of the universal joint, in the use of a guiding member to direct a boring tool, and in the use of the walls of an excavation sunk by the boring tool for the purpose of moulding a concrete pillar. As the learned trial judge points out, all the essential features of this system were in common use in New York for the same purpose, subject to this, viz., that, owing to the composition of the soil there, it is necessary, as a rule, first to drive down a casing in order to sustain the walls of the excavation while the concrete is introduced and is settling, and in order to prevent invasion by matter from the surrounding soil which might weaken the concrete structure. But, it was not disputed that the idea of using the walls of the excavation where the soil is suitable for the purpose of moulding the concrete pillar was no new idea. That is admitted and the learned trial judge has found it as a fact.

The procedure explained in the text book which was put in evidence, to which the learned trial judge refers, consists first in boring a hole, "mucking out," as the phrase is, then the sinking of a casing, and after that, the introduction of concrete. Under the patentee's system the casing is dispensed with. That, as I have said, admittedly was not a new idea.

To a skilled person having an adequate knowledge of the state of the arts involved, no exercise of inventive faculty would be required in devising the methods or the appliances, or the arrangements thereof, in respect of which protection is claimed, or in the application of them for the purpose defined. In other words, when the state of the art at the date of the patent is properly understood, it is clear, as it appears to me, that these things constituted no improvement proceeding from invention as contemplated by the patent law.

I express no opinion, however, upon the issue raised on behalf of the respondent as to the proof of infringement in fact. After the conclusion of the argument, a communication was addressed to the Court on behalf of the appellant in which it was suggested that, even if infringement had not been proved, there was sufficient evidence of threats of infringement. The communication was, in effect, a request for a reargument on the point which, in the circumstances, could not have been granted, even if it could properly (which it could not) be considered in the form in which it was presented. Apart from this, the plaintiff's case was not put upon that basis either at the trial, or in the Court of Appeal, or in the appellant's factum. In such circumstances, the Court could not, at this stage, (as matter of substance), permit such a contention to be advanced by an appellant.

Nor do I express any opinion upon another contention put forward by the respondent's counsel to the effect that there is no claim in respect of the patentee's procedure as a whole, but only claims in respect of method and separate claims in respect of devices. Nor do I pronounce upon the contention that, since, admittedly, the patentee's procedure would only be operable in soil of suitable consistency and condition, and since there is nothing in the patent defining, either by reference to soil composition or by reference to locality, the places in which it would be operable, the patent is void for want of sufficient disclosure. I express, as I say, no opinion upon this point, but there does appear to be some force in the suggestion that if the operability of the patentee's procedure in the soil found in Winnipeg were a circumstance, the discovery of which involved invention, then the patent, which makes no refer-

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ence to Winnipeg or any other locality, or to the matter of soil composition, stops short of a disclosure which would enable a person of ordinary skill to work the invention usefully without the necessity of the exercise of inventive ingenuity.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *O'Grady & O'Grady.*

Solicitor for the respondent: *J. R. Crawford.*

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*Feb. 17.
*Feb. 18.

MARY BRUCE AND THE NOVA SCOTIA TRUST COMPANY, EXECUTRIX AND EXECUTOR OF AND UNDER THE WILL OF ALFRED D. BRUCE, DECEASED, AND SHELBURNE SHIPBUILDERS LTD. (DEFENDANTS).... } APPELLANTS;

AND

LEWIS O. FULLER ON BEHALF OF HIMSELF AND ALL OTHER SHAREHOLDERS OF SHELBURNE SHIPBUILDERS LTD. OTHER THAN MARY BRUCE AND THE NOVA SCOTIA TRUST COMPANY AFORESAID (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO.

Appeal—Jurisdiction—Appeal from dismissal of appeal from order granting interim injunction—"Final judgment" within Supreme Court Act (R.S.C. 1927, c. 35)—Power and control of Supreme Court of Nova Scotia as to course of proceedings.

Plaintiff, a shareholder in a company, sued (on behalf of himself and other shareholders) for repayment to the company of moneys alleged to have been illegally paid to its manager in compliance with an invalid resolution passed at a meeting of the company, and for an injunction restraining the company from holding any meeting for the purpose of attempting to ratify or confirm said payments; and obtained an interim injunction to that effect until the trial. From dismissal by the Supreme Court of Nova Scotia *in banco* (9 M.P.R. 437) of an appeal from the order of interim injunction, defendants appealed to this Court.

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

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Held: Appeal quashed for want of jurisdiction. It was clear that the ground of the judgment appealed from was that plaintiff, in support of his application for an interim injunction, had produced a *prima facie* case sufficient to satisfy the court that it was "just or convenient" to hold matters *in statu quo* until final determination of the issue. There was no final determination of any substantive right in issue in the action, and, therefore, the judgment appealed from was not a final judgment within the contemplation of the *Supreme Court Act.*

The court pointed out that an interim injunction, like all interlocutory orders, bears *in gremio* a reservation of leave to apply; and, further, that the Supreme Court of Nova Scotia has full control over the course of the proceedings; has full power, if convenience or justice so demand, to direct that the issue concerning the holding of a meeting for the specified purpose shall be tried and determined before the issue arising on the claim for repayment is finally disposed of.

APPEAL by the defendants (by leave granted by the Supreme Court of Nova Scotia in banco) from the judgment of the Supreme Court of Nova Scotia in banco (1) dismissing (Chisholm C.J. and Ross J. dissenting) their appeal from an order of Doull J. (2) granting an interim injunction to the effect as stated in the judgment now reported. The appeal to this Court was quashed with costs, on the ground of want of jurisdiction.

W. G. Ernst K.C. for the appellant.

E. T. Parker K.C. for the respondent.

The judgment of the court was delivered by

DUFF C.J.—After fully considering the able argument of Mr. Ernst, we are forced to the conclusion that we have no jurisdiction to entertain this appeal.

The judgment appealed from is a judgment dismissing an appeal from an order by Mr. Justice Doull granting an interim injunction restraining the Shelburne Shipbuilders Ltd. from holding a meeting of the company for the purpose of ratifying or confirming certain withdrawals or payments to the late Alfred D. Bruce, the president or manager in his lifetime of the defendant company, alleged to be in excess of his salary.

The claims endorsed upon the writ are, first, for repayment and reimbursement by the executrix and executor of the deceased Alfred D. Bruce of certain moneys alleged

(1) 9 M.P.R. 437; [1935] 3 D.L.R. 256.

(2) 9 M.P.R. 437, at 437-440.

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to have been " wrongfully, improperly and illegally " withdrawn and paid to the said deceased, Alfred D. Bruce, in compliance with an invalid resolution alleged to have been passed at a general meeting of the company; and, second, for an injunction restraining the company from holding or allowing to be held the annual general meeting of the company on the 6th November, 1934, or holding any meeting of the company for the purpose of attempting to ratify or confirm such allegal illegal withdrawals or payments to the said Alfred D. Bruce.

It is clear, from the judgment of the majority of the court, that the appeal from Mr. Justice Doull was dismissed on the ground that, in support of their application for an interim injunction, the plaintiffs in the action had produced a *prima facie* case sufficient to satisfy the court that it was " just or convenient " to hold matters *in statu quo* until the final determination of the issue.

There is no final determination of any substantive right in issue in the action, and, therefore, the judgment is not a final judgment within the contemplation of the *Supreme Court Act*. The argument chiefly emphasized in support of the appeal was that the appellants are, by the restraining order, deprived of the opportunity to avail themselves of their voting rights as shareholders in order to strengthen their defence against the respondents' claim for the repayment of moneys alleged to have been illegally paid to the deceased, Alfred D. Bruce. This is an argument which goes to the merits of the matter, and not to the question of jurisdiction.

It should be observed, however, that an interim injunction, like all interlocutory orders, bears *in gremio* a reservation of leave to apply; and, further, that the Supreme Court of Nova Scotia has full control over the course of the proceedings; has full power, if convenience or justice so demand, to direct that the issue concerning the holding of a meeting for the specified purpose shall be tried and determined before the issue arising on the claim for repayment is finally disposed of.

The appeal will be quashed with costs.

Appeal quashed with costs.

Solicitor for the appellants: *V. L. Pearson.*

Solicitors for the respondent: *Burchell, Smith, Parker & Fogo.*

J. P. McLAUGHLIN (PLAINTIFF).....APPELLANT; 1935 * June 14, 17.

AND

ISAAC W. C. SOLLOWAY AND HARVEY MILLS (DEFENDANTS) .....RESPONDENTS. 1936 * Feb. 28.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Agency—Broker—Conversion—Secret profit—Company law—Liability of directors—Customer employing brokerage company to buy shares on margin, and depositing other shares as collateral security—Company failing to carry shares for customer and thereby, and by use of customer's shares, and by buying in on falling market for delivery to customer, making profit for itself—Claim by customer against directors of company—Customer's retention of shares delivered to him, as election precluding claim for conversion—Basis of claim, form of action and essentials for right to recover.

Defendants S. and M., who had as partners conducted a brokerage business, turned it over, on May 31, 1928, to a Dominion company, which they had organized and of which they were officers and almost the sole shareholders. That company, on November 30, 1928, transferred the Ontario portion of the business to an Ontario company which S. and M. had organized and of which they were high officials and directors. The Dominion company owned practically all the shares of the Ontario company.

On October 16, 1929, plaintiff employed the Ontario company (hereinafter called the company) as his agent and broker to buy 7,000 shares of a certain stock on the Toronto Stock Exchange at market prices on margin, and deposited, at varying intervals, in all, 14,000 shares of the same stock (hereinafter called the collateral) as security to maintain the margin. This Court found, or accepted findings of, the following facts: The company, while it did go upon the Exchange and buy 7,000 shares, virtually nullified that purchase by selling shares on its own account, the effect of this, under the Stock Exchange practice, being that the company took delivery of few, if any, of the shares so bought, and it did not get or carry shares from which it could make delivery to plaintiff if and when required. Though any asserted marginal requirement was always met by plaintiff promptly, the collateral was disposed of, in most instances, immediately it was deposited; in all, 11,800 of said 14,000 shares were disposed of for about $65,320. On January 13, 1930, plaintiff called for delivery of the 7,000 shares. The company bought upon the market (which had fallen) 7,000 shares for about $25,000 and delivered them to plaintiff as and for the shares which he had ordered in October. Plaintiff accepted the shares and paid the amount demanded ($50,334.92 for price, brokerage and interest), believing that the shares were those which he had ordered in October. The company also repurchased upon the market 11,800 shares for about $32,000, and these, along with the 2,200 shares which it had not sold, it delivered to plaintiff as the collateral, retaining the secret profit of about $33,320 which it had made on the sale and repurchase. The company's conduct, both as to

* PRESENT:—Duff C.J. and Lamont, Cannon, and Crocket JJ. and Dysart J. *ad hoc.*

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the 7,000 shares and the collateral, was in pursuance of a general system, which had been inaugurated by S. and M. when partners as aforesaid, and which had been carried on continuously since by the successive owners and operators of the business. S. and M. controlled and directed all the business and practices of the company.

A judgment against the company and S. and M. (for the difference between what the company charged plaintiff for the 7,000 shares and what it acquired them for when delivery was requested, and for the difference between what the company received and paid for the collateral; with adjustment for interest and brokerage) was, as to S. and M. reversed by the Court of Appeal for Ontario, which dismissed the plaintiff's action as against S. and M. Plaintiff appealed to this Court.

Held: (1) As to the 7,000 shares: Under the terms of the accepted order to buy and the representations regarding its execution, there was a legal duty on the company to get delivery of the shares bought and to carry always a sufficient number of shares available for delivery to plaintiff when demanded (*Conmee* v. *Securities Holding Co.*, 38 Can. S.C.R. 601; *Solloway* v. *Blumberger*, [1933] Can. S.C.R. 163, at 167); which duty was not fulfilled. The October order to buy was never fully executed and so came to naught. This relieved plaintiff of any contractual obligation to take any shares at any price. He was not obliged to take or retain the shares bought in January, but he had by his conduct after discovering the facts elected to retain the shares, thereby adopting the company's action in buying the shares as his agent, and defeating his claim, which he might otherwise have had, for conversion (his retention of the shares being a denial that they had passed to anyone else, and, further, the retention after election amounting in law to waiver of the conversion, not only against the converting company, but against all who participated—the waiver extending to the entire cause of action, absolving all the joint tort-feasors—*Buckland* v. *Johnson*, 15 C.B. 145). Plaintiff's remedy was for a strict accounting as agent. On the pleadings (and rejecting any claim for conversion) plaintiff's claim must be taken as based on agency, the purchase adopted as that of January, and the claim as being for the overcharge against him for the shares then bought by the company. This claim plaintiff was entitled to recover from the company, and was now merged in his judgment against it. Although that judgment stood unchallenged, it could not be regarded as the measure of the directors' liability in respect of the frauds (*Solloway* v. *Johnson*, [1934] A.C. 193, at 206). Before a director can be held liable for the acts of his company there must be established, (1) fraud of the company, and (2) loss or damage to the customer attributable to that fraud, or benefit accruing to the director from the fraud (*Solloway* v. *Johnson*, *supra*, at 207-8). In the present case, both fraud of the company and loss or damage (consisting in the excess or overcharge paid by plaintiff as aforesaid, the return of which he had been unable to secure) were established. Plaintiff should have judgment against S. and M. (and the company) to the extent of the moneys paid by him to the company for the 7,000 shares in excess of the actual market price as paid by the company for them on January 13, 1930, and the proper brokerage charges based on that price; and interest on that excess from January 13, 1930.

(2) As to the collateral: Plaintiff's claim for damages for conversion was defeated by his retention of the shares delivered to him as return of

the collateral. As to a claim based on agency: Judgment, obtained against the company, for the profits, could be obtained against the directors only on proof of the two elements aforesaid, fraud and loss, "loss" including benefit accruing to the directors attributable to the fraud. By retaining the shares plaintiff had elected to treat them as being the very shares that he deposited as collateral. Securing their return had not cost him anything. The withholding of the profits from him was not in itself a loss to him, because any right he might have to recover them was based, not upon a theory that they belonged to him or that he had lost what the agent had gained, but rather upon the broader doctrine of morality,—that good faith and honest dealing forbid an agent to make secret profits and require him to account for any made. (*Parker* v. *McKenna,* L.R. 10 Ch. App. 96, at 118; *Hutchinson* v. *Fleming,* 40 Can. S.C.R. 134). Therefore plaintiff could not be said to have suffered "loss or damage" in respect of the collateral. His claim for the secret profits (necessarily, for reasons aforesaid, based on assumption of agency, and precluding all ground partaking of the nature of tort) could only be allowed against the directors on proof that they had either received the profits or derived some benefit attributable to the fraud. They could not have made profit directly, because they were not, the company alone being, the plaintiff's agent. While plaintiff had a right to sue them for profit (as inferentially appears from *Solloway* v. *Johnson, supra,* at 207), yet no foundation was laid, either in the pleadings or evidence, upon which a conclusion could be based that they secured profits, or any benefit to themselves attributable to fraud. On this branch, therefore, plaintiff's appeal failed.

Judgment of the Court of Appeal for Ontario, [1934] O.R. 464, reversed in part.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1), which (Macdonnell J.A. dissenting) allowed the appeal of Solloway and Mills, the present respondents (defendants), from the judgment of Kerwin J. (2), who (subject to a correction in the amount for which judgment should be entered) dismissed their appeal from the report of the Assistant Master (by whom the action was tried, pursuant to an order that the action be referred to the Master of the Supreme Court of Ontario at Toronto for trial, under s. 67 of *The Judicature Act,* R.S.O. 1927, c. 88), in favour of the plaintiff (as against Solloway, Mills & Co. Ltd., a company incorporated under the laws of the Province of Ontario, and the said Solloway and Mills, for the difference between what the plaintiff was charged by said company for certain 7,000 shares in question and what the said company acquired them for when

(1) [1934] O.R. 464; [1934] 4 D.L.R. 36.

(2) [1934] O.R. 464, at 466-469.

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delivery was requested, and for the difference between what the said company received when it disposed of certain collateral and what it paid for it when required for delivery to plaintiff; with adjustment for interest and brokerage).

By the said judgment of the Court of Appeal for Ontario, the action was dismissed as against the present respondents, Solloway and Mills.

The material facts of the case are sufficiently stated in the judgment now reported.

J. C. McRuer K.C. for the appellant.

A. G. Slaght K.C. and *R. I. Ferguson* for the respondents.

The judgment of the court was delivered by

DYSART J. (*ad hoc*)—This appeal from the Court of Appeal of Ontario has to do with claims made by a customer against directors of a stock brokerage company, arising out of fraudulent dealings by the company, instigated by the directors, in connection with, (1) shares which the company bought, and delivered to the customer in professed execution of the customer's previous order to buy such shares for him on margin, and (2) shares which the customer deposited with the company to secure that margin. For convenience, the two groups will be considered separately.

The action, as commenced by the customer, was against four defendants,—Solloway, Mills & Co. Ltd. (hereinafter referred to as the Dominion Company), Solloway, Mills & Co. Ltd. (to be called the Ontario Company), Isaac W. C. Solloway and Harvey Mills. Before trial, the Dominion Company, being then in bankruptcy, was eliminated as a defendant because leave to proceed against it had not been obtained as required by the *Bankruptcy Act*. The trial took place before the Assistant Master of the Court on a reference, and judgment was obtained for a large sum in favour of the plaintiff against the Ontario Company and the two individual defendants. On appeal, that judgment was affirmed by Kerwin J. for the sum of $55,922.98, but was subsequently reversed as to the two individual defendants by the Court of Appeal, Macdonnell J.A. dissenting. From that reversal this appeal is taken by the customer.

Dealing with the first group of shares: On October 16, 1929, the Ontario Company agreed to act as the agent and broker of the customer in purchasing for him 7,000 shares of the Sudbury Basin Mines Ltd. on the Toronto Stock Exchange at market prices on margin. In due course, the company, by a series of "bought notes," notified the customer that it had bought for his "account and risk" the ordered shares, and had charged his account with the price thereof, namely, $48,937.50, plus brokerage fees. The bought notes also stated that the purchases were

> made subject in all respects to the rules, by-laws and customs existing at the time at the Exchange * * *

and

> with the distinct understanding that the actual delivery is contemplated,

and that

> all securities * * * may be loaned * * * or * * * pledged * * * for the sum due thereon or for a greater sum * * *, without further notice to the customer.

The company thereafter rendered periodical accounts showing the customer's indebtedness for the above sums together with interest thereon, and showing nothing to suggest that the marginal securities were in any degree inadequate to satisfy the marginal requirements. This state of things continued until the transaction was closed in January, 1930.

Under the terms of the accepted order for purchase, and the representations regarding its execution, there was a legal duty upon the company to get delivery of the shares so bought for its customer, and to carry them ready for delivery to him whenever that delivery might be demanded (*Conmee* v. *Securities Holding Company* (1)); or, at least, bearing in mind that, in contemplation of law, one share of stock is as good as another share of the same denomination, and that physical certificates themselves are merely evidence of the shares, the company was bound to have and to keep on hand at all times a sufficient number of such shares available for that delivery (*Solloway et al.* v. *Blumberger* (2)).

Contrary to its contractual duty and to its representations, the company did not fully execute the customer's

(1) (1907) 38 Can. S.C.R. 601.

(2) [1933] Can. S.C.R. 163, at 167.

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order. True, it did go upon the Exchange and buy 7,000 shares of the ordered stock, but at the same time it virtually nullified that purchase by selling shares of the same denomination on its own account. The consequence of this selling was that, in accordance with the Stock Exchange practice, the company's sales of each day were set off *pro tanto* against its purchases of the day, and only the excess, if any, of the purchased shares over the sold shares were, at the close of the day's trading, delivered to the company. In the result, the company took delivery of few, if any, of the shares so bought for the customer. Nor did it have on hand or carry other such shares from which it could make delivery if and when required. Thus the company did not fully execute the customer's order in that, although it bought, it did not get or carry, the shares so ordered.

On January 13, 1930, the customer called for delivery of the 7,000 shares. He was then told that the total amount owing for price, brokerage and interest, was $50,334.92. The company at the same time went upon the market and bought 7,000 shares of the stock for approximately $25,000 and delivered them to the customer as and for the shares which he had ordered on October 16, 1929. The customer accepted the shares, and paid the amount demanded, believing that the shares were those which he had ordered on October 16, 1929, and that he was contractually bound to accept and pay for them.

All that the company did in connection with these shares in breach of its duty, was done in pursuance of a general scheme or system whereby the company sold shares when its customers bought, using the customers' shares to make delivery of its own sales. This system was so extensively practised that the company was at times "short" 100,000 shares of this particular stock. The system had been inaugurated by these two individual defendants some years before when as partners under the name of Solloway, Mills & Co. they conducted the brokerage business which in substance was continued through successive transfers down to the date of the transactions now under review. The first of these transfers took place on May 31, 1928, when the partners turned their Dominion-wide business over to the Dominion Company, which they had organized to take over

the business; and the second was on November 30, 1928, when the Dominion Company transferred the Ontario portion of the business to the Ontario Company which the original partners had likewise organized to accept this transfer. There is some question as to the completeness of these transfers, but there is no doubt that the "system" was carried on without change or interruption by the successive owners and operators of the business.

The active participation of the individual defendants in the fraudulent scheme or system as conducted by the Ontario Company was made possible and probable by the facts that, as officers and almost the sole shareholders of the Dominion Company, which in turn owned practically all the shares of the Ontario Company, they stood to benefit substantially from all profits or gains made by the Ontario Company; and that, as high officials and directors of the Ontario Company, they controlled and directed all the business and practices of that company, including this system of making profit. Positive evidence was given at the trial that the directors did take an active part in directing the operations of the system, and, although available at the trial, they did not give testimony in denial—a reticence on their part from which strong inferences may properly be drawn. The Assistant Master has expressly found as a fact that the fraud was the concerted action of the Ontario Company and the two directors—a finding that is amply supported by the evidence, and has not been questioned in any of the appeal judgments.

Before examining the claims put forward in this action, it will be helpful to consider briefly what remedies were open to the customer, and how far they were affected or circumscribed by his own conduct. In the first place, it is clear that on discovering the fraud, the customer had the choice either of retaining the shares or of rejecting them. If he retained them he would thereby ratify or adopt the action of the company; in other words, would acknowledge that in so buying the shares the company acted as agent for him under some authority which, if not previously given, would then be conferred so as to relate back to the time of the purchase; and the only remedy open to him would be to hold the company to a strict accounting as his

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agent. The customer here did elect to retain the shares—he had previously taken delivery of them, and he never afterwards returned them, nor offered to return them. A further consequence of his retention of the shares would be to deprive him of the right which he otherwise would have had to sue for the conversion of the shares, because conversion presupposes that title to the shares had passed from him to someone else, whereas his retention of them was a denial of that supposition. Further, retention after election amounts in law to a waiver of the conversion, not only against the converting company, but against all who participated in the conversion, including the two directors; because the waiver extends to the entire cause of action, absolving all the joint tort-feasors; *Buckland* v. *Johnson* (1).

The purchase which was adopted must have been either that of October 16, 1929, or that of January 13, 1930. It could not possibly be both, because there could not in this transaction be more than one purchase of these shares by the company for the customer. The adoption of one purchase necessarily means that the other was not adopted, and so was left on the company's hands as its own, and disappears from the case. If the October purchase were adopted, it would have to be on the assumption that, contrary to the facts, but consistent with the company's representations, the company acquired the shares in October, and thereafter carried them until it delivered them on January 13; if, on the other hand, the purchase of January were adopted, it would assume that the shares had not been purchased for the customer prior to January. In either case, the customer's remedy would be based not on conversion but on agency, and would seek to recover from the agent all secret profits made during the agency.

We shall now see how the customer framed his action. In his statement of claim he alleges, *inter alia,* that on October 16, 1929, he employed the company as his agent and broker to buy for him 7,000 shares; that the company repeatedly represented that it had executed the order; that in fact the company never fully executed the order; that on January 13, 1930, the company, without knowledge or

(1) (1854) 15 C.B. 145.

acquiescence of customer, bought 7,000 shares and delivered them to him; that the company then by false representations induced him to pay for these shares a sum far greater than the actual price it had paid for them; and that the company so acted in pursuance of a system of fraud in which the directors actively participated. In his prayer for relief he asks for,—

(*b*) The recovery of $28,637.50 paid by the plaintiff to the defendant company upon the representation that the defendant company had paid for the account of the plaintiff the sum of $48,937.50 for 7,000 shares of Sudbury Basin Mines Limited purchased for the account of the plaintiff, when in fact it paid $20,300.

This pleading also contains averments that the company "converted and sold" the shares in October, and asks for general damages.

It is to be observed that the customer here seeks to pursue two divergent courses, one based on agency, the other on tort. The conversion claimed is stated only in a secondary way, and at any rate is defeated by the retention of the shares; and if the agency claim, which is stated more explicitly, is to stand, the conversion claim must be rejected, because no one may on the same set of facts sue in tort and agency at the same time, such causes of action being so different, if not opposite in their natures, as to be incompatible with each other: *Smith* v. *Baker* (1); *Rice* v. *Reed* (2).

The action must therefore be considered as having been laid in agency. It is also clear that the purchase which has been adopted is that of January, and the claim is for the overcharge made on that day. As thus regarded, the claim is entirely consistent with the retention of the shares, as well as with the adoption of the agency, and entitles the customer on proof submitted in support thereof to recover from the company all moneys which on January 13 he paid in excess of the actual price, plus proper brokerage fees. That claim is now merged in the judgment which stands against the company, and which to that extent is hereby affirmed.

Although the judgment against the company stands unchallenged, it cannot be regarded as the measure of the directors' liability in respect of the frauds, because, as

(1) (1873) L.R. 8 C.P. 350. (2) [1900] 1 Q.B. 54.

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stated by Lord Blanesburgh in delivering the judgment of the Judicial Committee in *Solloway* v. *Johnson* (1), a case in which similar questions were under consideration, and in which the appellant was a director,

> So far their Lordships have been dealing with the case as it affects indifferently both the defendant company and the appellant. But the actual liability of the appellant is a thing distinct and apart from that of the company, and the judgment, even if well founded as against the company, may be incapable of support as against him.

Before a director can be held liable for the acts of his company two facts must be established: (1) fraud of the company, and (2) loss or damage to the customer attributable to that fraud, or benefit accruing to the director from the fraud (*Solloway* v. *Johnson, supra,* at pp. 207-8).

In the case under review the fraud of the company is clearly established. The loss would seem to be no less clear. The customer was induced by misrepresentations of his agent to part with a large sum of money (over and above the actual amount which he should have paid), and has not since been able to secure the return of that excess. Surely that sum represents loss or damage to him. In the Court of Appeal it was said that the customer suffered no damage because "he got the shares that he purchased at the price at which he agreed to purchase them." With this view I cannot agree. The shares which the customer got and retained had not been purchased by him, nor at any agreed price. The order of October to buy at October prices was never fully executed and so came to naught, and relieved the customer of any contractual obligation to take any shares at any price; and no order for purchase was subsequently given by him. The January purchase by the company was at January prices; but here again there was no order, and so no obligation on the customer to take or retain the shares at even January prices,—certainly not at October prices. By electing to retain these shares after discovering the facts, the customer bound himself to recoup his agent for the actual price it had paid for the shares, and to compensate it for its brokerage services. That is the position he now takes. The excess or overcharge, as collected by the agent, resulted in something to the cus-

(1) [1934] A.C. 193, at 206.

tomer that cannot be designated as anything less than direct loss or damage.

The customer is therefore entitled to recover from the director in respect of this first group of shares.

Turning now to the second group, namely, the 14,000 shares of Sudbury Basin Mines Limited deposited as security to maintain the margin: The plaintiff deposited 3,500 of these shares with the company on October 16, 1929, when placing his order to buy, and thereafter, keeping pace with the company's calls for additional margin in a falling market, he deposited at varying intervals other shares of the same stock in smaller lots, until by December 16th he had put up a total of 14,000 shares. This collateral, in the language of the Assistant Master, "was disposed of, in most instances, immediately it was deposited." In all 11,800 of the shares were so disposed of for sums approximating $65,320. Then on January 13, 1930, in order to satisfy the customer's demand for the return of his securities when closing out his account, the company went upon the market and repurchased 11,800 of the shares for about $32,000, and these, along with the 2,200 shares which it had not sold, it delivered to him as and for the shares which it had received from him on deposit. The company retained the secret illegal profit of about $33,320 which it had made on the sale and repurchase of this collateral.

There never was at any time the slightest possible right in the company to sell the collateral shares, because (1) there was no margin to sustain where the October order to buy had not been fully executed; and (2) even apart from that, the falsely asserted marginal requirements had always been met by the customer promptly and fully and to the satisfaction of the company.

The sale and repurchase of these shares had been carried out in pursuance of another branch of the same general scheme or system which has already been described, and were, in the finding of the Assistant Master, fraudulently perpetrated by the concerted action of the company and the directors.

The discussion in regard to the first group of shares will serve to shorten the consideration of this group. On dis-

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covering the fraud the customer had the right to (1) reject and return the 11,800 shares, and sue the company and its directors as tort feasors for converting his shares, claiming the proceeds of the conversion sale or the value of the shares; or (2) to retain the shares and sue the company as his agent for the profits secretly made by it in the course of the agency and to include as parties to the action the directors who benefited from the fraud.

In his statement of claim on this branch of the case, the customer alleges only that the company "wrongfully converted and sold" the shares in pursuance of a conspiracy existing between itself and its directors, and claims generally for damages. The pleading also lays some indirect foundation for the specific prayer in which he asks for secret profits in these terms:—

> 28. (*a*) The sum of $33,320, being the profit made by the defendants on the sale of 11,800 shares of Sudbury Basin Mines Limited stock delivered by the plaintiff to the defendant company, and sold by it and repurchased for delivery to the plaintiff at a lesser price.

The claim for damages for conversion is defeated by the retention of the shares, and must be rejected. The specific claim for "profit" remains alone for consideration; and although direct allegations in support of the claim are wanting in the pleading, there are, it would seem, sufficient indirect allegations which, when coupled with the retention of the shares and the general evidence offered, may serve to form a basis for dealing with this group of shares upon an agency footing.

The judgment obtained against the company for the profits, although not challenged by the bankrupt company, can be upheld as against the directors only upon proof of the two elements already discussed, namely, fraud and loss. Loss, as we have seen, includes benefit accruing to the directors attributable to the fraud. By retaining the shares the customer has elected to treat them as being the very shares that he deposited as collateral. But, in order to secure their return, he did not, as he did in the case of the 7,000 shares, pay any money, nor part with anything else, nor enter into any obligation to give or do anything. Assuming that he is entitled to the profits, the withholding of the profits from him is not in itself a loss to him, because any right that he may have to recover those

profits is based upon the theory, not that they belong to him, nor that he has lost what the agent has gained, but rather is based upon the broader doctrine of morality,—that good faith and honest dealing forbid an agent to make secret profits out of the agency, or, if he has made profits, demand that he account for them to his principal: *Parker* v. *McKenna* (1); *Hutchinson* v. *Fleming* (2). On no ground, therefore, is it conceivable that the customer can be said to have suffered "loss or damage" in respect of these shares.

He is, however, entitled to the secret profits, but only by proving that the directors have either received the profits, or have derived some benefit attributable to the fraud. This claim for profits, it may be repeated, is based on the assumption of agency, and precludes all ground partaking of the nature of tort. In his prayer, the customer asks for "the profit made by the defendants"; and this may be taken as an indirect allegation that the directors derived benefit through the company, and not that they made profit directly. They could not have made profit directly, because they were not the agent of the customer—their company alone was the agent, as the customer alleges. If they directly participated in making the illegal profit, they might have been guilty of tort, but that has been waived. The right to sue them for such profit is very well established. In *Solloway* v. *Johnson, supra* (3), a case in which the customer claimed profit against a director, the claim was refused, because, in the language of Lord Blanesburgh, at p. 207,

> as has already been pointed out, no loss or damage attributable to the fraud is here proved: no benefit from any proved fraud is shown to have accrued to the appellant.

Inferentially, if proof had been furnished in that case, the claim would have been allowed. In the case before us no foundation is laid, either in the pleadings or in the evidence, upon which a conclusion could be based that the directors secured any benefit to themselves attributable to fraud; least of all that they have secured profits. If a contrary conclusion were drawn, it would be solely upon the assumption that the profits made by the Ontario Company found

(1) (1874) L.R. 10 Ch. App. 96, at 118.
(2) (1908) 40 Can. S.C.R. 134.
(3) [1934] A.C. 193.

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their way through the Dominion Company to the directors, but that is not shown; in the absence of the Dominion Company as a party to this action, it would not be feasible or possible to establish that as a fact.

On this branch of the case, therefore, the appeal must fail.

The general result, therefore, is:—

The appeal should be allowed and the judgment of Mr. Justice Kerwin restored with respect to the group of 7,000 shares, but only to the extent of the moneys paid by the customer to the Ontario Company in excess of the actual market price as paid by that company for the shares on January 13, 1930, and the proper brokerage charges based on that price. Interest on this excess is allowed to the customer from January 13, 1930.

In respect of the group of 14,000 shares, the appeal should be dismissed.

As to costs: The appellant should have the costs of the action against the respondents, Isaac W. C. Solloway and Harvey Mills, except the costs exclusively attributable to the issue on which the appellant fails. The appellant should pay to the respondents the costs of the appeal to Mr. Justice Kerwin and of the appeal to the Court of Appeal. The appellant should have his costs of the appeal to this Court.

Appeal allowed in part, with costs.

Solicitors for the appellant: *McRuer, Mason, Cameron & Brewin.*

Solicitors for the respondents: *Slaght & Cowan.*

THE CORPORATION OF THE CITY OF TORONTO ..... APPELLANT;

AND

FAMOUS PLAYERS' CANADIAN CORPORATION LTD..... RESPONDENT.

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* Mar. 16.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and taxation—Income assessment—Company subject to business assessment in respect of occupation of office premises—Company also assessed for income—Question whether assessed income was derived from the business in respect of which the company was subject to business assessment—Assessment Act, Ont., R.S.O. 1927, c. 238, ss. 9, 10.

APPEAL by the City of Toronto from the judgment of the Court of Appeal for Ontario (1), dismissing its appeal from the order of The Ontario Municipal Board (2), which held (affirming in the result, subject to amendment, the judgment of Macdonell Co. C.J. (3)) that, upon the facts established in this case, the respondent company had only one business, that of Theatre Controller and Operator (and, to give its proper description as such, the assessment roll should be amended), in respect of which business it was liable to business assessment, and that all its investments and all income derived therefrom (in 1932, the year in question) were made and received in connection with that business, and could not, therefore, be assessed for income (except in the sum of $3,586.40, admittedly received from investment of surplus funds in public securities).

On the appeal to the Supreme Court of Canada, after hearing the argument of counsel for the appellant, the members of the Court retired for consultation and, after their return to the Bench, the Court, without calling on counsel for the respondent, delivered judgment orally, dismissing the appeal with costs. The Chief Justice stated that the Court had considered fully the useful arguments of Mr. Colquhoun and Mr. Kent, and had reached the conclusion that it would be impossible to set aside the

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

(1) [1935] O.R. 314; [1935] 3 D.L.R. 327.

(2) Reported in part: [1935] O.R. 314, at 320-321; [1935] 3 D.L.R. 685, at 690-691.

(3) [1935] O.R. 314, at 315-320; [1935] 3 D.L.R. 685.

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findings of the Board on the ground that, on the evidence, they were legally inadmissible; and considered it equally impossible to hold that, given the findings, the order of the Board was wrong in law.

Appeal dismissed with costs.

C. M. Colquhoun K.C. and *J. P. Kent* for the appellant.

J. M. Bullen K.C. and *R. M. Fowler* for the respondent.

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* Mar. 12, 13.

JOHN H. RODD (PLAINTIFF).....APPELLANT;

AND

ARTHUR D. CRONIN AND IRENE E. CRONIN (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Sale of land—Objection to title—Purchaser terminating contract—Vendor claiming specific performance—Extent of title agreed to be conveyed—Vendor claiming rectification of formal contract—Alternative claim for specific performance of formal contract, with reference as to title.

Plaintiff sued for specific performance of an agreement of sale of land and land covered with water from him to defendant. Shortly after the agreement, the Crown in the right of the Dominion of Canada had asserted a claim to a part of the land as having passed to it at Confederation, under s. 108 of the *B.N.A. Act*, as part of a public harbour, and, on plaintiff's refusal to remove this objection to title, defendant had purported to terminate the agreement. The trial judge found (sustaining plaintiff's claim) that, under the agreement, plaintiff was selling only such title as he had in the lands, and granted specific performance. This judgment was reversed by the Court of Appeal for Ontario, which found that plaintiff had agreed to convey a good and sufficient title to the lands, and dismissed his action. Plaintiff appealed to this Court.

Held: Appeal dismissed. A certain executed formal document, under which plaintiff was bound to convey a good and sufficient title to the lands, constituted the only binding agreement, and plaintiff had established no adequate case for reformation in the sense claimed. The trial judge apparently failed to appreciate the evidentiary weight which must be ascribed to the fact of execution of that document and the legal consequences of that fact. As to defendant's objection to title because of said claim of the Crown—the evidence tended to show that part at least of the westerly portion of the lands was used as a public harbour before Confederation, and warranted the court in refusing to force such a doubtful title on defendant.

The court refused to plaintiff a decree of specific performance of the agreement as it stood, with a reference as to title, because, (1) when

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

plaintiff took the stand that defendant was bound to accept such title as he had, he was virtually repudiating his obligations under the formal agreement, and defendant, in view of the situation created by the Crown's claim, had just and solid grounds for his action in terminating the agreement, which thereupon ceased to have any virtue as a foundation for any claim by plaintiff; (2) no such claim or offer to accept such a decree (alternatively to rectification of the formal agreement) had been made by plaintiff until argument at trial after completion of the evidence, and, in view of plaintiff's persistent attitude up to that time, such claim should not be allowed in the appellate courts.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario which, reversing the judgment of Jeffrey J., dismissed the action, which was brought, by plaintiff as vendor, for specific performance of an agreement for sale of lands. The material facts of the case are sufficiently stated in the judgment now reported. The appeal to this Court was dismissed with costs.

R. S. Rodd K.C. for the appellant.

E. C. Awrey K.C. for the respondents.

The judgment of the court was delivered by

KERWIN J.—At the conclusion of the argument of counsel for the appellant, we considered that no grounds had been shown upon which this Court could interfere with the judgment of the Court of Appeal, and it was therefore unnecessary to call upon counsel for the respondents.

In his statement of claim, the appellant asked specific performance of what he alleged was the agreement between himself and the respondent, Arthur D. Cronin, but made no reference to a formal written document executed by the parties on June 27th, 1933. The said respondent, in his statement of defence, alleged that the contract between himself and the appellant was embodied in this formal document, in which the lands that were the subject of the sale were described by metes and bounds, to which the appellant agreed to give a good and sufficient title; that, the title to a large part of the lands described being still in the Crown, it was understood that the respondent should proceed with the necessary application to the Public Works Department under the *Navigable Waters' Protection Act* for approval of the construction of a dock for the purpose of which the respondent was acquiring the pro-

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perty; that, the application of the respondent to the Public Works Department having been brought to the attention of the Department of Marine, that Department asserted a claim to the site of the proposed structure as part of a public harbour which had passed to the Dominion at Confederation by force of section 108 of the *British North America Act;* that the respondent, having ascertained that the appellant had neither a title in himself nor power to require conveyance of the title, and the appellant having "notified the respondent that he would not clear up the title," rescinded the contract.

By paragraph 3 of the Statement of Claim, the appellant averred:—

> Although the said defendant was to take the title as patented he subsequently desired a definite patent carrying the lands to the harbour line, and after some negotiation the plaintiff undertook to obtain the patent from the Department of Lands and Forests of the Province of Ontario, each of the parties, however, to pay half of the fee to be charged by the Department for such patent.

and by paragraph 3 of the reply:

> * * * the fact is that this defendant was to accept the title to the lands as patented by the Crown, but subsequently at his request, and to hasten the closing of the sale, the plaintiff did undertake to and did obtain a confirmatory and extended grant from the Crown in the right of the Province of Ontario, but at the joint expense of both as the agreement shows. No other or different agreement or understanding in respect thereto was ever made or come to.

By his amended reply the appellant set up a claim for reformation of "the agreement sued upon herein" to bring it into conformity with the agreement so alleged in paragraph 3 of his various pleadings.

At the trial, the appellant maintained the position he had assumed in his pleadings, namely, that the respondent had agreed to purchase from the appellant such title as he had under the patents in existence on May 11th. His counsel is thus reported at page 208 of the case:—

> Mr. RODD: We say with regard to that in the first place there was no agreement at all to give more than the lands which were covered by the patent, and if you should find that is the case then no matter of defence—
>
> His LORDSHIP: You mean the position you take, under a proper interpretation of the agreement you agree to convey to him only such interest as you have in the land.
>
> Mr. RODD: That is it. All the correspondence fully bears that out.
>
> His LORDSHIP: Only such interest as you in fact had, or you purport to have.
>
> Mr. RODD: No matter how serious it might become that is the first step.

On this issue the appellant obtained from the learned trial judge a finding in his favour. "I am of opinion," the learned judge said, "as before expressed, that the defendant purchased from the plaintiff such title as he, the plaintiff, had in the property." It was of this agreement that specific performance was granted at the trial.

The Court of Appeal reversed the judgment of the learned trial judge. They took the view that the document executed by the parties on June 27th (under which the appellant was bound to convey a good and sufficient title to the lands described) constituted the only binding agreement, and that the appellant had established no adequate case for reformation in the sense in which it was claimed by him. With this we agree. The learned judge failed, it would appear, to appreciate the evidentiary weight which must be ascribed to the fact of the execution of the document of June 27th and the legal consequences of that fact.

Under that agreement, the appellant was bound to establish a title in himself in fee simple to all the lands described therein. He contends that he has done so, but, in connection with the various objections raised against such contention by the respondents, it is necessary to refer only to the claim made by the Department of Marine on behalf of His Majesty the King in the right of the Dominion of Canada to that part of the lands described in the agreement that had not been patented before Confederation. This claim arises under section 108 of the *British North America Act:* "The Public Works and Property of each Province enumerated in the Third Schedule to this Act, shall be the Property of Canada." Item two of the third schedule is "Public Harbours." The evidence tends to show that part at least of the westerly portion of the lands in question was used as a public harbour before July 1st, 1867, and warrants the court in refusing to force such a doubtful title on the purchaser.

It was also stated that, even if the formal agreement be not rectified, the appellant was willing to accept a decree for specific performance of it as it stands, with a reference as to title. We were informed by his counsel that this position was taken on behalf of the appellant for the first time in argument before the trial judge after the comple-

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tion of the evidence. He repeated this offer in the Court of Appeal.

There are two distinct grounds on which this indulgence must be refused. First, the respondent was justified in putting an end to the agreement. The appellant, in taking the stand that the respondent was bound to accept such title as he had, was virtually repudiating his obligations under the agreement of the 27th of June. And the respondent was in no sense taking advantage of a mere technical situation. The claim of the Dominion Government, so long as it was pressed, constituted a real cloud upon the title. When the appellant repudiated any obligation to convey any title other than that which he possessed, the respondent, in view of the situation created by the Government's claim, had just and solid grounds for his action in terminating the agreement, which thereupon ceased to have any virtue as a foundation for any claim by the appellant.

Moreover, we agree with the Court of Appeal, that in view of the appellant's persistent assertion of his right to force upon the respondent his own title, whatever its defects might be, down to the trial, and at the trial with success, he could not with justice be allowed in the Court of Appeal to claim relief by way of the specific enforcement of the agreement which he had all along repudiated. The claim has no place in the pleadings; no hint of it was given during the course of the trial until, as already observed, after all the evidence—which had not been directed to issues that might have been raised by such a claim—had been presented. Further comment is superfluous; the appellant cannot be allowed to play fast and loose.

A minor point raised by the appellant is that he should be recompensed for the repairs made by him to the summer cottage which was to be given him in exchange, and which his son-in-law occupied for one season. In taking possession of and making repairs to the cottage, before consummation of the agreement, the appellant took the risk of the matter not being completed. Furthermore, it is to be noted that the respondent Cronin had counter-claimed for an occupation rent of these premises. This counter-claim was dismissed without costs by the trial judge and no appeal was taken by Cronin. While there is no evidence as to

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the rental value of the property, one claim might very well be taken to offset the other.

In view of the result we need not consider the position of the respondent, Irene E. Cronin, the wife of the respondent, Arthur D. Cronin.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Rodd, Wigle, Whiteside & Jasperson.*

Solicitors for the respondents: *Furlong, Furlong, Awrey & St. Aubin.*

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* Feb. 17.

WINNIPEG ELECTRIC COMPANY (DEFENDANT) ..... } APPELLANT;

AND

LILIAS ROADHOUSE (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Passenger injured through slipping on roadway when alighting from defendant's bus—Condition of place where bus stopped—Bus not drawn up to sidewalk—Findings by jury of negligence of defendant and against contributory negligence of passenger—Evidence—Defendant's duty and liability in law.

APPEAL by the defendant from the judgment of the Court of Appeal for Manitoba (1) allowing the plaintiff's appeal from the judgment of Adamson J. (2).

On February 19, 1934, the plaintiff was a passenger on one of the defendant's buses in the city of Winnipeg, and when alighting therefrom slipped on the roadway and fell, receiving injuries, in respect of which she brought the action, claiming damages. At the trial, before Adamson J. with a jury, the jury found the defendant guilty of negligence

to the extent that the bus was not drawn into the curb to allow the plaintiff to alight. Taking into consideration where the bus did stop and where the plaintiff did alight, the road was in a dangerous and slippery condition.

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

(1) 43 Man. L.R. 184; [1935] 2 W.W.R. 194; [1935] 3 D.L.R. 246.

(2) 43 Man. L.R. 184, at 184-187.

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They found damages in the sum of $2,500. They found the plaintiff not guilty of contributory negligence. The trial judge (1) held that there was no evidence "that the motorman acted unreasonably or otherwise than as a prudent man would have acted," that "there was no known or obvious danger at this landing place," that "there was nothing to indicate that there was more danger here than at any other place where he might have stopped," that the case fell fairly within *Brunstermann* v. *Winnipeg Electric Ry. Co.* (2), that s. 66 of *The King's Bench Act*, Statutes of Manitoba, 1931, c. 6, does not preclude the trial judge from entering a proper verdict, and one in accordance with the law, and one that will be the final judgment, that upon the jury's finding of fact there was no legal liability; and he accordingly dismissed the action with costs. The Court of Appeal (3) (Dennistoun and Trueman JJ.A. dissenting) allowed the plaintiff's appeal with costs and ordered that judgment be entered in favour of the plaintiff for $2,500 and costs.

On the defendant's appeal to the Supreme Court of Canada, after hearing argument of counsel for the appellant, the members of the Court retired for consultation, and on their returning to the Bench, the Court, without calling on counsel for the respondent, delivered judgment orally, dismissing the appeal with costs. The Chief Justice stated that Mr. Schroeder had argued the appeal with his accustomed earnestness and thoroughness; that the members of the Court had considered the matter and were quite satisfied that the majority of the Court of Appeal were right; that there was evidence to go to the jury, that the verdict of the jury was sufficient and that there was no ground upon which it could properly be set aside.

Appeal dismissed with costs.

W. F. Schroeder for the appellant.

J. T. Thorson K.C. for the respondent.

(1) 43 Man. L.R. 184, at 184-187.

(2) 31 Man. L.R. 212; [1921] 2 W.W.R. 21.

(3) 43 Man. L.R. 184; [1935] 2 W.W.R. 194; [1935] 3 D.L.R. 246.

THE TORONTO GENERAL TRUSTS CORPORATION ..... APPELLANT; * Mar. 23, 24. * April 21.

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AND

MILDRED GOODERHAM .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO

Insurance (sickness)—Policy issued in 1920 against disability from accident or sickness—Wife of insured designated as beneficiary—Sickness of insured in 1934—Question whether payments by insurance company during insured's disability belonged to committee of estate of insured or to insured's wife—Provisions of policy—Ontario Insurance Act, R.S.O. 1914, c. 183, s. 178 (in force when policy issued)—Subsequent statutory changes—Question as to retrospective effect—1922, c 61; 1924, c. 50; R.S.O. 1927, c. 222; 1928, c. 35; 1931, c. 49—"Continuous" policy—Right of wife to recover insurance moneys direct without intervention of committee.

In 1920, G., then 44 years of age, residing in Toronto, Ontario, obtained an insurance policy against disability from accident or sickness. His application therefor, attached to the policy, was for a "non-cancelable income policy," and designated his wife as beneficiary. By provisions of the policy, it expired one year from date except as it might be continued by renewal for terms of one year each (or by a certain period of grace), and until the insured became 60 years of age he should have the right to renew the policy from year to year by payment of premium. The policy was kept alive by payment of annual premiums. In 1934, G. was declared, under R.S.O. 1927, c. 98, to be incapable of managing his affairs, and a committee of his estate was appointed. The main question in dispute was whether the monthly payments made by the insurance company under the policy during G.'s disability belonged to the committee or to G.'s wife. Sec. 178 of the *Ontario Insurance Act,* R.S.O. 1914, c. 183, in force when the policy was issued, provided that where the contract of insurance or declaration provided that the insurance money should be for the benefit of a "preferred beneficiary" (that term including a wife), such contract or declaration should (subject as therein provided) create a trust in favour of such beneficiary and that "so long as any object of the trust remains the money payable under the contract shall not be subject to the control of the assured, or of his creditors, or form part of his estate." The committee contended that any trust thereby created in respect of the policy in question had been destroyed by subsequent statutory enactments.

Held: G.'s wife was entitled to the proceeds of the policy. By said designation of her as beneficiary and the operation of said s. 178, a trust was created in her favour; and it was impossible, on the general language of the subsequent amendments, to conclude that the legislature thereby destroyed or intended to destroy said trust or the operation and effect of the above quoted provision in said s. 178. (The subsequent enactments dealt with in the judgment included, *inter alia,* 1924, c. 50, ss. 114, 134, 135, 136, 139, 177 (3), 180; 1928, c. 35, ss. 4, 6 (2), and new statutory condition 19 substituted for that

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

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introduced in 1922 (c. 61); 1931, c. 49, s. 11 (2)). The policy in question was not an annual renewal policy, but a continuous policy, and the distinction (discussed) becomes of importance in considering changes in a general statute governing policies of insurance. Where, as in this case, the contract is of continuous insurance, kept alive, merely by payment of the stipulated annual premium, it requires very clear and precise language in general amendments to destroy a statutory trust created in favour of a named beneficiary at the time the policy was taken out. The subsequent amendments in question may have been intended to have, to a certain extent, retrospective effect, but when the language is not plain the new law ought to be construed so as to interfere as little as possible with vested rights and should not be given a larger retrospective power than one can plainly see the legislature intended (*Reid* v. *Reid*, 31 Ch. D. 402, at 408-409).

Held, further: The wife was entitled, as between her and the committee, to recover the insurance moneys direct from the insurance company without the intervention of the committee. (*National Life Assur. Co. of Canada* v. *McCoubrey*, [1926] Can. S.C.R. 277).

Judgment of the Court of Appeal for Ontario, [1935] 2 D.L.R. 329, affirmed in the result, with a variation declaring the wife's rights lastly above mentioned.

APPEAL by the Toronto General Trusts Corporation, Committee of the estate of Henry F. Gooderham (who was, by an order in the Supreme Court of Ontario, declared to be a person incapable of managing his affairs), from the judgment of the Court of Appeal for Ontario (1) allowing an appeal by Mildred Gooderham, wife of the said Henry F. Gooderham, from the order of Kerwin J. declaring that the said committee was entitled to the moneys theretofore paid and thereafter payable under a certain policy insuring the said Henry F. Gooderham against total disability from sickness. The judgment of the Court of Appeal set aside the order of Kerwin J. and declared that the said committee held the insurance moneys paid and would hold those thereafter payable under the policy in trust for the said Mildred Gooderham, the present respondent. The latter cross-appealed for variation of the judgment of the Court of Appeal, to provide that the moneys theretofore paid and thereafter to be paid under the policy should be declared to be payable and should be directed to be paid to her (i.e., that she was entitled to recover direct from the insurance company without the intervention of the committee).

(1) [1935] 2 D.L.R. 329; [1935] Ont. W.N. 138.

The material facts of the case, the material provisions of the policy, and the relevant statutory enactments, are sufficiently stated in the judgment now reported. The appeal to this Court was dismissed and the cross-appeal allowed, with costs throughout.

J. C. McRuer K.C. and *F. A. Brewin* for the appellant.

J. Jennings K.C. and *G. Lovatt* for the respondent.

The judgment of the court was delivered by

DAVIS J.—On June 24, 1920, Henry F. Gooderham, a barrister residing in the city of Toronto, then 44 years of age, applied to the Continental Casualty Company, incorporated by the State of Indiana, one of the United States of America, for a policy of insurance against total disability, and in pursuance thereof the company duly issued its policy on August 21, 1920, to Mr. Gooderham insuring him

against disability resulting either from accidental bodily injury or from sickness, if such disability from either cause originates while this policy is in force and results in continuous total loss of business time.

The indemnity payable for loss of business time as so defined was $500 per month and the annual premium was $100. The written application for the insurance designated Mildred Gooderham, wife of the insured, as beneficiary under the policy applied for. The policy was kept alive by payment of the annual premiums when, on January 8, 1934, a Judge of the Supreme Court of Ontario, under the provisions of chapter 98 of the Revised Statutes of Ontario, 1927, declared Mr. Gooderham to be a person incapable of managing his affairs, appointed the Toronto General Trusts Corporation to be Committee of his estate and ordered that it be referred to the Master of the said Court to propound and report a scheme for the management of the estate and for the maintenance of Mr. Gooderham.

The Continental Casualty Company did not dispute liability upon the policy and monthly payments of $500 as from the 26th of December, 1933 (being the day fixed by an order of a Judge of the Supreme Court of Ontario, dated March 22, 1934, for the commencement of the monthly payments), have been paid regularly by the company to the Committee.

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The question raised in these proceedings is whether or not these moneys belong to the Toronto General Trusts Corporation (appellant) as such Committee or to Mildred Gooderham (respondent), the wife of the insured, as the designated beneficiary. The company is not a party to the proceedings. The Trust Company moved before a Judge of the Supreme Court of Ontario, on notice to the wife and to the Public Trustee, for an order declaring it, as Committee of Mr. Gooderham's estate, entitled to the moneys payable under the policy in question. The learned Judge who heard the motion, declared in favour of the Committee; the wife appealed to the Court of Appeal of Ontario who reversed the order and declared in favour of the wife; and from that order the Committee appealed to this Court. It is only fair to the wife to say that her claim is not in fact an effort to deprive her husband of the fruits of the policy during the unfortunate period of his total disability but is an obvious effort to avoid these moneys becoming available to her husband's creditors who appear to have reached out for the moneys.

The appeal raises an interesting and important question as to the effect of the provisions of the Ontario *Insurance Act* in respect of this policy of accident or sickness insurance. Before considering the relevant provisions of the *Insurance Act* it is advisable that some observations be made upon the exact wording of the particular policy. The application made by Mr. Gooderham to the company, which was attached to the policy, was for a "non-cancellable income policy" to provide "$500 per month for disability." To one of several printed questions set out on the form of application,

> 9. Whom do you designate as beneficiary under policy applied for, and what relationship is such beneficiary to you?

Mr. Gooderham filled in the answer opposite the printed word "name:" "Mildred," and opposite the printed word "Relationship:" "Wife." The application contained an agreement by Mr. Gooderham to pay an annual premium of $100. The policy issued pursuant to this application states that

> After one year from its date this policy shall be incontestable as to the time of origin of any disability commencing thereafter.

and

> The indemnity payable for loss of business time as before defined and as hereinafter made payable is Five Hundred Dollars per month to

be paid in monthly instalments during the Company's liability on any claim.

The policy further states that

Its annual premium is One Hundred Dollars, to be paid in advance.

and provides that

The Company will pay said indemnity for loss of business time during the continuance of disability as defined above, until such time as the Insured engages in a gainful occupation; provided, however, that no indemnity shall be paid for the first month of any period of disability.

Then follow in the policy what are termed "Statutory Provisions." There were no such statutory provisions, at the date of the issue of the policy, in the *Ontario Insurance Act* and these provisions in the policy were substantially taken from the then Dominion *Insurance Act*. They have, of course, the force of contract between the parties. It is necessary to refer specifically to a few of these provisions or parts of them.

1. This policy, including the endorsements and attached papers, if any, contains the entire contract of insurance except as it may be modified by the Company's classification of risks and premium rates as provided in paragraph 6 of these statutory provisions.

2. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties. No such statement shall be used in defense to a claim under this policy unless it is contained in the copy of the application for this policy which is endorsed hereon or attached hereto.

5. Upon request of the Insured and subject to due proof of loss all accrued indemnity for loss of time on account of disability will be paid at the expiration of each thirty days during the continuance of the period for which the Company is liable, and any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of due proof.

7. Written notice of injury or sickness on which claim may be based must be given to the Company within thirty days after the date of the accident causing such injury or within fifteen days after the commencement of disability from such sickness.

8. Such notice given by or in behalf of the Insured or beneficiary, as the case may be, to the Company at its Head Office, in Toronto, Canada, or to any authorized agent of the Company, with particulars sufficient to identify the Insured, shall be deemed to be notice to the Company. Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

9. The Company upon receipt of such notice, will furnish to the Claimant such forms as are usually furnished by it for filing proofs of loss. * * *

Following the statutory provisions in the policy are certain provisions termed "Miscellaneous Provisions," to several of which reference should be made.

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1. This policy is issued in consideration of the statements and agreements contained in the application therefor and the payment of an annual premium as therein provided. The falsity of any statement in the application, materially affecting either the acceptance of the risk or the hazard assumed hereunder, shall bar all right to recovery under this policy.

2. This policy becomes effective upon its issue and delivery, if said annual premium has then been paid in full, but otherwise it does not become effective until said premium has been so paid. It expires at 12 o'clock noon (Standard time at residence of Insured) one year from date except as it may be continued by renewal for terms of one year each or by the period of grace hereinafter given.

4. Until the Insured becomes sixty years of age, he shall have the right to renew this policy from year to year by the payment of premium as herein provided. * * *

6. The Company shall have the right and opportunity to examine the person of the Insured when and so often as it may reasonably require during the pendency of claim hereunder.

8. All indemnities of the policy are payable to the insured at the Head Office of the Company in Canada. Upon the payment of claim hereunder any premium then due or unpaid or covered by any note or written order may be deducted therefrom.

11. Strict compliance on the part of the Insured with all the provisions of this policy is a condition precedent to recovery hereunder and any failure in this respect shall forfeit to the Company all right to any indemnity.

It is plain that neither the application nor the policy covered indemnity for accidental loss of life, but only indemnity against disability.

Before departing from the exact language of the policy and the application therefor, it is to be noted that the policy itself does not specifically say to whom the proceeds of the policy are to be paid. The policy merely states that it "hereby insures" Mr. Gooderham "hereinafter called the Insured" against disability. But the application for the policy specifically designated the wife as the beneficiary and nos. 7 and 8 of the Statutory Provisions provide that written notice of injury or sickness on which claim may be based may be given "by or in behalf of the Insured or beneficiary, as the case may be, to the Company." No. 2 of the Statutory Provisions expressly states that "the application for this policy" is "endorsed hereon or attached hereto." And by no. 1 of the Statutory Provisions, "This policy, including the endorsements and attached papers, if any, contains the entire contract of insurance." Then as to the right of renewal, no. 2 of the Miscellaneous Provisions provides that the policy expires one year from its date "except as it may be continued by renewal for terms of one year each or by the period of grace hereinafter given."

And by no. 4 of the Miscellaneous Provisions, "Until the Insured becomes sixty years of age, he shall have the right to renew this policy from year to year by the payment of premium as herein provided." Further, the application was for a "non-cancelable income policy" on the basis of an annual premium of $100.

At the date of the issue of the policy, the *Ontario Insurance Act* then in force was that contained in the Revised Statutes of Ontario, 1914, Ch. 183, and amendments thereto. By sec. 2 (6) "beneficiary" included every person entitled to insurance money; by sec. 2 (19) "declaration" included any mode of designating in writing a beneficiary; and by sec. 2 (35) "insurance of the person" included insurance against death, sickness, infirmity, casualty, accident, disability, or against any change of physical or mental condition. Sec. 171 (3) provided that,

> The assured may designate the beneficiary by the contract of insurance or by an instrument in writing attached to or endorsed on it or by an instrument in writing, including a will, otherwise in any way identifying the contract, * * *

Sec. 178 defined the rights of preferred beneficiaries, and, the first two subsections being vital to the question in issue in this appeal, I shall set them out in full:

> (1) Preferred beneficiaries shall constitute a class and shall include the husband, wife, children, grand-children and mother of the assured, and the provisions of this and the following three sections shall apply to contracts of insurance for the benefit of preferred beneficiaries.
>
> (2) Where the contract of insurance or declaration provides that the insurance money or part thereof, or the interest thereof, shall be for the benefit of a preferred beneficiary or preferred beneficiaries such contract or declaration shall, subject to the right of the assured to apportion or alter as hereinafter provided, create a trust in favour of such beneficiary or beneficiaries, and so long as any object of the trust remains the money payable under the contract shall not be subject to the control of the assured, or of his creditors, or form part of his estate, but this shall not interfere with any transfer or pledge of the contract to any person prior to such declaration.

Sections 171 and 178 were by sec. 170 made applicable to all contracts of insurance of the person and declarations whether made before or after the passing of the Act.

The contract which the insured himself made with the insurance company was in favour of his wife, and as a wife was one of the class of preferred beneficiaries named in the statute at the time of the making of the contract, the statute operated upon the contract which the insured made and gave effect to the contract as a statutory trust

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in favour of the wife as beneficiary, and the statute provided that the moneys payable under the contract should not be subject to the control of the insured or of his creditors or form part of his estate. The contention of the appellant, as Committee of the insured, is that this trust has been destroyed by subsequent statutory enactments. Clearly it would require very plain and precise language in a subsequent statute to destroy the trust created at the time of the issue of the policy. It becomes necessary, therefore, for us to examine carefully the subsequent statutory provisions upon which counsel for the appellant relies.

In 1922, by 12-13 Geo. V, ch. 61, certain amendments were made to the *Ontario Insurance Act*. Accident and sickness insurance were defined by sec. 2 as follows:—

2. (1a) "Accident Insurance" shall mean insurance against loss arising from accident to the person of the insured.

(51a) "Sickness Insurance" shall mean insurance other than Life insurance against loss through sickness or disability of the insured not arising from accident or old age.

The Act of 1922 introduced by sec. 12 statutory provisions relating to accident and sickness insurance by adding certain sections, of which 190a (1) and 190c (1) and (2) are material to the question involved in this appeal.

190a. (1) Sections 190a to 190h inclusive shall apply to accident and sickness insurance and to an insurer undertaking accident and sickness insurance in the Province but shall not apply to any fraternal society or to its contracts.

190c. (1) The conditions set forth in this section shall be deemed, subject to the provisions of sections 190d, 190e, and 190f, to be part of every contract of accident and of sickness insurance in force in Ontario, and shall be printed on every policy hereafter issued under the heading "Statutory Conditions."

(2) An insurer may renew an existing contract of insurance by issue of a renewal receipt on which is printed in conspicuous type, "This policy is subject to the Statutory Conditions respecting contracts of Accident and Sickness Insurance contained in Section 190c of *The Ontario Insurance Act*.

Only one of the statutory conditions referred to in sec. 190c appears to be material and is as follows:—

STATUTORY CONDITION 19

Subject to the laws of the Province in which this contract is made, the insured may, without the consent of the beneficiary assign the policy and may, from time to time, change the beneficiary or revoke the benefits thereof, or make it entirely payable to himself or to his estate, pro-

vided that if the beneficiary is a preferred beneficiary under the statutes of the Province in which the contract is made, the rights of the insured and the beneficiaries hereunder shall be subject to such statutes.

It is admitted by counsel for the appellant that the amendments made in 1922 did not affect the trust declared by the statute in respect of the policy in question, but reference is made to these amendments for the purpose of better understanding subsequent amendments which, it is argued, have a destructive effect upon the trust created in favour of the wife as preferred beneficiary by the statute as it stood at the date of the issue of the policy. It may be observed in passing that while sec. 190c of the 1922 amendments provided that the conditions set forth in that section shall be deemed to be part of every contract of accident and of sickness insurance "in force" in Ontario, the section specifically states that the conditions shall be printed on every policy "hereafter issued" and that

an insurer may renew an existing contract of insurance by issue of a renewal receipt on which is printed in conspicuous type "This policy is subject to the Statutory Conditions respecting contracts of Accident and Sickness Insurance contained in section 190c of *The Ontario Insurance Act.*"

It is admitted that in this case no renewal receipts were issued; the policy continued in force from year to year merely by virtue of the payment of the annual premium of $100. It should be observed further that statutory condition 19 carefully preserved the rights of preferred beneficiaries.

Then in 1924, by 14 Geo. V, Ch. 50, the *Ontario Insurance Act* separated the provisions relating to life insurance from the provisions relating to accident and sickness insurance, the former being put under Part V and the latter under Part VII of the Act. Under Part VII we find by sec. 177 (3) that, except where inconsistent with the provisions of Part VII or with any statutory policy condition required to be inserted in contracts of accident and sickness insurance, the provisions of Part V relating to contracts of life insurance, except subsection 2 of sec. 122 and sec. 123 (not here material), shall apply *mutatis mutandis* to contracts of accident and sickness insurance. Sec. 180 under Part VII sets forth certain conditions which "shall be deemed, subject to the provisions of secs. 181 to 185, to be part of every contract of accident and of sickness insurance in force in Ontario" and shall be printed

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on every policy "hereafter issued" under the heading "Statutory Conditions." Sections 181 to 185 do not affect this case. Statutory condition no. 19 remained the same as in the 1922 Act. By sec. 275 of the 1924 statute the provisions of the *Ontario Insurance Act*, being Ch. 183 of the Revised Statutes of Ontario, 1914, were repealed.

Counsel for the appellant contends that sec. 114, which comes under Part V, applies to accident and sickness insurance by virtue of sec. 177 (3). The material portions of sec. 114 are as follows:—

> 114. (1) Notwithstanding any agreement, condition or stipulation to the contrary, this Part shall apply to every contract of life insurance made in the Province after the coming into force of this Part, and any term in any such contract inconsistent with the provisions of this Part shall be null and void.
>
> (2) Unless hereinafter otherwise specifically provided, this Part shall apply to the unmatured obligations of every contract of life insurance made in the Province before the coming into force of this Part.

But the provisions of Part V are not made to apply to contracts of accident and sickness insurance where they are "inconsistent with" the provisions of Part VII (sec. 177 (3)). It seems to me doubtful if sec. 114 relating to every contract of life insurance made in the province after the coming into force of Part V can be said to be consistent with the provisions of Part VII which relate to accident and sickness insurance, but in any event sec. 114 (1) clearly refers only to contracts made "after the coming into force" of Part V (i.e., 1924) and cannot apply to the contract with which we are concerned that was made in 1920. Sec. 114 (2) presents some difficulty in that it provides that Part V shall apply "to the unmatured obligations" of every contract of life insurance made in the province "before the coming into force" of this Part. Again it seems doubtful to me if that subsection, limited to contracts of life insurance made before the coming into force of the section, can be read to apply to the accident or sickness policy with which we are concerned, and what is the exact import of the words "unmatured obligations" is not plain. There is, at any rate, no such precise language used in any of the changes made in the 1924 statute as would destroy the plain statutory trust created in favour of the wife as beneficiary of the policy in question, particularly when the provisions relating to preferred beneficiaries (secs. 134, 135, 136 and 139) remained substantially the same as

in the prior legislation, definitely creating a trust in favour of the designated beneficiary and providing that the insurance money shall not be subject to the control of the insured or of his creditors or form part of the estate of the insured.

In 1928, by 18 Geo. V, Chap. 35, further amendments were made to the Ontario *Insurance Act*, and counsel for the appellant particularly points to these amendments as effective to extinguish any statutory trust or trusts created in relation to policies of sickness or accident insurance such as we are concerned with in this appeal. The Ontario statutes had been revised in 1927, the *Insurance Act* being Chap. 222. Section 177 of the 1924 Act became sec. 184 in the revised statute. By sec. 4 of the 1928 statute, subsections 2 and 3 of sec. 184 were repealed and others substituted therefor. New subsection 4 of sec. 184 reads:—

(4) Sections 122, 133 to 138 and 161 shall apply to contracts to which this Part applies.

The effect was that the provision found in the 1924 Act whereby, except where inconsistent with the provisions of Part VII or with any statutory policy condition required to be inserted in contracts of accident and sickness insurance, the provisions of Part V relating to contracts of life insurance, except subsection 2 of sec. 122 and sec. 123, should apply *mutatis mutandis* to contracts of accident and sickness insurance, was stricken out. By new sec. 184 (4), only sections 122, 133 to 138 and 161 under Part V remained applicable to contracts to which Part VII applies, and none of these sections is material here. The 1928 statute, moreover, repealed (by sec. 6 (2) thereof) condition 19 and substituted the following therefor:

19. Where moneys are payable under this policy upon the death of the insured by accident, the insured may from time to time designate a beneficiary, appoint, appropriate or apportion such moneys and alter or revoke any prior designation, appointment, appropriation or apportionment.

This change in the wording of statutory condition 19 is the real point of emphasis made by counsel for the appellant. The contention is that the former right to designate preferred beneficiaries of sickness and accident policies was expressly taken away except where moneys under such policies are payable in the event of the death of the insured by accident. Upon the language of this amendment it is argued that the wife in the policy we have to consider is

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no longer a beneficiary within the statute, and this argument is based upon the contention that there is now no right by statute, the policy not providing for the death of the insured by accident, to designate a beneficiary. It is further argued that we must read new condition 19, as it appears in the 1928 statute, with the provisions of sec. 180 in the 1924 statute (now sec. 187 of the Revised Statutes) as a condition which "shall be deemed, subject to the provisions of sections 181 to 185, to be part of every contract of accident and of sickness insurance in force in Ontario." Sections 181 to 185 in the 1924 statute are now sections 188 to 192 of the Revised Statutes of 1927 and are not material here. We have observed, however, that the words "in force in Ontario" in sec. 180 (now sec. 187) are immediately followed by the words "and shall be printed on every policy hereafter issued under the heading 'Statutory Conditions'."

In 1931 (21 Geo. V, Ch. 49) the *Insurance Act* was further amended and sec. 11 (2) added the words "and no other provisions contained in Part V," after the figures 161 in subsection 4 of sec. 184 as enacted by sec. 4 of *The Insurance Act, 1928*. The subsection now reads:—

> Sections 122, 133 to 138 and 161 and no other provisions contained in Part V shall apply to contracts to which this Part applies.

The insertion of the words "and no other provisions contained in Part V" did not add anything to the amendment of 1928; it was plain enough that only sections 122, 133 to 138 and 161 under Part V thereafter should apply to contracts to which Part VII applied.

It is impossible, on the general language of the subsequent amendments relied upon by counsel for the appellant, to reach the conclusion that the Legislature by such amendments destroyed or intended to destroy the statutory trust created in 1920 in favour of the wife as the designated preferred beneficiary of the policy in question and the statutory provision that "so long as any object of the trust remains the money payable under the contract shall not be subject to the control of the assured, or of his creditors, or form part of his estate." There might be some support for such a contention were the policy an annual renewal policy rather than a continuous policy. The distinction between what is regarded as a continuous policy and what is regarded as a renewal policy in insurance law is

clearly established. For instance, a policy of life insurance usually contemplates the insurance continuing until death; consequently, stipulations giving an absolute right of renewal are in the main confined to life policies, but the accident or sickness policy with which we have to deal in this appeal gives an absolute right of renewal until the insured is sixty years of age and contemplates the continuance of the insurance from year to year merely by the payment of the stipulated annual premium. Except in such cases of continuous insurance, policies are renewable only by mutual consent. The assured, if he wishes to renew the policy, may apply to the insurers for renewal and tender the renewal premium, but they are not bound to accept the renewal premium or renew the policy. Under the former type of policy, the contract is a continuing contract, inasmuch as it is made once and for all at the commencement of the insurance and is kept in force by the renewal. There is not a fresh contract on each renewal. On the other hand, where the policy is renewable only by mutual consent at the expiration of a stipulated period of time, the position is different. On each renewal there must be an agreement between the parties to renew the policy, and each renewal constitutes a fresh contract. See Halsbury (2nd ed.), Vol. XVIII, pp. 455-457. The distinction between continuing insurance and a renewal policy becomes of importance in considering changes in a general statute governing policies of insurance. One can quite understand that, where you have in law a fresh contract with each renewal, the statutory provisions in force at the date of each renewal may operate upon the contract made at the time, but where you have, as in this case, a contract of continuous insurance made in 1920 and kept alive merely by the payment of the stipulated annual premium until the date of the event insured against, it requires very clear and precise language in general amendments to destroy a statutory trust created in favour of a named beneficiary at the time the policy was taken out. There is a good deal of difficulty in determining exactly what is the full effect to be given to the amendments to the *Ontario Insurance Act* discussed before us. To a certain extent they may have been intended to have retrospective effect, but when the language is not plain the new law ought to be construed so as to interfere as little as possible with vested rights

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and should not be given a larger retrospective power than one can plainly see the legislature intended. This was the view taken by Lord Bowen in *Reid* v. *Reid* (1), where he said:—

> Now the particular rule of construction which has been referred to, but which is valuable only when the words of an Act of Parliament are not plain, is embodied in the well-known trite maxim *omnis nova constitutio futuris formam imponere debet non præteritis*, that is, that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that even in construing an Act which is to a certain extent retrospective, and in construing a section which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. That is a necessary and logical corollary of the general proposition that you ought not to give a larger retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the legislature meant.

There is no such language in the amendments to the *Ontario Insurance Act* upon which counsel for the appellant relies to justify the contention that the statutory trust in respect of the policy before us has been extinguished.

That is sufficient to dispose of the appeal and to affirm the judgment of the Court of Appeal for Ontario that the wife is entitled to the proceeds of the policy. But the Court of Appeal rested its judgment, not only upon the ground that the subsequent amendments to the statute did not destroy the trust, but also upon the ground that

> whatever may have been the case before the *Married Women's Property Act*, since that Act when such a policy as this is issued with the wife named as the beneficiary, while she may not sue the insurer in her own name, the insurance money when received by the husband or his representatives is held in trust for her.

It must be observed, however, that sec. 11 of the *Married Women's Property Act*, Imperial Statutes (1882) 45-46 Vic., ch. 75, was limited to "a policy of assurance effected by any man on his own life" and did not extend to a policy of sickness or accident insurance. Further, when the *Married Women's Property Act* was carried into the Ontario Statutes in 1884 (by 47 Vic., ch. 19), sec. 11 of the Imperial Act was not reproduced. A similar provision appeared, however, in the 1884 Statutes of Ontario, ch. 20 thereof being "An Act to Secure to Wives and Children the Benefit of Life Insurance," but here again the statute was limited to life insurance. This latter Act was repealed

(1) (1886) 31 Ch. D. 402, at 408-409.

in 1897 by 60 Vic., ch. 36, and thereafter became part of the Insurance Act, and as such was carried forward in the Insurance Acts from time to time until 1912 when, by omitting the preliminary words "when a person effects insurance on his or her own life * * *", the preferred beneficiary provisions first became applicable to accident and sickness insurance policies. It was not, then, by virtue of the *Married Women's Property Act,* but by virtue of the 1912 *Ontario Insurance Act,* that a husband could effect accident or sickness insurance for the benefit of his wife.

It becomes unnecessary for us to consider the further interesting and rather difficult point raised during the argument as to whether or not, apart from the statute, the insurance moneys, to the extent to which they have reached the hands of the Committee, are impressed with a trust in favour of the wife by reason of the terms of the application of the insured to the company for the policy. In the *Maybrick* case (1), the moneys had never reached the insured or his legal representative and the point was not really in issue.

There is a cross-appeal by the wife from the judgment of the Court of Appeal in so far as the judgment treats the Committee as the person lawfully entitled to enforce and collect upon the policy. The wife contends that, as designated preferred beneficiary, she is entitled herself under the statute to recover these insurance moneys direct from the insurance company without the intervention of the Committee. She obviously fears an abstraction from the monthly payments of the regular fees and disbursements of the Committee as a trustee, if the judgment remains whereby the trust company as Committee is declared not only to have been the proper recipient of the moneys already paid but the person entitled to collect all future payments, though bound upon receipt thereof to turn them over to the wife.

This Court decided in *National Life Assurance Co. of Canada* v. *McCoubrey* (2) that the widow, as preferred beneficiary of a life policy, was entitled to payment of the insurance moneys from the insurance company without the appointment of a legal representative of her

(1) *Cleaver* v. *Mutual Reserve Fund Life Association,* [1892] 1 Q.B. 147.

(2) [1926] S.C.R. 277.

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deceased husband where there was no notice or knowledge on the part of the company of any change of beneficiary. The insurance company there insisted that the will of the deceased should be probated before payment could be made to the widow. Having determined in the present case that the wife as designated preferred beneficiary is entitled under the statute to the moneys under the policy with which we are now dealing, it follows that she is entitled to the moneys direct from the company and the order below should be varied accordingly. The insurance company not being a party to these proceedings, our judgment is, of course, only a declaration of right as between the Committee and the wife.

The appeal should be dismissed, and the cross-appeal allowed by varying the judgment appealed from to provide for payment over by the appellant to the respondent, without deduction, of the total amount received by the appellant as proceeds of the policy in question, and by declaring that the respondent is entitled, as between her and the appellant, to enforce the policy. The appellant must pay the respondent all her costs throughout.

Appeal dismissed and cross-appeal allowed with costs.

Solicitors for the appellant: *McRuer, Mason, Cameron & Brewin.*

Solicitors for the respondent: *Jennings & Clute.*

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HOLLAND - CANADA MORTGAGE COMPANY LIMITED (PLAINTIFF).. } APPELLANT,

AND

ROBERT JOHN HUTCHINGS AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

* Feb. 12.
* Mar. 31.

HOLLAND - CANADA MORTGAGE COMPANY LIMITED (PLAINTIFF).. } APPELLANT,

AND

THE ROYAL TRUST COMPANY, JUDICIAL TRUSTEE OF THE ESTATE OF HUGH NEILSON, DECEASED, AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

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

Guarantee—Mortgage bond—Construction of conditions—Extension or renewal of loan—Rate of interest increased without the knowledge of sureties—Whether sureties released—Written acknowledgements by sureties after completion and delivery of the extension and renewal agreements—Whether binding.

On December 15, 1909, the Calgary Y.M.C.A. mortgaged its leasehold of certain lands to the Standard Trusts Company to secure the payment of a loan of $25,000, the terms of payment and interest being set out in the mortgage indenture. As an added security, the respondent Hutchings, the deceased Hugh Neilson and 13 other individuals executed a bond, on the same date, in favour of the mortgagee, for due payment and performance by the Y.M.C.A. It was stipulated in the bond that if the Y.M.C.A. "shall pay * * * to the said The Standard Trusts Company * * * the sum of $25,000 * * * with interest thereon the days and times and in the manner called for in the mortgage or any renewal or extension thereof provided and shall further fully perform all covenants and conditions contained in the said mortgage or any renewal or extension thereof, no matter what dealings the said company may have had with the mortgagors or any one interested in the said lands (the intention being that the above obligation shall remain in full force and virtue as long as any money remains unpaid under the said mortgage or any renewal or extension thereof) then the above bond or obligation to be void, otherwise to remain in full force and virtue." The mortgage moneys were repayable with interest at 7 per cent per annum and the final payment of principal and interest was due and payable on January 2, 1915. The mortgage and moneys secured thereby were assigned and transferred to the appellant company. The Y.M.C.A. defaulted a number of its payments and negotiated with the appellant for an extension of time and eventually

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

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an agreement was reached and reduced to writing on June 29, 1915, whereby time for final payment under the mortgage was extended to April 1, 1918, and the rate of interest was increased from 7 per cent. to 8 per cent.; and a renewal agreement with similar clauses was also negotiated. The sureties were not consulted in the negotiations for the extension and renewal agreements and were not parties to them; but the appellant company prepared a document which was signed by 13 of the 15 bondsmen, among whom were the respondents Hutchings and Neilson, but not until late November or December, 1915. This document purported to acknowledge notice of the assignment of the mortgage and the bond and also notice of the extension agreement. No proceedings upon the mortgage, upon the agreements or upon the bond were taken by the appellant company until March 27, 1934, when an action was brought against the respondent Hutchings and later, on April 9, 1934, a similar action was taken against the legal representatives of the deceased Neilson.

Held, affirming the judgment of the Appellate Division, ([1935] 2 W.W.R. 338), that the respondents Hutchings and Neilson were not liable. The change in the rate of interest was a material variation in the original contract, the performance of which the sureties had guaranteed by their bond, and operated in law in extinguishment of their liability. A renewal or extension with an increased rate of interest was not a renewal or extension within the contemplation of the parties to the bond.

As to the appellant's contention that the words in the bond "*no matter what dealings the said company may have had with the mortgagors* * * " permitted the change of the rate of interest and that the respondents cannot complain of the alteration, reading the instrument as a whole, those words must be confined in their meaning and effect to dealings with matter collateral to the contract and cannot be extended to matters inconsistent with or repugnant to the very contract, the performance of which the sureties have guaranteed: an increase in the rate of interest is not something collateral to but a definite alteration of a material part of the original contract. The parties expressed in that clause their intention that the obligation of the bond shall remain as long as any money remains unpaid under the *said* mortgage or any renewal or extension thereof. The words of that clause cannot be construed to entitle the creditor to make a new contract with the principal debtor and still hold the sureties on the bond given in respect of the original contract.

As to the written acknowledgments signed by the respondents Hutchings and Neilson, it is settled law that a surety is not discharged by a variation to which he assents afterwards, even though there may be no fresh consideration for the assent, where it is not the creation of a new debt but the revival of an old debt; but, whether the assent is given previous to or subsequent to a variation, the creditor must put the surety in possession of all the facts likely to affect the degree of his responsibility, and if he neglects to do so, it is at his peril; and the evidence in this case does not establish that the sureties ever knew the real facts and circumstances surrounding the making of what are described as the extension and renewal agreements, or that they knew that two of their co-sureties had not assented to the variation in the contract; the original bond was the joint and several obligation of the 15 sureties and each surety had a contractual right of contribution against the others apart altogether from his equitable

right as a surety; that discharge of these co-sureties was something that those who were asked to remain in the bond were entitled to know.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of the trial judge, Ives J. (2) and dismissing the appellant company's action.

E. D. Arnold, for the appellant.

H. G. Nolan K.C. for the respondent The Royal Trust Company.

L. H. Mayhood for the respondent Hutchings.

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

The judgment of the Court was delivered by

DAVIS J.—This appeal arises out of consolidated actions brought by a mortgagee against certain sureties upon a bond given to secure the payment of the mortgage debt and interest. The appellant, Holland-Canada Mortgage Company Limited, acting at the time through its investment agent, The Standard Trusts Company, made a loan on or about December 15, 1909, to the Calgary Young Men's Christian Association (hereafter for convenience called the Association) of the sum of $25,000 repayable $2,000 on January 2 in each of the years 1911, 1912, 1913 and 1914 and the balance thereof on January 2, 1915, with interest at the rate of 7 per cent. per annum half-yearly on the 2nd days of January and July of each year. To secure repayment of the moneys the Association mortgaged to the said Standard Trusts Company its leasehold lands in the city of Calgary and the Canadian Pacific Railway Company, which was the owner of the lands, joined in the mortgage to perfect the security but expressly exempted itself from the covenant to pay.

Concurrently with the giving of the mortgage fifteen citizens of the city of Calgary executed and delivered to The Standard Trusts Company a bond guaranteeing the repayment by the Association of the moneys borrowed and

(1) [1935] 2 W.W.R. 338. (2) [1935] 1 W.W.R. 133.

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interest thereon. As early as January 2, 1914, the Association became definitely in default under the mortgage. The Standard Trusts Company transferred the mortgage to the appellant on June 3, 1915, and assigned the bond to the appellant on August 20, 1915. Subsequently (the exact date is for the moment unimportant) two agreements were made between the appellant, the Association and the Canadian Pacific Railway Company. One of these agreements, described as an extension agreement, was dated June 29, 1915, and the other agreement, described as a renewal agreement, was dated June 30, 1915, but the evidence shews that it was not until Sept. 22, 1915, that these agreements became finally executed by all parties and completed. The sureties were not consulted in the negotiations for these agreements and were not parties to them. A form of document, described as an acknowledgment, to which I shall later refer was subsequently circulated among the sureties and ultimately thirteen out of the fifteen sureties signed separate documents of like effect.

By the extension agreement it was recited that the Association on January 2, 1915, owed the appellant $19,000 principal and $467.30 interest and that the said sums with interest thereon remained unpaid. The agreement provided that the said $19,000 should be repayable as follows: $500 on the first days of April and October in each of the years 1916 and 1917 and the balance on the first day of April, 1918, with interest thereon from the second day of January, 1915, at the rate of 8 per cent. per annum payable half-yearly on the first days of April and October in each year. It was declared and agreed that all the covenants, clauses, conditions, powers, matters and things contained in the mortgage should apply and relate to the extended dates of payment as fully and in the same manner as if the same had been the dates of payment fixed in and by the said mortgage, excepting that there should be no right of premature repayment except as in the agreement stated and that any statutory right in that behalf should take effect as if the said mortgage had been dated on the date of the agreement. It was further expressly declared and agreed that these presents

shall not create any merger or alter or prejudice the rights and priorities of the company as against any surety, subsequent encumbrancer or other person interested in the said lands or liable in whole or in part for the moneys secured by said mortgage and not a party hereto, or the rights

of any such surety, subsequent encumbrancer or other person, all of which rights are hereby reserved.

By the renewal agreement dated one day after the date of the extension agreement, the principal of the mortgage is recited to be $19,500 instead of $19,000. The evidence shews that that sum was arrived at by taking $500 of the arrears of interest and treating it henceforth as principal, making the new principal $19,500, which sum was by the terms of this agreement made payable $500 on the first days of April and October in each of the years 1916 and 1917 and the balance on the first day of April, 1918, with interest from January 2, 1915, at the rate of 8 per cent. per annum payable half-yearly on the first days of April and October in each year. The Association expressly covenanted with the appellant "to pay the said principal money and interest on the days and in the manner above set out." Then followed in this agreement the exact language used in the extension agreement relating the covenants in the mortgage to the extended dates of payment and reserving the rights of the appellant against any surety. The somewhat cumbersome procedure adopted in making two agreements appears to have been first to extend payment of the principal and interest, both in arrears, and then to create a new principal sum and provide new terms for repayment. One of the contentions of counsel for the respondents was that the second agreement with its express covenant to pay, taken in the light of the appellant's letters referring to the "new loan," operated to extinguish the original debt and gave place to a new debt. I shall not stop at the moment to consider that contention.

No proceedings upon the mortgage or upon either of these agreements or upon the bond appear to have been taken by the appellant until March 27, 1934, when the appellant commenced an action against the respondent Hutchings, one of the signatories to the bond given by the fifteen citizens of Calgary in 1909 to secure the payment of the mortgage indebtedness then incurred. On April 9, 1934, the appellant commenced a similar action against the legal representatives of one Neilson, deceased, who had died in 1918, and who, with Hutchings, had been one of the fifteen signatories to the bond. No action has been taken against any of the other signatories to the bond. During the nineteen years intervening between the date

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of the renewal agreement and the commencement of these actions the matter seems to have been allowed to drift along without any one taking any definite action to enforce payment by the Association. The Association obviously had faced a good deal of difficulty in raising money from time to time to pay upon the mortgage and the mortgagee seems to have kept nursing the account from year to year.

By order of the Court the Hutchings action was stayed, on April 23, 1934, until the appellant should commence action on the mortgage against the Association and the Canadian Pacific Railway Company to enforce the security. The appellant then amended its statement of claim in the Hutchings action to include a mortgage action and the Hutchings and the Neilson actions were consolidated. Subsequently on November 19, 1934, the appellant obtained an order nisi against the Association and the Canadian Pacific Railway Company upon the mortgage with a six months' period for redemption. The consolidated actions then proceeded to trial against Hutchings and the Neilson estate upon the bond.

Before discussing the judgments in the courts below it is well to understand the issues involved. Much turns upon the exact language of the bond itself and it is convenient now to set out the bond in full:

> Know all men by these presents, that we, William George Hunt, manager; Robert John Hutchings, manager; Absalom Judson Sayre, manager; Archibald John McArthur, gentleman; George Thomas Callendar Robinson, merchant; Albert William Ward, merchant; George Allan Anderson, physician; John Niblock, superintendent; John Edward Irvine, agent; Charles Allan Stuart, judge; John Henry Hannah, merchant; Alfred Price, superintendent; Thomas Underwood, contractor; Hugh Neilson, merchant; Fred Fishenden Higgs, merchant, all of the city of Calgary, in the province of Alberta, are jointly and severally held and firmly bound unto The Standard Trusts Company, in the penal sum of twenty-five thousand dollars, to be paid to the said Standard Trusts Company, their successors or assigns, for which payment well and truly to be made, we bind ourselves our and each of our heirs, executors and administrators and every one of them firmly by these presents.
>
> Sealed with our seals and dated this 15th day of December, A.D. 1909.
>
> Whereas that the Calgary Young Men's Christian Association have given a mortgage for the sum of twenty-five thousand dollars, dated 15th day of December, 1909, and registered in the Calgary Land Titles Office as no. 2431, to The Standard Trusts Company, on the following property in the city of Calgary in the province of Alberta, and being all that portion of the Canadian Pacific Railway Company's station grounds described as follows: Commencing at the southeast corner of First street East and Ninth avenue, thence easterly along the south limit of Ninth avenue one hundred and fifty feet thence southerly at right angles to the

first mentioned course one hundred feet, thence westerly parallel to and one hundred feet distant from the first mentioned course one hundred and fifty feet to the east limit of First street East, thence northerly along the east limit of First street East one hundred feet to the point of commencement containing 0·34 acre.

Now the condition of the above obligation is such that if the said Calgary Young Men's Christian Association, their successors or assigns shall well and truly pay or cause to be paid to the said The Standard Trusts Company, their successors or assigns the just and full sum of twenty-five thousand dollars of lawful money of Canada with interest thereon the days and times and in the manner called for in said mortgage or any renewal or extension thereof provided and shall further fully perform all covenants, provisoes and conditions contained in the said mortgage or any renewal or extension thereof, no matter what dealings the said company may have had with the mortgagors, or any one interested in the said lands (the intention being that the above obligation shall remain in full force and virtue as long as any money remains unpaid under the said mortgage or any renewal or extension thereof) then the above bond or obligation to be void, otherwise to remain in full force and virtue.

It is significant that the full names and descriptions of each of the fifteen signatories are set out in the opening words of the bond. Obviously each one of those who signed the bond knew exactly how many sureties were joining with him and who they were. It is not unreasonable to infer that each undertook the obligation because the other fourteen joined with him. It was a joint as well as a several obligation.

The bond expressly provided for a renewal or extension of the mortgage. It is unnecessary it seems to me to discuss the rather technical point raised by counsel for the respondents that the use of the singular rather than the plural, i.e., "any renewal or extension thereof," confined the right of renewal or extension to one and only one such transaction. The vital point is that the rate of interest, originally fixed by the mortgage at 7 per cent. per annum, was by the said agreements increased to 8 per cent. per annum. Apart from the questions raised by certain acknowledgments in writing alleged to have been given by the sureties, or some of them, to the appellant at or about the time of the making of the extension and renewal agreements and subject to the question of the effect of the particular language of the bond, the change in the rate of interest was a material variation in the original contract, the performance of which the sureties had guaranteed by their bond, and operated in law in extinguishment of the liability of the sureties. Counsel for the appellant relied upon the *Woodcrafts* case,

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Egbert v. *Northern Crown Bank* (1), for his proposition that a mere change of the rate of interest does not discharge the sureties but in so far as interest charges have been increased they do not bind the sureties. In the *Woodcrafts* case (1), however, Lord Dunedin pointed out that the Bank had imposed a rate of interest that was prohibited by the *Bank Act* and the agreement betwen the Bank and its customer for payment of the increased rate was "statutorily invalid and of no effect." A surety has always been a favoured creditor in the eyes of the law. His obligation is strictly examined and strictly enforced. "It must always be recollected," said Lord Westbury in *Blest* v. *Brown* (2),

> in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he entered into. If that written engagement is altered in a single line, no matter whether it be altered for his benefit, no matter whether the alteration be innocently made, he has a right to say, "The contract is no longer that for which I engaged to be surety: you have put an end to the contract that I guaranteed, and my obligation, therefore, is at an end."

Apart from any express stipulation to the contrary, where the change is in respect of a matter that cannot "plainly be seen without inquiry to be unsubstantial or necessarily beneficial to the surety," to use the language of Rowlatt, The Law of Principal and Surety, 2nd ed. (1926) p. 102, the surety, if he has not consented to remain liable notwithstanding the alteration, will be discharged whether he is in fact prejudiced or not. *Holme* v. *Brunskill* (3). It cannot be said to be self-evident that a change of the rate of interest on a debt of some $19,000 from 7 per cent. to 8 per cent. is unsubstantial or necessarily beneficial to the surety. This is not really disputed by the appellant. What is said is that a particular stipulation in the bond permitted this change and that the respondents cannot complain of the alteration. Our attention is directed by counsel for the appellant to the particular language of the particular bond where in the condition it is expressly stipulated,

> no matter what dealings the said company (i.e., the appellant) may have had with the mortgagors or anyone interested in the said lands.

(1) [1918] A.C. 903.

(2) (1862) 4 De G. F. & J., 367 at 376.

(3) (1877) 3 Q.B.D. 495.

Counsel for the respondents observe that immediately following these words appear in brackets the further words the intention being that the above obligation shall remain in full force and virtue as long as any money remains unpaid under the said mortgage or any renewal or extension thereof.

What then is the meaning and effect to be given to the words "no matter what dealings the company may have had with the mortgagors?" They cannot be disregarded as meaningless. The parties expressed their intention, however, that the obligation of the bond shall remain as long as any money remains unpaid under the *said* mortgage or any renewal or extension thereof. The words in controversy cannot be construed to entitle the creditor to make a new contract with the principal debtor and still hold the sureties on the bond given in respect of the original contract.

A renewal or extension with an increased rate of interest is not a renewal or extension within the contemplation of the parties to the bond. The peculiar language relied upon to hold the sureties notwithstanding a material alteration of the original contract, is not susceptible of the interpretation put upon it by counsel for the appellant. Reading the instrument as a whole, the particular phrase must be confined in its meaning and effect to dealings with matters collateral to the contract, and cannot fairly be extended to matters inconsistent with or repugnant to the very contract, the performance of which the sureties have guaranteed. One can well appreciate collateral dealings between mortgagor and mortgagee that leave the contract itself alone; matters either contemplated by the parties in the original mortgage transaction or incidentally arising throughout the currency of the mortgage. It is sufficient for the purpose of this case to say that an increase in the rate of interest is not something collateral to but a definite alteration of a material part of the original contract.

But the appellant, in any event, relies upon written acknowledgments from Hutchings and Neilson which, it is contended, constitute assent by them to the alteration. It is not proved, however, that either of their acknowledgments was given before Sept. 22, 1915, the date of the completion and delivery of the extension and renewal agreements, and the respondents argue that such an acknowledg-

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ment or assent given without consideration subsequent to a change that operated to discharge the surety cannot revive the debt.

But it has long been settled law that a surety is not discharged by a variation to which he assents afterwards, even though there may be no fresh consideration for the assent, where it is not the creation of a new debt but the revival of an old debt. *Mayhew* v. *Crickett* (1); *Smith* v. *Winter* (2); Rowlatt, 2nd ed., 118. And yet whether the assent be given previous to or subsequent to a variation, the creditor must put the surety in possession of all the facts likely to affect the degree of his responsibility and if he neglects to do so, it is at his peril: *Pidcock* v. *Bishop* (3). Lord Loughborough, in *Rees* v. *Berrington* (4) stated the rule thus:

> It is the clearest and most evident equity not to carry on any transaction without the privity of him (the surety) who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him.

Lord Hanworth, in *Smith* v. *Wood* (5) pointed out that this rule stated by Lord Loughborough was followed in *Holme* v. *Brunskill* (6) and he applied it to the facts of the case before him. Now what were the special facts of the arrangement made between the mortgagor and the mortgagee in September, 1915, in the case before us? Five hundred dollars of arrears of interest were capitalized so as to fix the capital amount at $19,500; the rate of interest was increased from 7 per cent. to 8 per cent. per annum and made retroactive to January 2, 1915; the interest dates were changed from January and July to April and October; the instalments of principal were made payable thereafter $500 half-yearly instead of $2,000 yearly; and the whole debt and interest was to be paid off by April 1, 1918. This transaction, which was described by the mortgagee in its correspondence as "the new loan," cannot be treated as a mere renewal or extension; it involved, if not a new loan, a substantial variation or alteration of the original contract.

While I cannot accept the contention of counsel for the respondents that there was the creation of a new debt and the extinguishment of the old debt, there were such

(1) (1818) 2 Swanst. 185.
(2) (1838) 4 M. & W. 454.
(3) (1825) 3 B. & C., 605 at 610.
(4) (1795) 2 Ves. Jun. 540, at 543.
(5) [1929] 1 Ch. 14, at 23.
(6) (1877) 3 Q.B.D. 495.

material changes in the original contract as to call for full disclosure to the sureties and assent to such changes if the sureties were to be rendered liable for the contract as varied. It is not suggested, much less proved, in evidence that the sureties ever knew the real facts and circumstances surrounding the making of what are described as the extension and renewal agreements. Two of the fifteen sureties never gave any acknowledgment and the authority of the agent who purported to sign for Hutchings is denied by Hutchings. But in any event the acknowledgment is merely this, that

> I have received notice that said Holland-Canada Mortgage Company Limited has entered into an agreement with the said Young Men's Christian Association whereby the time for repayment for the said mortgage has been extended for a term of five years at the rate of interest of 8 per cent per annum, and I agree that said bond so executed by me shall be and remain binding on me notwithstanding said extension or said increase of rate of interest.

It is not established by the evidence that either Hutchings or Neilson knew of the real transaction between the mortgagor and the mortgagee and assented to it, nor is it attempted to be shewn that Hutchings or Neilson knew that two of their co-sureties, Niblock and Irvine, had not assented to the variation in the contract. The original bond was the joint and several obligation of the fifteen sureties and each surety had a contractual right of contribution against the others apart altogether from his equitable right as a surety. The discharge of these two co-sureties was something that those who were asked to remain on the bond were entitled to know.

But it is said that both the extension and renewal agreements reserved the rights of the sureties by express language in the instruments. It is quite a different matter, however, to reserve the rights against the surety in an agreement merely extending the time for payment and to reserve the rights against the surety in an agreement materially altering the old contract. This was clearly pointed out by Street J. in *Bristol and West of England Land Mortgage and Investment Company* v. *Taylor* (1) where he said at p. 296 that

> the words reserving the creditor's rights against the surety, however effectual they may be in so far as the extension of time is concerned, are mere "idle words" in so far as any effect upon the stipulation for an increased rate of interest is concerned.

(1) (1893) 24 O.R. 286.

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We were asked by counsel for the appellant to decline to follow that case upon the ground that it was not rightly decided. That was a decision of the Queen's Bench Division in Ontario over forty years ago. We entirely agree with the views expressed in that case by Street J. and the decision may well be regarded as settled law.

A great deal of correspondence between the parties to the original transaction was put in at the trial and the appellant endeavoured to shew from some of it that Hutchings and Neilson had, quite independently of the form of acknowledgment, by later correspondence acknowledged their liability on the bond. I have read carefully the correspondence put in at the trial and having regard to all the facts and circumstances surrounding the transactions as hereinbefore related I do not find any such admission of liability as to entitle the appellant to judgment against either Hutchings or the estate of Neilson. This was the conclusion reached by the learned trial judge and was affirmed by the unanimous judgment of the Appellate Division of the Supreme Court of Alberta.

It is unnecessary therefore to consider the questions raised during the argument on the defence that the actions were barred by the running of time. It is obvious that the appellant would encounter a good deal of difficulty in this respect having regard to the facts that the bond was given on October 15, 1909, default on the mortgage occurred as early as January, 1914, and suit was not entered till March, 1934. Had we considered the appropriate statutory provisions of Alberta governing the limitation of time for the commencement of these actions, the appellant might well have been found to have been barred but we have thought it better to consider and discuss the appeal upon the broad ground of liability without reference to any statutory bar of the actions.

The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Fitch & Arnold.*

Solicitors for the respondent Hutchings: *Short, Ross, Shaw & Mayhood.*

Solicitors for the respondent The Royal Trust Company, trustee: *Bennett, Hannah & Sanford.*

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ALEXANDER M. STEWART (PLAINTIFF) ..... APPELLANT;

*Feb. 28.
*Apr. 21.

AND

HANOVER FIRE INSURANCE COMPANY (DEFENDANT) ..... RESPONDENT.

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

Lease—Lease and hire of work or personal services—Tacit renewal—General provisions as to lease or hire of things applicable to lease and hire of work or personal services—Right of master to dismiss servant and right of servant to quit service—Notice to be given by both within delay prescribed by law—Arts. 1608, 1609, 1642, 1657, 1667, 1670 C.C.

Tacit renewal of a contract of lease or hire of work or personal services prolongs that contract for another year, or for the term for which such lease was made, if less than a year.

The Civil Code treats the lease or hire of work or personal services as coming under the subject and general provisions of lease and hire, and both contracts, that having things for its object and that having work for its object, are dealt with by the Code under the same general title. (Arts. 1600 and seq. C.C.). Therefore the intention of the legislature and of the Civil Code in using the words "tacit renewal" in connection with the lease and hire of work or personal services in article 1667 C.C., was that it should convey the same meaning, carry the same effect and be governed by the same rules, *mutatis mutandis,* as tacit renewal operating in the case of a contract for lease or hire of things. Accordingly, under article 1667 C.C., as under article 1609 C.C., tacit renewal will operate in the case of lease or hire of work or personal services if the lessee continues to give his services beyond the expiration of the term originally fixed, without any opposition or notice on the part of the lessor; and applying the terms of article 1609 C.C., in such a case, the lessor, or servant, will not have the right thereafter to leave the service of the master, or the master will not have the right to dismiss the servant unless notice has been given within the delay required by law.

As to the length of such notice, the provisions of article 1657 and 1642 C.C. relating to lease or hire of things, may be made applicable to the lease or hire of work or personal services.

Asbestos Corporation Ltd. v. *Cook,* ([1933] S.C.R. 86) has no application to the present litigation. That case was not dealing with the question of tacit renewal, but with a contract of lease for personal services for an undetermined period of time. Even that contract could not be terminated without giving a notice of a reasonable delay.

Also: although it had been held in the *Asbestos* case that article 1642 C.C. was not applicable to a lease of personal services for the purpose of determining the length of the contract, it has not been decided in that case that article 1642 C.C. could not be applied to leases of personal

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

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services, in so far as it is referred to in article 1657 C.C., for the purpose of computing the delay of the notice required to terminate a contract prolonged by tacit renewal.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Greenshields C.J., and dismissing the appellant's action for damages for wrongful dismissal from the respondent company's employ.

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

F. P. Brais K.C. for the appellant.

C. A. Hale K.C. for the respondent.

The judgment of the Court was delivered by

RINFRET J.—The appellant was manager for Canada, chief agent and chief attorney of the respondent company. He had assumed this office on or about the end of October, 1928, under an agreement entered into between the parties in Montreal. Under the terms of the agreement, the services of the appellant were retained for one year from December 1, 1928, at a salary of $6,500 per annum; but it was understood that, both sides being satisfied with the results obtained, the salary for the year 1930 would be $7,500.

It was also then and there expressly agreed that the appellant would receive an additional compensation of 10 per cent, based on certain items of "income and outgo," more particularly described in the memorandum accepted and initialed by the appellant and also by the respondent through its president and secretary.

At the end of the year 1929, both parties were apparently satisfied of the results obtained, for the appellant continued in the service of the respondent at the higher salary of $7,500 per annum.

The contract was silent as to the terms of payment of the salary. It can be said, however, with certainty that during the time the appellant was in the employ of the respondent he received his payment in fortnightly amounts.

As a matter of fact, at the trial, the secretary of the respondent testified that this arrangement as to the period

(1) (1935) Q.R. 59 K.B. 175.

at which the appellant should receive his salary was made when the contract was first entered into. There was a controversy on that point, the appellant swearing that the drawing of his salary was entirely left to himself, although, as a matter of convenience, he usually drew it every two weeks. The trial judge, interpreting this evidence, held that the appellant's salary was

payable by the year and only at the expiration of a year of services.

On the contrary, the Court of King's Bench found

que, d'après la preuve qui a été faite à ce sujet, il a été établi qu'il avait été convenu dès le début que le salaire de l'intimé lui serait payable tous les quinze jours.

In the result, the divergence of views on this question of fact is the true basis of the difference in the conclusion reached by each court in this case.

But before we discuss them, we must complete our statement of the facts.

As already mentioned, at the expiration of the first year of services, to wit, on December 1, 1929, the appellant continued in the employ of the respondent. For the year 1930, the appellant was paid at the rate of $7,500 per annum, the contract in other respects remaining the same, in full force and effect.

At the expiration of the second year (December 1, 1930), and again at the expiration of the third year (December 1, 1931), the relations between the parties continued as they were; when, on October 21, 1932, the respondent company, through its secretary, notified the appellant that his services would no longer be required, at the same time informing him that his salary would be paid until December 1, 1932.

The appellant took exception to the respondent's action, expressed his willingness to continue in his position and to abide by and carry out his contract until December 1, 1933. But the respondent having persisted in the stand already taken, the appellant left the employ of the respondent; and, in due course, brought this action to recover the sum of $7,012.50, for what he alleged to be an illegal and an unjustified cancellation of his contract of engagement.

The defence was that the contract, under its terms and by force of law, expired on December 1, 1932; and that the respondent had refused to renew it and had expressly notified the appellant accordingly on October 21, 1932, a prior

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notice which was usual, reasonable and lawful. Moreover, the refusal to renew the contract for another year had been accepted and acquiesced in by the appellant. But, in addition to these formal grounds of defence, the respondent alleged it had refused to renew the contract for good, valid and sufficient cause the particulars of which were given in the plea.

Both courts in the province of Quebec refused to entertain the alleged grounds of acquiescence on the part of the appellant and of dismissal for cause. They were not renewed at bar in this Court and they may be taken for abandoned to all intents and purposes.

The Superior Court maintained the appellant's action to the amount of $5,312.50 for the reason mainly that, in the view that the Court took of the contract, the appellant's salary was payable by the year and, consequently, a notice of at least three months was necessary and required to put an end to the contract and relieve the respondent from a claim in damages.

On the other hand, the Court of King's Bench thought the evidence clearly showed that the salary was payable fortnightly and, accordingly, a notice of fifteen days prior to the 1st December, 1932, was amply sufficient to prevent the tacit renewal of the contract for another year. Moreover, the Court expressed the opinion it might even be held that no notice whatsoever was required, since, in the state of the law in the province of Quebec, the contract expired of its own terms on the 1st December, 1932. The appeal was, therefore, allowed and the action of the appellant dismissed.

The appellant now seeks to have the judgment of the Superior Court restored.

As will have been noticed, the judgments submitted to us turned practically on the question whether the salary of the appellant was legally payable yearly or fortnightly.

An admission was made, at the trial, by the respondent in the following terms:

> The defendant admits in open court that the contract between the parties was an annual contract for one year, tacitly renewed from year to year and was in full force and effect.

In a special factum filed in the trial court, the respondent stated:

> The defendants agree with the plaintiff's (now appellant) statement that he had an original contract for one year and that it was renewed.

They contend, however, that the notice of termination of between five and six weeks, given on October 21, 1932, was ample to terminate their contract on December 1, 1932. The whole case, therefore, centers around the sufficiency of the notice.

The above admission and the above statement were referred to by the trial judge and by the Court of King's Bench in their respective judgments; and each treated the litigation as being limited to the question of the sufficiency of the notice.

The contract now under discussion is called in the Quebec Civil Code a contract for the "lease and hire of work." It is governed by arts. 1666 & seq. contained in chapter 3rd of the general title (seventh) concerning lease and hire; the first chapter of the title dealing with general provisions, and the second chapter thereof dealing with the lease or hire of things.

The material articles of the third chapter having to do with the present case are:

1667. The contract of lease or hire of personal services can only be for a limited term, or for a determinate undertaking.

It may be prolonged by tacit renewal.

1670. The rights and obligations arising from the lease or hire of personal services are subject to the rules common to contracts.

(N.B. The balance of the article is immaterial here).

As a result of the admissions, we have it in this case:

1. That the contract between the parties was originally for one year;

2. That it was tacitly renewed from year to year;

3. That the notice of termination was given on October 21, 1932, to terminate the contract with the appellant on December 1, 1932; and

4. That the whole case centres around the sufficiency of the notice.

The consequence is, as very properly held by the Superior Court, that the present case is taken out of the application of the decision of this Court in *Asbestos Corporation Ltd.* v. *Cook* (1).

In that case, the whole discussion turned upon the length of a contract of lease and hire of work, the duration of which was not fixed, and the salary being stipulated at "$6,000 per annum, dating from the 1st May, 1927, payable $500 a month." It was held that, according to its literal meaning, a contract of lease or hire of personal ser-

(1) [1933] S.C.R. 86.

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vices at so much per year, or per month, is not a contract for a fixed period, but one for an indeterminate period; and that there was no provision in the Civil Code to the effect that the contract of hire of personal services whose duration has not been agreed upon will be deemed to have been made for one year when the salary has been fixed at so much per year.

On the precise point herein involved, *Asbestos Corporation Ltd.* v. *Cook* (1) has no application to the present litigation. There exists here no dispute with regard to the length of the original contract, since the parties agree that it was made for one year.

The engagement of the appellant under the terms of the contract would, therefore, have ended on the 1st of December, 1929, without there being any necessity for a notice from one side or the other.

But the parties agree that the contract was prolonged by tacit renewal. And although article 1667 of the Civil Code enacts that this may be done, it is absolutely silent on the terms and conditions whereby the tacit renewal is to be governed.

Contrary to what was said in the Court of King's Bench, this Court, in the *Asbestos* case (1), did not decide that

> la tacite reconduction n'avait pas eu lieu pour une autre année mais plutôt pour un temps indéterminé, mais cela pour le motif que le contrat d'engagement originaire n'avait pas été fait pour un an, comme l'avait décidé la Cour d'Appel, mais pour un temps indéterminé.

The view expressed by us was that in the *Asbestos* case (1) the question of tacit renewal did not arise:

> Et si le contrat était, comme nous le décidons, pour une période indéterminée, il ne pouvait être question de tacite reconduction. En effet, comme le fait remarquer Mignault, Droit civil canadien, vol. 7, p. 371: "Pour qu'il y ait lieu à tacite reconduction, il faut qu'il y ait un terme convenu ou présumé pour la durée du service."
>
> La tacite reconduction n'a lieu que si les relations des parties persistent après l'expiration de la date fixée au bail de services; dans le cas d'un louage pour une période indéterminée, le cas ne saurait se présenter.

The question now submitted is, therefore, fully open in this Court. Of course, as was pointed out, both parties appear to agree that tacit renewal of a contract of lease or hire of personal services originally made for a year prolongs that contract for another year. Such is the contention put forward by the appellant in his declaration; and such is also the effect of the admission made by the respondent and already referred to:

(1) [1933] S.C.R. 86.

that the contract * * * was * * * tacitly renewed from year to year and was in full force and effect

at the time when the notice was given.

Our view of the law agrees with the admission. Might it be said at once that, on this subject, no guidance can be found in the jurisprudence of the courts of France or in the doctrine of the French writers, because the law is not the same.

Under what terms and conditions is the lease and hire of work prolonged by tacit renewal in the province of Quebec?

The words "tacit renewal" are employed in the Civil Code in articles 579, 1608, 1609, 1610, 1611, 1667, and nowhere else.

In all these articles, they are used exclusively in connection with leases. Every one of these articles is contained within the title of "Lease and Hire," except art. 579 dealing with emphyteutic lease and which refers to it only to provide that "emphyteusis is not subject to tacit renewal."

Otherwise, the Civil Code treats the lease or hire of personal services as coming under the subject and general provisions of lease and hire; and both contracts, that having things for its object or that having work for its object, are dealt with by the Code under the same general title (Arts. 1600 & seq. C.C.).

It is, therefore, strictly in conformity with the usual rules of interpretation that the same words, used in the same legislation, will, unless the context compels a different construction, be interpreted as having the same meaning.

It would follow that, in the minds of the codifiers and of the legislature, the words "tacit renewal," in art. 1667 C.C., in connection with the lease and hire of work, must have been used for the same purpose and within the same meaning as the identical words in another chapter of the same title of the Civil Code dealing with the lease or hire of things.

As a matter of fact, "tacit renewal," as expressed in articles 1608, 1609, 1610 and 1611 C.C., is used for the same purpose and with the same effect as in article 1667 C.C., to wit: the tacit prolongation of a contract of lease originally made for a fixed period and which is allowed

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by the parties to last beyond the length of time originally agreed upon.

Under the circumstances, our view is that the intention of the legislature and of the Civil Code in using the words "tacit renewal" in connection with the lease and hire of personal services, in article 1667 C.C., was that it should convey the same meaning, carry the same effect and be governed by the same rules, *mutatis mutandis*, as tacit renewal operating in the case of a contract for lease or hire of things.

In the case of things, tacit renewal operates

if the lessee remain in possession more than eight days after the expiration of the lease, without any opposition or notice on the part of the lessor (Art. 1609 C.C.).

In a similar way, under article 1667 C.C., will tacit renewal operate in the case of personal services (provided, of course, they were not leased for a determinate undertaking), if the lessor continues to give his services beyond the expiration of the term originally fixed, without any opposition or notice on the part of the lessee.

By force of article 1609 C.C., tacit renewal of the lease of things

takes place for another year, or the term for which such lease was made, if less than a year.

Likewise, tacit renewal of a lease of personal services will take place for another year, unless the term for which such lease was made is less than a year.

But, alike in the lease of things or real property, where "the lessee cannot thereafter (i.e., after tacit renewal) leave the premises or be ejected from them, unless notice has been given within the delay required by law" (Article 1609 C.C.), in the lease of work prolonged by tacit renewal, the lessor, or servant, will not have the right thereafter to leave the service of the master, or the master will not have the right to dismiss the servant, unless notice has been given within the delay required by law.

Applying this view of the law to the contract between the appellant and the respondent, it means that when the original lease of the personal services of the appellant (which was made for one year) was prolonged by tacit renewal, it was prolonged for another year from December 1, 1929, to December 1, 1930.

But it also means that, once having been prolonged beyond the term originally fixed in the contract ("terme

conventionnel"), it was no longer a contract which, by its very terms, was to terminate at a fixed date mutually agreed upon; it became a contract which, by law, was presumed to be prolonged for another period of time fixed by the law itself, and with the proviso that it would terminate upon one or the other party giving a notice "within the delay required by law."

We cannot acquiesce, therefore, to the somewhat novel suggestion made by the Court of King's Bench that a contract of lease prolonged by tacit renewal ought to be considered as a contract for a fixed period of time terminating at the expiration of that time without any notice being required from one party or the other. This new doctrine would have the effect of applying to the tacit renewal of leases of work the provision of article 1609 C.C. in part only, without the qualification that there must be a notice to put an end to a lease so renewed. We can see no reason why, if the tacit renewal provided for in article 1667 C.C. is to be assimilated to the tacit renewal in article 1609 C.C., the provisions of the latter article should not apply in full.

We may add that counsel for the respondent was utterly unable to find any precedent in the jurisprudence of the province of Quebec in support of such a proposition. So far as we have been able to ascertain, the decisions in the province of Quebec have consistently been in the other direction.

May we part with this point by referring to the following passage of Mr. Mignault, in his Droit Civil Canadien (vol. 7, p. 348), with which we completely agree:

> Ce qui est abondamment clair c'est que le congé est requis pour mettre fin à tout bail, écrit ou verbal, dont la durée n'a pas été déterminée, ainsi qu'au bail présumé de l'article 1608 et au bail continué par tacite reconduction.

Article 1609 C.C., by its clear terms, requires a notice to be given in order to terminate a lease which has been tacitly renewed; but the article itself does not contain any provision as to the length of the notice required to be given. In the case of lease of things, the rule invariably followed, and which in our view is the right one, is, for the requirements of the law in respect to notice, to look to article 1657 C.C.

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To use the words of Planiol and Ripert (vol. 11, no. 859):

D'une manière générale la durée du délai est en rapport avec les époques de paiement du salaire. * * *

We see no difficulty in accepting this guidance equally for the delay with which a notice ought to be given in order to terminate a contract for the lease or hire of work prolonged by tacit renewal. In fact, this would seem to be in accordance with the principles of good sense; and, unless we are greatly mistaken, we think it is also in accordance with the regular practice of the courts in the province of Quebec. At least, this would appear to be the effect of the numerous cases cited to us by counsel on both sides in the present case.

No disapproval of that practice can be found in our judgment in *Asbestos Corporation Ltd.* v. *Cook* (1), contrary to what seemed to have been the impression of counsel for the respondent, both in his factum and in his argument.

It should be emphasized, as already pointed out at the beginning of this judgment, that the *Asbestos* case (1) had nothing to do with the question of tacit renewal. Our judgment in that case was dealing with a contract of lease for an undetermined period of time.

But, even in a case of that character, this court decided that the contract could not be terminated without giving a notice of a reasonable delay; and that, on this point,

l'article 1657 du Code pose une règle qui peut servir de guide (2).

Now, article 1657 C.C. requires a notice of three months prior to the expiration of the contract prolonged by tacit renewal, if the rent be payable at terms of three or more months; if, however, the rent be payable at terms of less than three months, the delay is to be regulated according to article 1642; which means that if the rent be payable at terms of a month, the notice must be given with a delay of one month; if for a day, then the notice must be with a delay of one day.

In the *Asbestos* case (1), we discussed the question of the application of article 1642 C.C. to a lease of personal services, and we held that it was not applicable to such a lease for the purpose of determining the length or the duration of the contract, since it was clear that the article

(1) [1933] S.C.R. 86.

(2) [1933] S.C.R. 86, at 100.

was, by its very terms, a rule peculiar to the lease or hire of houses. There was, however, no intention of extending the principle beyond the subject-matter in discussion in that case, or, in other words, beyond the question of the length of the lease. The words of The Earl of Halsbury, L.C., in *Quinn* v. *Leathem* (1) are apposite:

> Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be an exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found * * * , a case is only an authority for what it actually decided.

We did not decide in the *Asbestos* case (2) that article 1642 C.C. could not be applied to leases of personal services, in so far as it is referred to in article 1657 C.C. for the purpose of computing the delay of the notice required to terminate a contract prolonged by tacit renewal. That is an entirely different question from the question in issue in that case.

We thought we would make the above statement so as to remove any misapprehension in that regard; but in the view we take of the present case, it is not necessary to rely on article 1642 C.C., for article 1657 C.C. is sufficient for our decision.

The appellant, it is true, under the terms of his contract with the respondent, was being paid a salary of $7,500 per annum. The contract itself was silent as to the time of payment of the salary. There was a question whether it was part of the contract that the salary should be paid fortnightly. The trial judge held that it was payable yearly. Under all circumstances, this would be a question of fact as to which due consideration would have to be given to the finding of the court of first instance.

But a point which seems to have been overlooked by the Court of King's Bench and as to which considerable argument was offered to this Court is that the salary of $7,500 per annum was not the only, nor the whole compensation which the appellant was entitled to receive under his contract. There was provision for an "additional compensation" in the form of a commission of 10% based on certain specified items of income and outgo to be computed at the end of the year. The "rent" in respect to

(1) [1901] A.C. 495,, at 506. (2) [1933] S.C.R. 86.

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the payment of which the delay for the giving of the notice is to be computed under article 1657 C.C. evidently, in the case of the present appellant, includes both the salary and the commission.

Even if it should be held that the salary was payable fortnightly, it is quite clear that the commissions were payable only at the end of the year. Under the circumstances, it seems to us that it cannot be said of the appellant that the "rent" due to him, or his salary and commission together were payable "at terms of less than three months"; and it follows that, having regard to the provisions of article 1657 C.C., and to all the circumstances, this is not a case where the lease of personal services, prolonged as it was by tacit renewal, could be terminated by a notice of less than three months.

For the reasons above stated, the appeal ought to be allowed; and, in the result, the judgment of the Superior Court should be restored with costs here and in the Court of King's Bench.

Appeal allowed with costs.

Solicitors for the appellant: *Brais, Létourneau & Campbell.*

Solicitors for the respondent: *Laverty, Hale & Laverty.*

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* Mar. 24.
* Apr. 21.

F. G. BRODIE AND G. C. BARRETT....APPELLANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Indictment—Formal charge in writing setting forth offence—Description of offence—Insufficiency—Defects in matters of substance and essential averments omitted—Conspiracy—Overt act—Substantial wrong—Sections 852, 859, 873, s.s. 5, Criminal Code.

Held insufficient a count in a formal charge in writing (replacing in Quebec, a bill of indictment before a grand jury no longer required in that province) that the accused were parties "to a seditious "conspiracy in conspiring together and with (other persons named "and unknown), thereby committing the crime of seditious conspir-

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

"acy," such a charge containing defects in matters of substance and essential averments having been wholly omitted.

Although conspiracy to commit a crime, being in itself an indictable offence, may be charged alone in an indictment and independently of the crime conspired to be committed, it is nevertheless necessary that a count charging conspiracy alone, without the setting out of any overt act, should describe it in such a way as to contain in substance the fundamental ingredients of the particular agreement which is charged, or, in other words, in such a way as to specify in substance, the specific transaction intended to be brought against the accused.

Under the terms of section 852 Cr. C., which enacts an imperative requirement ("shall contain"), there must be in the charge a statement that the accused has committed an indictable offence; and such offence must be "specified." It will be sufficient if the substance of the offence is stated; but every count must contain such statement "in substance." It will not be sufficient to merely classify or characterize the offence; it is necessary to specify time, place and matter and to state the facts alleged to constitute the indictable offence. The statement "may be made in popular language, without any technical averments" or allegations; or it "may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence"; but the statement must contain the allegations of matter "essential to be proved" and must be in "words sufficient to give the accused notice of the offence with which he is charged" (ss. 2 and 3 of section 852 Cr. C.): the main object of such legislation being that an accused may have a fair trial and consequently that the indictment shall, in itself, indentify with reasonable precision the act or acts with which he is charged in order that he may be advised of the particular offence alleged against him and prepare his defence accordingly.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, sustaining the conviction of the appellants, on their trial before Belleau J. and a jury, on a charge of having been parties to a seditious conspiracy. The grounds of appeal, and the material facts of the case bearing on the points dealt with by this Court, are sufficiently stated in the judgment now reported. The appeal was allowed, the indictment and the conviction were quashed.

R. L. Calder K.C. and *Louis Lemay* for the appellants.

Gérard Lacroix K.C. for the respondent.

The judgment of the Court was delivered by

RINFRET J.—The appellants were found guilty and convicted in the province of Quebec of having been parties to a seditious conspiracy. Upon appeal, the verdict and

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conviction thereon were unanimously affirmed by the Court of King's Bench (appeal side).

In the province of Quebec (as well as in the provinces of Manitoba, Saskatchewan, Alberta and British Columbia), it is no longer necessary to prefer a bill of indictment before a grand jury; but it is sufficient that the trial of any person charged with a criminal offence be commenced by a formal charge in writing setting forth as in an indictment the offence with which he is charged (Cr. Code, subs. 5 of sec. 873).

In the present case, the charge was preferred by the Attorney-General and read as follows:

> The Attorney-General of the province of Quebec charges that: during the months of September and October in the year of our Lord one thousand nine hundred and thirty-three, at the city of Quebec, in the district of Quebec, and elsewhere in the province of Quebec, George H. Brodie, of Toronto, and G. C. Barrett, of Belleville, Ontario, were party to a seditious conspiracy, in conspiring together and with one W. F. Greenwood, W. G. Brown, Mrs. Charles Alton and Mrs. A. M. Rose and also with other persons unknown, thereby committing the crime of seditious conspiracy.

One of the grounds of appeal to the Court of King's Bench was that this indictment was, on the face of it, insufficient. That court, however, refused to entertain the objection and to quash the indictment.

The appellants, thereupon, alleging that the judgment appealed from conflicted with the judgment of the Court of Appeal of Ontario in a like case (to wit: *Rex* v. *Buck*) (1), were granted leave to appeal to this Court under section 1025 of the Criminal Code.

There can be no question of the existence of the conflict.

In the present case, the whole indictment, and in the *Buck* case (1), the count objected to in the indictment, charged the accused with being parties to a seditious conspiracy. In both cases, the time and place were mentioned, the accused were named and all that was charged was that, at such time and place, the accused were "parties to a seditious conspiracy." In the present case, the indictment adds:

> in conspiring together and with one W. F. Greenwood, W. G. Brown, Mrs. Charles Alton and Mrs. A. M. Rose and also with other persons unknown.

(1) (1932) 57 Can. Cr. Cas. 290.

It does not appear in the report of the *Buck* case (1) that the count there in issue contained a similar mention. But otherwise the form of the charge was identical. In the Quebec court of appeal, the indictment was held valid; in the Ontario Court of Appeal, the count in the indictment was held invalid. It is evident that the condition required by section 1025 of the Criminal Code is met; and, leave having been granted, an appeal lies to this Court.

It remains for us to decide whether or not a charge preferred in the form stated is sufficient under the provisions of the Criminal Code.

The general provisions as to counts and indictments are contained in ss. 852 & seq. of the Code; and the fundamental rule is laid down in s. 852 itself, which reads as follows:

852. Every count of an indictment shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some indictable offence therein specified.

2. Such statement may be made in popular language without any technical averments or any allegations of matter not essential to be proved.

3. Such statement may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence, or in any words sufficient to give the accused notice of the offence with which he is charged.

4. Form 64 affords examples of the manner of stating offences.

This section has given rise to a diversity of interpretations, not only in the case immediately under discussion and in the judgment of the Ontario court in *Rex* v. *Buck* (1) already adverted to, but also in other decisions throughout the country. It has been stated by one court that the requirement that a count shall state in substance that the accused has committed some indictable offence therein specified has reference to the particular kind of offence, such as distinguished from other kinds of offences recognized by the law; that it was not directed to the specific acts and things which constitute the offence alleged to have been committed (Prendergast, J., in *Rex.* v. *Kelly* (2)); while another court (*Rex* v. *Trainor* (3) Appellate Division of the Supreme Court of Alberta) thought it was clear the enactment did not mean that it is sufficient to say that the accused did, on such a day, "commit theft," or

(1) (1932) 57 Can. Cr. Cas. 290. (2) (1916) 27 Can. Cr. Cas. 94 at 102.
(3) (1916) 27 Can. Cr. Cas. 232, at 235.

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"steal," or "did commit an assault with intent to rob," without specifying the thing stolen, or identifying the person assaulted, not necessarily by name, but in some way or other.

Such was decidedly the view of the Appellate Division of the Supreme Court of Ontario, as expressed in its judgment in *Rex* v. *Bainbridge* (1), where Magee, J.A., said (p. 222):

> It is evident from subsec. 2 (of sec. 852) that matter which is essential to be proved is not to be omitted, and from subsec. 3 that the accused is to have notice of the offence and not merely of the character or class of the offence; while subsec. 1 requires that there is to be a substantial statement of an offence which, not the class of which, is specified, and which must be an indictable one.

In the same case, Clute, J. said:

> This (subsec. 1 of sec. 852) does not mean merely naming an offence, as "murder" or "theft," but the offence itself must be specified.

And a little further:

> The indictment must contain a valid count identifying the charge.

The other judges of the court agreed either with Magee, J.A., or with Clute, J.

Following the same principle, the Chief Justice of Ontario, speaking for the Court of Appeal in the *Buck* case (2) and, as already mentioned, with reference to an indictment preferred in precisely the same wording as in the present case, said that the count failed for insufficiency; and the insufficiency was not cured by the furnishing of particulars showing matter which, if embodied in the count, would have rendered the count adequate. He expressed the view that the true functions of particulars was to give further information to the accused of that which it was intended to prove against him, so that he may have a fair trial; but it was not intended to be, in effect, the supplementing of a defective indictment by supplying that which ought to have appeared in the indictment itself. He added:

> This is very plain from the reading of sec. 859 of the Code (later to be referred to).

On the other hand, in the judgment now appealed from, Bernier, J., thought

> qu'il suffit que l'acte d'accusation contienne en substance une déclaration que le prévenu a commis quelque acte criminel et spécifié * * *

(1) (1918) 30 Can. Cr. Cas. 214.

(2) (1932) 57 Can. Cr. Cas. 290, at 293.

chaque chef d'accusation doit décrire les circonstances de l'infraction imputée, afin de permettre à l'accusé de reconnaître ce à quoi il se rapporte; néanmoins, ajoute l'article, l'absence ou l'insuffisance de ces détails ne vicie pas le chef d'accusation.

He further said, it is true:

Il est possible que l'acte d'accusation aurait pu décrire en détails la conspiration séditieuse reprochée aux appelants; chose bien certaine cependant, c'est que cette omission ne leur a causé, et ne pouvait leur causer aucun préjudice, aucun *substantial wrong;* ils savaient parfaitement ce dont ils étaient accusés et ce pourquoi ils allaient subir une enquête préliminaire suivie d'un procès.

And it is not possible exactly to surmise how far the latter consideration influenced the decision of the learned judge.

As for Walsh, J., who spoke on behalf of the other members of the Court, he held the indictment sufficient as the appellants were "charged in the words of the Criminal Code." The Crown had submitted and produced certain pamphlets distributed by the accused, expressive of the seditious intention, and although no specific passage in those pamphlets had been indicated by the Crown, this, in the learned judge's view, was not necessary in this case because no particular, but an *ensemble* constituted the offence.

The differences in the legal interpretation of sec. 852 might also be traced in, among other cases: *The Queen* v. *Weir* (No. 5) (1), Wurtele, J.; *Rex.* v. *Lemelin* (2), King's Bench (Quebec) appeal side; *Le Roi* v. *Beauvais & Montour* (3); *Hatem* v. *Rex* (4).

It has now become our duty to decide the question.

If section 852 be analysed, it will be noticed the imperative requirement ("shall contain") is that there must be a statement that the accused has committed an indictable offence; and such offence must be "specified." It will be sufficient if the substance of the offence is stated; but every count must contain such statement "in substance." In our view, this does not mean merely classifying or characterizing the offence; it calls for the necessity of specifying time, place and matter (Compare dictum of Channel, J., in *Smith* v. *Moody* (5)), of stating the facts alleged to constitute the indictable offence.

The manner of stating the matter is of no absolute importance, in view of subsections 2 and 3. The statement may be made in popular language, without any technical

(1) (1900) 3 Can. Cr. Cas. 499.
(2) (1912) 22 Can. Cr. Cas. 109.
(3) (1924) Q.R. 36 K.B. 347.
(4) (1927) Q.R. 43 K.B. 111.
(5) [1903] 1 K.B. 56, at 63.

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averments or allegations; or it may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence; but we think the latter parts of subsections 2 and 3 are indicative of the intention of Parliament: the statement must contain the allegations of matter "essential to be proved," and must be in "words sufficient to give the accused notice of the offence with which he is charged." Those are the very words of the section; and they were put there to embody the spirit of the legislation, one of its main objects being that the accused may have a fair trial and consequently that the indictment shall, in itself, identify with reasonable precision the act or acts with which he is charged, in order that he may be advised of the particular offence alleged against him and prepare his defence accordingly.

What Parliament intended by using the words "a statement * * * (of) some indictable offence therein specified," in subsection 1 of section 852 is, to our mind, clearly illustrated by the "examples of the manner of stating offences" given in Form 64, referred to in subsection 4 of section 852.

Under the *Interpretation Act* (Ch. 1 of R.S.C., 1927), by force of sec. 31 (*d*):

> wherever forms are prescribed, slight deviations therefrom, not affecting the substance or calculated to mislead, shall not invalidate them;

which obviously means that any substantial deviation might be sufficient to invalidate the form used. Now, a perusal of the examples given in Form 64 will be sufficient to indicate that in no case is the manner of stating offences limited to the mere naming of them, but in each case the act charged against the accused, though described in the words of the enactment, is identified by specifying the time, the place and the matter. We think the examples in Form 64 are referred to for the purpose of indicating that they ought to be followed in substance. It is not sufficient in a count to charge an indictable offence in the abstract. Concrete facts of a nature to identify the particular act which is charged and to give the accused notice of it are necessary ingredients of the indictment. An accused person may not be charged merely of having committed murder; the statement must specify the matter. In the same way, in the present case, the appellants could not be charged merely with having been "parties to a seditious conspiracy," or

having "committed the crime of seditious conspiracy." The particular agreement between each of them and "with one W. F. Greenwood, W. G. Brown, Mrs. Charles Alton and Mrs. A. M. Rose and also with other persons unknown" into which they are alleged to have entered and to which the Attorney-General gave the appellation of "seditious conspiracy" ought to have been specified in the charge prepared, either in popular language or in the words of the code, in such a way as to show on its face that "the matter charged" (subsection 2 of sec. 852) was an indictable offence and as to apprise the accused of the acts committed by them for which they were called upon to answer.

As a matter of fact, this requirement of an indictment is further embodied in sec. 853 of the Criminal Code, which enacts that

> Every count * * * shall contain so much detail of the circumstances of the alleged offence as is sufficient to give to the accused reasonable information as to the act or omission to be proved against him and to identify the transaction referred to.

Such is the rule of the Criminal Code.

Of course, it is qualified by the proviso

> that the absence or insufficiency of such details shall not vitiate the count,

and it must be granted that these words are very strong. It should be noticed, however, that the proviso, as well as the section itself, relates only to the "absence or insufficiency of details." It does not detract from the obligation resulting from sec. 852 that the substance of the offence should be stated in the indictment.

Again do we find in sec. 855 the confirmation of the construction which must be put on sec. 852, in accordance with the views now expressed by us.

Sec. 855 is an enumeration of instances where, notwithstanding the omission of certain statements, the law says that

> no count shall be deemed objectionable or insufficient for the reason only

of this omission. A mere perusal of the instances there given will show conclusively, to our mind, that the requirements of sec. 852 with regard to the ingredients which "every count of an indictment shall contain" may not be restricted to the mere naming of the offence charged, without specifying the substance of the particular act complained of. If sec. 852 were to be construed in accordance

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with the contentions of the Crown in the present case, the enumeration in sec. 855 of special exceptions wherein certain omissions are not to be deemed objectionable, or to render the counts insufficient, would have been quite unnecessary.

Perhaps, in the premises, it should be added that the Crown was unable to bring the indictment within any of the enumerated exceptions, which makes it still clearer that the indictment under discussion is insufficient. For example: Subsection (*d*) of sec. 855 enacts that no count shall be deemed objectionable for the reason

> that it does not set out any document which may be the subject of the charge.

In our view, this assumes that a document made the subject of a charge should be referred to in the count, but that it will not be necessary to "set out" the document itself. In the present case, although apparently the Attorney-General intended to charge against the accused the distribution of certain pamphlets, no reference in the indictment is made to these pamphlets, or, indeed, to any pamphlet at all. *A fortiori,* was there no "setting out," in whole or in part, of the pamphlets in question; although the omission to "set out" the document is alone stated as being the omission which shall not be deemed objectionable or shall not render the count insufficient.

The same reasoning may be made in respect to subsection (*e*) of sec. 855, that the count

> does not set out the words used where words are the subject of the charge.

Under subsections (*f*) and (*g*), a count is not insufficient for the reason

> that it does not specify the means by which the offence was committed,

or

> that it does not name or describe with precision any person, place or thing.

It seems to us that the very terms in which the exceptions are expressed underline the minimum of ingredients which a valid count of an indictment should contain. It must contain, in substance, a statement of the specific act which is charged, although it is not necessary that it should "specify the means" by which the act was committed, or that it should name, or describe, "*with precision*" any

person, place or thing. In the latter provision, the essential words are the words: "with precision."

That this is the correct interpretation of sec. 855 is strengthened, in our view, by comparison with sec. 859 enumerating the cases in which particulars may be ordered.

Subsection (*d*) of sec. 859 deals with the charge of selling, or exhibiting, an obscene book, pamphlet, newspaper, printing or writing. If the court is satisfied that it is necessary for a fair trial, it may order the prosecutor to furnish particulars stating what passages in the book, pamphlet, newspaper or other printing or writing are relied on in support of the charge. Which presupposes that the book, pamphlet, newspaper, printing or writing has already been referred to in the charge.

This is made still clearer in subsections (*e*), (*f*) and (*g*) relating to "any document or words the subject of a charge"; to "means by which any offence was committed"; or to "any person, place or thing referred to in any indictment." Each of these subsections begins by the words: "further describing," which obviously contemplates indictments already describing the document or words the subject of a charge, the means by which any offence was committed, but requiring a "further" description which, in the view of the Court, "is necessary for a fair trial."

As for the "person, place or thing" dealt with in subsection (*g*), the point is made doubly clear, since the subsection speaks of a "person, place or thing (already) referred to in any indictment"; and it is stated that a particular may be ordered "further describing" them.

The evident relation between the matters dealt with in subsections (*d*), (*e*), (*f*) and (*g*) of sec. 855 and the corresponding subsections of sec. 859 is, we think, illuminating on the subject-matter of the present discussion. Clearly the result flowing from the two sections read together is: that some statement of the particular circumstances of the offence charged is assumed to be already contained in the count; that there may be omissions which, on account of sec. 855, are not sufficient to make the count objectionable; that the count will not be deemed insufficient by reason only of those omissions; and that if the court is satisfied that it is necessary for a fair trial, it may order particulars to describe further, or with more precision the matters in question.

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It need not be added that we are speaking now of counts in general, without reference to special cases such as are: libel, perjury, false pretence, or other cases which are the objects of special provisions with regard to indictment in the Criminal Code.

Applying the above principles to the present appeal, it follows that the indictment must be found insufficient. It is not the case where an offence is imperfectly stated; it is a case where essential averments were wholly omitted. The so-called indictment contains defects in matters of substance. To use the apt words of counsel for the appellants: "it does not describe the offence in such a way as to lift it from the general to the particular."

Of course, we are dealing with a case of conspiracy; and we are not unaware of the fact that in stating the object of the conspiracy the same certainty may not be required as in an indictment for the offence conspired to be committed (Archbold's Criminal Pleading, 29th ed., at p. 1419).

On a charge of conspiracy, the agreement is itself the gist of the offence (*Paradis* v. *The King* (1)). The mere agreement to commit the crime is regarded by the law sufficient to render the parties to it guilty at once of a crime (Kenny, Outlines of Criminal Law, 13th ed., p. 81).

And we need only recall the often cited passage of Lord Chelmsford in *Mulcahy* v. *The Queen* (2):

> It cannot exist without the consent of two or more persons; and their agreement is an act in advancement of the intention which each of them has conceived in his mind.

In other words, to borrow the expression of Mr. Justice Willes (*Mulcahy* v. *The Queen* (2) at p. 317): "The very plot is an act in itself." It follows that a person may be convicted of conspiracy as soon as it has been formed and before any overt act has been committed. The offence is complete as soon as the parties have agreed as to their unlawful purpose (Kenny, Outlines of Criminal Law, 13th ed., p. 289; *Belyea* v. *The King* (3)). Hence the overt acts need not be set out in the indictment (Archbold's Criminal Pleading, 29th ed., p. 1420. *The King* v. *Hutchinson* (4)).

(1) [1934] S.C.R. 165, at 168.
(2) (1868) L.R. 3 E. & I. App. 306, at 328.
(3) [1932] S.C.R. 279.
(4) (1904) 8 Can. Cr. Cas. 486.

The conspiracy is the offence. It is not necessary to show that the accused went on to commit some overt act towards carrying out the conspiracy. The actual accomplishment of the crime agreed upon will not cause the original offence of conspiracy to become merged in it (Kenny, pp. 289 and 290).

But although conspiracy to commit a crime, being in itself an indictable offence, may be charged alone in an indictment and independently of the crime conspired to be committed, it does not follow that the count charging conspiracy alone, without the setting out of any overt act, must not describe it in such a way as to contain in substance the fundamental ingredients of the particular agreement which is charged, or, in other words, in such a way as to specify, in substance, the specific transaction intended to be brought against the accused.

These averments were omitted and these necessary ingredients were lacking in the indictment preferred against the appellants. Their absence constitutes defects in matters of substance; and we are of opinion that these defects were not cured by the so-called incomplete particulars verbally given by the Crown when, at the outset of the trial, objection was taken to the indictment by counsel for the accused. The Crown, it may be added, in the argument before us did not rely on these particulars, and took the stand that the indictment was sufficient as it stood. Nor can we accede to the argument that, in the circumstances, no substantial wrong or miscarriage of justice has actually occurred and that we should exercise the powers given to us by sec. 1014 of the Criminal Code. In our view, it was a substantial wrong towards the appellants to have compelled them to plead to an illegal indictment.

The motion to quash the indictment made by the accused at the beginning of the trial, and before pleading, ought to have been granted. The appeal will, therefore, be allowed. The indictment and the conviction must be quashed, the Crown being at liberty to prefer a fresh indictment, if so advised.

We do not want to part with this appeal, however, without saying that our decision is strictly limited to the points in issue. We would not like to be taken as subscribing to certain generalities contained in some of the judgments to

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which we have been referred and which would tend to convey the idea that, notwithstanding the coming into force of the Criminal Code, the criminal law in this country should continue to be administered as though there were no Code.

Appeal allowed; conviction quashed.

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* Feb. 13, 14.
* April 21.

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... } APPELLANT;

AND

TORGIL ANDERS ANDERSON, AN INFANT SUING BY HIS NEXT FRIEND, ASTRID OLIVIA ANDERSON, AND ASTRID OLIVIA ANDERSON (PLAINTIFFS).. } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Railways—Negligence—Highways—Railway track on public street—Children playing in vicinity—Track used for assembling of freight train—Child climbing on car of assembled train just before train hauled away, falling through jerk of starting train and injured—Liability of railway company.

Defendant railway company had a track on the north side of H. street in the city of Winnipeg, on which it would assemble a freight train by moving easterly successive "cuts" of cars to be added to those already assembled. When the assembling was completed an engine was attached and the train was hauled westerly to connecting tracks within defendant's yards. Children played in the vicinity. One evening, after a long train had been assembled, and the hauling crew had taken charge, and were about to start the train, the plaintiff, a boy aged 4½ years, ran across the street, unnoticed by the trainmen, climbed the end side ladder of a car, crossed to the rear ladder, and fell at the jerk of the starting train and was injured by the moving train. Defendant was sued for damages.

Held (Crocket J. dissenting): Defendant was not liable. (Judgment of the Court of Appeal for Manitoba, 43 Man. R. 345, reversed).

Per Duff C.J. and Rinfret J.: Plaintiff was a trespasser on the train and on that ground alone was precluded from maintaining a right of action for negligence. The case is governed by *Grand Trunk Ry. Co.* v. *Barnett,* [1911] A.C. 361. (*Lygo* v. *Newbold,* 9 Ex. 302, *Hughes* v. *Macfie,* 2 H. & C. 744, and *Addie* v. *Dumbreck,* [1929] A.C. 358, also cited). Further, no breach of duty by defendant had been established. Towards people using the public street defendant was bound to exercise reasonable care. Engaged in the execution of statutory powers, it was bound to take reasonable care not to cause unnecessary harm to those who might be injured by a careless or unreasonable

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

exercise of its rights. But it was under no obligation to intending trespassers, children or adults, to prevent them effectuating a trespass upon its cars. Its duty towards such a trespasser was limited to refraining from intentionally injuring him or "not to do a wilful act in disregard of ordinary humanity towards him"; "not to act with reckless disregard of the presence of the trespasser." On the evidence it was clear that defendant did not permit children to climb on the cars and tried to prevent them; it was not in the position of a tacit licensor. There was here no nuisance; the action rested upon negligence; (the distinction, and its importance, discussed, and *Lynch* v. *Nurdin,* 1 Q.B. 29, *Liddle* v. *Yorkshire,* [1934] 2 K.B. 101, *Cooke* v. *Midland,* [1908] 2 Ir. R. 242, [1909] A.C. 229, *Latham* v. *Johnson* [1913] 1 K.B. 398, discussed). The present case has no analogy to *Lynch* v. *Nurdin,* 1 Q.B. 29, *Glascow Corporation* v. *Taylor,* [1922] 1 A.C. 44, *Excelsior Wire Rope Co.* v. *Callan,* [1930] A.C. 404, or *Cooke* v. *Midland,* [1909] A.C. 229. A person who is using his vehicle in the usual way, having committed no wrong, and though the vehicle may be attractive to children, is guilty of neither negligence nor nuisance, and is not responsible for injury to children caused by their trespassing thereon.

Per Davis J.: The case cannot be treated in law as one of nuisance, and falls to be determined upon the question of negligence. That distinction is fundamental. The presence and movement of cars on the street was the inevitable result of the ordinary exercise of defendant's public authority. It was not shewn that plaintiff was on the car with leave or licence of defendant. He was a trespasser on the car. It was clear upon the evidence that no employee of defendant saw him approaching the car or upon it. It could not be fairly said upon the evidence that defendant's conduct toward him was such wilful or reckless disregard of his presence as to amount to malicious conduct toward him. To hold defendant liable would make it virtually an insurer of a trespasser. (*Grand Trunk Ry. Co.* v. *Barnett,* [1911] A.C. 361, *Addie* v. *Dumbreck,* [1929] A.C. 358, and *Liddle* v. *Yorkshire,* [1934] 2 K.B. 101, cited. *Lynch* v. *Nurdin,* 1 Q.B. 29, *Cooke* v. *Midland,* [1909] A.C. 229, *Excelsior Wire Rope Co.* v. *Callan,* [1930] A.C. 404, and other cases, discussed).

Per Kerwin J.: Defendant's railway track was legally on the street, and its employees were lawfully engaged in moving the cars. Defendant owed no duty to plaintiff which it failed to fulfil. Plaintiff's act in running out and getting on the car when none of defendant's employees happened to be looking, was something against which defendant could not guard, and which, in law, it was not incumbent upon it to foresee. (*Donovan* v. *Union Cartage Co.,* [1933] 2 K.B. 71, *Liddle* v. *Yorkshire,* [1934] 2 K.B. 101, and other cases, referred to).

Per Crocket J. (dissenting): Defendant, in the exercise of its right to assemble cars and move trains on its track along the street, was bound to take such precautions for avoidance of injury to the public as were fairly commensurate with the danger created by said operations. Its degree of care and vigilance owed to the public depended on existing conditions and risks, as they were known or ought to have been known to defendant or its servants in charge. At the particular point where the accident happened there was a special danger from the presence of children in play in close proximity, and upon the evidence defendant through its servants and agents must be charged

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with knowledge thereof. The standing cars were an attraction to younger children, and this should have been known to defendant's servants; and defendant did not take reasonably adequate precautions to guard against the obvious danger of such a thing as happened. It should have kept one or two watchmen to patrol the dangerous sections, specially charged with looking out for children, from the time the hauling crew took over the train until it was moved off the street. In the circumstances defendant could not avail itself of the fact that plaintiff was a trespasser on the car; he was no more so than were the infant plaintiffs in *Lynch* v. *Nurdin*, 1 Q.B. 29, and *Excelsior Wire Rope Co.* v. *Callan*, [1930] A.C. 404.

APPEAL by the defendant railway company from the judgment of the Court of Appeal for Manitoba (1) allowing (Dennistoun and Trueman JJ.A. dissenting) the plaintiffs' appeal from the judgment of Adamson J. (2) dismissing the action. The Court of Appeal set aside the judgment of Adamson J. and gave judgment for the infant plaintiff for $5,000 and for the adult plaintiff (the mother of the infant plaintiff) for $800. The action was brought to recover damages by reason of injury to the infant plaintiff caused when, having climbed on a car of defendant's freight train which had been assembled on defendant's track on Higgins Avenue in the city of Winnipeg, he was jerked off by the starting train and run over. The material facts of the case are sufficiently stated in the judgments now reported. The defendant's appeal to this Court was, as against the infant plaintiff, allowed, and the judgment of the trial judge restored, Crocket J. dissenting. The appeal as against the adult plaintiff was dismissed for want of jurisdiction, no order granting special leave to appeal having been obtained.

W. N. Tilley K.C. and *L. J. Reycraft K.C.* for the appellant.

J. T. Thorson K.C. for the respondents.

The judgment of Duff C.J. and Rinfret J. was delivered by

DUFF C.J.—The infant respondent, it would appear, was a trespasser on the appellant's train, and on that ground alone would seem to be precluded from maintaining a right of action for negligence.

(1) 43 Man. R. 345; [1935] 3 W.W.R. 225; [1936] 1 D.L.R. 198.

(2) 43 Man. R. 345, at 346-350.

The case is governed by *Barnett's* case (1). No pertinent distinction can, I think, be drawn between a train which is momentarily upon a part of the railway that traverses a public street and a train which, at the time of the injury, is on a part of the company's line where the title to and possession of the soil are vested in the railway company. Indeed, in *Lygo* v. *Newbold* (2), a person who was riding in the defendant's wagon on a public road in such circumstances as to constitute him a trespasser was held to be precluded by virtue of that fact from recovering damages from the owner for injuries resulting from the negligence of the owner's servant who was driving the wagon. This case is cited with approval in the judgment of the Privy Council in *Barnett's* case (1). The principle of *Lygo* v. *Newbold* (2) was applied in *Hughes* v. *Macfie* (3). The judgments of Lord Hailsham and Lord Dunedin in *Addie* v. *Dumbreck* (4) establish that for this purpose no distinction can be drawn between adults and infants.

Lynch v. *Nurdin* (5) is said to establish such a distinction. It is convenient to discuss that case later.

But the respondent also fails because no breach of duty by the appellants has been established. Towards people using the public street the appellants are bound to exercise reasonable care. They are engaged in the execution of statutory powers and are, therefore, under an obligation to take reasonable care not to cause unnecessary harm to those who may be injured by a careless or unreasonable exercise of their rights. But they are under no obligation to intending trespassers to prevent them effectuating a trespass upon their cars, which are a part of the railway; whether they be children or adults. If they permit children to climb upon their cars they may find themselves in the position of tacit licensors and, in consequence, affected by duties towards them as licensees; but nobody suggests (such a suggestion is negatived by the evidence) that the respondent was a licensee.

The duty of the appellants towards a trespasser on one of their trains, as explained in *Barnett's* case (6), is limited

(1) *Grand Trunk Ry. Co.* v. *Barnett,* [1911] A.C. 361.
(2 (1854) 9 Ex. 302.
(3) (1863) 2 H. & C. (Exch. Rep.) 744.
(4) [1929] A.C. 358.
(5) (1841) 1 Q.B. 29.
(6) [1911] A.C. 361.

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to refraining from intentionally injuring him, or what is virtually the same thing, "not to do a wilful act in disregard of ordinary humanity towards him." The distinction between cases of nuisance and cases of negligence where the plaintiff is a trespasser is illustrated in *Liddle* v. *Yorkshire* (1).

Three lines of argument founded upon three separate decisions are presented in support of the judgment. Before dealing with these decisions, two observations would appear to be pertinent. First, as a general rule, it is not a legitimate use of a judgment to separate particular expressions from their context and, without regard to the point at issue or the facts of the case, to treat those expressions as governing the decision in other cases. Second, we must be careful, as Farwell L.J. said in *Latham* v. *Johnson* (2),

> not to allow our sympathy with the infant plaintiff to affect our judgment: sentiment is a dangerous will-of-the-wisp to take as a guide in the search for legal principles.

The first of these decisions is *Lynch* v. *Nurdin* (3). There has been some difference of opinion upon the question whether the ground of liability in *Lynch* v. *Nurdin* (3) was nuisance or negligence. Notwithstanding the observations of Lord Macnaghten in *Cooke* v. *Midland* (4), I can not escape the conclusion that the view expressed by Lord Sumner (then Hamilton L.J.) in *Latham* v. *Johnson* (5), by Farwell L.J. in the same case, and by Greer L.J. in *Liddle* v. *Yorkshire* (1), correctly gives the effect of that case. Lord Sumner says:

> It is necessary to distinguish all these cases which turn upon negligence from those which turn on nuisance upon or adjoining a highway. Such cases, so far as they relate to children, may in that particular be to some extent in point, but the differences between cases of nuisance and cases of negligence must never be lost sight of. The cases of *Lynch* v. *Nurdin* (3); *Jewson* v. *Gatti* (6); *Harrold* v. *Watney* (7), and *Barker* v. *Herbert* (8) are all of this class (see especially *per* Vaughan Williams L.J. in the last cited case at pp. 637 and 638).

With this view Farwell L.J. agreed, at page 403. He said:

> No question therefore arises of the duty not to do anything that may be a nuisance close to or upon a highway, such as arose in *Jewson* v. *Gatti* (6), *Harrold* v. *Watney* (7), or in *Lynch* v. *Nurdin* (3), which, with all respect to Lord Macnaghten's contrary opinion in *Cooke* v. *Midland Great Western Railway of Ireland* (9), was clearly a case of

(1) [1934] 2 K.B. 101, at 123.
(2) [1913] 1 K.B. 398 at 408.
(3) (1841) 1 Q.B. 29.
(4) [1909] A.C. 229.
(5) [1913] 1 K.B. 398 at 412-413.
(6) (1886) 2 Times L.R. 441.
(7) [1898] 2 Q.B. 320.
(8) [1911] 2 K.B. 633.
(9) [1909] A.C. 229 at 234.

nuisance. The horse and cart left unattended in the highway, to use the language of Vaughan Williams L.J. (1), "constituted a danger to those using the highway—that is, it constituted a nuisance."

Greer L.J. in *Liddle* v. *Yorkshire* (2) approved the pronouncements of these eminent judges. He said:

> That was a case of nuisance, and the question involved in the case was whether the damage to the infant plaintiff could rightly be said to have been caused by the wrongful act of the defendant. As the act of the infant plaintiff in getting into the cart and the act of the other child who set it in motion were acts which any one would expect to follow as a probable result of the defendants' wrongful act, the defendants were held liable. The story began with a wrongful act by the defendant. Here there was no wrongful act by the defendants unless it be a wrongful act not to prevent children from trespassing. We have the high authority of Lord Sumner, then Hamilton L.J., in *Latham* v. *Johnson* (3) for this explanation of *Lynch* v. *Nurdin* (4). * * *

The discussion in the judgments in *Liddle* v. *Yorkshire* (5) illustrates the importance of the distinction between actions founded on negligence and actions founded on nuisance as regards the fact of the plaintiff being a trespasser.

Then, in *Cooke* v. *Midland* (6), the Lord Chancellor of Ireland explains *Lynch* v. *Nurdin* (4) as a case of nuisance. So also does Holmes L.J. at p. 284. FitzGibbon L.J. does not use the term nuisance but employs these words:

> *Lynch* v. *Nurdin* (4) was the case of injury on a public highway, where a man left his horse and cart unattended in the street, and a probable danger resulted in actual injury.

The question of causal relation between the wrongful act of leaving the horse and cart unattended in a public highway and the injury to the plaintiff was, of course, a question of importance in *Lynch* v. *Nurdin* (4). I am inclined to think that it is to this matter of causal relation that the observation usually quoted from Lord Denman's judgment is addressed. Lord Denman said:

> For if I am guilty of negligence in leaving any thing dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first (7).

This sentence taken by itself would require considerable qualification, but the succeeding sentence shews what was in the mind of the Lord Chief Justice. He said:

(1) [1898] 2 Q.B. 324.
(2) [1934] 2 K.B. 101, at 123.
(3) [1913] 1 K.B. 398, at 413.
(4) [1908] 2 Ir. Rep. 242, at 277.
(5) [1934] 2 K.B. 101.
(6) [1908] 2 Ir. Rep. 242, at 277
(7) 1 Q.B. at p. 35.

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If, for example, a gamekeeper, returning from his daily exercise, should rear his loaded gun against a wall in the playground of school boys whom he knew to be in the habit of pointing toys in the shape of guns at one another, and one of these should playfully fire it off at a school-fellow and maim him, I think it will not be doubted that the gamekeeper must answer in damages to the wounded party.

The true doctrine as regards causal relation is stated with accuracy, if I may say so, by Hamilton L.J., in his judgment in *Latham* v. *Johnson* (*supra,* at p. 413), in these words:

> Children acting in the wantonness of infancy and adults acting on the impulse of personal peril may be and often are only links in a chain of causation extending from such initial negligence to the subsequent injury. No doubt each intervener is a *causa sine qua non,* but unless the intervention is a fresh, independent cause, the person guilty of the original negligence will still be the effective cause, if he ought reasonably to have anticipated such interventions and to have foreseen that if they occurred the result would be that his negligence would lead to mischief. Such cases are collected and elaborately discussed in *Sullivan* v. *Creed* (1). The following are instances: *Dixon* v. *Bell* (2); *Illidge* v. *Goodwin* (3); *Lynch* v. *Nurdin* (4); *Clark* v. *Chambers* (5); *Englehard* v. *Farrant & Co.* (6); *McDowall* v. *Great Western Railway* (7); *Williams* v. *Eady* (8).

The sentence in the judgment in *Lynch* v. *Nurdin* (9) following the passage I have quoted above seems to support the conclusion that nuisance was within the contemplation of that judgment. Lord Denman says,

> This might possibly be assumed as clear in principle; but there is also the authority of the present Chief Justice of the Common Pleas in its support; *Illidge* v. *Goodwin* (3).

The decision of Tindal C.J. to which the Lord Chief Justice refers is expressed in these words:

> * * * If a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done; (10).

which seems clearly enough to point to nuisance.

In this view, *Lynch* v. *Nurdin* (4) could have no application to the present case. There was here no nuisance; the action rests upon negligence and the appellants owed no duty to a trespasser beyond that stated above.

Then, one asks oneself whether there is any analogy between a railway train, to which an engine is attached, guarded by its train crew, and a horse and cart left wholly

(1) [1904] 2 I.R. 317, 335.
(2) (1816) 5 M & S. 198.
(3) (1831) 5 C. & P. 190.
(4) 1 Q.B. 29.
(5) (1878) 3 Q.B.D. 327.
(6) [1897] 1 Q.B. 240.
(7) [1903] 2 K.B. 331.
(8) (1893) 10 Times L.R. 41.
(9) 1 Q.B. 29 at 35-36.
(10) 5 C. & P. at 192.

unguarded in a public street. The horse and cart was not only likely to attract children, it was calculated to entice them to interfere with it, to set it in motion. The only way a child can interfere with a railway train is by attempting to get on it. In the judgment already referred to, Hamilton L.J. considers the elements of attractiveness and of danger as envisaged by the general rule,

> that a person who, in neglect of ordinary care, places or leaves his property in a condition which may be dangerous to another may be answerable for the resulting injury, even though but for the intervening act of a third person or of the plaintiff himself (*Bird* v. *Holbrook* (1); *Lynch* v. *Nurdin* (2)), that injury would not have occurred.

At p. 419, he says:

> One asks what kind of chattel it is in respect of which its owner owes a duty of care towards strangers, equally whether it is in a public place or on his own premises, and equally whether the strangers are invited or only licensed. There is only one answer: the chattel must be something highly dangerous in itself, inherently or from the state in which its owner suffers it to be. Danger is relative. What property must the chattel possess to make the consideration of its attractiveness to children relevant? It must be something which, from its nature or state, will draw children to it and induce them heedlessly to put it into operation.

I cannot in any intelligible way apply this language to the appellant's train. Hamilton L.J. is speaking of property which, in neglect of ordinary care, is placed or left in a "condition which may be dangerous to another"; and is something which, by reason of being left unguarded, will not only attract children to it, but will induce them heedlessly to put it into operation or tamper or play with it.

Hamilton L.J., at page 415 in the same judgment, discusses the phrases "trap," "attraction" and "allurement." A trap, he says,

> involves the idea of concealment and surprise of an appearance of safety under circumstances cloaking a reality of danger.

Lynch v. *Nurdin* (2) has never been applied, so far as I am aware, to a vehicle actually in use and guarded in the normal way. It is well known that all boys experience the pressure of the invitation to climb on the back of a vehicle in order to get a ride. It has never been held, so far as I know, that a farmer driving hay to market must have somebody on top of the load to keep an eye on boys who may, and almost certainly will, indulge their propensities

(1) (1828) 4 Bing. 628. (2) 1 Q.B. 29.

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by getting on the back of the vehicle. In *Lygo* v. *Newbold* (1) Alderson B. appears to have rejected the idea that liability could arise in such circumstances if the child were injured through *negligent* driving. Indeed, he puts this possibility as a *reductio ad absurdum*.

So long as a person is actually using his vehicle in the ordinary and accustomed way, he is, it would appear, entitled to the enjoyment of it without the curtailment of his rights by trespasses or encoachments of anyone. The fact that the vehicle may present an irresistible allurement to children in the street can make no difference. There is neither negligence nor nuisance in making use in the ordinary way of a vehicle presenting attractions of such a character to infants. If, unfortunately, children of an age too tender to possess the capacity to take care of themselves put themselves in a position of danger by getting into it without the consent of the persons in charge of the vehicle, and without their knowledge, then there arises just one of those risks to which such children, when left unguarded, will unhappily be subject. The person who is making use of a vehicle he employs in the usual way, having committed no wrong, is not chargeable with responsibility for them.

It was considered in the Court of Appeal that *Glasgow Corporation* v. *Taylor* (2) governs this case. There, a shrub with poisonous berries was growing in the Botanical Gardens in Glasgow; and a child ate some of the berries and died in consequence. The Corporation was held responsible.

The question was raised by way of demurrer. Lord Buckmaster, in his judgment at pp. 49-50, sums up thus the averments in the pursuer's condescendence:

> On a small piece of fenced ground in the gardens the appellants grew, among other botanical specimens, a shrub known as *Atropa Belladonna*, whose berries present a very alluring and tempting appearance to children. Notwithstanding the fence the piece of ground on which this shrub grew was open to the public. There was no isolation of the shrub nor warning that could be seen of its dangerous character. The spot where it grew was frequented by children, and according to the pursuer's allegations the circumstances were such that the defenders knew that it was probable, and indeed practically certain, that children would be tempted and deceived by the appearance of the shrub and would eat the berries. The knowledge that these berries were poisonous was also said

(1) (1854) 9 Exch. 302.

(2) [1922] 1 A.C. 44.

to be possessed by the defenders. The pursuer's child, a little boy of seven, ate some of these berries and, in consequence, died.

All the judgments proceeded upon the circumstance that, according to the allegations, within reach of the children who, in pursuance of undoubted legal right habitually frequented the place, there had been put something which they were tempted to eat, while to eat was the certain prelude to sickness, and the probable precursor of death; as well as the facts that, though this danger was well known to the Corporation, no warning was given to parents or those having the custody of the children, and that these had no knowledge of the danger. The allegation that the defenders knew it was probable, and, indeed, practically certain, that the children would be tempted and deceived by the appearance of the shrub and would eat the berries would seem to put the matter beyond all question, and that is the basis of the decision. Lord Shaw says (at p. 62):

> I do not find myself able to draw a distinction in law between natural objects such as shrubs whose attractive fruitage may be injuriously or fatally poisonous, and artificial objects such as machines left in a public place unattended and liable to produce danger if tampered with.

The case plainly falls within the general rule stated in the judgment of Hamilton L.J., as quoted above (of which *Bird* v. *Holbrook* (1), is given as an instance), and all the elements mentioned in that judgment as constituting danger, attraction and trap were present. It is important to observe that the Lords who took part in *Taylor's* case (2) unanimously stated, either in explicit words or impliedly, that the decision has nothing whatever to do with cases where the peril is not concealed. Lord Buckmaster emphasizes "the element of mistake and deception" (p. 51). At page 53, Lord Atkinson says:

> The defenders were, therefore, aware of the existence of a concealed or disguised danger to which the child might be exposed when he frequented their park, a danger of which he was entirely ignorant, and could not by himself reasonably discover, yet they did nothing to protect him from that danger or even inform him of its existence.

Lord Shaw says, at pages 60 and 61:

> In grounds open to the public as of right, the duty resting upon the proprietors, or statutory guardians like a municipality, of making them reasonably safe does not include an obligation of protection against dangers which are themselves obvious. Dangers, however, which are not seen and obvious should be made the subject either of effectively restricted access or of such express and actual warning of prohibition as reaches the mind of the persons prohibited.

(1) (1828) 4 Bing. 628.

(2) [1922] 1 A.C. 44.

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And again,

> Where the dangers are not familiar and obvious, and where in particular they are or ought to be known to the municipality or owner, special considerations arise. In the case of objects, whether artificial, and so to speak, dangerous in themselves, such as loaded guns or explosives, or natural objects, such as trees bearing poisonous fruits which are attractive in appearance, it cannot be considered a reasonably safe procedure for a municipality or owner to permit the exhibition of these things with their dangerous possibilities in a place of recreation and without any special and particular watch and warning.

He adds:

> When the danger is familiar and obvious, no special responsibility attaches to the municipality or owner in respect of an accident having occurred to children of tender years. The reason of that appears to me to be this, that the municipality or owner is entitled to take into account that reasonable parents will not permit their children to be sent into the midst of familiar and obvious dangers except under protection or guardianship. The parent or guardian of the child must act reasonably; the municipality or guardian of the park must act reasonably. This duty rests upon both and each; but each is entitled to assume it of the other.

Furthermore, the analogy of the case to that of an unguarded machine left in a place frequented by children and possessing, by reason of its unguarded state and other circumstances, all the elements of allurement and trap, as explained by Hamilton L.J., seems to exclude its application to the facts now under examination. If it be said that the child in plucking the berries was guilty of trespass, then the answer is that the averments, as summarized by Lord Buckmaster, would seem to bring the defenders within the rule that the land owner is under a duty even towards a trespasser " not to do a wilful act in disregard of ordinary humanity towards him."

I now come to *Excelsior Wire Rope Co.* v. *Callan* (1). Before considering the application of that case to the facts before us, it will be convenient to state those facts with some particularity.

In Winnipeg, a street named Higgins street runs along the southern boundary of part of the freight yards of the appellants. The street is 66 feet wide and in the northerly strip of 14 feet there runs a railway track, part of the appellants' railway, and, admittedly, lawfully there for the railway purposes of the appellants. This track connects at its westerly end with other tracks within the freight yards and extends between 2,500 and 3,000 feet along Higgins street, and is known as the " K " lead. There are

(1) [1930] A.C. 404.

freight sheds in the freight yards along the northern boundary of Higgins street.

It is a practice of the appellants every day in the evening to assemble a drag or train of freight cars on "K" lead. That is done by a group of men known as the shed crew who bring, first, a "cut" of cars, as the phrase is, to the west end of the lead and then, moving from the west, to add successive cuts until the whole drag is assembled. The drag in the present case included 55 cars and was something over 2,000 feet long. As each successive cut is added, the cars of the preceding cuts are necessarily pushed easterly along the lead. The car at the east end is known as the "point" car.

For the safety of people using the street, the appellants employed a man, Messier, whose primary duty it was to protect the "point," in the language of the witnesses, which means that it was his duty to see that the car at the eastern end did not come into contact with any obstruction in the street and that people using the street should be warned of its approach. It was also his duty to protect the cars against intruders and, as children played on the street in the immediate vicinity and had a playground on the corner of Higgins street and another street, Ellen, entering Higgins street from the south, it was his business to see that children were kept away from the cars. His duty came to an end when the drag was assembled, as the learned trial judge has found, and, no doubt, rightly found. When the drag is assembled, also, the duties of the shed crew come to an end. It is then taken over by a hauling crew. An engine is attached and it is moved away into yards on the west.

Unfortunately, the respondent, who was only four and a half years of age at the time, had climbed the iron ladder which, as usual, was attached to the side of one of the cars in the drag and at its end, and had succeeded in crossing to the ladder attached to the rear of the car adjacent to that attached to the side, just before the hauling crew, pursuant to their duty, started the train on its westerly movement; and, when the train started, he fell from his place on the ladder to the track below and had his leg severed from his body by one of the moving wheels.

The procedure in starting the train seems to be something like this: The engine is started on a movement towards

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the west, and then, if the driver is apprized, by signal originating with the trainman stationed near the easterly end of the train, that all the couplings are working, he proceeds with hauling the train west. The boy's fall seems to have been occasioned either by the first jerk or by that combined with the movement of the train an instant later.

The hauling crew consisted of the locomotive driver and fireman (with whom we are not concerned), the train foreman Wilkinson, two trainmen, Boardman and Smith. There was also a railway constable, Crick.

Wilkinson gave this account of his movements. He said that he and his two trainmen, Boardman and Smith, came to the west end of the drag before the assembling of the drag was quite complete; that he and Boardman walked to the east end of the train, then turned and walked west again. He left Boardman at a place about twelve or fifteen cars west of the east end, and proceeded to the west end of the drag where the other trainman, Smith, was stationed. It was Boardman's duty to see that, on the initiation of the movement of the train, the cars were all "pulling," and, if so, to signal to Wilkinson at the west end of the train. Boardman gave the signal from a position approximately fifteen cars west of the east end of the train, and the train moved on. Boardman, still looking towards the west end of the train, climbed on top of the train, as did Wilkinson and Smith.

Crick, the constable, says that it was his duty to check the seals on the cars and at the same time to keep watch to see that there was nobody around the train. He started at the east end of the train and walked along the northern side examining the seals and then again walked from the west end to the east end. Neither Wilkinson, nor Boardman, nor Crick saw any children near the train, although there were children playing on the southern side of Higgins street. At the time the respondent climbed the ladder, Boardman apparently was between 150 and 200 feet to the west of him with his face turned to the west. Crick, apparently, was at the car at the east end with his face turned towards the east. As to the actions of the respondent, there seems to be little doubt. The learned trial judge has accepted the story of a boy, Voss, who was eleven years of age at the time of the accident. Voss was lying on the east side of Ellen street about, as the learned judge

says, 150 feet from the train. He saw the respondent rush past him, run to the car, climb the ladder just before the train started. The learned trial judge says this must have occurred just as Boardman was giving the signal. It was either just as he gave the signal or just before, when Boardman's face, as the learned judge says, was turned to the west. The boy's statement, as the learned trial judge interpreted it, virtually coincides with this. The learned trial judge, referring to the boy's movements and to the fact that he escaped the attention of the train men, says it "would all happen in a few seconds."

Mr. Thorson, who presented a very able argument on behalf of the respondent, contended most earnestly that there was evidence from which it ought to be concluded that this child had been playing near the train just before he started to climb the ladder. That view cannot be reconciled with the account given by Voss (who was a witness for the plaintiff, and whose account of what occurred was put forward by the plaintiff in Voss's evidence in chief), which, as I have said, was accepted by the learned trial judge.

Another boy named Hobson, who was riding about on his bicycle, gives some evidence upon which Mr. Thorson relied. Unfortunately, the effect of Hobson's evidence is rather obscure. He said in examination in chief that he had seen the little boy playing "around the cars." In cross-examination he said he saw him playing where the tracks switch off into the platform. This platform is on the south side of Higgins street where a spur from "K" lead crosses that street. He says the boy was not playing on the platform but near there, and he adds that he was not in Ellen street at all.

Now, Hobson's story as to his own movements is this. He saw the little boy, as he says, playing near the platform, which is about sixty or seventy feet from Ellen street. Just then he turned his bicycle west and rode on down Ellen street, not quite as far as Henry street which is distant from Higgins street about 180 feet, then he turned around and proceded towards Higgins street, and, when he was about half way between Henry and Higgins, he noticed the boy "hanging on to" the ladder on the end of the car.

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It is quite evident that Hobson's story cannot be reconciled with that of Voss. According to Hobson, the boy was never on Ellen street. And it is quite clear that, accepting Hobson's account of his own movements, a very short time indeed must have elapsed between the time he left the respondent playing near the platform on Higgins street and the time he saw him hanging from the ladder. It is difficult to suppose that a boy of that age could, within that short space of time, have got over to the place at which he passed Voss running towards the train, climbed the ladder on the side of the car and passed over to the ladder on the rear of the car.

If the learned trial judge was right in the view he took, accepting Voss's account that the child dashed from the lower part of Ellen street not far from Henry to the train, mounted the ladder and was knocked off by the jerk of the train in starting, all in a "few seconds," as the trial judge finds, that this occurred when Crick's face was turned towards the easternmost car, and when Boardman's face was turned in the opposite direction, it would seem to have been the merest accident indeed that this little lad in his rapid dash escaped the observation of both the trainman and the constable.

The contention on behalf of the respondent is that Messier should have been kept on duty until the train was hauled out. I have already pointed out that there is no rule of law by which the appellants owe a duty to adults or to children to prevent them trespassing on their cars. If they permit such trespasses, then they may incur the obligations of licensees, but the evidence is clear and uncontradicted that everything that could reasonably be done was done to keep children away from the cars while the drag was being assembled. Messier's primary duty was to warn people using the street of the approach of the train. Very naturally and properly, he was required to keep children away from the cars; occasionally a child would attempt to get on a car and would have to be driven away. Apart altogether from humanitarian considerations, the railway company probably understood the risk from the legal point of view of permitting the children to trespass. I see no reason to reject the view of the trial judge that, after the drag was assembled and while the train was stationary under the care of the hauling crew,

they had no reasonable ground to suppose that, in the presence of the hauling crew passing up and down the south side of the train, as has been explained, and of the constable, any child attempting to get on the train would escape observation; there is no suggestion in the evidence of any other child having attempted to do so on the same or any other occasion after the hauling crew came on duty.

In this conection it should be observed that the evidence all points to the conclusion that the danger of approaching the train when the engine was attached was quite well understood even by children. The little boy says, and what he says has in it the probability of truth, that two boys who were with him when he approached the train refused to climb with him on the car and he adds (where he got the information does not appear) that they saw the engine and he did not.

I come now to the *Excelsior Wire Rope* case (1). The facts in their general features are important. The appellants there had a siding on some land which was the property of the Marquis of Bute, and, as a haulage apparatus, they had on the same property a post and sheave to which wires and ropes were attached and which was worked by a dynamo. Children used the vicinity of this post and sheave as a playground. They played uninterruptedly, not only in the vicinity, but with the machine and ropes and other things attached to it, except on the occasions, a few times a week, when the machine was just to be put into operation; and then it was the duty and the practice of the employees working the machine to see that the children were not in danger. Except on these occasions, they were permitted to play with the machine.

The case was tried by Shearman J. who

held that the appellants were liable on the ground that the appellants had acquiesced in children frequenting the siding, so as to constitute the children licensees, and that the setting in motion of the haulage apparatus constituted a trap * * * (p. 405).

There was an appeal to the Court of Appeal.

The Lords Justices proceeded on the assumption that the children were trespassers, and held that their injuries were caused by an act done by the appellants' servants with reckless disregard of the presence of children whom they had every reason to think might be injured. (pp. 405-406).

(1) [1930] A.C. 404.

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The pertinent facts are stated by Lord Buckmaster who delivered the leading judgment in the House of Lords:

On August 5, 1927, the Excelsior Wire Rope Works were going to use this line for one of their trucks. There is evidence that just before it was in fact so used a little child was seen swinging on the wire. What actually happened is a matter about which there is no direct testimony at all. There were two men whose business it was to superintend the operations, one named Williams and the other named Osborne, and they both came up to the sheave for the purpose, no doubt, of seeing that the wire was properly put round the pulley, and also for the purpose of driving the children away. They knew the children would be there, and because of that knowledge, before putting the wire in motion, they used to go and send them away. * * * There is no doubt that these people do what is obviously their duty to do in the circumstances, that is, go and adjust the wire, and when doing that see if there are any children before they start the work. They did that on this occasion, but they went back and started the machinery without being clear that the wire was free from children, and one little child who was either sitting on it or playing with it—what she was actually doing no one knows—got her hands entangled in the machinery, and her little brother, who came to help her, got his hand injured too.

His conclusion is as follows:

To the knowledge of the Excelsior Wire Rope Company these children played uninterruptedly round the post; there was nothing to prevent them doing it, and I cannot find that there is any evidence to show that, except at the moment when this machine was going to be set in action, they were ever driven away. It was therefore well known to the appellants that when this machine was going to start it was extremely likely that children would be there and, with the wire in motion, would be exposed to grave danger.

In such circumstances the duty owed by appellants, when they set the machinery in motion, was to see that no child was there, and this duty they failed to discharge.

Lord Warrington says:

There is ample evidence that, to the knowledge of the servants of the appellants, children were in the habit, not only of playing around this sheave and using it for purposes connected with their games, but were actually in the habit of playing with the machine, and the ropes and so forth attached to it, so that it was found necessary, when they were about to use the machine, to see that it had not been put out of gear by the children. Under those circumstances, it seems to me quite plain that there was a duty upon the present appellants, by their servants, when they were about to put this machine in motion, so that it would become a danger to any children who might be in the neighbourhood, to see whether or not at that moment there were children in such a position as to be exposed to danger. That duty was plainly neglected, and under the circumstances I think the appellants have rightly been held liable.

Lord Thankerton says (p. 414):

* * * the children not only had constant and free access to the machine itself, but clearly to the knowledge of the appellants they were in the habit of interfering and playing with both the post and the wire rope, and it was only when the occasion of putting the machine into operation arose that there was any question of keeping the children

away from that spot. My Lords, that last fact itself appears to me to recognize a necessity and a duty to see that the children were away from this dangerous machine.

Lord Dunedin says: On the assumption that the children were not licensees the appellants' servants acted "with reckless disregard of the presence of the trespasser," quoting from the judgment of Lord Hailsham in *Addie's* case (1).

The decision really rests upon the circumstances that the children habitually and with the permission of the defendants played with the machine except when, on the occasions when it was to be put into motion, they were actually kept away from it. The persons responsible for putting the machine in motion knew that children in the ordinary course would be there and in a position of danger and, on the occasion in question, that it was extremely likely they would be in such a position.

This decision can have no application to the present case. It is true that occasionally children climbed on the cars while the drag was being assembled, but they were always sent away. The learned judge has in effect negatived the conclusion that the hauling crew ought to have been aware that some child would likely be on one of the cars, or even might be on one of the cars, at the time the signal was given. There was none of the probability or practical certainty of children being in danger, which was averred in *Taylor's* case (2).

There was nothing in the conduct of the railway company, as in the *Excelsior* case (3), to encourage the children to think they were safe in playing near the cars except when they were driven away. The constable was there, whose duty it was to keep people away from the cars, the foreman and his trainman had walked the whole length of the drag immediately before the signal was given and had seen no child in dangerous proximity to the cars. The evidence warrants the finding of fact that, with the exception of the respondent and, possibly, his two companions, in the dash at the last instant, there were no children in any place of danger in respect of the train after the hauling crew came on duty. It was the sudden unanticipated dash of the child which the hauling crew could not, in any

(1) [1929] A.C. 358. (2) [1922] 1 A.C. 44.
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reasonable view of the situation, be expected to anticipate, that made the accident possible.

To summarize briefly: the respondent is precluded from recovering by reason of the fact that, being a trespasser, the only duty owing to him is that explained in *Barnett's* case (1), not intentionally to injure him or "not to do a wilful act in disregard of humanity towards him," "not to act with reckless disregard of the presence of the trespasser." The findings of the learned trial judge, which completely negative any such misconduct by the appellants, are quite adequately supported by the evidence. The case has no analogy to *Lynch* v. *Nurdin* (2) (whatever be the legal explanation of that case) where a horse and cart were left wholly unattended in a public street and where the injury suffered by the child on whose behalf the action was brought was caused by another child interfering with the horse and putting the horse and cart into motion, as well as the fact that the plaintiff himself had climbed into the cart and where, as Lord Denman said, "it was extremely probable that some other person would unjustifiably set" the horse and cart "in motion to the injury of a third." It has no analogy to *Glasgow Corporation* v. *Taylor* (3), where the Corporation had caused a shrub bearing poisonous berries to grow in a place frequented by children, knowing, as the pursuer averred, that children would probably, even certainly, eat the berries; that this would certainly be followed by illness or death; and, knowing the poisonous character of the berries, failed to give any warning to the parents or others responsible for the safety of children in the park. In *Taylor's* case (3), the elements of concealment and surprise and of knowledge of the Corporation of the probability or certainty that children would eat the berries, were the foundation of the judgment. It has no analogy to the *Excelsior Wire Rope Company's* case (4), where the defendants knew that, in the ordinary course, children would be playing, not only near the machine, but with the machine itself and its attachments, unless steps were taken to keep them away from it when the machine was put into operation; and knew it to be "extremely probable" that there would be children in a

(1) [1911] A.C. 361.
(2) (1841) 1 Q.B. 29.
(3) [1922] 1 A.C. 44.
(4) [1930] A.C. 404.

position of danger when the machine was put into operation on the particular occasion on which the plaintiff was injured. Nor does it bear the least resemblance to *Cooke's* case (*supra*) (1), where the children were licensed to be in the field where the turntable was and to play on the turntable itself; where the turntable was a trap in the full sense of the judgment of Hamilton L.J. (though usually locked in a way that it could not be set in motion by a child, it was on the particular occasion unlocked), and there was, as the Lords held, an extreme probability that the children playing on the turntable would set it in motion to the injury of themselves or others. Even on these facts, Lord Loreburn assented with great hesitation, saying that the case was near the line.

The findings of the learned trial judge negative the existence of any knowledge on the part of the appellant company or the train crew of the certainty or the reasonable likelihood that any children would be on one of the cars at the time the train was put in motion. Leave and licence were expressly disclaimed in the very able and candid argument of Mr. Thorson. The evidence is wholly incompatible with any suggestion that the conduct of the company in any way inspired (as in the *Excelsior* case (2)) among the children a belief that it was safe to play in close proximity to the cars except when they were driven away.

The appeal should be allowed and the judgment of Mr. Justice Adamson restored. I assume the appellants will not ask for costs.

As to the appeal against the judgment in favour of the mother, we announced at the hearing that there was no jurisdiction to entertain the appeal and that we should not reserve judgment in order to enable the appellants to apply for leave. It stands dismissed for want of jurisdiction.

DAVIS J.—The respondent, the infant plaintiff, when a little less than four and a half years old, climbed a ladder on the side of a standing freight car belonging to the appellant railway company and then lost his balance and fell to the ground with the result that one of his legs was so injured as to require amputation below the knee. This action was brought by his widowed mother, personally and

(1) [1909] A.C. 229. (2) [1930] A.C. 404.

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as his next friend, against the railway company for damages.

The freight car was standing at the time on railway tracks that were on a public street in the City of Winnipeg. We have therefore to consider the case not only in the light of the private rights of the railway company in its own property, but of the public rights of the child upon the street. Nothing turns in the case upon the right of the railway company to operate its railway upon the street in question. Counsel for the plaintiff at the trial admitted that the tracks in question were properly upon the street and that the defendant was lawfully entitled to operate its railway where it did upon the street. With this admission of public authority in the railway, the case cannot be treated in law as one of nuisance, and falls to be determined upon the question of negligence. That distinction is fundamental, and it seems to me that failure to bear that distinction in mind may have accounted for some of the divergent views in the court below.

The case then, like all cases of negligence, turns upon its own particular facts. The street in question is 66 feet wide; the railway track occupies the northerly 14 feet thereof; of the southerly 52 feet, 34 feet 4 inches adjoining the railway track is paved and used by vehicles, and the remainder, 17 feet 8 inches, is a cinder path for pedestrians and a boulevard. The railway track in question extends along the street a distance of some 2,900 feet and was in daily use by the railway company for the assembling of freight trains. Freight trains would be made up of a variable number and of different types of freight cars necessary for particular runs. The cars would be picked up from other tracks and collected or assembled upon the particular track or siding with which we are concerned. A " switch " engine used for assembling would back down the track the different cars that had been selected for a particular run. The first car or group of cars would be backed down to the rear end of the track and then the next car or group of cars would be backed down to meet the cars already placed in position, and so on until the whole train would be assembled. This involved, as one can readily understand, a good deal of movement and shunting of the cars on the track in the process of assembling the train. On the day in question the particular freight train that had

been assembled consisted of 55 cars, with a total length of about 2,200 feet. Now whenever a freight train had been assembled, the engine that had been used in assembling the cars and the "shed" or "assembling" crew in charge of that operation would depart for some other siding where a similar operation had become necessary. The company employed one Messier, a disabled employee, to be present during the assembling operations to warn persons against crossing the tracks when the cars were being placed in position. Then, when the time came that the assembled train was to proceed on its journey, a different engine and a different crew would come to take it away. The hauling crew consisted of an engineer, a fireman, a yard foreman and two yardmen. The movement of the train at this time would be a forward movement and involved no switching or shunting.

The accident happened after the assembling crew had completed its operations and had left the track in question and during the time that the hauling crew had arrived to take the train away to another place. The infant plaintiff had climbed the ladder of one of the freight cars (about the fourteenth car from the rear end of the train) and was thrown from the car either at the moment that the hauling engine attached itself to the train or at the moment that the hauling engine commenced to pull the cars out. The period of time between these two events would be a matter of only a minute or two and the evidence does not make plain, and it is really a matter of no consequence, the exact moment that the child fell. The child was unquestionably a trespasser on the car, the private property of the railway company. Counsel for the plaintiff, however, focuses our attention upon the public right of the child to be upon the street and asks us to treat the freight cars in question as an allurement to children generally and presents a case against the railway company of alleged negligence based upon evidence that was directed to shew that the railway company knew that children in the neighbourhood, and particularly at the very place on the street where the accident occurred, were accustomed to play upon the street in and around the freight cars and occasionally were even known to climb upon the cars. The statement of claim puts the case against the defendant in these words: that the defendant

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by its agents, servants or employees negligently caused the said freight cars to be set in motion without any warning to the said plaintiff.

and that

the defendant, its agents, servants and employees, having the knowledge hereinbefore alleged, well knew or should have known that small children, such as and including the plaintiff, being adventuresome, would be likely to be allured and enticed and attracted as the said plaintiff and the said several other small boys were in fact allured, enticed and attracted, and would be likely to respond to the invitation and yield to the temptation held out * * * and would be likely to climb the said ladders and hang and ride on the said freight cars * * * and that injury such as that which actually did result to the said plaintiff would be likely to result, if the said railway tracks were left unprotected by the defendant or the said freight cars were left unattended by the defendant, or the said freight cars were set in motion without adequate warning and precautions by the defendant, or small children such as and including the said plaintiff were not prevented by the defendant from coming near or being on the said freight cars while they were in motion.

Where, as here, there is admitted public authority to maintain and operate a railway upon a public street, the presence and movement of cars is the inevitable result of the ordinary exercise of such authority. Lord Dunedin in *Manchester Corporation* v. *Farnworth* (1) said:

> When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized.

But the company is responsible, of course, in an action of negligence for any want of reasonable care in its operations.

No one of the railway crew engaged at the time and at the place of the accident in moving the train saw the child before he fell from the car. The case made against the railway company is that the railway crew, or some of them, ought to have seen the child or that under all the circumstances, having regard to the habit of children to play upon the street near cars left standing there, the railway company did not take special precautions or give an adequate warning before moving the train.

There is evidence that the children in the neighbourhood, to the knowledge of the defendant, played on the street in question, particularly in the evenings after supper; that the older children played games in a vacant yard across the street from the place of the accident, leaving the smaller children to play somewhere else; that the children were in the habit of playing on a loading platform, across the

(1) [1930] A.C. 171 at 183.

street from the place of the accident, which lay alongside a spur track of the defendant. There is evidence that children frequently played near the cars on the tracks. One witness, Hobson Sr., said that he had seen from thirty to fifty children at times playing on the street after supper in the immediate neighbourhood of the accident. It is further in evidence that when children were playing ball in the yard across the street, the ball often went over the fence, rolled across the street and under the train of cars standing on the tracks on the street; that sometimes the children would get the ball themselves and sometimes Messier would get the ball for them; that sometimes the children climbed under the cars to get the ball and sometimes they would ask Messier whether they might go and get the ball. Hobson, Jr., a boy of 17, said that Messier used to tell the boys when it was all right to go across and get the ball, and the boys would then climb up the ladder steps between the cars, go over the couplings and then climb down the other side. He had done this himself and had seen other boys do it. Stevens, a night watchman at a factory nearby, said he had frequently seen boys and girls go under the cars to get the ball and was always afraid that an accident would happen where it did. There is some evidence that children at times climbed up on the freight cars when they were standing on the street. Gustaffson, a boy of fifteen, said that he had seen a boy on a ladder of a freight car, once. Messier said that children did actually climb on the cars, "as often as he could not stop them," but that when they did, he stopped them as part of his duty, took his cane to them and chased them away. Voss, a boy of thirteen, said that Messier "used to chase the kids off the box cars."

Counsel for the plaintiff presents this picture of a dangerous situation known to the railway company. But it must be observed that the railway company had no right to keep children off the public street. Messier said that it was part of his duty during the assembling of the trains to keep children away from the cars. He was discharged by the railway company the day after the accident and colour is put upon the picture by that fact, though the railway company explained his dismissal upon other grounds than his absence from the place of the accident at the time the accident occurred.

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The child gave unsworn testimony at the trial *quantum valeat*. He was then about six years of age. He said he saw three other boys and he said to them,

> "Let us go to the train." So we went to the train, and then we sat down * * * on the first seat (meaning, I take it, the first rung of the ladder) and then I said, "Let us climb." And they said "No." And I went up and then they seen the engine coming * * * They didn't tell me that the engine was coming and I didn't even see it, and they were running. I didn't know what they were running for. When I got to the top, I climbed around to the back and it jerked and my foot slipped, and I fell.

The child did not name any of the three other boys to whom he refers and no one of them was called as a witness. It is plain, however, upon the evidence that the child was thrown from the ladder on the back of the car by the "jerk" or "bump" of the train. While the exact moment of the accident is, as I have said, of little consequence, it seems clear that when the hauling engine attached itself to the cars there was a jerk or a bump to the particular car upon which the child had climbed.

An important fact to be determined is whether the child had been playing with other children around the freight cars before he climbed the ladder on one of the cars or whether he had suddenly run across the street by himself and climbed up the ladder at once. The boy Hobson said in his evidence that when he first saw the infant plaintiff that night "he was playing with some other boys around the freight cars," but on cross-examination Hobson leaves the exact place where he said he first saw the infant plaintiff very doubtful, for he then says, "Right around where the tracks switch off into the platform on the lot east of the vacant lot * * * He wasn't on the platform; he was playing on the street near there." Voss, another boy, tells a totally different story. Voss says that he himself was lying down on a side street, Ellen Street, about half way in between Higgins and Henry Streets, and he says that when he first saw the infant plaintiff, "he was running past us," on Ellen Street, "towards the box cars, to the north. He started climbing up the side of a box car that was standing still, then went over on to the ladder on the back of the box car." The trial judge (1) accepted the evidence of Voss, though he is in error in stating that young Voss said that the infant plaintiff "with two other boys

(1) 43 Man. R. at 347.

ran out of Ellen Street and across Higgins Street north towards the box cars." The evidence is that Voss was asked, "Who was with you—who was lying down with you?" And his answer was, "There were some other boys and girls around there." But Voss very definitely says that the place on Ellen Street where he was lying on the grass "was about half a block away" from the car on which the infant plaintiff had climbed. Voss said that when the train started with a jerk and knocked the infant plaintiff's feet from under him and he was just hanging on with his hands, he and two other boys started toward the car. Hobson was one of these boys and another was Gustaffson. Hobson ran with Voss to the car but Gustaffson turned sick at the sight of the infant plaintiff and did not go on to the car. The trial judge in delivering his judgment plainly accepted the evidence given by Voss rather than the evidence of Hobson, who said that he saw the infant plaintiff playing with some other boys around the freight cars, for the trial judge, after referring to the evidence of Voss, said,

> He (the infant plaintiff) ran out a few moments before the train started and evaded being seen by the trainmen or the constable who had both passed the car to which he ran a short time before.

The hauling crew were on duty making ready for the train to be pulled out. This crew, if I may repeat, consisted of an engineer, a fireman, a yard foreman and two yardmen. The foreman of the crew, Wilkinson, and one of the yardmen, Boardman, had walked along the full length of the train on the opposite side from what may be called the street and then walked back along the street side about 600 feet from the rear end of the train to a point not far from the exact place of the accident. Boardman waited there, looking toward the engine as was his duty (with his back to the place where the child climbed on one of the cars). Wilkinson continued along the street side of the train toward the engine which was some considerable distance ahead. The engine was brought to the train by the other yardman, Smith; Wilkinson gave the signal to proceed; Boardman gave him the signal that the cars were all moving; Wilkinson repeated this to the engineer; the yardman climbed on the train, and the train proceeded. Another employee of the railway company, Crick, a constable, had gone up and down the cars on each side testing

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the seals. Just before the train started he was in the act of testing the seal on the street side of the last car. He turned round and saw three boys running across the street and then run alongside the train. Crick started after them and when the speed of the train increased he jumped on the train and came to the point where the infant plaintiff was lying at the time. Wilkinson, Boardman and Crick all stated that there were no children near the train as they had walked up and down beside it. Crick, the constable, said that he considered it to be part of his duty to warn children away. It was not suggested that any of the crew or Crick saw the child.

In the opinion of Mr. Justice Adamson, the trial judge, the defendant company "did all that was reasonable to see that all was clear when the train started," and he dismissed the action with costs. Upon an appeal, the Court of Appeal for Manitoba by a majority (Dennistoun and Trueman JJ.A. dissenting) allowed the appeal and directed judgment to be entered in favour of the infant plaintiff in the sum of $5,000 and in favour of the adult plaintiff, the mother of the child, in the sum of $800. From that judgment the railway company appealed to this Court. No leave having been granted to appeal in respect of the judgment in favour of the adult plaintiff, there was no jurisdiction in this Court to entertain the appeal against her, and, at the conclusion of the argument, we dismissed the appeal against the adult plaintiff. The sole question reserved was as to the right of the infant plaintiff to hold the judgment in his favour in the sum of $5,000.

The child was, strictly, a trespasser upon the freight car of the defendant, and it is clear upon the evidence that no one in the employ of the railway company saw the child either approaching the cars or upon the car from which he was thrown. The question is whether or not, notwithstanding these facts, there was a duty in law upon the railway company under all circumstances to take care of the child. Counsel for the infant plaintiff, while admitting that the child was, strictly speaking, a trespasser on the car, contended that under all the facts and circumstances of the case the child should be treated as a licensee or the defendant's conduct should be treated as such a neglect of a duty to take care as to entitle the infant plaintiff to succeed in law.

Mr. Thorson, in his very able and exhaustive argument on behalf of the infant plaintiff, placed much reliance upon the judgment in the old case of *Lynch* v. *Nurdin* (1). In that case the defendant left his horse and cart unattended in the street and the plaintiff child, seven years old, climbed into the cart in play, another child incautiously led the horse on and the plaintiff child thereby fell out and suffered injuries. It was held that the defendant was liable, although the plaintiff child was a trespasser on the cart and contributed to the mischief by his own act. That decision, nearly a hundred years old, has been much discussed in subsequent cases and the judgment may very properly be regarded now as really founded upon the fact that the horse and cart were an allurement to young children and, being left in the street wholly unattended, constituted a trap. In the recent case of *Liddle* v. *Yorkshire* (2), Slesser, L.J., discussed *Lynch* v. *Nurdin* (1) and said, at p. 129:

> Although *Lynch* v. *Nurdin* (3) remains an authority on the question of contributory negligence of children, the present state of the law seems to me to justify me in declining to think that it binds me to-day to say that the defendants are liable when they do not put a trap intentionally or intend to injure if the plaintiff is a trespasser.

In *Harrold* v. *Watney* (4), the defendant was the owner of a fence abutting on a highway. The plaintiff, a child of four years of age, attracted by some boys at play on the other side of the fence, put his foot on it, and it fell on and injured him. The jury found that the fence was very defective but actually fell through the plaintiff standing wholly or partly on it, though not for the purpose of climbing over. The trial judge directed that judgment should be entered for the defendant but the Court of Appeal held that, the defective fence being a nuisance and the cause of the injuries to the plaintiff, the defendant was liable. But even in cases of nuisance there will be no liability to the child unless the thing through which the accident happened was something that was likely to attract children to intermeddle with it and was dangerous if intermeddled with. Thus, in *Donovan* v. *Union Cartage Co.* (5) an unhorsed van belonging to the defendants was left by them, unattended, in a public street outside their premises.

(1) (1841) 1 Q.B. 29.
(2) [1934] 2 K.B. 101.
(3) 1 Q.B. 29.
(4) [1898] 2 Q.B. 320.
(5) [1933] 2 K.B. 71.

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The plaintiff, an infant aged seven years, while playing in the street with other children, climbed on to the van, fell and was injured. It was held, in an action for negligence, that the defendants, the owners of the van, were not liable because there was no inherent danger in a sound, stationary and immobile vehicle, left unattended in the street, and even if the stationary van was an obstruction to the use of the highway, there was no relation of cause and effect between an obstruction to the use of the highway and the occurrence of the accident.

In *Cooke* v. *Midland Great Western Railway of Ireland* (1), Lord Atkinson at p. 237 said that the authorities from *Lynch* v. *Nurdin* (2) downward established, it appeared to him, first, that every person must be taken to know that young children and boys are of a very inquisitive and frequently mischievous disposition, and are likely to meddle with whatever happens to come within their reach; secondly, that the public streets, roads, and public places may not unlikely be frequented by children of tender years and boys of this character; and, thirdly, that if vehicles or machines are left by their owners, or by the agents of the owners, in any place which children and boys of this kind are rightfully entitled to frequent, and are not unlikely actually to frequent, unattended or unguarded and in such a state or position as to be calculated to attract or allure these boys or children to intermeddle with them, and to be dangerous if intermeddled with, then the owners of these machines or vehicles will be responsible in damages for injuries sustained by these juvenile intermeddlers through the negligence of the former in leaving their machines or vehicles in such places under such conditions, even though the accident causing the injury be itself brought about by the intervention of a third party, or the injured person, in any particular case, be a trespasser on the vehicle or machine at the moment the accident occurred.

This decision in *Cooke* v. *Midland* (3) was much criticized and Lord Atkinson took occasion in *Glasgow Corporation* v. *Taylor* (4) to point out the *ratio decidendi* of the *Cooke* case (3) when he said at p. 53, referring to it,

(1) [1909] A.C. 229.
(2) 1 Q.B. 29.
(3) [1909] A.C. 229.
(4) [1922] 1 A.C. 44.

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The decision of this House in the first of these two cases has, no doubt, been frequently criticized. I am familiar with the criticisms, and have noticed that in them not unfrequently either no weight or not full weight is given to the vital fact that there was evidence there to go to the jury from which they might reasonably conclude that the children mentioned in that case not only entered upon the lands of the company with its leave and licence, but also played upon the dangerous machine, the turntable, they found there, with that very same leave and licence.

And Lord Atkinson continued at p. 54,

And I, myself, after referring to the question which would arise in a case where the boys or children were trespassers, proceeded to say: "In the view I take it is not necessary to determine that question in the present case, because I think there was evidence proper to be submitted to the jury that the children living in the neighbourhood of this triangular piece of ground, of which the plaintiff was one, not only entered upon it, but also played upon the turntable—a most important addition—with the leave and licence of the defendant company." Such were the real facts and the real question decided in *Cooke* v. *Midland Great Western Ry. Co. of Ireland* (1).

Lord Shaw, at p. 63 of the *Glasgow* case (2) said:

I do not desire, my Lords, to close my opinion without stating that I attach my express concurrence to the statement of my noble and learned friend Lord Atkinson in regard to the true scope and effect of *Cooke* v. *Midland Great Western Ry. Co. of Ireland* (1).

In the *Liddle* case (3), Lord Justice Scrutton said at p. 111 that confusion was temporarily introduced into the law of England by the decision of the House of Lords in *Cooke* v. *Midland* (1) but he thought,

it is now established by the judgment in *Latham* v. *Johnson* (4) and the explanation of *Cooke's* case (1) by Lord Atkinson in *Glasgow Corporation* v. *Taylor* (5) that *Cooke's* case (1) must be treated as the case of a child impliedly licensed to use a plaything which was, for a child, a trap.

Grand Trunk Railway Company v. *Barnett* (6) was a case that went to the Judicial Committee from the Court of Appeal for Ontario. The Grand Trunk Railway Company and the Pere Marquette Railway Company had each a station and railway yards a short distance from each other in the city of London, Ontario. The Grand Trunk Railway, under some arrangement with the Pere Marquette Railway, allowed the latter company's trains, or some of them, access to the Grand Trunk Company's station by means of a cross line so as to bring the Pere Marquette train up to the Grand Trunk station. The particular train concerned in the accident was the Pere

(1) [1909] A.C. 229.
(2) [1922] 1 A.C. 44.
(3) [1934] 2 K.B. 101.
(4) [1913] 1 K.B. 398.
(5) [1922] 1 A.C. 44, 53.
(6) [1911] A.C. 361.

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Marquette train, which had arrived at the Grand Trunk station and had duly discharged its passengers at the platform of the Grand Trunk station. Its ordinary and proper course then was to wait till it received a signal from the Grand Trunk switch operator, after which it would back out over the Grand Trunk tracks and return to the Pere Marquette yard to remain for the night. The plaintiff was aware of this practice, and on the night in question he came into the Grand Trunk station and, going to the Pere Marquette train before it began to back out, he jumped on the platform at the rear end of the car and stood with one foot on the platform and one foot on the step, his object being to get a lift as far as the Pere Marquette station, which was on his way home. He was aware that the train was not at that moment in use as a passenger train, he had no ticket and did not pretend that he received any invitation or had any right to do what he did. The Pere Marquette train backed as usual along the cross line and while still on the property of the Grand Trunk Company, a freight train of that company, which was being made up at an adjacent siding, was negligently backed so as to come into collision with the train on which the plaintiff was standing. He was thereby thrown off the car platform and seriously injured. In their Lordships' opinion, the plaintiff was a trespasser both on the premises of the Grand Trunk Company and on the train of the Pere Marquette Company. On the footing that the plaintiff was a trespasser the question was, what, under the circumstances of the case, were his rights against the Grand Trunk Company? Lord Robson, in delivering the judgment, said, at p. 369:

> The railway company was undoubtedly under a duty to the plaintiff not wilfully to injure him; they were not entitled, unnecessarily and knowingly, to increase the normal risk by deliberately placing unexpected dangers in his way, but to say that they were liable to a trespasser for the negligence of their servants is to place them under a duty to him of the same character as that which they undertake to those whom they carry for reward. The authorities do not justify the imposition of any such obligation in such circumstances.

And at p. 370:

> Again, even if he be a trespasser, a question may arise as to whether or not the injury was due to some wilful act of the owner of the land involving something worse than the absence of reasonable care. An instance of this occurred where an owner placed a horse he knew to be savage in a field which he knew to be used by persons as a short cut

on their way to a railway station: *Lowery* v. *Walker* (1). In cases of that character there is a wilful or reckless disregard of ordinary humanity rather than mere absence of reasonable care.

In *Addie* v. *Dumbreck* (2), the House of Lords had to consider a case where the plaintiff claimed damages for the death of his son, a child of four, who had been crushed in the terminal wheel of a haulage system belonging to a colliery company. The system was used in a field owned by the company and consisted of an endless wire cable operated from the pithead by an electric motor, while at the other end of the system, which was not visible from the pithead, there was a heavy iron wheel round which the cable passed and returned. The field was surrounded by a hedge which was quite inadequate to keep out the public, and it was used, to the knowledge of the company, as a playground by young children. The company officials at times warned children out of the field but their warnings were disregarded. The wheel was dangerous and attractive to children and at the time of the accident it was insufficiently protected. The accident occurred owing to the wheel being set in motion by the company's servants without taking any precaution to avoid accident to persons frequenting the field. The House of Lords held unanimously that the child was a trespasser and went on the premises at his own risk and that the company owed him no duty to protect him from injury. In the following year, however, in *Excelsior Wire Rope Co.* v. *Callan* (3), the House of Lords was presented with a case which, upon a superficial examination of the facts, might seem to require a similar decision. But the facts of this case when carefully examined were materially different from those in *Addie* v. *Dumbreck* (2) and the House gave judgment for the plaintiff. Lord Dunedin was prepared, if it were necessary, to describe the children, upon the special facts of the case, as licensees to whom the defendants owed an obvious duty of care. But if they were to be regarded as trespassers, he considered the conduct of the defendants to be so reckless as to amount to an intent to injure. Lord Thankerton, at the top of p. 414, sets the facts out thus:

* * * the children not only had constant and free access to the machine itself, but clearly to the knowledge of the appellants they were in the

(1) [1910] 1 K.B. 173; [1911] A.C. 10.
(2) [1929] A.C. 358.
(3) [1930] A.C. 404.

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habit of interfering and playing with both the post and the wire rope, and it was only when the occasion of putting the machine into operation arose that there was any question of keeping the children away from that spot. My Lords, that last fact itself appears to me to recognize a necessity and a duty to see that the children were away from this dangerous machine.

Upon that state of the facts the children were obviously where they were with the leave and licence of the company. But as Lord Dunedin said, assuming that the children were trespassers, he thought that the company's servants acted, to use the words of Viscount Hailsham in *Addie's* case (1), "with reckless disregard of the presence of the trespasser," or, in his own words, "that the acting was so reckless as to amount to malicious acting."

The American cases, such as *Railroad Company* v. *Stout* (2), have taken what has been said to be a more humanitarian or liberal view of the duties of an occupier of dangerous premises toward children trespassing thereon and coming to harm. In the last edition of Salmond on Torts (8th edition) at p. 529, the editor says that

> In England it may be said with some confidence that no such rule of liability is recognized.

Lord Justice Scrutton in the *Liddell* case (3) said:

> I agree with the view of Mr. Justice Salmond in his work on Torts (7th ed.) at p. 472, where he says, "The humanitarian impulse which prompts such decisions as that of *Railroad Company* v. *Stout* (4) and seeks to impose upon the occupiers of premises a legal duty in the guardianship of infant trespassers will in the long run do more harm than good. The duty of preventing babies from trespassing upon a railway line should lie upon their parents, and not upon the railway company."

It is not shown in the case before us that at the time of the accident the infant plaintiff was where he was by the leave or licence of the railway company, nor can it be fairly said upon the evidence that the railway company's conduct toward the infant plaintiff was such wilful or reckless disregard of his presence on the freight car as to amount to malicious conduct toward him. To hold the railway company liable in damages to the infant would make the railway company virtually an insurer of a trespasser.

There is no course open to us upon the settled law as I understand it but to allow the appeal and dismiss the action, with costs if asked for.

(1) [1929] A.C. 358.
(2) (1873) 17 Wall. 657.
(3) [1934] 2 K.B. 101, at 110.
(4) (1873) 17 Wall. (U.S.) 657.

KERWIN J.—The appellant's railway tracks were legally on the highway, Higgins avenue, and at the time of the accident the company's employees were lawfully engaged in moving the railway cars. The infant respondent was entitled to be on the highway but not on the appellant's cars.

The trial judge has found that, after what has been called the assembling of the cars had been completed, the boy "ran out a few moments before the train started and evaded being seen by the trainmen or the constable who had both passed the car to which he ran a short time before." I understand this to mean, not that the boy, who was then but four and a half years of age, intentionally waited until he saw the coast was clear but that he ran out when none of the appellant's employees happened to be looking. I agree that in fact, this is something against which the appellant could not guard, and in law, conduct which it was not incumbent upon the appellant to foresee.

The authorities are legion and not easy to reconcile. Two of the recent cases in the House of Lords, *Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck* (1) and *Excelsior Wire Rope Company* v. *Callan* (2), are referred to in *Mourton* v. *Poulter* (3) and in the 8th Edition of Salmond on "Torts," 527. Lord Justice Scrutton in the *Mourton* case (3) and the editor of the text-book seem to agree that the difference between the two cases is that in the latter the trespassers were, and in the former they were not, known to be present. In my opinion that is a correct statement of the distinction.

In the present case, while the appellant's employees knew that children were playing in the enclosed field, on the landing platform, and on the street, the fact that the boy darted to the cars and commenced climbing one of them disposes of any contention that the employees knew or should have known that the young lad either was on the cars or that he might run out and climb upon them.

(1) [1929] A.C. 358. (2) [1930] A.C. 404.
(3) [1930] 2 K.B. 183.

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Kerwin J.

With respect, I find myself unable to agree with the learned Chief Justice of Manitoba (1) that "commensurate care must be exercised however wide the field of danger" as that begs the question of the duty owing by the appellant to the infant. And on the evidence, I cannot find that "the field of particular danger, as well known by the company, was practically restricted to the corner in question." The evidence discloses that the children played at other spots along the length of Higgins avenue, and, in any event, we are concerned with what actually did transpire and not with what might be the situation under other circumstances.

Two late cases in England, *Donovan* v. *Union Cartage Company* (2) and *Liddle* v. *Yorkshire (North Riding) County Council* (3), indicate the limits within which an infant trespasser must fall in order to entitled it to recover. However, in my view, nothing can be gained by an exhaustive survey of all the decided cases. In each the question must be the extent of the duty owing by one party to the other, and in the case at bar I am unable to find that the appellant owed any duty to the infant which it failed to fulfil. So far as the judgment for $5,000 in favour of the infant plaintiff is concerned, the appeal should therefore be allowed, with costs if demanded.

On the argument the attention of counsel was drawn to the fact that the judgment of the Court of Appeal in favour of the adult plaintiff was for $800 and costs, and that no order granting special leave to appeal had been obtained. The appeal from the judgment in favour of the adult plaintiff was thereupon dismissed.

CROCKET J. (dissenting):—The defendant many years ago was permitted by the City of Winnipeg to lay a railway track along the northerly side of Higgins avenue as an adjunct of its terminal yards system, which occupies an extensive area abutting the northerly side line of that street. This track is known as K lead and extends along the avenue a distance of 2,900 feet. There is no fence or visible boundary between the terminal yards proper and the street, so that the lead practically forms part of the railway terminal system, though for most of its length it

(1) 43 Man. R. at 360. (2) [1933] 2 K.B. 71.
(3) [1934] 2 K.B. 101.

is planked between the rails and for a few feet on either side, the rails and planking being flush with the street pavement on the south side. The north rails of the lead are parallel to and about 8 feet from the northerly limit of the avenue, which is 66 feet wide. The lead thus actually forms part of a public street, and with the planks, which border it on either side, and the few feet between the north side planking and the southerly side line of the railway terminal yards proper, occupies nearly one-fourth of the width of the avenue. In its length of 2,900 feet the lead passes two north and south streets which end on the south side of the avenue, viz., St. Patrick's and Ellen streets. A third street, Lizzie street, intersects Higgins avenue about 600 feet east of Ellen street and runs past the defendant's local freight shed. There is a cinder path 5½ feet wide all along the south side of the avenue and an open space of 10 or 11 feet, which was described as a boulevard, between it and the south curb of the street pavement. The lots along the south side of the avenue across from the lead are occupied for the most part by warehouses and industrial plants, but along the north and south streets and along Henry avenue, which parallels Higgins avenue about 176 feet to the south, there are many dwellings from which children come to Higgins avenue to play in the evening hours. There is a large vacant lot at the northeasterly corner of Ellen street, surrounded by a board fence with a gate affording entrance and exit from and to the south side of Higgins avenue directly across from the lead and in which children were in the habit of playing ball and other games. Just east of this lot there is a loading platform, to which a railway spur curves across the street pavement and the boulevard, upon which children frequently played after supper, and the approach to which rises gradually from the level of the avenue.

For some years past, the railway has used the Higgins avenue track after 5 o'clock every afternoon except Sunday for the assembling of a westbound freight train. In accordance with its usual practice, an assembling or shed crew, as it was called, went to work for the purpose stated at 5 o'clock p.m. on April 18, 1933, with a switch engine, which collected cuts of from 10 to 14 cars in the adjoining yard and backed these cuts down, one at a time, on to K lead

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over a switch curve at its westerly end until the whole train or drag, as it is called, of 55 cars was assembled. When completed this drag extended from a point about 150 feet west of Lizzie street to a point on the curved track at the west end of the lead—a distance of about 2,200 feet, and was left standing on the lead for another crew, called the hauling crew, to take over and move on to another track in the adjoining terminal yards. After the assembling crew had finished their work and left the lead and while the drag was standing on the track awaiting its transfer to the yard, while it was still daylight, the infant plaintiff, a boy of four and a half years, started climbing the side ladder of one of the box cars. As this ladder was placed close to the east end of the car, and there was another ladder on the rear of the car within easy reach, the boy, after climbing a few rungs of the side ladder, reached around the corner and got on the end ladder, and was in the act of climbing the latter when the train started with a jerk, causing him to fall to the ground outside the south rail. His right leg, however, got across the south rail and was run over by the wheels of the next car and had in consequence to be amputated a few inches below the knee.

This action was brought in the Court of King's Bench for Manitoba by the boy's mother as his next friend to recover damages in his behalf as well as in her own right for hospital and medical expenses she was compelled to pay. It was tried before Adamson J., without a jury. His Lordship found that the defendant did all that was reasonable to see that all was clear when the train started; and, relying on the decision of the House of Lords in *Addie* v. *Dumbreck* (1), also held that the boy was a trespasser and the author of his own injury, and for these reasons dismissed the action. On appeal the Court of Appeal, by Prendergast, C.J.M., and Robson and Richards, JJ.A. (Dennistoun and Trueman, JJ.A., dissenting), set aside the trial judgment and awarded $5,000 damages to the infant plaintiff and $800 damages to the mother with costs of appeal as well as of the action throughout.

The case, I think, with all respect, is one in which, if there was really any negligence on the part of any of its servants which materially contributed to bring about the

(1) [1929] A.C., 358.

boy's injury, the defendant cannot avail itself of the fact that the infant plaintiff wrongfully got upon the ladder and was consequently a trespasser on the railway car. If he was a trespasser in that sense he was no more so than was the infant plaintiff, a boy aged 7, a trespasser in the cart, which the defendant's servant left unguarded in the street in *Lynch* v. *Nurdin* (1), or than the two infant plaintiffs aged respectively 5 and 9, were on the wire rope, on which they were swinging, in *Excelsior Wire Rope Co.* v. *Callan* (2). Yet in both these cases the infant plaintiffs were held entitled to recover, notwithstanding that it was strongly urged that the infant plaintiff in the former and the two infant plaintiffs in the latter were trespassers. Certainly a child too young to be capable of caution or of appreciating a danger, which would be obvious to older children, could not well be held to be guilty of negligence either causing or materially contributing to cause injury or damage.

The true test of the liability of the defendant in this case, under the authorities as I read them, is whether the defendant took reasonably adequate precautions to protect children such as the infant plaintiff, with their natural propensities to inquisitiveness, play and mischief, and whom it must be taken to have known through its servants were likely to be upon the street in close proximity to its cars at the time, from the danger attending the assembling and movement of these cars along its railway track, situated, as it was, actually upon a public street, and whether its failure to do so was the cause of the infant plaintiff being upon the ladder when the train was started. Whether the boy was a trespasser, a licensee or an invitee, and the manner in which he came to get on the ladder, is quite irrelevant except in so far as it may bear upon the question of the alleged negligence of the defendant's servants, as similar considerations were held to be in the recent *Excelsior Wire Rope* case (3), already cited. In that case Lord Buckmaster, who wrote the leading judgment, referred to some evidence which had been adduced to shew that the children, who were in the habit of playing on the land on which the wire apparatus was placed, were mischievous and had

(1) 1 Q.B. 29.
(2) [1930] A.C. 404.
(3) [1930] A.C. 404.

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broken lamps by the side of the path which led to that field, and said:

but that appears to me to be totally irrelevant. It really is a ridiculous thing to imagine that you can expect the same gravity and decorum from children as that which is sometimes associated with advanced years, and for the purposes of this case it is important to remember that the duty which we are about to examine is a duty to these children.

In the same case Lord Atkin said:

There has arisen in respect to the duties of owners and occupiers of land an elaborate series of decisions which have involved the consideration of the precise difference between invitees of the occupiers, licensees of the occupiers, or trespassers upon the land. In my view, in this case none of these questions is relevant, * * * The defendants in this case were not occupiers of the land in question. They had a right from the Marquess of Bute, who in fact owned the land, and, as far as I can see on the evidence, was the occupier of the land, to place a line of rails upon it,

and after pointing out that there was a term in the lease that the Marquess retained the right to make what use he pleased of the land on which the siding was placed subject to there being no unreasonable interference with the siding, His Lordship continued:

A similar position existed in reference to the erection of this particular hauling machinery that was placed upon this siding (the wire rope apparatus for the movement of trucks along the siding). In those circumstances, my Lords, the only question that appears to me to arise is: What was the obligation on the owners of this hauling machinery to persons who might be endangered by its use?

Though the defendant had a right, as was admitted on the trial, to assemble cars and move trains on K lead notwithstanding its location upon and along a public street, there can be no doubt that in the exercise of that right it was bound to take such precautions for the avoidance of injury to the public as were fairly commensurate with the danger created by its operations thereon. What degree of care and vigilance the railway owed to the public depends, as indeed it always does in such cases, on the existing conditions and risks, as they were known or ought to have been known to it or to its servants and agents in charge of those operations, but there can, in my opinion, be no question that it was the unmistakable duty of the railway to guard the public as far as was reasonably practicable against any and every danger which its operations created on this highway and which ought reasonably to have been foreseen by those in charge thereof. That there was a special danger at particular points along the lead, arising from the presence of children in close proximity to the railway cars while the train was being made up

by the shed crew and in starting it by the hauling crew after its assembly was completed on its transfer to the adjoining yard, cannot, I think, fairly be questioned on the evidence.

The witness, Messier, a former switchman in the employ of the defendant, who when so employed had lost a leg in 1925 and was spoken of as an old man, and who at the time of the accident to the infant plaintiff had been employed for about two years as a kind of watchman on Higgins Avenue, during the assembling operations by the shed crew, testified that his duties were "to keep traffic away from the cars and keep the kids away," by which he explained he meant "the children away from the cars as they were coming down the street." Asked where he was supposed to be stationed on Higgins Avenue, he replied, "Well, that is pretty hard to say, but stationed anywhere along the street where there was traffic and where there was kids; down around Ellen Street, the intersection of Ellen and Higgins Avenue." He told of the vacant lot at the corner on which he said the children played baseball, football and sometimes tag, and of the loading platform just east of it where children played also sometimes, and of children playing as well on Ellen Street and on Higgins Avenue. When asked if children ever climbed on to the box cars, he answered "Yes."

Q. How often did they do that?
A. I couldn't tell you how often, they done it occasionally.
BY THE COURT:
Q. As often as you could not stop them?
A. Yes.
Q. You stopped them as often as you saw them, as part of your duty?
A. Yes.
BY MR. THORSON:
Q. What did you do?
A. I chased them away from the cars. I took my cane to them.

* * *

Q. Coming back to the yard, Mr. Messier, on the southeast corner of Ellen and Higgins you say the children played games there?
A. Yes.
Q. Ball games?
A. Ball, any kind of games, all kinds of games.
Q. Did the ball ever go over the fence across Higgins avenue?
MR. REYCRAFT: I object to that and I submit it is all irrelevant. I don't care whether the ball went over the fence.
A. Yes, many times.
Q. Did the ball ever go under the train?
A. Yes.

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Q. What happened then?

A. Sometimes they would get the ball themselves, and sometimes I would get it for them.

Q. When they got the ball themselves what did they do?

A. They continued playing.

Q. But how did they get the ball?

A. They would go underneath the cars and get the ball, and go away again. Sneak away if I wasn't around.

Q. You say that sometimes you would get the ball yourself?

A. Yes, sometimes I would get the ball for them. Reach in with my stick and knock the ball out.

Q. Did the children ever ask you whether they might go and get the ball?

A. Yes, sometimes they would. They would come and tell me their ball was under the cars. I would tell them to leave it there for a few minutes, and I would get it for them.

CROSS-EXAMINATION BY MR. REYCRAFT:

Q. Any time you were on Higgins avenue near the shed and you saw children in danger, you would drive them away, or tell them to go away, you always did that?

A. Yes.

Q. Wasn't your duty, Mr. Messier, to watch the point or the end car as they were shunting the different cars down on that siding on that day?

A. It was partly.

Q. That is if they had shoved a few cars down and left them on the track, and then they would go back and get some more, and as those were pushed down your duty was to be at the east end of the east car to see nobody passed by there?

A. Yes.

Q. And when the drag was assembled your duties were through?

A. Yes.

The evidence of Messier was not contradicted, though much reliance was placed by the defendant on the fact that the witness Gustaffson, who gave testimony in its behalf, said that he thought he saw boys climb on the car ladders only once and that he didn't recall seeing any *small* boys playing on the street at any time, and on the testimony of some of the members of the hauling crew to the effect that they never saw any more children about the corner of Ellen Street than elsewhere along the avenue.

As to the value of Gustaffson's evidence, it should be pointed out that he was put on the stand for the apparent purpose of substantiating the contention which was put forward by the defendant that the infant plaintiff had not fallen from a car ladder at all but was knocked down by the train while he was running alongside it with another companion. The trial judge rejected his evidence in this regard and found that the infant plaintiff was on the ladder when the train started, as sworn to by two companions of

Gustaffson. If one reads Gustaffson's cross-examination in full one cannot fail, I think, to be impressed by its inconsistency and uncertainty throughout.

The foreman, or head of the hauling crew (Wilkinson), however, stated in his cross-examination that there were always children on Higgins Street when they went down there in good weather, all the way down Higgins, though he couldn't say he noticed them particularly at the corner of Ellen Street—that "there are always children playing on Higgins Ave," and that he had noticed that in the ordinary course of his duties as a foreman there.

Another member of the hauling crew, Boardman, said he had seen children on Higgins Avenue at different times playing there. When asked if he had seen them playing on the corner, he replied that he wouldn't say on the corner, anywhere along the whole street—he didn't want to specify Ellen any more than any other street, but he reiterated that he had seen them all along Higgins Avenue while he was working there as a switchman.

Beatty, the defendant's general yardmaster, when asked as to Messier's duty, said that his principal duty was to protect the east end of the drag, but that if he was standing there and saw children in danger he was supposed to warn them and he admitted that he had seen children playing on Higgins Avenue.

Q. At the corner of Ellen and Higgins?
A. Well, in all the district.
Q. There are a lot of children in the district, aren't there?
A. No more than normal, I imagine.

In addition to the evidence of Messier another witness for the plaintiff, Voss, swore that Messier used to chase the kids off the box cars.

Hobson, Jr., another witness for the plaintiff, who was 17 years old at the time of the trial and 15 at the time of the accident, who actually saw the infant plaintiff fall from the ladder, testified that Messier used to tell them, when the ball would go over on the other side of the tracks, whether it was o.k. to go across and get it, and that he usually told them whether the train was going out or not and say "Yes" or "No," and that if the train was stationary they climbed up the ladder steps on the couplings and climbed down the other side; that he had done that himself and that he had seen other boys do it.

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Hobson's father also gave evidence to the effect that children all around the district generally played in that neighbourhood around by the vacant lot on Ellen Street, especially in the evenings when the cars of the defendant were on the Higgins Avenue track; that he had often seen children playing on the top of the loading platform and along by the warehouse where the drag comes in on Ellen Street between Henry and Higgins and on Higgins Avenue itself; that lots of times he had seen from 30 to 50 children.

Another witness, Stevens, who was employed as night man in a warehouse which extends to Higgins Avenue on Ellen Street, also swore that children were in the habit of playing in and around the corner of Ellen and Higgins in large numbers in the summer; that he had seen them playing on the loading platform, rolling tires, balls and rolling hoops down the slope over towards the train; that he had seen the ball knocked over the fence of the vacant lot and roll under the cars and seen both boys and girls go under the cars; that that was a frequent occurrence, " two or three times an evening."

The boy, Hobson, was riding a bicycle towards the top of Ellen Street when he saw the infant plaintiff fall from the ladder of the box car. Though at the outset of his testimony, when asked where he first saw the little boy on the day in question, he answered " On Ellen Street," and that he (Hobson) was riding a bicycle at the time, it is clear from his evidence that before he saw the boy on the ladder of the box car he had seen him that night on Higgins Avenue and he distinctly swore that he was then playing with some other boys around the freight cars.

I cannot avoid the conclusion upon the whole record that the defendant through its servants and agents must be charged with knowledge that there was a special danger to young children, more particularly in the immediate vicinity of the corner of Ellen Street, not only in the shunting of cars during the assembling operations by the shed crew on this railway track, but in the starting of the completed train by the hauling crew. The railway cars of the first or second cut, it seems, were usually standing upon the railway track directly opposite the top of Ellen Street, where it was the habit of children to gather for their after supper play—some in the ball field, some on

the loading platform, and some on the street and boulevard —and were clearly an object of attraction to the younger children, who doubtless had seen the older ones climb the car ladders. If the defendant's servants and agents in charge of these operations did not actually know of these conditions and of that danger, they ought to have known of them, and that one or more of these children were more than likely to be about or upon the cars when the train was started. This was the real basis of the action, so that, as already indicated, the vital question is: Did the defendant take reasonable and proper precautions to guard against this obvious danger to such children as the infant plaintiff, who was too young to see it himself.

It is quite apparent from his reasons for judgment that the learned trial judge's finding that the defendant did all that was reasonable to see that all was clear when the train started was based upon a consideration of the conduct of the infant plaintiff rather than upon a consideration of whether on the whole evidence the railway took adequate precautions to guard against such a thing as happened. His Lordship says the little fellow "ran out a few moments before the train started and *evaded* being seen by the trainmen or the constable who had both passed the car to which he ran a short time before," and immediately adds:—

> How could the defendant guard against such conduct? The little lad told what happened without being sworn. For what it is worth he said that he and two companions ran across the street to the cars—that the other two boys saw the engine and ran on. He did not see the engine, crawled up the side ladder and went to the back ladder when the train started. He fell and his foot was cut off. This would all happen in a few seconds. They must have run out just when Boardman (one of the two trainmen referred to) was giving his signal and when his back was turned. If Boardman is correct as to where he was, he must have been very few car lengths from the very car the boy climbed. Crick (the constable) says he saw a boy fall while running, but it must have been one of the other boys. He was fifteen car lengths east. He did not happen to look during the few seconds it took these boys to cross Higgins avenue to the cars.
>
> On the facts it is clear that the plaintiff was a trespasser.

It will be seen that these findings are for the most part inferences drawn from undisputed facts and are therefore quite open to review by a Court of Appeal.

If Boardman was at all concerned in seeing "that all was clear (in the sense that no young children were endangered) when the train started," and was standing

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opposite Ellen street just west of the switch, as the evidence clearly shews he must have been, it seems to me to be an altogether remarkable thing that he could have failed to see three children run across the street to the cars and one of them climb the lower rungs of the side ladder behind him and then crawl around the corner to get on the back one, without any lack of vigilance or failure of duty on his part. Why should he before the train started be looking away from the place of greatest danger at the critical moment? When the defendant's counsel in his examination-in-chief asked Boardman if there were any children near the cars when he was standing there, his answer was: "Not that I noticed particularly; there might have been some up on the sidewalk or the boulevard." The truth is that Boardman was not there for the purpose of being on the lookout for children, but simply for the purpose of giving his O.K. signal after the train started to Wilkinson, the other yardman who was standing near the engine, that the cars were all coming, as he explained to the defendant's counsel. It is true that before he took up his position for this purpose he had passed the car to which the boy ran, and in fact walked down Higgins avenue the full length of the drag, but this was not for the purpose of seeing that no young children were on or about the cars either, but for the purpose of making a list of all the car destinations. This work must have taken more than a few minutes. After completing his list he walked back to the point west of the switch from which he gave his signal to Wilkinson. He was not asked if on his way back to this position he looked to see if any children were on or about any of the cars. No doubt, however, if he had seen the infant plaintiff on the side ladder he would have said so.

Wilkinson, the other trainman, who is said to have passed the car, from which the plaintiff fell, a short time before, does not agree with Boardman that he accompanied the latter on his walk east along the whole length of the drag. He says he left Boardman at a point about 12 car lengths from the rear of the train, but was not at all sure as to whether it might not have been 13 or 14 car lengths. Apparently it depended in his mind upon how many cars were included in the first cut of cars which had been placed on the lead by the shed crew, for he said they went

down together to that point to see that the first cut was coupled. It was clearly not for the purpose of seeing if any children were on or about the train when it started, and would have been of no avail in this regard, for he thought it was 15 minutes before the train pulled out that he left Boardman and walked back to take up his signalling position near the engine. It was Wilkinson who said that there were always children playing on Higgins avenue, but notwithstanding this he stated he never got any instructions about children.

As regards Crick, who is described as a constable, the record shews that he went on duty at the lead at 7.15 p.m.—about an hour before the train pulled out—for the purpose of taking the seal records of all the cars, and that he walked along both sides of the full length of the train for that purpose, first along the north side from east to west and then the south side from west to east. It is true he says he kept watch while doing so to see there was nobody around the train, but his principal duty was to take the seal records on all the cars, which obviously would take considerable time, and not enable him to properly perform the duty of seeing that "all was clear," so far as children were concerned, "when the train started," for the train was a train of 55 cars and stretched along the track for not far short of half a mile.

Crick himself in his examination-in-chief testified that when he got to the east end car and was reading that seal record the train started to move and that he immediately turned round and saw three small boys run across Higgins avenue from Ellen street towards the train; that they turned west and ran alongside of the train; that he saw one boy fall; that he (Crick) immediately proceeded to catch up to him, and after walking a short distance alongside the train got on the moving train, and when within about 200 feet of where the boy fell, saw another boy come across from Ellen street and pick the lad up. In cross-examination he first said he was walking east towards the end of the train when it started, but immediately afterwards said he was "at the east end car of the train" at the time. Whether, however, he was walking towards the east end or had reached the end car and was standing there, he afterwards distinctly affirmed that when the train

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started to move he was about 150 feet west of the west line of Lizzie street with his back to the engine, looking east. The learned trial Judge did not accept that portion of Crick's evidence, which clearly pointed to the infant plaintiff as the boy who fell while running west alongside the train, but he finds that Crick was 15 car lengths east (of where Boardman was standing to give his O.K. signal to Wilkinson) when he says he saw the boys running. "He did not happen," His Lordship adds, "to look during the few seconds it took these boys to cross Higgins avenue to the cars." So that if it was Crick's duty to see that all was clear, so far as children were concerned, when the train started, there was a clear failure of duty on his part also. He was looking east from the rear car 450 feet from Ellen street with his back to the engine at the critical time.

That both Boardman and Crick should have had their backs turned to the danger point at the critical moment, if it was the duty of either to see that no children were on or about the cars when the train started, is surely a most extraordinary coincidence. The fair inference from it is that neither regarded it as his duty to see that all was clear and that no children would be endangered when the train started to move.

The finding of the learned trial judge that the defendant did all that was reasonable to see that all was clear when the train started could only be justified on the assumption that it owed no duty to guard young children against such an obvious danger, for it was not pretended that there was anyone else than Boardman, who could have seen the children run to the train from the vicinity of the Ellen Street corner, and warn them when it was about to start, and Crick, who, as stated, was 450 feet east of that point, was too far away to warn them, and was actually looking east when the train started to move west. No other precautions of any kind were taken by the railway to guard against such a danger.

Messier, who appears to have been the only employee of the defendant whose real duty was to watch for children and others and warn them of the movement of cars on the lead during the operations of the assembling crew, was not in the locality at all. He went on duty with the shed crew and left when that crew finished their work. Beatty, the general yardmaster, said that Messier did not usually

stay on Higgins Avenue until the train pulled out; that as long as the shed crew was through he was through. Messier himself in his cross-examination by the defendant's counsel said that when the drag was assembled his duties were through. Had he been stationed at the corner of Ellen Street, where he stated that he usually stationed himself, he would surely have seen the infant plaintiff run across with the two or three other boys and climb the ladder and this unfortunate accident would not have occurred.

It seems to me that ordinary prudence should have suggested to the defendant's terminal officers the necessity of keeping Messier or some other watchman, specially charged with the duty of looking out for children, from the time the hauling crew took over the drag until it was moved safely off the street, and that it was in no sense sufficient for the railway to rely for the avoidance of such a thing as happened that night, and as might have happened at any moment while the little boys were about the street, upon its ordinary hauling crew and a man like Crick, who was engaged at the very time the train started, according to his own evidence, in examining the seal of the last car 15 car lengths east of the most obvious point of danger with his back to the engine.

As regards the learned trial judge's finding that the infant plaintiff ran out a few moments before the train started and "evaded" being seen by the trainmen, I cannot think it possible that a boy of but 4½ years could have had any thought of taking advantage of Boardman's lack of vigilance when he ran across the street with his three companions and climbed the ladder. The boy himself in his unsworn statement, to which His Lordship refers "for what it is worth," says that when he and the other boys ran over to the train he, before climbing the first few rungs of the side ladder and pulling himself around the corner to the end ladder, sat down on the first seat (of the ladder) and then said to his companions, "Let us climb," and they said, "No," but that he went up the ladder and that the other boys then saw the engine coming and ran away. If this statement is to be relied upon at all and the boy had any appreciation of the surroundings, it would surely indicate that he could not possibly have had any idea of "evading" Boardman. In any event he was merely

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indulging the natural instinct of children to play and amuse themselves, which was the cause of the special danger against which it was the defendant's duty to guard.

It was strongly contended in behalf of the defendant that it was not reasonably practicable for the railway to guard against such a danger, inasmuch as to do so effectually would require it to employ special watchmen all along the street when the trains were about to start, and such a requirement would be an intolerable and unreasonable burden to impose upon the railway. I quite agree that it would be unreasonable to insist upon the employment of special watchmen "all along the street," if that means at every car along the lead, and that the only duty resting upon the defendant towards the children was to take reasonably adequate precautions to gaurd them from the danger involved in the shunting of cars and the starting of trains in such a locality. I do not agree, however, that there was no more danger at the corner of Ellen Street than elsewhere, and that there was consequently no more obligation on the part of the defendant to provide a watchman there than at any other point along the track. The weight of the evidence is decidedly to the contrary. The testimony of Messier, who had acted as a special watchman for the defendant for two years during the assembling of the cars on the lead, and which was not contradicted in any of its essential features, conclusively proves that he himself recognized the fact that there was a special danger at that corner, apart altogether from that of the other witnesses, which I have above summarized. I have already called attention to the fact that there were but two north and south streets west of Lizzie Street, which ended on Higgins Avenue. This duty, it seems to me, could properly have been discharged by the employment of one or two special watchmen at the most to patrol the really dangerous sections when the hauling crews took over the assembled drags. It was, in my opinion, not adequately discharged by relying wholly upon the yardmen of the ordinary hauling crew, supplemented only by a constable, charged with the duty of examining and recording the car seal records, and who was most likely in his fulfilment of that duty to be at the extreme end of the drag when the train started, with his mind centred on his particular work. One or two such special watchmen as I have suggested would

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have been required for a period of not more than half an hour before the train moved off the street.

I entirely agree with the majority judgment of the Appeal Court on the issue of liability, and as there can be no objection to the quantum of damages, which the Court itself assessed on undisputed testimony in order to avoid the expense of a new trial for the assessment of damages only in such a case, I would dismiss this appeal with costs.

Appeal as against infant respondent allowed, with costs if asked for. Appeal as against adult respondent dismissed for want of jurisdiction.

Solicitor for the appellant: *L. J. Reycraft.*

Solicitor for the respondent: *J. T. Thorson.*

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* May 6
* May 27.

LOBLAW GROCETERIAS CO. LIMITED ..... } APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and taxation—Business assessment—Clause (cc) (added in 1933, c. 2, s. 2) of s. 9 (1) of Assessment Act, R.S.O. 1927, c. 238—"Distribution premises" for goods supplied to a chain of retail stores—Submission of questions under s. 84 of said Act.

Clause (*cc*) (added in 1933, c. 2, s. 2) of s. 9 (1) of the *Assessment Act*, R.S.O. 1927, c. 238, imposes upon "every person carrying on the business of selling or distributing goods * * * to a chain of more than five retail stores or shops in Ontario" a business assessment for a sum equal to 75 per cent. of the assessed value of the land occupied or used "in such business for a distribution premises, storage or warehouse" for such goods, or for an office used in connection with the business. Appellant company owned a chain of retail grocery stores and had in Toronto, Ontario, a large warehouse building in which it had its general administrative offices, and in which it stored goods until required by its stores, and from which it distributed goods by trucks to its stores. In respect of this building (and the land on which it stood) appellant was assessed under said clause (*cc*); this assessment was not in dispute. In 1934 appellant acquired land and built thereon, across a street from the said older building (and not

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

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connected with it except by a small pipe tunnel under the street for housing pipes and wires for conveying steam heat, water, electricity and gas to the new building), a building used, (1) for a garage for housing appellant's trucks, (2) as a repair shop for its trucks, and for servicing its cars used by its store supervisors in making inspections, and (3) as a carpenter, paint and repair shop for repairing shelving and other fixtures in the retail stores and doing repairs to said stores. In respect of this building also (and the land on which it stood), and as a parcel in itself, appellant was assessed by the City of Toronto under said clause (*cc*); and the question in dispute, on a case stated by a County Court Judge under s. 84 of said *Assessment Act*, was whether appellant was (in respect of the latter building and land) properly so assessed.

Held: Appellant was not assessable under said clause (*cc*) in respect of the building and land secondly above described. It could not be said that the land was occupied or used by appellant in its business for distributive purposes in the sense that the two buildings taken together were occupied and used in its business for the storage and distribution of its goods. The occupation or use of the particular land assessed must be looked at; and the new building could not be said to come plainly within the words "distribution premises" within clause (*cc*), strictly read.

The contention that the finding in the courts below that the land and building in question were used as distribution premises was a finding of fact which should not be interfered with, was rejected. The question raised was the proper construction of the statute (*Sedgwick* v. *Watney*, [1931] A.C. 446).

The only questions that may be submitted by a County Court Judge under said s. 84 are questions directly affecting the particular assessment in appeal before him. It was not proper in the present case to submit further a general question whether the premises were assessable for business tax under any of the provisions of the Act.

APPEAL by Loblaw Groceterias Co. Ltd. from the judgment of the Court of Appeal for Ontario dismissing (Henderson J.A. dissenting) its appeal from the judgment of His Honour, Judge Lee, of the County Court of the County of York, confirming a certain assessment by the City of Toronto (respondent) of the appellant company for business assessment. The appeal to the Court of Appeal was by way of stated case pursuant to s. 84 of the *Assessment Act*, R.S.O. 1927, c. 238, and amendments. The material facts of the case are sufficiently stated in the judgment now reported, and are indicated in the above head-note. The appeal to this Court was allowed, with costs throughout.

G. A. Urquhart K.C. for the appellant.

J. P. Kent and *W. G. Angus* for the respondent.

The judgment of the court was delivered by

DAVIS J.—The appellant, Loblaw Groceterias Co. Limited, carries on business in the province of Ontario as retail grocers and owns a chain of more than five retail stores or shops in the province of Ontario. The head office of the company is in the city of Toronto.

In 1928 the appellant constructed a large warehouse building in the city of Toronto on lands bounded on the south by Fleet street, on the west by Bathurst street, on the north by Housey street and on the east by a railway siding.

The following are the uses to which this building has been and is put:

(*a*) The housing of the general administrative offices of the company.

(*b*) The storage of surplus goods, wares and merchandise sold in the company's retail stores until such times as they are required by these stores.

(*c*) The manufacture of candies, cakes and sundry other articles and the cutting of meats, etc.

(*d*) The loading of trucks in runways on the ground floor of said building.

(*e*) The distribution of goods, wares and merchandise by the said trucks from this building to the various retail stores operated by the appellant according to the needs of the stores. No selling by retail is done at this building.

Nothing is charged directly to the stores for the service of distribution from this building to the stores, but the goods are sent out to the various stores from this building duly priced for sale in the said stores.

In the year 1934 the appellant acquired certain land bounded on the south by Housey street, on the west by Bathurst street and on the north and east by a travelled road, and constructed a large new building which is used solely for the following purposes:

(1) As a garage for housing appellant's trucks.

(2) As a repair shop for repairing appellant's trucks and for the service of appellant's cars used by the supervisors of the various retail stores in making their inspections. The appellant does not carry on a garage business.

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(3) As a carpenter, paint and repair shop solely for the purpose of servicing the shelving and other fixtures in the retail stores and doing repairs to the said stores.

There is no connection between the two buildings except by a small pipe tunnel which passes under Housey street for housing pipes and wires for conveying steam heat, water, electricity and gas from the first mentioned to the last mentioned building.

The appellant does not carry on a trucking business, its trucks being used only to distribute the appellant's own goods, wares and merchandise to the retail stores of the appellant.

These are the facts stated by a Judge of the County Court of the County of York pursuant to the provisions of sec. 84 of the *Assessment Act,* R.S.O. 1927, ch. 238, and amendments thereto, on an appeal by the appellant to the Court of Appeal for Ontario from the judgment of the County Judge who confirmed an assessment by the respondent for "business assessment" on the secondly described land and building. The question in appeal turns upon the proper construction to be put upon an amendment in 1933 to the *Assessment Act,* the amendment being sec. 2 of chapter 2 of the Statutes of 1933, which amended subsection (1) of section 9 of the *Assessment Act* by adding thereto the following clause (*cc*):

(*cc*) Every person carrying on the business of selling or distributing goods, wares and merchandise to a chain of more than five retail stores or shops in Ontario, directly or indirectly, owned, controlled or operated by him, for a sum equal to seventy-five per centum of the assessed value of the land occupied or used by him in such business for a distribution premises, storage or warehouse for such goods, wares and merchandise, or for an office used in connection with the said business.

Until the 1933 amendment, the appellant was liable for business assessment as a retail merchant under clause (*h*) of subsection (1) of section 9 for a sum equal to 25 per centum of the assessed value of the land occupied or used by it for the purpose of its business. The amendment of 1933, (*cc*), increased the rate of assessment from 25 to 75 per centum on every person, such as the appellant, carrying on the business of selling or distributing goods, wares and merchandise to a chain of more than five retail stores or shops in Ontario, directly or indirectly, owned, controlled or operated by such person, but the assessment at the increased rate applies only to "the assessed value of the

land occupied or used by him in such business for a distribution premises, storage or warehouse for such goods, wares and merchandise, or for an office used in connection with the said business."

Since the amendment of 1933 the firstly described building and the land on which it stands have been assessed for business tax for a sum equal to 75 per centum of their assessed value, and this assessment is not in dispute. The secondly described building and the land on which it stands were similarly assessed for business tax for 1936. From the latter assessment, the appellant appealed to the Court of Revision which dismissed the appeal. From that decision an appeal was taken by the appellant to the County Judge, and he dismissed that appeal. The appellant having requested the County Judge on the hearing of the said appeal to make a note of the questions of law to be considered and to state them in the form of a special case for a Divisional Court pursuant to the provisions of sec. 84 of the *Assessment Act,* the facts above set forth were so stated for the consideration of a higher court. The learned County Judge on the facts was of opinion that the secondly described building and the land on which it stands came within the 1933 amendment. Upon further appeal by the appellant, on the stated case. the Court of Appeal for Ontario (Latchford, C.J.A., and Riddell, J.A.; Henderson, J.A., dissenting) dismissed the appeal. From this judgment the appellant appealed to this Court.

The sole question therefore is, whether or not the land and building used by the appellant for a garage and paint shop come within the words "distribution premises" in the amending statute. It is not suggested, of course, that the land or building was used for "storage" or "warehouse" for the appellant's "goods, wares and merchandise" or for "an office" in connection with its business. but it is contended by counsel for the respondent that the land is occupied or used by the appellant in its business for distributive purposes in the sense that the two adjacent buildings taken together are in fact occupied and used by the appellant in its business for the storage and distribution of its goods, wares and merchandise. The two parcels of land are separately assessed and the particular assessment with which we are concerned must itself be justified

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by the statute. It is plain that the words of the statute "point at some kind of special use of the premises," to use the words of Viscount Dunedin in the House of Lords in *Sedgwick* v. *Watney* (1), and that the occupation or use of the particular land subjected to this special assessment must be looked at. Without attempting any definition as to what are and what are not "distribution premises" within the statute, I do not think that the garage and paint shop in the separate though adjacent building to the warehouse or storage building of the owner can be said to come plainly within the language strictly read. The use of precise words such as "storage," "warehouse" and "office" in the section entitles the appellant to the narrower construction.

It is argued that, the courts below having reached the conclusion that the land and building were used as distribution premises, this is a finding of fact with which we ought not to interfere. But it is a question of law that is made the subject-matter of the right of appeal from the County Judge upon a stated case and we are bound to determine upon the proper construction of the amendment whether or not, upon the facts stated, the land and building are caught by the increased rate of assessment. Questions of this sort are constantly before the House of Lords on taxing statutes and are dealt with as raising the proper construction to be put upon the language of the statutes. For instance, in *Sedgwick* v. *Watney* (2) above mentioned the question was whether a bottling store occupied by brewers in which beer brewed by them elsewhere was matured, carbonated, filtered and bottled, and from which, after the bottles had been corked and labelled, it was distributed to the trade, was "an industrial hereditament" under sec. 3 of *The Rating and Valuation Apportionment Act, 1928,* or was primarily occupied and used for the purposes of "distributive wholesale business" within an exception in the Act. The rating authority had put the premises on the special list as an industrial hereditament and their decision was upheld by the Assessment Committee. Appeal being taken to Quarter Sessions, a special case was stated to the King's Bench Division which reversed the court below. From that judgment, appeal was taken

(1) [1931] A.C. 446, at 463. (2) [1931] A.C. 446.

to the Court of Appeal which reversed the judgment of the King's Bench Division and restored the judgment of the Assessment Committee. The House of Lords then considered the matter and the judgment of the House was read by Viscount Dunedin, pp. 460-465, and while it said that "after all, the question is an individual one as to each particular hereditament," the appeal was determined upon the proper construction to be put upon the words of the statute.

The appeal should be allowed with costs throughout, and the first question submitted by the County Judge upon the stated case,

> Was I correct in holding that the appellant in respect of the land and building above mentioned situate on the northeast corner of Housey and Bathurst streets, Toronto, was properly assessable for business tax for a sum equal to seventy-five per centum of the assessed value thereof?

should be answered in the negative.

The County Judge submitted a further question:

> If the above question is answered in the negative, are the said premises assessable for business tax under any of the provisions of the Assessment Act?

This second question was not discussed before us and we assume that the parties did not think that it raised any difficulty once the first question was answered. But the question was not in any event a proper one, in that the particular assessment before the court was founded and supported solely upon the amending clause (*cc*), and the only questions permitted a County Judge to submit by way of a stated case under sec. 84 of the *Assessment Act* are questions directly affecting the particular assessment in appeal before him, and the provision of the statute cannot be used generally for obtaining the court's opinion as to whether an assessment under some other section of the statute could properly be made.

Appeal allowed with costs.

Solicitors for the appellant: *Urquhart & Urquhart.*

Solicitor for the respondent: *C. M. Colquhoun.*

1935
* Oct. 29.
* Nov. 7.
1936
* May 27.

HIS MAJESTY THE KING (PLAINTIFF) . . APPELLANT;

AND

THE SHIP *EMMA K*, HER GOODS, BOATS, TACKLE, RIGGING, APPAREL, FURNITURE, STORES AND CARGO, AND JOHN BARRETT (DEFENDANTS) . . . . . RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, BRITISH COLUMBIA ADMIRALTY DISTRICT

Evidence—Shipping—Crown claiming forfeiture of ship, under s. 67 (2) of Merchant Shipping Act, 1894 (Imp.), because of alleged false statement of citizenship in declaration of ownership—Authenticated photostatic copy of certificate of naturalization in foreign country to person of same name as person making declaration of ownership—Inadmissibility of comparison of handwriting of citizen's signature on said copy of certificate of naturalization with that of signature on declaration of ownership, to prove identity—Failure to object to admissibility at trial.

The Crown claimed forfeiture of a ship, under s. 67 (2) of the *Merchant Shipping Act, 1894*, (Imp.), alleging that its registered owner, one Manuel Purdy, wilfully made a false declaration touching his qualification to be registered as owner, by falsely declaring that he was a British subject. The declaration in question was contained in his declaration of ownership upon his application for registration of the ship in his name as owner, in March, 1933. His signature to this was duly proved. There was also put in evidence an authenticated photostatic copy of a naturalization certificate issued on November 27, 1926, by which "Manuel Purdy," "who previous to his naturalization was a subject of England," became a citizen of the United States. The signature "Manuel Purdy" appeared on this certificate, and evidence was given of the practice to have the signature of the person to whom the certificate relates put upon it. The Crown relied on a comparison of the handwriting of this signature with that of the signature to the said declaration of ownership, along with the identity of names, to prove identity.

Held: Such a comparison of handwriting was inadmissible. The authenticated copy of the naturalization certificate was good evidence of the contents of the original document; and the proper inference was that the signature "Manuel Purdy" appearing on the certificate was that of the person to whom the certificate was granted. But the rules by which, at common law or by statute, a record may be proved by exemplification or by the certificate of the person having the custody of the record, where in the nature of things the original cannot be produced, do not contemplate the use of such document for the purpose of establishing the character of the handwriting on the original document. The court cannot receive for the purpose of comparison of handwriting a copy, photographic or other, of alleged specimens of handwriting upon proof by official certificate alone. The court could

* PRESENT AT HEARING:—Duff C.J. and Rinfret, Lamont, Davis and Kerwin JJ. Lamont J. died before delivery of judgment.

not examine the photostatic copy of the certificate of naturalization in question for any other purpose than that of ascertaining the contents of the original. It was not shewn, therefore, that the Manuel Purdy who in 1926 was admitted a citizen of the United States was the same person who in 1933 made the said declaration of ownership and became registered as owner of the ship. Identity of names alone was not satisfactory evidence upon which to decree a forfeiture (which postulates an offence) under said s. 67 (2).

The contention that, as the above particular objection to the comparison of handwriting to shew identity was not taken when the evidence was offered and received, effect should not be given to it now, was rejected (*Jacker* v. *International Cable Co.*, 5 T.L.R. 13). Nothing occurred at the trial (such as did occur, e.g., in *Bradshaw* v. *Widdrington;* see 86 L.T. 726, at 732) which precluded insistence on the objection now. Also, the document being admissible to establish a necessary part of the Crown's case, and having been admitted, it was not so much a question of the admissibility of a piece of evidence as of the manner in which evidence admissible and admitted could properly be applied. The denial of admissibility of such comparison was a proposition of law to which the court could not refuse to give effect on this appeal; because the Crown by this appeal was asking the court to declare a forfeiture, and the court must consider whether there was a proper foundation in the evidence for such a declaration.

Judgment of Martin, D.J.Adm., [1936] Ex. C.R. 92, in favour of an unregistered transferee of a registered mortgage of the ship, as against the Crown, affirmed in the result.

APPEAL by the Crown from the judgment of the Honourable Mr. Justice Martin, District Judge in Admiralty for the British Columbia Admiralty District (1).

The Crown claimed forfeiture of the ship *Emma K* by reason of an alleged false declaration in a declaration of ownership made on March 23, 1933. At the trial the present respondent Barrett was given leave to intervene as being a person interested as the unregistered transferee of a registered mortgage, and judgment was given in his favour (1) for the sum standing in court to the credit of the cause as the balance of the proceeds of sale of the ship, to be applied in reduction of the mortgage. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

F. P. Varcoe K.C. for the appellant.

D. K. MacTavish for the respondent Barrett.

The judgment of Duff C.J. and Rinfret, Davis and Kerwin JJ.* was delivered by

(1) [1936] Ex. C.R. 92; 50 B.C. Rep. 97; [1935] 3 D.L.R. 673.

*Lamont J., who, with the Judges here mentioned, sat at the hearing, died before the delivery of judgment.

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DUFF C.J.—This is an appeal from the judgment of Mr. Justice Martin (1), the local Judge in Admiralty for the Admiralty District of British Columbia, who, in proceedings taken under section 76 of the *Merchant Shipping Act* charging an offence under section 67 (2) of the same Act, adjudged the ship forfeited, but held that the sum of $2,689.34 standing in court, a balance of the proceeds of the sale of the ship, should be paid out to John Barrett, intervener, who claimed as mortgagee. The learned judge held that forfeiture under section 67 (2) does not operate until condemnation and that the interest of the mortgagee was not affected by it.

In the view I take, it will be unnecessary to consider the point discussed in the very able judgment of the learned judge in admiralty.

Prior to the 22nd of March, 1933, the ship *Emma K* was registered in the name of Edward Lipsett Limited. By virtue of a bill of sale dated on that day it was sold to one Manuel Purdy who became the registered owner on or about that date. On the 18th day of April, 1934, an action was instituted by certain seamen for wages. In that action the ship was arrested and, on the 12th of June, 1934, was sold pursuant to a judgment in admiralty to satisfy the wage claims and costs of the crew. The Judge in Admiralty directed that the balance of the monies in court, after payment of these claims, should remain in court to the credit of any actions that were pending on the date of the order, and these included the present action. At the trial of the action, Barrett obtained leave to intervene as defendant as the unregistered transferee of a mortgage in favour of one Allender, dated the 23rd of March, 1933. The claim of forfeiture is in the endorsement on the writ stated in the following words:

> The plaintiff's claim against the defendant ship is for the confiscation thereof to the purposes of His Majesty the King for that the registered owner thereof, one Manuel Purdy, did wilfully make a false declaration touching his qualification to be registered as such owner by falsely declaring that he was a British subject, whereas in truth and in fact he is and at all material times has been a citizen of the United States of America, contrary to Section 67, Subsection (2) of the "Merchant Shipping Act, 1894."
>
> Alternatively the plaintiff says that being a citizen of a foreign country the said Manuel Purdy did unlawfully cause the ship *Emma K*

(1) [1936] Ex. C.R. 92; 50 B.C. Rep. 97; [1935] 3 D.L.R. 673.

to fly the British flag and assume a British character contrary to Section 69 of the "Merchant Shipping Act, 1894."

The learned judge found that the alternative claim was not established; and we agree with his views upon this branch of the case.

In support of the principal claim, the declaration of ownership made upon the application of Manuel Purdy for registration of the ship in his name as owner was produced from the Victoria registry and the signature of Manuel Purdy was proved by one of the employees in the registry who said that the document was signed in his presence. The declaration contains this statement:

> I am a natural-born British subject, born at White Bay, Newfoundland, * * * and have never taken the oath of allegiance to any foreign sovereign or state, or have otherwise become a citizen or subject of a foreign state.

The claim for forfeiture is based upon the allegation that this statement is false and that the declaration was a "wilfully * * * false declaration" within the meaning of section 67 (2) of the *Merchant Shipping Act* which provides:

> (2) If any person wilfully makes a false declaration touching the qualification of himself or of any other person or of any corporation to own a British ship or any share therein, he shall for each offence be guilty of a misdemeanor, and that ship or share shall be subject to forfeiture under this Act, to the extent of the interest therein of the declarant, and also, unless it is proved that the declaration was made without authority, of any person or corporation on behalf of whom the declaration is made.

Section 1 of the *Merchant Shipping Act* enacts that a natural born British subject who has become a citizen or subject of a foreign state shall not be qualified to be the owner of a British ship, subject to a qualification not presently material; and, consequently, the statement quoted from the declaration was obviously a statement "touching the qualification of" the declarant to be the owner of a British ship.

Evidence was adduced to show—to this evidence I shall particularly refer in a moment—that Manuel Purdy had, on the 27th of November, 1926, been admitted a citizen of the United States of America pursuant to law. Obviously, if the Manuel Purdy who became the registered owner of the *Emma K*, and, for the purpose of becoming registered as owner, signed and made the declaration of ownership above mentioned, was the Manuel Purdy who was admitted as an American citizen in 1926, he was not

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qualified to be the owner of a British ship and the statement quoted from the declaration of ownership was contrary to the fact.

The claim for forfeiture necessarily rests upon proof by the Crown that, in making this statement, Manuel Purdy "wilfully made a false declaration" touching the qualification of himself to own a British ship. The point to be considered is whether or not the Manuel Purdy who, in 1926, was admitted a citizen of the United States was the same Manuel Purdy who made the declaration of ownership in 1933, and became registered as owner of the ship in 1933. Two circumstances are relied upon: first, identity of names, and second, identity of handwriting.

For the purpose of establishing this identity, a photostatic copy of the naturalization certificate issued to Manuel Purdy on the 27th November, 1926, is produced, and that copy is authenticated, first of all by the seal of the United States Court of Alaska, Division No. 1, attested by the Clerk of that Court; and, secondly, by the certificate of the Acting Deputy Commissioner of Labor under the seal of the Department of Labor of the United States of America, which seal in turn is attested by the certificate of the Acting Secretary of State for the United States of America and the Chief Clerk of the Department of State. The certificate of naturalization is as follows:

UNITED STATES OF AMERICA

No. 2303964

CERTIFICATE OF (Coat of Arms) NATURALIZATION

Petition, Volume VIII, Number 992-J.

Description of holder: Age, 33 years; height, 6 feet ½ inch; color, white; complexion, fair; color of eyes, hazel; color of hair, dark brown; visible distinguishing marks, none.

(Note:—After September 22, 1922, husband's naturalization does not make wife a citizen.)

United States of America
Territory of Alaska.

ss. Manuel Purdy
Signature of Holder.

Be it remembered, that Manuel Purdy, then residing at number Street, City of Juneau, Territory of Alaska, who previous to his naturalization was a subject of England, having applied to be admitted a citizen of the United States of America pursuant to law, and at a regular term of the U.S. Court of Alaska, Div. No. 1, held at Juneau, on the 27th day of November, in the year of our Lord nineteen hundred and twenty-six, the court having found that the petitioner intends to reside per-

manently in the United States, and that he had in all respects complied with the Naturalization Laws of the United States, and that he was entitled to be so admitted, it was thereupon ordered by the said court that he be admitted as a citizen of the United States of America.

IN TESTIMONY WHEREOF the seal of said court is hereunto affixed on the 27th day of November, in the year of our Lord nineteen hundred and twenty-six, and of our Independence the one hundred and fifty-first.

JOHN H. DUNN, Clerk
U.S. District Court, Div. No. 1.
(Seal) By 'Alta C. Purpus,'
Deputy (Official character of attestor)

The evidence sufficiently proves that one Manuel Purdy became a citizen of the United States by naturalization on the date mentioned. Evidence was also given to the effect that the practice is that the signature of the person to whom the certificate of naturalization relates shall be put upon the certificate; and the proper inference is that the signature "Manuel Purdy" appearing on the certificate is the signature of the Manuel Purdy to whom the certificate was granted. The Crown relies upon a comparison of the handwriting of this signature with the handwriting of the signature of Manuel Purdy attached to the declaration of ownership. The question is: Is such a comparison of handwriting admissible?

Section 8 of the *Canada Evidence Act* is in these words:

8. Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses; and such writings and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.

There is high authority to the effect that comparison under the statutory rule involves the production of both the disputed and the genuine handwriting. In *McCullough* v. *Munn* (1) the view of Palles C.B., that a photographic copy of the alleged genuine handwriting was not admissible for the purpose of comparison under the rule, was accepted by virtually all the Irish judges including Fitzgibbon L.J. and Holmes L.J. Whether or not that principle is applicable in this case it is not necessary to decide.

The certificate of naturalization was pertinent evidence to establish the offence charged under section 67 (2) and, probably, if the original document had been before the court, it would have been competent to the court, without the aid of the statutory rule, to enter upon a comparison

(1) [1908] 2 Ir. Rep. 194.

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of the handwriting in the two signatures for the purpose of dealing with the question of identity. It is unnecessary to decide the question whether, if a photographic copy, proved in the ordinary way by the evidence of the photographer who had made the photograph and could inform the court upon the preliminary question as to the accuracy of his methods and results, had been before the court, it would have been competent to the court to inspect the copy of the signature so proved for the purpose of comparison with the signature attached to the declaration of ownership. What we have before us is something entirely different. It is a certified copy, or, if you will, an exemplification of proceedings in the United States Court in Alaska. This document is perfectly good evidence of the contents of the original document; but the rules by which at common law or by statute a record may be proved by exemplification or by the certificate of the person having the custody of the record, where in the nature of things the original cannot be produced, do not contemplate the use of such document for the purpose of establishing the character of the handwriting on the original document. I know of no principle and of no authority which could justify a court in receiving for the purpose of comparison of handwriting a copy, photographic or other, of alleged specimens of handwriting upon proof by official certificate alone. In my opinion, it is not competent for the court to examine the photostatic copy of the certificate of naturalization now before us for any other purpose than that of ascertaining the contents of the original certificate.

As evidence of identity there remains the identity of names which, in my opinion, is not satisfactory evidence upon which to decree a forfeiture (which postulates an offence) under section 67 (2).

The Crown argues that, as this particular objection to the evidence was not presented when the evidence was offered and received, effect cannot be given to it now. This argument is answered by *Jacker* v. *International Cable Company* (1), a decision which has been applied in this court more than once. There may, of course, be cases in which the failure to take an objection precludes the party from insisting on that objection on appeal, for example,

(1) (1888) 5 T.L.R. 13.

if, by reason of the fact that evidence was not objected to, the party refrains from offering other evidence which he has at his command which would be unobjectionable, the right to object to the evidence received may be lost. An instance of that occurred in *Bradshaw* v. *Widdrington* (1) where, as stated in the judgment of the Master of the Rolls,

> * * * it seems to me that Mr. Terrell is really not in a position to contest before us, as a matter of strict law, whether those accounts are admissible or not, because at the trial Mr. Astbury was there with the evidence which would have told us the precise conditions under which those accounts came into existence. Owing to what passed at the time between him and Mr. Terrell in the presence of the judge in the court below, that evidence was not called. * * * If those objections had been pressed, Mr. Astbury had witnesses who were prepared to deal with them.

Nothing occurred at the trial in the present case which precludes the respondent from insisting on the objection now.

It should be observed, however, that the document, the photostatic copy of the certificate of naturalization, was plainly admissible for the purpose of establishing a necessary part of the case of the Crown, viz., that Manuel Purdy had become a citizen of the United States of America. The document being admitted, it is not so much a question of the admissibility of a piece of evidence as of the manner in which evidence admitted and admissible can properly be applied. In the view above expressed, the law does not permit the court to make use of certain marks on that document, that is to say, the words "Manuel Purdy," for the purpose of ascertaining whether or not the Manuel Purdy to whom the certificate was issued was the same person as the Manuel Purdy who signed the declaration of ownership. That is a proposition of law to which the court cannot refuse to give effect on this appeal; because the Crown by this appeal is asking the court to declare that the monies in court have been forfeited to the Crown and the court must consider whether there is a proper foundation for such a declaration in the evidence before it.

The appeal must, therefore, be dismissed with costs; but it must not be assumed, by reason of the fact that we have dismissed the appeal on a ground which is not the same as that upon which the judgment of the Judge in

(1) (1902) 86 L.T. 726, at 732.

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THE KING v. THE SHIP "EMMA K" ET AL.

Duff C.J.

Admiralty proceeded, that any disagreement is implied with the reasons upon which the learned judge held that the claim of Barrett to the monies in court has been established.

Appeal dismissed with costs.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitors for the respondents: *Lucas & Lucas.*

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* Mar. 3, 4, 5.
* Apr. 21.

NATHAN GROBSTEIN (PETITIONER).....APPELLANT;

AND

KHALIL A. KOURI AND DAME N. KOURI (CONTESTANTS) ..... } RESPONDENTS;

AND

THE NEW YORK LIFE INSURANCE COMPANY AND THE BANK OF MONTREAL (MISES-EN-CAUSE).

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

Bankruptcy—Insurance, life—Joint life insurance policy—Both lives not insured—Death of one insured—Other insured becoming bankrupt—Right of the trustee to the proceeds of the policy—Transfer of policy to a third person—Insured party to transfer—Validity of the transfer—Bankruptcy Act, R.S.C. [1927], c. 11, section 2, ss. ff—Husbands' and Parents' Life Insurance Act, R.S.Q., 1925, c. 244.

On February 4, 1927, one Aboosamra Kouri and his son, Khalil Kouri, one of the respondents, insured their lives jointly with the New York Life Insurance Company, the policy being what is known as a "joint life insurance policy." Under this policy, issued on two applications made individually by the father and the son, both were called the insured; and the insurance company agreed to pay to the survivor of them the sum of $24,947, upon receipt of due proof of the death first occurring of either of the insured, whereupon the contract would cease and determine. The premiums were payable during the joint lifetime of the insured. Shortly after the issue of the policy, on February 18, 1927, the respondent Khalil Kouri signed a letter addressed to his father, declaring he had no interest in the policy and stating that, in the event of his father's death before his, he renounced in favour of his mother, the other respondent, the full amount of the policy; and the latter concurrently accepted in writing the benefit of her son's interest in the policy. In each of the applications attached to the policy and so forming part of the contract, each insured had reserved unto himself the right and power "to change the beneficiary from time to time"; and accordingly, on March

* PRESENT:—Rinfret, Cannon, Crocket, Davis and Kerwin JJ.

8, 1934, the father and the son joined in signing a document by which the wife of one and the mother of the other respondent was designated as beneficiary under the policy; such appropriation was duly noted and endorsed on the policy by the insurance company. The father also, by his will dated December 24, 1931, bequeathed all his life insurance policies to his wife. On March 19, 1930, the respondent Khalil Kouri went into bankruptcy and the appellant was appointed trustee. On June 10, 1934, the father died; and the proceeds of the policy were deposited into court by the insurance company, after satisfying a lien of the Bank of Montreal, to which both the insured had assigned the policy as security for a loan. The appellant trustee in bankruptcy then brought the present action to effect a cancellation of the transfer of the policy by the son to his mother and to claim the proceeds of the policy.

Held, affirming the judgment appealed from (Q.R. 60 K.B. 114) but for different reasons, that the appellant was not entitled to claim any right to the proceeds of the insurance policy.

Per Rinfret, Cannon and Kerwin JJ.—The bankrupt debtor had not really a right under the policy; he held a mere chance of benefit, a mere possibility; and neither that chance of benefit nor that possibility came *within* the definition of property as contained in subsection *ff* of section 2 of the *Bankruptcy Act;* consequently, it did not pass to the appellant trustee. The trustee might have claimed the proceeds of the policy, if the insolvent son were still the beneficiary at the death of his father; but the latter exercised his right to change the beneficiary and the mother then became the sole beneficiary in the event of the death of her husband. The fact that the son joined his father in signing the appropriation document whereby the latter revoked him as his beneficiary could not and did not affect the validity of the document. At the time the new appropriation was made, the father enjoyed full liberty to make it, and it does not matter that his son was then bankrupt and undischarged or even that the father would have been moved to act as he did precisely because his son was then bankrupt; the creditors were not thereby deprived of anything to which they could make a valid claim.

Per Davis J.—The appellant cannot succeed on the ground raised by him, that the proceeds of the policy belong to the insolvent son's estate because the policy was not within the *Husbands' and Parents' Insurance Act,* it being a "joint insurance policy" of father and son. Under such a policy, the two lives of the father and the son were not insured; but one of them; that of the one who died first. The policy by its terms came to an end with the death of that one. That one in this case was the father who predeceased his son. The son's life was only conditionally insured in the event of his predeceasing his father and the father's life was insured conditionally in the event that he predecease the son; and that event happened. Accordingly this case should be decided, as would be decided the simple case of a father insuring his life in favour of his son and subsequently designating his wife as preferred beneficiary; there would be no doubt of the right of the widow to the proceeds of the insurance policy.—A "joint insurance," as the one in this case, should be construed as an insurance "by each of the other's life and not as an insurance by each of his * * * own life." Vaughan Williams L.J. in *Griffiths* v. *Fleming,* ([1909] 1 K.B. 805, at 815).

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GROBSTEIN v. KOURI.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Boyer J. and dismissing the petition of the appellant, trustee in bankruptcy, to have the proceeds of a life insurance policy declared the property of a bankrupt estate.

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

I. M. Babrove for the appellant.

W. F. Chipman K.C. and *L. H. Ballantyne K.C.* for the respondents.

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

RINFRET J.—This case has been the occasion for a considerable variety of arguments which, it seems to us, was quite unnecessary and irrelevant.

The respondent Khalil Kouri went into bankruptcy on March 19, 1930, and the appellant, Nathan Grobstein, was appointed trustee.

As such, the appellant claimed the right to the proceeds of an insurance policy, issued by the New York Life Insurance Company, on February 4, 1927, less a certain amount due to the Bank of Montreal, to which the policy had been assigned.

The policy was what is known as a "joint life insurance policy," issued on two applications made individually by Khalil Kouri, the respondent, and Aboosamra Kouri, his father.

Under this policy, both applicants were called the insured; and the insurance company agreed to pay to the survivor of them the sum of $24,947, upon receipt of due proof of the death first occurring of either of the insured, whereupon the contract would cease and determine.

The policy provided for a number of benefits and provisions including: Participation in surplus, dividends, loan values, surrender values, additional methods of settlement, and other benefits and provisions. The premiums were payable during the joint lifetime of the insured.

(1) (1936) Q.R. 60 K.B. 114; [1936] 1 D.L.R. 373.

We will now state the facts in the order of their occurrence, although, in the view we take of the case, most of them have no bearing upon the decision, but so that we may have a complete story of the happenings.

On February 18, 1927, the policy was assigned to the Bank of Montreal by both the insured as security for a loan. By consent of all parties, the balance due on that loan was paid to the bank out of the proceeds of the insurance policy; and the bank has no further interest in the matter. There remains in the hands of the insurance company a balance of $16,687 available to whoever will be declared entitled to it as a result of the present litigation.

On February 18, 1927, Khalil Kouri, so it is asserted by the respondents, signed a letter addressed to his father, Aboosamra Kouri, declaring

he had no interest in the policy of the New York Life Insurance Company issued jointly on his life and that of his father;

and stating that, in the event of his father's death before his, he renounced in favour of Mrs. Aboosamra Kouri, his mother, the full amount of the policy.

The validity of this renunciation, and, in fact, the authenticity of the letter itself was strenuously contested by the appellants upon several grounds. The trial judge implicitly held it good and valid. The majority of the Court of King's Bench (1) did not pass upon that point, having decided the case upon a ground which made it immaterial whether the renunciation was effective or not.

On December 24, 1931, the father, A. Kouri, made his will before a notary and instituted his wife, Mrs. Kouri, his universal legatee and testamentary executrix, bequeathing unto her

all the property * * * of any nature whatsoever without exception, which I may die possessed of and which will compose my estate and succession, including the proceeds of all insurance policies existing on my life, to hold, use and enjoy and dispose thereof as her own forever from and after my decease.

On March 8, 1934, Aboosamra Kouri and Khalil Kouri joined in signing the following document:

Know all men by these presents that we, the insured under policy no. 9738981 issued by the New York Life Insurance Company do hereby declare, pursuant to the statutes of Quebec in that behalf, that said policy and all advantages to be derived therefrom shall be appropriated to and accrue for the sole benefit of Najla Zakaib Kouri, whose relationship to

(1) (1936) Q.R. 60 K.B. 114.

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us is that of wife and mother respectively. This appropriation is subject to existing assignment. And we hereby revoke any previous directions to the contrary or inconsistent therewith.

Dated and signed at Montreal, Que., this 8th day of March, 1934.

(Sig.) ABOOSAMRA KOURI.
(Sig.) KHALIL KOURI.

Sworn to & subscribed
before me this 8th day
of March, 1934.

(Sig.) J. A. VILLEMAIN, N.P.

The New York Life Insurance Company, in accordance with its rules, has retained the duplicate copy of this appropriation, but assumes no responsibility for its validity.

New York, Mar. 28, 1934.

FREDERICK M. JOHNSTON,
Secretary,
Per Trincke.

Aboosamra Kouri died on June 10, 1934.

Thereupon the insurance proceeds became payable to the beneficiary under the terms of the policy.

Subsequently, on September 17, 1934, the appellant, as trustee of the estate of Khalil Kouri, held a meeting of the inspectors, at which he conveyed to them the information, which he stated to have received on the 13th of the same month, to the effect that Khalil Kouri had an interest in the life insurance policy in question and that Khalil Kouri had transferred his interest in the said policy over to his mother. In the result, the appellant was authorized to take legal action to effect a cancellation of the transfer and pray that the New York Life Insurance Company be ordered to pay to the estate the difference between the amount of the policy and the amount due to the bank.

Both the Bankruptcy Court and the majority of the Court of King's Bench dismissed the petition of the trustee appellant mainly on the ground that the insurance policy was governed by the provisions of the *Husbands' and Parents' Life Insurance Act* (c. 244 of R.S.Q. 1925); that, by the terms of the said Act, insurance policies effected or operated under it were exempt from seizure for debt due either by the insured or by the persons benefited; that, by reason of the foregoing, the said policy of insurance did not fall into the bankrupt estate of Khalil Kouri; and that, as a result, the appellant herein had no interest in the said policy, or the proceeds thereof.

Before this Court, the appellant strongly urged that the particular insurance policy under discussion could not possibly fall under the provisions of the *Husbands' and Parents' Life Insurance Act,* because it was a joint life insurance policy obviously, as it was contended, taken out by the insured parties for the purposes of the business in which they were both engaged, and not in any sense of the word a policy taken out by a father for the protection of his child, which is the evident object of the insurance policies contemplated by the Quebec statute.

The view of the majority of the learned judges of the Court of King's Bench was that the purpose of the Quebec Act

> was to create an exception to the general rule in all cases where a parent insured his life in favour of his children, and that a parent can no longer deal with insurance otherwise than as indicated in (that) statute and that all such policies are unseizable for debts due either by the insured or the beneficiary. The Act indicates no exceptions. It sets up no machinery to enable a person to decide whether he is under this Act or any other law. The purpose of the Act seems to be to make all insurance by a husband in favour of his wife, or by a parent in favour of his children, a matter of public policy and to allow such insurance with the full knowledge that the proceeds will not be seizable.

In the opinion of the majority, it did not matter whether the policy was a joint life policy or whether it could be classified as what the appellant styled a policy for business purposes.

Although, in truth, all logical arguments tend in the direction of the above solution, it must be admitted that the question presents difficulties, by no means the slightest of which is the declaratory provision contained in section 2 of the Act, whereby

> nothing contained in (it) shall be held or construed to restrict or interfere with any right *otherwise* allowed by law to any person to effect or transfer a policy for the benefit of a wife or children * * *

But we feel greatly relieved that we do not find it necessary to express any opinion upon that point so as to decide this case.

In order to be successful, the appellant had to overcome a great many obstacles; and, in our view, he failed at the first hurdle.

It was incumbent upon him to show that, as trustee of the bankrupt estate, he had a right to the insurance moneys.

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Now, under the *Bankruptcy Act,* a trustee takes the property of the debtor only subject to all the rights and equity to which it was subject while it was held by the debtor. The trustee is the legal representative of the debtor; and generally speaking succeeds only to such rights as the debtor himself would have had, if not bankrupt, and to no other rights. There are, of course, exceptions to that principle, whereby the trustee is vested for the benefit of the creditors with certain additional rights not available to the bankrupt debtor; but this is not a case where these exceptions come in.

Whether the insurance policy, in this case, is looked upon as a double contract of insurance contained in one document or as a single contract of insurance upon the joint life of the two insured; whether it is envisaged as a gratuitous contract on the part of the father or an onerous contract mutually agreed upon by the father and the son, there is no question that the rights of Khalil Kouri, the bankrupt debtor and the respondent in the present case, stand to be determined by the contract itself, unless it should be decided that the contract itself is prohibited by the statutory law of Quebec.

If it be true to say that, under that law, a father cannot insure his life for the benefit of his children, except under the provisions of the *Husbands' and Parents' Life Insurance Act,* there can follow only two results in respect of the insurance policy now under consideration: 1. Either that policy was made in accordance with the provisions of the Act, in which case section 30 of the Act applies; and then the proceeds thereof are exempt from seizure for the debts due by the insured or by the persons benefited, and, therefore, under no circumstances, do the proceeds of the insurance policy fall into the bankrupt estate and in the hands of the trustee; 2. Or the insurance policy was not made in accordance with the provisions of the Act; and, in such a case, it would be illegal and inoperative; and the appellant would take nothing by his petition.

On the other hand, if the policy issued by the New York Life Insurance Company on the 4th February, 1927, be a transaction legally authorized in the province of Quebec, as being "allowed by law * * * otherwise" than by the *Husbands' and Parents' Life Insurance Act,* it must be interpreted as all other contracts; and we can see no reason

why the parties to it should not be bound by the terms to which they have agreed.

It is a term of the policy that

> the policy and the applications therefor, copy of which is attached hereto, constitute the entire contract.

(Sec. 4.—other benefit provisions: miscellaneous provisions).

In each of the applications attached to the policy and so forming part of the contract, we find that Aboosamra Kouri and Khalil Kouri have each subscribed to the following condition:

> 5. I designate as beneficiary to receive the proceeds of the policy in event of death and reserve the right to change the beneficiary from time to time:

(Here the name of the beneficiary is printed in full, with the address of his residence and his relationship to the insured). Consequently, each insured had fully reserved unto himself the right and power "to change the beneficiary from time to time." This was a condition of the contract, whatever be its character, to which each had subscribed and which was expressly accepted by each.

It follows that any right deriving from the policy to one or the other of the contracting parties was necessarily contingent upon the will of either of them that his beneficiary should remain the same as had been designated in the policy. The right to change the beneficiary unqualifiedly vested in each of the insured who, without the intervention of the other beneficiary and quite independently of him, could modify that clause, revoke it and confer the benefit of the insurance on some other person and any other person at his will. (*Meunier* v. *Metropolitan Life Insurance Company* (1).

Assuming that the letter of Khalil Kouri, addressed to his father, on February 18, 1927, was not effective as a renunciation to his rights under the policy, the most that subsisted in his favour when he became bankrupt was a conditional right to the benefits of the policy, provided his father did not revoke him as a beneficiary, which his father had the absolute right to do. The appellant trustee, when he became vested with Khalil Kouri's property, as a result of the bankruptcy order, could take only what the bankrupt was entitled to, and that is to say: the conditional interest in question and no more. (*Rees* v. *Hughes*) (2).

(1) (1923) Q.R. 35 K.B. 164.

(2) (1894) Q.R. 3 Q.B. 443, at 452, 453.

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In our view, the bankrupt debtor had not really a right under the policy. He held a mere chance of benefit, a mere possibility. And neither that chance of benefit nor that possibility came *within* the definition of property in the *Bankruptcy Act* (Subs. *ff* of Sec. 2). Consequently it did not pass to the appellant trustee.

The trustee might have claimed the proceeds of the insurance policy if the father had allowed it to remain in its original form and Khalil Kouri were still the beneficiary at the death of his father.

But, on March 8, 1934, the father exercised the right which he had reserved unto himself to change the beneficiary under the policy; and, by a document in due form, he appointed as his beneficiary his wife, Mrs. N. Kouri (the other respondent), to whom he appropriated all the advantages to be derived from the policy.

As a consequence, Khalil Kouri ceased to be the beneficiary in case his father died before him; Mrs. N. Kouri, ever since the 8th March, 1934, became the sole beneficiary in the event of the death of her husband; and the appropriation was duly noted and endorsed on the policy by the New York Life Insurance Company.

In passing, it may be said that this new appropriation was made in accordance with all the provisions of the *Husbands' and Parents' Life Insurance Act* and fully complied with all the requirements thereof. (1925, R.S.Q., ch. 244, ss. 12 and 13).

It is true that Khalil Kouri joined his father in signing the appropriation document whereby the latter revoked him as his beneficiary. But this was quite unnecessary; for the father, under the terms of the policy and as a result of the right which he had reserved unto himself, had complete and unrestrained power to make the change, notwithstanding any objection that Khalil Kouri might have raised against that move.

Obviously, the participation of Khalil Kouri in that document could not and did not affect its validity. At the time this new appropriation was made, Aboosamra Kouri enjoyed full liberty to make it. It does not matter that his son was then bankrupt and undischarged. It does not matter even if the father was moved to act as he did precisely because his son was then bankrupt. The father had complete control of his part of the policy and he could yet

designate his beneficiary as he pleased. Any hope of benefit which Khalil Kouri might have had under it was wholly subject to the possibility that his father might change his name as beneficiary; and that is exactly what happened. His creditors were not thereby deprived of anything to which they could make a valid claim. It is quite out of the question to think that they would have had the right to prevent Aboosamra Kouri from appointing a new beneficiary.

This is our view of the case before us; and it would also appear to have been that of the English Court of Appeal (composed of Lord Esher, M.R., Bowen and Fry, LL. JJ.) in the case of *Ex parte Dever,* in *re Suse and Sibeth* (1); see particularly the reasons of Bowen, L.J., at pp. 667 and 668 and of Fry, L.J., foot of p. 669 and p. 670.

The conclusion which we have reached is none the less satisfactory because, upon the evidence, and throughout the life of the policy, the premiums were always paid by the father, Aboosamra Kouri. Even if the admissibility of the verbal evidence to that effect should be disputed, the fact is nevertheless clearly established by the circumstances. Khalil Kouri went into bankruptcy in March, 1930; and it is evident that the trustee never paid anything on the premiums between the date of the bankruptcy and the death of the father, since admittedly he never heard of the existence of this life insurance policy until "the 13th day of September, 1934."

For these reasons, and without expressing any opinion upon the very interesting arguments submitted to us on other points, we think the appeal fails and ought to be dismissed with costs.

CROCKET J.—I agree that this appeal should be dismissed with costs.

DAVIS J.—On February 4, 1927, Aboosamra Kouri and his son, residents in the province of Quebec, insured their lives jointly with the New York Life Insurance Company. The obligation of the policy was as follows:

> New York Life Insurance Company agrees to pay to the survivor of the insured $24,947 upon receipt of the due proof of the death first occurring of either Aboosamra Kouri (the father) or Khalil A. Kouri (the son) and thereupon this contract shall cease and determine.

(1) (1887) L.R. 18 Q.B.D. 660.

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The father died on June 10, 1934, and the son survived him. On March 19, 1930, however, the son had become bankrupt but it is alleged that shortly after the issue of the policy, that is, on February 18, 1927, he had renounced in writing his interest in it to his mother who concurrently accepted in writing the benefit of her son's interest in the policy.

The father by his will had given all his life insurance to his wife and by a declaration signed by him March 8, 1934, and delivered to the insurance company in his lifetime, had designated his wife as beneficiary of the policy. The insurance company honoured the death claim and the proceeds of the policy, after satisfying a lien of the Bank of Montreal, have been paid into court, there being a contest between the widow and the trustee in bankruptcy of the son's property.

The contract of insurance was made in the province of Quebec. Article 1265 of the Civil Code prohibits husband and wife benefiting each other during marriage by acts *inter vivos*

except in conformity with the provisions of the law, under which a husband may, subject to certain conditions and restrictions, insure his life for his wife and children.

By sec. 3 (2) of the *Husbands' and Parents' Life Insurance Act*, R.S.Q. 1925, c. 244,

a father * * * may insure his * * * life or appropriate any policy of insurance held by himself on his life * * * for the benefit and advantage of his * * * children, or of one or more of them.

By sec. 4

the insurance mentioned in sec. 3 may be effected, either for the whole life of the person whose life is insured, or for any definite period; and the sum insured may be made payable upon the death of such person or upon his or her surviving a specified period of not less than ten years.

Then by sec. 12,

any person who has effected an insurance or who has appropriated a policy of insurance, for the benefit of a wife or of a wife and child or children, or of a child or children, at any time and from time to time thereafter, may revoke the benefit conferred by such insurance or appropriation, either as to one or more or as to all of the persons intended to be benefited, and may declare in the revocation that the policy shall be for the benefit only of the persons not excluded by the revocation, or for the benefit of such persons not excluded, jointly with another or others, or entirely for the benefit of another or others, not originally named or benefited. Such other or others must be a person or persons for whose benefit an insurance may be effected or appropriated under these provisions.

By sec. 13

such revocation may be made either by an instrument to be attached to the policy * * * or by will * * *

and by sec. 30

policies effected or appropriated under this Act shall be exempt from seizure for debts due either by the insured or by the persons benefited.

These provisions are substantially the same as the preferred beneficiary provisions of the life insurance statutes in the common law provinces.

If the case were as simple as a father insuring his life in favour of his son and subsequently designating his wife as the preferred beneficiary, there would be no doubt of the right of the widow to the proceeds of the insurance. It is contended by the son's trustee in bankruptcy that the proceeds of the policy in this case belong to the son's estate upon the ground amongst others that the policy was not within the *Husbands' and Parents' Life Insurance Act* because it was what is commonly called a "joint insurance policy" of father and son. Does this make any difference? The two lives were not insured; but one of them; that of the one who died first. The policy by its terms came to an end with the death of that one. That one in this case was the father who predeceased his son. The son's life was only conditionally insured in the event of his predeceasing his father. It is equally true that the father's life was insured conditionally on the event that he predecease the son but that event happened.

Vaughan Williams, L.J., in *Griffiths* v. *Fleming* (1), said:

> It is to be observed that there is a practical reason for construing these joint insurances by husband and wife as insurances by each of the other's life, and not as an insurance by each of his or her own life, namely, that these joint insurances in practice are generally effected by partners, so as to afford protection against the loss to the surviving members of the firm likely to arise from the withdrawal of the capital of the deceased partner; and in such case the nature of the loss provided against seems to negative the construction which would treat the policy as being on the life of each insuring partner.

In that case husband and wife were jointly insured with the event on which the sum assured by the policy was to become payable being stated as "on the death of such of the lives assured as shall first die." The husband and wife had, in that case, the same as the father and son had in this case, before the granting of the policy, each filled up and signed a separate proposal for assurance of the proposer's life, in the form issued by the insurer, respectively giving therein, in answer to questions, certain particulars

(1) [1909] 1 K.B. 805, at 815.

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with regard to the proposer's residence, occupation and other personal matters. In the *Griffiths* case (1) the wife's proposal stated that the sum insured for was "£500 jointly with my husband" and, in the case of the husband, "£500 jointly with my wife" to be "payable at death. Table 9." The prospectus published by the insurer in that case contained various tables giving the respective rates of premiums payable in respect of different modes of life insurance, and Table 9 dealt with

> Joint Life Assurances. Policies may be effected on joint lives, the sum being payable and the premium ceasing on the first death. This form of policy is specially suitable for partners in business to replace capital withdrawn on the decease of either of them, or to provide for those who may have been dependent on him.

In the present case the only reference to the insurance of the joint lives is in the words "Joint Life" being written in pen and ink across the top of each of the two application forms and the printed words at the foot of the first page of the policy itself, which words are,

> Joint Life Insurance payable at death. Premiums payable during joint lifetime.

The policy states that

> The policy and the application therefor, copy of which is attached hereto, constitute the entire contract.

In the *Griffiths case* (1) the wife committed suicide shortly after the granting of the policy and the insurer in an action brought by the husband upon the policy pleaded, *inter alia,* that the plaintiff had no insurable interest in the life of his late wife as required by the *Life Assurance Act,* 1774. The plaintiff in reply, pleaded, *inter alia,* that by virtue of the said policy the lives of husband and wife were jointly assured and that by virtue of such assurance each had an insurable interest in the life of the other; and, alternatively, that the plaintiff insured his life in favour of his wife and the wife insured her life in favour of the plaintiff and that on the death of the wife the sum insured became payable to the plaintiff. There was evidence to the effect that the wife had contributed to the premium an amount which corresponded with the difference in their ages and it further appeared that the wife had rendered services to the plaintiff by doing housework and looking after their children and that in consequence of her death he had been obliged to hire some one to perform these services in her place.

(1) [1909] 1 K.B. 805.

Pickford J. at the trial held that inasmuch as the wife had performed household services for her husband and through her death he had in fact sustained loss by reason of having to hire some one to perform those services in her place, the plaintiff had an insurable interest which would support the policy. The learned judge therefore gave judgment for the plaintiff for the amount claimed. Upon appeal, it was held, upon the footing that the policy was an insurance by the husband upon the life of the wife, that, notwithstanding the provisions of the *Life Assurance Act*, 1774, it was not necessary in order to maintain the action that the plaintiff should prove that he had any pecuniary interest in the life of his wife. Vaughan Williams, L.J., thought the preferable construction was to treat the policy as by the husband on his wife's life, because he was inclined to think that the husband had an interest in his wife's life which ought to be presumed, and treating the policy in that way he did not think it necessary to go into the evidence to shew a pecuniary interest in the husband as was done before by the learned judge at the trial. I have quoted above the words of Vaughan Williams, L.J., as to the practical reason for treating these joint insurances as insurance by each of the other's life. Farwell, L.J., with whom Kennedy, L.J., concurred, thought it plain, from the separate proposals which were accepted by the company, that the husband proposed to insure his own life and the wife to insure her own life for the benefit in each case of the survivor of them and that there was nothing to shew any intention to carry these intentions out by a single policy, unless it were the reference to Table 9, which is the table relating to joint policies. He was of the opinion that the policy should be read distributively as an insurance by the wife on her own life expressed to be for the benefit of her husband contingently on his surviving her, and by the husband on his own life for the benefit of his wife contingently on her surviving him, and that such an insurance was perfectly legal; but inasmuch as the wife's insurance would take effect under sec. 11 of the *Married Women's Property Act*, 1882, the husband would have to take out administration to her estate in order to comply with the section before he could give a valid receipt for the sum assured if the appeal were decided on that ground, and

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he preferred, he said, to rest his judgment upon the ground that the husband as such had an insurable interest in his wife's life and was entitled to recover on his own contract and not on his wife's.

The *Griffiths* case (1) was not mentioned during the argument and it is the only authority I have been able to find on the true construction of a joint insurance policy. It is interesting to observe that the case involved consideration of the construction and meaning of sec. 11 of the *Married Women's Property Act,* 1882, which permitted a married woman to effect a policy of insurance upon her own life or the life of her husband for her separate use and provided that a policy of insurance effected by any man on his own life and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life and expressed to be for the benefit of her husband or of her children, or of her husband and children, or any of them, should create a trust in favour of the objects therein named, and the moneys payable under any such policy could not, so long as any object of the trust remained unperformed, form part of the estate of the insured or be subject to his or her debts. There is a striking similarity in the general language of that section of the *Married Women's Property Act* with the general language of the *Husbands' and Parents' Life Insurance Act* of the province of Quebec, the construction and meaning of which were discussed before us. Here we have a father and son engaged in business, though it is not shewn that the son was actually a partner of his father in the business, and it is plainly indicated by the words "Joint Life" written in ink across the top of each of the separate applications for the insurance and by the words "Joint Life Insurance payable at death. Premiums payable during joint lifetime," which appear upon the face of the policy itself, that the parties here did intend to effect joint insurance. The fact that almost at the time of its delivery the policy was assigned to the Bank of Montreal as security for the indebtedness of the business to the bank shews that it was intended to be used for a protection of the business. In the event that happened I should construe the policy as by

(1) [1909] 1 K.B. 805.

the son on the father's life. That being so, the policy does not come within the provisions of the *Husbands' and Parents' Life Insurance Act.* In that view the proceeds of the policy would not be affected by either the father's will or his change of beneficiary from his son to his wife. On March 8, 1934 (the son's bankruptcy was March 19, 1930, the father's death June 10, 1934) father and son, by an instrument in writing delivered to the insurance company on March 28, 1934, appropriated the proceeds of the policy, subject to the existing assignment to the Bank of Montreal, to the wife and mother, who claims the moneys in court being the balance of the proceeds of the policy after satisfying the bank's claim thereon. But her counsel does not rely upon this document as a transfer from the son to his mother because of the difficulty that would be presented by the prior bankruptcy of the son. Reliance is put upon a document purporting to have been executed by the son on February 18, 1927, whereby the son renounced his interest in the full amount of the policy in favour of his mother and a document purporting to be of the same date from the mother to the son in acceptance of the son's renunciation in her favour of his interest in the proceeds of the policy. Those documents gave rise to the real contest in the case. They had not been delivered to the company or notice thereof given to the company before the father's death and much evidence at the trial was directed to shew that what purports to be the signature of the father as witness to the mother's acceptance of her son's renunciation was a forgery. A great deal of evidence was given at the trial on this phase of the matter and the trial judge came to the conclusion that it was not a forgery. The majority of the Court of King's Bench, while putting the policy under the protection of the *Husbands' and Parents' Life Insurance Act,* expressly declined to follow the learned trial judge in his conclusion as to the absence of proof of forgery. Where a trial judge has seen the witnesses and examined the documents as he heard the witnesses give their evidence and cannot find a serious charge of forgery to have been proved, an appellate court should in my view be very cautious in finding such a charge to have been proved. The matter was discussed before us at some length and I am not only inclined to agree with the finding of fact in this regard by the trial judge but am certainly

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not satisfied that he was in error in the conclusion he reached. That being so, the son effectively transferred his interest in the policy to his mother by the document of February 18, 1927, nearly three years before his bankruptcy occurred. There is no suggestion that at that date there was any attempt on the part of the son to defeat creditors and the transfer is not impeached by counsel for the appellant upon the ground of it being a fraudulent conveyance in that sense.

In the result, though for different reasons, I would dismiss the appeal from the judgment of the Court of King's Bench with costs.

If, however, the policy is to be treated in the event that happened as the father's policy on his own life in favour of his son, then the policy came under the provisions of the *Husbands' and Parents' Life Insurance Act* and the father effectively changed the beneficiary from his son to his wife, and I would agree entirely with the reasons of my brother Rinfret, who arrived at the same disposition of the appeal along different lines.

I can see the objection that can be taken to my own preference of dealing with the policy in the way that Vaughan Williams, L.J., did in the *Griffiths* case (1) because of the words of reservation of change of beneficiary in each of the applications. But a finely printed sentence on a general form of application, obviously intended for individual policies, may be disregarded in my view as inconsistent with the pen and ink words "Joint Life" specially written across the top of each application and equally inconsistent with the words of obligation in the policy itself which was accepted by the insured as a compliance with their applications. That obligation was definite: to pay to the survivor of the two insured upon the death first occurring of either of the insured.

Appeal dismissed with costs.

Solicitor for the appellant: *Isidore M. Bobrove.*

Solicitors for the respondent: *Brown, Montgomery & McMichael.*

(1) [1909] 1 K.B. 805.

THE CANADIAN SURETY COMPANY (DEFENDANT)..... APPELLANT;

AND

QUEBEC INSURANCE AGENCIES LIMITED (PLAINTIFF)..... RESPONDENT.

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* Mar. 2.
* Apr. 28.

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

Surety—Insurance—Surety company—Warranty—Bond—Pecuniary losses to employer through acts of employee—"Larceny or embezzlement"—Whether to be construed in their technical or popular sense—Whether contract a suretyship or insurance—Arts. 1919, 1935 C.C.

Upon a bond, commonly called a surety bond, subscribed by the appellant in favour of the respondent for pecuniary losses through acts of larceny or embezzlement on the part of respondent's employee, although it was not proven that the latter had been guilty of these offences construed in the strict sense of these words, *held*, Davis J. dissenting, that, as a result of the circumstances of this case and in view of its context, the terms of the bond were sufficient to cover the cases of fraud and dishonesty committed by the appellant's employee.

When the insurer bound himself to pay the insured (employer) such "pecuniary losses * * * as (the insured) shall have sustained of money or other personal property * * * by any act or acts *of larceny or embezzlement on the part of*" (an employee), it is sufficient to find these acts to have been fraudulent or dishonest and such indeed as to amount to embezzlement, if not in the technical sense, at least in the non-technical or popular sense, of the word. The word "embezzlement" should not be construed in the same way and with the same specific meaning as it would be construed when used in an indictment under the criminal law. Davis J. dissenting.

Such class of bond is not in effect, as commonly known, a surety bond: it partakes more of the nature of an insurance policy than of the nature of a suretyship (art. 1929 C.C.). Therefore, art. 1935 C.C. which enacts that "suretyship * * * cannot be extended beyond the limits within which it is contracted" has no application to such a bond, which, by its real character, is a commercial contract to which should be given a liberal interpretation. Davis J. dissenting.

Per Davis J. (dissenting)—Upon a proper interpretation of the language of the policy, the words "larceny and embezzlement" should be given their technical and strict meaning. The meaning of technical terms in a contract of suretyship ought not to be extended beyond what is the strict meaning of the words.

Judgment appealed from (Q.R. 59 K.B. 295) affirmed, Davis J. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the

* PRESENT:—Rinfret, Cannon, Crocket, Davis and Kerwin JJ.

(1) (1935) Q.R. 59 K.B. 295

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judgment of the Superior Court, Philippe Demers J. and maintaining the respondent's action upon a bond issued by the appellant against pecuniary losses by act of larceny or embezzlement on the part of respondent's employee.

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

W. F. Chipman K.C. for the appellant.

C. A. Hale K.C. for the respondent.

The judgment of the majority of the Court (Rinfret, Cannon, Crocket and Kerwin JJ.) was delivered by

RINFRET J.—This action was instituted in the province of Quebec upon a bond called a surety bond, issued by the appellant, The Canadian Surety Company, in favour of the respondent, the Quebec Insurance Agencies Limited, against the

> pecuniary losses, not exceeding five thousand dollars, as said (Quebec Insurance Agencies Limited) shall have sustained of money or other personal property * * * by any act or acts of larceny or embezzlement on the part of the (Independent Insurance Agencies Limited), directly or through connivance with others while in any position or at location in the employ of the (Quebec Insurance Agencies Limited).

In the bond, the Quebec Insurance Agencies Limited is styled the Employer and the Independent Insurance Agencies Limited is styled the Employee. For the sake of brevity, we will hereafter refer to them by these names.

The bond was made and signed on May 3, 1928, in Montreal, and is admittedly governed by the laws of the province of Quebec.

The relations of the Employer and Employee were as follows:

The Employer did the business of an insurance agent and as such represented several insurance companies. The Employee was in the same business and acted as general agent for the Employer; but, in addition, it represented other insurance agents.

The Employee was authorized to issue insurance policies for and on behalf of the Employer. It was supposed to make daily reports to the Employer of the insurance policies underwritten on its behalf; and the method adopted for that purpose was for the Employee to send to the

Employer copies of the policies issued during the day. At the end of each month, the Employer prepared a monthly account of the total amount of premiums due in respect of all the policies issued during that month, less the commission earned by the Employee as a result of the issuance of these policies; and such account represented the amount for which the Employee was indebted to the Employer. The Employee was understood to be liable for the amount so shewn in the monthly accounts, whether the premiums had been actually collected by it or not; and the Employer would look to the Employee as its debtor for the balance shown in the monthly account. The Employer was not advised of the payments of the premiums by the insured people and, in fact, was not, in any way, concerned with the question whether these premiums were paid or were not paid. No remittance of a particular premium for a particular policy was ever made or supposed to be made by the Employee to the Employer. There was kept a running account of the transactions between the two; and an accounting was done *en bloc* for the lump sum due at the end of each month.

The regular practice was that the Employee, after receiving the monthly account, was allowed a further sixty days to pay to the Employer the balance shown in the account.

Up to the month of August, 1929, matters went on satisfactorily; and there were apparently no arrears in the payments made by the Employee to the Employer.

After that month, however, payments began to slow up and so continued through the fall of 1929 and the early part of 1930.

On January 28 of that year, the Employer wrote to The Canadian Surety Company, advising them that circumstances were becoming suspicious, that the Employee's account was overdue and that it was giving notice of this fact in accordance with the terms of the bond.

On the 10th of February, 1930, the Employee went into liquidation.

It was then found out that the affairs of the Employee were in bad shape. Its books had not been written up since two years. Indeed, it required the liquidator four or five months to have them put in order. The Employer

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had a claim of $17,753.09 for premiums due to it on policies actually issued on its behalf and figuring in the daily reports, in addition to a further claim of $680.20 of premiums later found out to have been collected by the Employee and unreported.

As it turned out when the liquidator succeeded in clearing up the affairs of the Employee, the total liabilities amounted to $52,406.29, and the total assets realized netted a sum of $968.37.

The Employer made a claim on the bond to the Canadian Surety Company.

The claim was met by the contention on behalf of the Canadian Surety Company, that the Employer's pecuniary losses were not sustained as a result of any act or acts of larceny or embezzlement on the part of the Employee, and that, consequently, the Canadian Surety Company owed nothing to the Employer in respect of the bond.

The Superior Court came to the conclusion that the Employer was entitled to the amount of $680.20, representing the premiums which had never been reported by the Employee, and for a further amount of $2,702.89, being the total sum of items contained in the claim of $17,753.09, which that court found to have been proven as being covered by the surety bond. The balance of the claim was disallowed.

The court held that, although the Employee or its officers and servants were perhaps not guilty of larceny, or of embezzlement in the strict sense of the word, yet the surety bond ought to be widely interpreted, and its terms were sufficient to cover the cases of fraud and dishonesty which had been proven to have existed in this instance.

The majority of the Court of King's Bench (Appeal Side) (1) took practically the same view and affirmed the judgment.

Before this Court, the responsibility of the appellant was not seriously disputed with regard to the item of $680.20. The trial judge held it was clearly covered by the bond; and there does not seem to be any doubt that, with regard to it, the judgments appealed from should not be disturbed.

(1) (1935) Q.R. 59 K.B. 295.

Only one question was really raised so far as that item of $680.20 is concerned, and that was that, through some oversight, the commission to which the Employee was entitled on the premium represented by that amount had not been deducted in allowing it to the Employer respondent. Indeed, the Employer seems to have forgotten to put in specific evidence of what the rate of that commission should be in respect of the item in question. It was, however, agreed at bar that the usual commission charged by the Employee during the course of its relations with the Employer was 20%. We see no reason why this small matter should not be adjusted by this Court; and deduction being made of that commission, this award in favour of the respondent ought therefore, to stand, in any event, up to the amount of $544.16.

It remains to consider the other item of $2,702.89, representing the total sum of items allowed by the trial judge out of the claim of $17,753.09 for premiums on policies mentioned in the daily reports and which the Employee has failed to pay to the Employer.

As already said, the appellant strenuously opposes that claim on the ground that it is not covered by the surety bond, inasmuch as, so the appellant contends, these losses were not sustained by the Employer as a result of any act of larceny or embezzlement on the part of the Employee.

It seemed to be common ground between the appellant and the respondent that the Employee could not be charged with larceny; and our discussion of this branch of the case may, therefore, be restricted to the question whether the acts of the Employee constituted the crime which the bond intended to designate under the appellation of embezzlement; and whether, so as to be covered by the bond, the acts of the Employee must necessarily consist in embezzlement; or, as decided by the judgments appealed from, it is sufficient if they are found to have been fraudulent or dishonest and such indeed as to amount to embezzlement, if not in the technical sense, at least in the non-technical or popular sense of that word. On behalf of the appellant, it was strongly urged that larceny and embezzlement were terms of art, relating to something well known and which had acquired specific meaning in the criminal law. It was said that the scope of the appellant's liability was strictly

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defined in the surety bond and that it could not be extended beyond the limits within which it was contracted (Art. 1935 C.C.). The word "embezzlement" in the bond had to be construed in the same way as it would be construed when used in an indictment (*Debenhams Ltd.* v. *Excess Insurance Co. Ltd.* (1). The acts proven against the Employee did not come within the strict definition of embezzlement, as was practically admitted by the judgments appealed from; and, therefore, the respondent had failed to establish the responsibility of the appellant under the bond.

It should be admitted that the case is not free from difficulty. After having given it careful and anxious consideration, we have reached the conclusion that, on the particular bond subscribed by the appellant and, as a result of the circumstances in this case, the decision reached by the Superior Court and the majority of the Court of King's Bench was right and should not be reversed by us.

We have been referred to a number of cases where a similar conclusion was arrived at by different courts in England, in the United States and in Canada; but when the cases there decided come to be compared with the present one, it is at once apparent that none of them could really be regarded as an authority upon which the decision in this case may be founded, because, in those cases, the language of the bond was dissimilar. It is evident that a decision having to do with the construction of a particular document can never serve as a precedent for the construction of another document not in every respect similar to the former one. Although general principles enunciated here and there in some of the judgments cited to us should, of course, be given due weight, it need not be said that the result of the present case depends essentially and exclusively upon the interpretation of the particular bond now under discussion.

It is not necessary here to attempt to give a precise definition of embezzlement. The term is not to be found in the Criminal Code of Canada. In a technical sense, it connotes the act of a person employed in the capacity of a clerk or servant fraudulently appropriating to his own use the whole or any part of a chattel, money, or valuable

(1) (1912) 28 T.L.R. 505.

security delivered to, or received, or taken into possession by him, for, in the name, or on the account, of his master or employer (Kenny, Outlines of Criminal Law, 13th ed. p. 230).

In view of the relations existing between the Employer and the Employe and of the facts established in evidence, it may be granted that the Employee in this case was not guilty of embezzlement in that technical sense.

But it should also be emphasized that if, as between the appellant and the respondent, the bond has to be construed in that narrow sense, it could not possibly cover any act done by the Employee, as such, in the course of its relations with the Employer. Strictly speaking and having regard to the course of dealing, the moneys paid as premiums by the insured to the Employee were not moneys belonging to or owned by the Employer. They never were so in any case throughout the whole course of the relations between the two. They never could be, in view of the agreement between them. It follows that if the respondent should be held to the strict meaning of the word Embezzlement, the bond was absolutely useless for its purposes and of no value to it. This result would be contrary to the rules of interpretation laid down in the Civil Code (arts. 1014 and 1015).

It should be taken that the appellant and the respondent, when they agreed upon some sort of suretyship to protect the respondent against the acts of the Employee, must have intended to agree upon a contract which would be of some effect in favour of the Employer. And we think there are evidences of that intention in the wording of the bond, envisaged as a whole, and also the interpretation put upon it in the way it was dealt with by the appellant.

That class of bonds—and this is equally true of the present one—is not, in effect, a surety bond; it partakes more of the nature of an insurance policy. The Civil Code (art. 1929) defines a surety as

> the act by which a person engages to fulfil the obligation of another in case of its non-fulfillment by the latter, etc. * * *

This is not quite what the appellant undertook to do under the bond subscribed by it. It did not undertake, nor did it intend to undertake, to fulfil the obligation of the Employee in this case. It promised, under the bond, to indemnify the respondent for

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such pecuniary losses * * * sustained of money or other personal property (including that for which the Employee is responsible) by any act or acts of larceny or embezzlement on the part of the Employee.

This is truly the function of an insurance policy; and we may add that in several instances before this Court a bond of a similar character was treated and was regarded as such; (compare amongst others: *The Corporation of the Town of Arnprior* vs. *United States Fidelity & Guaranty Company* (1); *Railway Passengers Assurance Company* vs. *Standard Life Assurance Company* (2); *United States Fidelity & Guaranty Company* vs. *The Fruit Auction of Montreal* (3); and there were many others).

The main consequence of this interpretation is that article 1935 of the Civil Code of Quebec (by force of which "Suretyship is not presumed; it must be expressed and cannot be extended beyond the limits within which it is contracted") has no application to a bond like the present one which is in effect an insurance policy and which, by its real character, is a commercial contract to which should be given a liberal interpretation.

The respondent, we think very properly, pointed to the fact that when, in the other parts of the bond, the act of the Employee is referred to as giving rise to some action under the bond, it is referred to as "dishonesty" or "default," both of which are clearly not as limited as the word "embezzlement."

But the strongest evidence of the intention of the parties was pointed out both by the trial judge, Mr. Justice Philippe Demers, and by Mr. Justice Saint-Germain in the Court of King's Bench.

Clause 5 of the bond is to the effect that

the Surety shall not be liable for loss sustained by the Employer * * *

(2) in consequence of premiums unpaid on policies issued, although such premiums may have been reported and assumed by the Employee as chargeable to his account. * * *

Now, if one bears in mind the method whereby the business was carried out between the Employer and the Employee, the exception we have just quoted would indicate that the appellant was fully aware of this method, for the particular clause is clearly intended to meet one of the features adopted by the parties for the conduct of

(1) (1914) 51 S.C.R. 94. (2) (1921) 68 S.C.R. 79.
(3) [1929] S.C.R. 1.

business between them, as it is disclosed in the earlier part of this judgment.

Mr. Justice Philippe Demers and Mr. Justice Saint-Germain point out that the insertion of that particular clause would be quite inconsistent with the interpretation of the word embezzlement in the strict technical sense already indicated. Indeed, the clause proceeds to exclude liability on the part of the Canadian Surety Company for acts which could never conceivably be regarded as larceny or embezzlement.

In truth, we think Mr. Justice Demers was right in saying that the clause in question might be construed to mean

que la caution s'est obligée de rembourser toute partie de primes collectées et retenues par l'employé, moins sa commission, qu'il y ait fraude ou non. Un homme du commun qui recevrait un pareil contrat l'interprèterait évidemment en ce sens.

And Mr. Justice Saint-Germain adds:

Pourquoi cette distinction entre les primes non payées et les primes payées, au sujet de la responsabilité de la compagnie-appelante, si dans aucun cas, qu'il s'agit de primes payées ou de primes non payées, la responsabilité de la dite compagnie disparaissait du moment qu'un rapport avait été fait pour ces primes et que le montant en avait été assumé par l'Independent?

We think the correct view of the bond given by the appellant, since it was undoubtedly intended to be of some value to the respondent, is that it would not be restricted to acts of embezzlement in the technical sense, and we agree with Mr. Justice Demers and the majority of the Court of King's Bench that it should be interpreted as meaning that the appellant would be responsible

pour les montants qui ont été retenus frauduleusement par l'appelante.

Moreover, there is strong evidence that such is the way in which the appellant itself interpreted the bond it has subscribed in the premises, because when it was called upon to supply to the respondent a form which the latter was to fill in, in order to lay its claim before the appellant, the form which it supplied began by the following words:

In the matter of the default of Independent Insurance Agencies Limited *for whose honesty* the said Surety Company issued its bond in the sum of five thousand dollars * * *

The following is a detailed statement of the loss resulting from said default and all sums due and owing by the said defaulter and the balance stated below is the true net loss resulting from the said default, etc.

The claim form, moreover, closed with the words:

That the foregoing statement is correct and that the loss resulting to Quebec Insurance Agencies Limited from the default of Independent

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Insurance Agencies Limited is as above stated, and that the items composing the debits are chargeable to the said defaulter on the specified dates and that all sums due and owing by said defaulter to Quebec Insurance Agencies, Limited, are thereby correctly stated.

The true effect of the expressions used in that claim form and those which are scattered throughout the bond, interpreted (as they should be) the one by the other (and) giving to each the meaning (to be) derived from the entire act, (art. 1018 C.C.) is that the Superior Court and the Court of King's Bench were justified in interpreting the bond as they did; and their judgments ought to be confirmed.

The definite impression one has from the evidence is that the acts of the Employee, during the last period of its relations with the Employer, were the result of a scheme systematically organized for the purpose of fraudulently depriving the respondent of the legitimate return to it of the amount of the premiums received by the Employee as the proceeds of the policies issued by the Employee in the name and on behalf of the Employer. These proceeds were fraudulently appropriated. (Roscoe, Criminal Evidence—15th ed.—p. 597—Kenny, p. 236).

As found concurrently by the Superior Court and the Court of King's Bench, the fraudulent intention of the Employee inevitably results from the circumstances established, even if it be true that the premiums themselves, when they were paid by the assured, did not immediately become the property of the Employer; even if, in respect of these premiums, the relation of the parties was that of debtor and creditor. It should not be forgotten that, under the law of Quebec, " the property of a debtor is the common pledge of his creditor " (art. 1981 C.C.); and the Employee acted consistently in such a way as to render itself insolvent and to defeat absolutely any possibility of the respondent being able to recover the amount of the premiums. (See Kenny—Outlines of Criminal Law, p. 244). It is proven that the respondent has itself paid to the several insurance companies the amounts now forming the basis of its claim.

The situation in which the respondent found itself is the result of the fraudulent manœuvres and manipulations perpetrated by the Employee, who appropriated to its own use the moneys which, though not earmarked, constituted practically the only source from which it could expect to pay its Employer. It did so knowingly and with a fraudu-

lent intent (9 Halsbury, 2nd ed., pp. 522 & 523), and with criminal dishonesty (Kenny, p. 234).

To use the words of Hamilton, J. (afterwards Lord Sumner), in the case cited by the appellant, *Debenhams* v. *Excess Insurance Company Limited* (1),

> he made away with money that was really its employer's * * * He converted it to his own use, so that he might have the benefit of it and might cheat them out of it. * * *

If, said the learned judge, the jury were satisfied that such was the situation, they were entitled to say, and should say that there was embezzlement against which the plaintiff was insured.

Likewise, in the present case, we think the respondent has shown a set of facts and the existence of conditions against which it was insured by the appellant and, as a consequence of which he is entitled to have its claim maintained in part.

The result is that the judgments appealed from should be upheld, except for the slight modification due to the fact above mentioned that the Employee's commission on the sum of $680.20 was overlooked in the disposition made of the case both by the Superior Court and by the Court of King's Bench. The amount of $680.20 as already indicated, should be reduced to $544.16. As for the other amount of $2,702.89, also awarded against the appellant, it was not our understanding at the argument before this Court that it was equally subject to the deduction of the 20% commission. It appears to us that this amount was made up of items shown in the monthly accounts and from which, therefore, the commission had already been deducted. In accordance with our present view of the situation, the amount of $2,702.89 should stand as originally allowed by the Superior Court. If, however, we should be mistaken on the point, the matter may be spoken to before the judgment is settled. We wish to indicate to the parties that we agree that the Employee's commission of 20% should not be included in the amount which the appellant will be called upon to pay to the respondent as a result of the present judgment; but our impression is that such commission has already been taken into account in fixing the balance of $2,702.89.

(1) (1912) T.L.R. 505.

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Rinfret J.

With the modification just mentioned, the appeal should be dismissed with costs.

DAVIS J. (dissenting): The appellant, as surety, bound itself to pay the respondent such pecuniary losses, not exceeding $5,000, as the respondent shall have sustained of money or other personal property (including that for which the respondent is responsible), "by any act or acts of larceny or embezzlement" on the part of Independent Insurance Agencies Limited directly or through connivance with others while in any position or at location in the employ of the respondent. It was a common form of fidelity bond for an employer's protection against an employee but the employer, so called in the bond, was a general insurance agency (respondent) and the employee, so called in the bond, was Independent Insurance Agencies Limited, a sub-agent, both being incorporated companies. The sub-agent carried on a general insurance business and acted as agent for other principals besides the respondent. By the agreement between the respondent and the sub-agent, the sub-agent made daily reports to the respondent of the business done by it on the respondent's behalf; at the end of each month the respondent made up and delivered to the sub-agent a monthly statement of account (on the basis of the daily reports that had been received by it) shewing the amount of premiums payable less commissions and cancellations; the respondent allowed the sub-agent sixty days from the end of each month for payment of the net balance shewn on the statement for that month and sometimes even further delay was allowed. The agreement involved payment of the premiums ultimately by the sub-agent to the respondent whether in fact they were ever collected or not. No specific moneys were, however, intended to be ear-marked and set aside, and there was no obligation on the sub-agent to deliver over in specie the identical money or security received by it. The respondent looked to its sub-agent for payment of a debt. A running debtor and creditor account was thus established by arrangement betwen the parties. The liability to pay was purely a civil liability. There came a time, however, when the sub-agent was unable to pay and went into bankruptcy. The respondent does not contend that there is any claim based on larceny; the claim is put forward as embezzlement

within the meaning of the policy. But a contract of indemnity against loss by embezzlement cannot be turned into a guarantee of the solvency of the sub-agent at the date of the expiration of the periods of delay granted by the respondent to its sub-agent.

The use of the word "dishonesty" in the policy in a provision whereby the policy was to terminate on the discovery by the respondent of "loss" under the policy, or of "dishonesty" on the part of the sub-agent, cannot in my view extend or enlarge the express risk undertaken by the policy, larceny or embezzlement, to acts of "dishonesty." Nor can the use of the word "defaults" be taken to extend the precise words of the obligation. Nor, again, can more or less loose language in the form of the claim papers provided by the appellant enlarge or extend the exact risk covered by the language of the policy itself.

The question of law is whether or not upon a proper interpretation of the language of the policy the words "larceny" and "embezzlement" are to be given their technical and strict meaning. There is much to be said for the view that these fidelity bonds are ordinary commercial contracts and that a liberal interpretation may well be put upon them. But upon consideration I have arrived at the conclusion that we are not entitled to extend the meaning of technical terms in a contract of suretyship beyond what is the strict meaning of the words. That was the view taken in *Debenhams'* case (1), by Lord Sumner, then Hamilton J. That was an action on a fidelity policy issued to the plaintiffs by the defendants whereby the latter agreed

> to reimburse to the employer (the plaintiffs) to the extent of the sum stated against the name of the respective employed set forth in the schedule contained herein, such pecuniary loss, if any, as the employer shall sustain by any act of larceny or embezzlement on the part of any one or more of the said employed in connexion with the respective duties stated in the schedule hereto.

The plaintiffs alleged that one of their employees had received in the course of his employment various sums of money for or on account of the plaintiffs, and had fraudulently converted the same to his own use, and had not paid the same to them. By reason thereof they alleged that they had sustained pecuniary loss by larceny or embezzle-

(1) (1912) 28 Times L.R. 505.

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ment within the meaning of the policy. The defendants denied that the alleged pecuniary loss was caused by larceny or embezzlement on the part of the employee. They said that the question was really one of account between the employee and the plaintiffs. Mr. Justice Hamilton (as he then was) in the course of his summing up said that the term "embezzlement" in this policy meant the same thing as it meant in an indictment. There was no reason for giving it any less strict meaning in the policy by which the plaintiffs were insured than if a direct charge was being made. It was of the very essence of it that the jury must be satisfied that what the man did he did fraudulently and dishonestly; because mere carelessness, mere puzzleheadedness, mere objection to discharge his routine business and keep accounts, mere unwillingness to come back to England and settle his account, mere careless omissions would not of themselves constitute, or even evidence, the crime that it is said was committed, unless there was evidence to shew that which he did was dishonestly done. But if he fraudulently embezzled, that was to say, made away with money that was really his employers', and if he converted it to his own use, so that he might have the benefit of it and might cheat them out of it, then, if the jury were satisfied of that, they were entitled to say, and should say, that there was the embezzlement against which the plaintiffs were insured.

In *London and Lancashire Fire Insurance Co.* v. *Bolands Ld.* (1), the plaintiff was insured against loss by burglary, housebreaking and theft of cash in the cashier's office in the plaintiff's bakery in Dublin, subject to the proviso that

> this insurance does not cover loss directly or indirectly caused by or happening through or in consequence of * * * riots. * * *

During the currency of the policy, four armed men entered the plaintiff's premises on a summer evening while it was still daylight, held up the employees with revolvers, and took possession of all the money they could find in the cashier's office. There was no disturbance in the neighbourhood at the time. In answer to the plaintiff's claim to recover the loss, the insurance company relied on the proviso in the policy. The case went to the House of Lords

(1) [1924] A.C. 836.

and it was there unanimously held that the insurance company was not liable because the theft was conducted in a manner which constituted a riot at law. Lord Sumner at p. 847 said:

> It is true that the uninstructed layman probably does not think, in connection with the word "riot," of such a scene as is described in the case stated. How he would describe it I know not, but he probably thinks of something, if not more picturesque at any rate more noisy. There is, however, no warrant here for saying that, when the proviso uses a word which is emphatically a term of legal art, it is to be confined, in the interpretation of the policy, to circumstances which are only within popular notions on the subject, but are not within the technical meaning of the word.

The House of Lords in construing the policy interpreted it in terms of legal art.

Equitable Trust Company of New York v. *Henderson* (1), is a recent decision of Rowlatt J. There the plaintiffs, who carried on business in New York, took out a policy of insurance in London against loss which they might incur by having acted upon any document which might prove "to have been forged," and during the currency of the policy the plaintiffs were induced to lend money to a firm by a document containing a false statement of the firm's assets and liabilities. Before the whole of the loan had been repaid the firm became bankrupt and the plaintiffs sued on the policy. By the law of the State of New York, forgery includes "a false statement of financial condition." A member of the firm had been convicted in New York of forgery. The plaintiffs contended that the word "forged" in the policy must be construed by the law of New York where the loss occurred and that therefore it was immaterial if the document was not a forgery according to English law. Counsel for the defendant submitted that while the document had been falsely made, that fact did not constitute it a forged document. It had the effect which it pretended to have and was what it pretended to be; its only fault was that it did not tell the truth. The false making of a document was something different from the making of a false document. Mr. Justice Rowlatt said that though the plaintiffs admitted that the policy as a whole must be construed according to English law, they contended that the word "forged" must be construed as defined by the law of the place where the loss occurred. As

(1) (1930) 47 Times L.R.90.

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to this, he held that even if the document was a forged document according to the law of New York, the word "forged" in the policy was used merely to describe an existing state of fact and was not a term of art to be construed according to the criminal law of the place where the loss happened; and he dismissed the action.

Larceny and embezzlement are technical terms and in construing the language of the policy they should be given their strict meaning.

So far in what I have said I have had in mind the major claims in respect of items regularly reported and accounted for but never paid. The items of $680.20, however, were never reported by the sub-agent to the respondent or accounted for, and consequently stand in a different position. The fraudulent omission to account brings these items within the policy.

I would therefore allow the appeal and reduce the judgment at the trial to $544.16 (the amount of the $680.20 items less 20% agreed commission) with costs of an action of that amount. The appellant should have its costs of its appeal to the Court of King's Bench (Appeal Side) and to this Court.

Appeal dismissed with costs.

Solicitors for the appellant: *Brown, Montgomery & McMichael.*

Solicitors for the respondent: *Laverty, Hale & Laverty.*

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* May 7.
* May 27.

WILLIAM FRASER AND OTHERS.....APPELLANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Trial—Circumstantial evidence—Rule as to evidence consistent with innocence or guilt of accused—Verdict of guilty by the jury—Proper direction as to rule—Conviction affirmed by appellate court—Appeal to the Supreme Court of Canada—Whether this Court should interfere with the verdict of the jury.

Where the evidence in a criminal case is purely circumstantial and the jury has been properly instructed within the rule as to the value of circumstantial evidence, the verdict of the jury finding the accused

* PRESENT:—Rinfret, Cannon, Crocket, Davis and Hudson JJ.

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guilty is equivalent to a finding that, in the minds of the jury, the inferences to be drawn from the evidence were consistent with the guilt of the accused and inconsistent with any other reasonable conclusion, i.e., with the absence of guilt. Likewise, an appellate court could also decide, on the evidence, whether the facts were such as to be equally consistent with the innocence as with the guilt of the accused, and accordingly quash the verdict. But, before this Court, when the accused does not urge any ground of complaint against the direction of the trial judge and the evidence is such that the jury might, and could, legally and properly draw an inference of guilt, as held by the appellate court, it is not for the Court to decide whether the jury ought or not to have inferred that the accused was guilty.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the conviction of the appellants by a jury on charges of conspiracy and other offences under the *Customs and Excise Act*.

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

Lucien Gendron K.C. for the appellant.

J. Crankshaw for the respondent.

The judgment of the Court was delivered by

RINFRET J.—The appellants were tried and convicted by a jury in the Court of King's Bench, district of Montreal.

The indictment laid against them contains some nine counts, charging them with the offences of conspiracy and with different offences under the *Customs and Excise Act*. The appellant Fraser was found guilty on all counts charged against him. The appellant Brabant was also found guilty on all counts charged against him (eight in number). The appellant Pharand was found guilty on four counts representing what may be called the overt acts, but not guilty on the different counts charging conspiracy.

An appeal was lodged by each of them to the Court of King's Bench (appeal side) which confirmed the verdict and maintained the sentences in each case. The judgment was unanimous; and the appellants are now before this Court as a result of leave granted by a judge of the Court (1).

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

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Under the Criminal Code, no appeal lies to the Supreme Court of Canada on behalf of any person convicted of an indictable offence, whose conviction has been affirmed, except "on any question of law on which there has been dissent in the court of appeal" (Cr. Code, sec. 1023), or "if leave to appeal is granted by a judge" of the Court (Cr. Code, sec. 1025).

In the first case, the appeal is limited to the question of law which has been the object of the dissent in the court of appeal. In the second case, leave can be granted, and this Court holds jurisdiction, only

if the judgment appealed from conflicts with the judgment of any other court of appeal in a like case.

In the present case, it was common ground that all the evidence upon which the appellants were found guilty was circumstantial evidence. And the point of law on which the judgment appealed from allegedly conflicted with judgments of other courts of appeal in Canada was that the well known rule laid down by Baron Alderson, as far back as the *Hodge* case (1), and generally accepted and acted upon throughout Canada, had been misinterpreted and misapplied by the Quebec court of appeal in this instance.

At the conclusion of the argument and having had the advantage of a complete perusal of the record, we had some doubt as to whether the conflict which seemed to be apparent at first sight—and which alone stands as the foundation of our jurisdiction—did not exist perhaps more in the expression rather than in the real intention of the judgment *a quo*.

As was observed in *McLean* v. *The King* (2), "there is no single exclusive formula" whereby the rule may be stated. It is, however, a rule of general application, and some of the statements made by the learned judge who delivered the judgment of the court were of a nature to convey the meaning that there were exceptions to the rule. After having stated that one fact in the chain of circumstances proven was conclusive of the appellants' guilt, the learned judge added:

On conviendra, je crois, qu'un tel fait, lorsqu'il se produit, doive mettre en *échec* la règle de droit sus-mentionnée

(1) (1838) 2 Lewin's Crown's Cas. 227.

(2) [1933] S.C.R. 688, at 690.

a statement apparently suggesting that the present case was one where the rule should not apply. But, at the hearing before the Court, counsel for the Crown was able to show that, taking the judgment as a whole, the statement was susceptible of being understood as indicating that, in view of the existence, in the chain of evidence, of this outstanding fact found to be conclusive, no further doubt could subsist as to the guilt of the accused. As a result of this interpretation of the learned judge's statement, instead of excepting this case from the application of the rule, on the contrary, he would thus be applying the rule and declaring that, as a consequence of that rule, the evidence surrounding the main pivoting fact established in the case was conclusive of the appellants' guilt and incompatible with the theory of their innocence.

However, having now heard the appeal, and more particularly in view of the result presently to be announced, there would not be much object in entering upon a more complete discussion of the issue in respect to the conflict, except in mentioning, as we have just done, the state of mind in which the Court was left after a full consideration of the able argument presented to us and a careful examination of the whole record.

We will, therefore, proceed to express our view upon the merits of the point submitted by counsel for the appellants which is, in effect, that there was no legal evidence upon which a jury might find a verdict of guilty in the circumstances. The argument of the learned counsel was that, in a case where all the evidence is circumstantial, should the court of appeal not be satisfied, upon its own findings, that the circumstances proven were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person, it ought to quash the verdict on the ground that there was not sufficient legal evidence to support it.

Although, as a general rule, the question whether the proper inference has been drawn by the jury from facts established in evidence is really not a question of law, but purely a question of fact, for their consideration (*Gauthier*

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v. *The King*) (1), there is authority for the view that the rule with regard to circumstantial evidence is not exclusively a rule in respect of the direction which it is the duty of the trial judge to give to the jury or a rule solely for the guidance of a trial judge unassisted by a jury.

We were referred to, at least, two cases where the Court of Criminal Appeal in England set aside verdicts and quashed convictions when, after having considered the evidence as a whole, it seemed to the Court to be clear that the evidence was as consistent with the innocence of the accused as with his guilt.

In *Rex.* v. *Bookbinder* (2), the accused was convicted of larceny by a jury at Derbyshire assizes upon wholly circumstantial evidence. The appeal was heard by Heward L.C.J., Avory and Acton JJ. Counsel for the Crown argued that the jury were entitled to convict as the case depended solely on the proper inference to be drawn from the evidence. The Court came to the conclusion that there was no evidence which was not as consistent with the innocence as with the guilt of the appellant. Mr. Justice Avory, speaking for the Court, said:

> We think that the verdict was unsatisfactory and cannot be supported, having regard to the evidence. The appeal will be allowed and the conviction quashed.

In *Rex* v. *Carter* (3), the accused appealed against his conviction for indecent assault at Cheshire sessions. The ground for the appeal was that there was not sufficient evidence for the jury in convicting the appellant. The Court was composed of Mr. Justice Avory, Mr. Justice Hawks and Mr. Justice Humphreys. The evidence was circumstantial only. Again Mr. Justice Avory pronounced the judgment of the Court. Summing up the case, he said:

> When we come to consider the evidence as a whole, it seems to be clear that the evidence is as consistent with the innocence of the appellant as with his guilt.
>
> In all the circumstances, we have come to the conclusion that this conviction was unsatisfactory and cannot be supported, having regard to the evidence.
>
> The appeal is allowed and the conviction quashed.

It would appear, therefore, that, when the evidence in a criminal case is purely circumstantial and at the same

(1) [1931] S.C.R. 417.

(2) (1931) 23 Cr. App. Reports 59.

(3) (1931) 23 Cr. App. Repts. 101.

time equally consistent with the innocence as with the guilt of the accused, the Court of Criminal Appeal in England regards that evidence as insufficient to justify the jury in convicting, holds the verdict unsatisfactory and quashes the conviction, on the ground that it cannot be supported, having regard to the evidence.

To a certain extent, this would assimilate verdicts based on circumstantial evidence "as consistent with the innocence as with the guilt of the accused" to verdicts where it is claimed that there is no evidence at all to support them, the view being that the court of appeal is empowered to set aside those verdicts on the ground that they are unsatisfactory, whether on account of a total lack of evidence or for want of sufficient legal evidence to support them.

Let it be granted, however, that such a question should be deemed a question of law, or of mixed law and fact, when once it is established that the evidence is of such a character that the inference of guilt of the accused might, and could, legally and properly be drawn therefrom, the further question whether guilt ought to be inferred in the premises is one of fact within the province of the jury (*Reinblatt* v. *The King*). (1)

The appellants do not complain of the judge's charge to the jury. No objection was entered by them at the trial; indeed, counsel for the appellants freely admitted at bar that the charge was not open to objection. The direction there given upon the particular point dealing with the duty of the jury with regard to the value of circumstantial evidence and the standard by which it should be measured in the premises appears to us to have been as comprehensive as could be required. The jury was in substance told that, in order to reach a verdict of guilty, it should be satisfied, not only that the circumstances proven were consistent with the appellants having committed the acts, but they should also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the appellants were guilty of the charges brought against them.

In the face of that direction, the jury found the appellants guilty. The jury having been properly instructed,

(1) [1933] S.C.R. 694, at 697.

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within the terms of the rule, their verdict is equivalent to a finding that the inferences to be drawn from the evidence were consistent with the guilt of the appellants, and inconsistent with any other reasonable conclusion, and that is to say: with the absence of guilt. After the direction they were given, the jury must be taken to have eliminated all possibility of the innocence of the appellants as a rational inference from the facts as they believed and understood them.

Likewise, the court of appeal, to which the case was brought under sec. 1013 of the Criminal Code, could decide, on the evidence in this case, that the facts were such as to be inconsistent with any other rational conclusion than that the appellants were guilty.

The appellants having no ground of complaint against the direction of the trial judge and the evidence being such that the jury might, and could, legally and properly draw the inference of guilt, as held by the Court of King's Bench (appeal side), it is not for this Court to decide whether the jury ought or not to have inferred that the appellants were guilty.

The appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants: *Gendron, Monette & Gaultier.*

Solicitor for the respondent: *James Crankshaw.*

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* May 6, 7.
* May 27.

W. C. RICKARD AND HERBERT RICKARD (DEFENDANTS) ..... } APPELLANTS;

AND

JAMES RAMSAY AND GEORGE CONCHAR RAMSAY (AN INFANT, BY JAMES RAMSAY, HIS NEXT FRIEND) (PLAINTIFFS) ..... } RESPONDENTS.

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

Negligence—Horses—Child running towards, and kicked by, colt led on highway on grassy strip between gravelled roadway and cinder sidewalk—Liability in damages for injury to child.

The junior defendant, a boy 17 years old, was riding a pony northerly on a street in Calgary, Alberta, and leading by a rope a haltered colt on

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

the east side of him. He went on to a grassy strip on the highway, east of its gravelled portion. He met two young boys running southerly on a cinder sidewalk east of the grassy strip. One of them, the the infant plaintiff, 6 years and 7 months old, ran towards the colt after it had passed him and was kicked by it. Said defendant and his father (who owned the colt and was following in a wagon some distance away) were sued for damages.

Held (Kerwin J. dissenting): Defendants were liable. Judgment of the Appellate Division, Alta., [1935] 3 W.W.R. 554, affirmed.

Per Duff C.J., Crocket, Davis and Hudson JJ.: The junior defendant, the moment he saw the boys running along the cinder path towards him, should have foreseen the danger and taken the horses off the grassy strip on to the gravelled roadway. His failure to discharge this duty to the children must, in the circumstances disclosed by the evidence, be held to be both the primary and proximate cause of the accident. No intervening act by a child too young to be capable of appreciating an obvious danger, which primarily arises from another's negligence, can avail to relieve that other from the consequences of his own negligence, unless the child's act be such as could not reasonably have been foreseen. The child's act in going upon the grassy strip and following the horses, so likely to attract him, should have been anticipated as a likely consequence of keeping them on the grassy strip after seeing the children running towards them.

Per Kerwin J. (dissenting): As the pony was lame, the junior defendant acted prudently and properly in travelling on the grassy strip, but having seen the children he was bound to proceed in a reasonable manner and so as not to endanger them. There was no *scienter;* the colt was under proper control and defendant had no reason to expect that the boy would run after the colt or that the colt would kick. It could not be said, on the facts appearing from the evidence, that defendants were responsible in law for the injury.

APPEAL by the defendants from the judgment of the Appellate Division of the Supreme Court of Alberta (1) reversing the judgment of Simmons C.J.T.D. at trial (2).

The action was brought to recover damages by reason of injury received by the infant plaintiff when kicked by a colt owned by the defendant W. C. Rickard and led, on the occasion of the accident, by his son, the defendant Herbert Rickard.

The accident occurred on March 31st, 1933, on Second street North West, in the city of Calgary, Alberta. The defendant Herbert Rickard, who was 17 years of age, was riding a pony northerly on said street and was leading by a rope a haltered colt on the east side of him. His father, the defendant W. C. Rickard, the owner of the colt, was following in a wagon about half a block back. Herbert Rickard went on to a grassy strip on the highway, east of

(1) [1935] 3 W.W.R. 554; [1936] 1 D.L.R. 308.

(2) [1935] 3 W.W.R. 554, at 554-558; [1935] 3 D.L.R. 623.

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its gravelled portion. He met two boys, the infant plaintiff who was six years and seven months old, and a companion who was about seven years old, who were running southerly on a cinder sidewalk east of the said grassy strip. The infant plaintiff ran towards the colt after it had passed him and the colt kicked him. There was conflicting evidence as to certain facts in connection with the accident. The facts and circumstances are discussed in the judgments now reported, and in the judgments below, above referred to.

The trial judge concluded, on the evidence, that the plaintiffs had not satisfied the burden that was on them to establish by a preponderance in the weight of evidence that the children were still in the "danger zone," that is, in the zone which called for the defendant to keep a look-out for them, when the infant plaintiff ran out after the horses. The Appellate Division (Mitchell J.A. dissenting) held that the trial judge was in error in holding that the defendant had removed himself from the "danger zone"; that if the defendant had paid attention to the boys after he passed them, as he should, until all risk of danger was passed the accident might have been avoided, and in his failure to do so he was guilty of such negligence as rendered the defendants liable for the damages caused. It reversed and set aside the judgment of Simmons C.J. T.D., and gave judgment against the defendants for the infant plaintiff for $5,000 and for his father, the other plaintiff, for $457. The defendants appealed to this Court (special leave to appeal having been granted by the Appellate Division in respect of the judgment in favour of the adult plaintiff).

O. M. Biggar K.C. and *W. B. Cromarty* for the appellants.

J. K. Paul for the respondents.

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

CROCKET J.—In my view, it was the duty of the junior defendant, when he saw the infant plaintiff and his young companion running along the cinder sidewalk towards the pony he was riding on the boulevard with this young colt beside him, to take the animals off the boulevard on to the

gravel roadway. The boys were not more than 150 feet away from him when he saw them running towards him and he ought to have foreseen the danger he was creating for the children by keeping the pony and the colt on the boulevard so close to the cinder path with the colt on the inside. The children were naturally attracted by the spectacle of a young man riding a pony along a boulevard with an exhibition colt haltered beside him, and, if the infant plaintiff did run out from the sidewalk after he reached the horse and colt and run after them, he did what any child of his years might reasonably be expected to do, as the colt did what he might naturally be expected to do, viz., to kick the child when he approached too closely. The danger became apparent the moment the children were seen running towards the animals. It was a danger for which the junior defendant was certainly primarily responsible. In my opinion, he might easily have avoided it by simply turning the animals he was riding and leading on to the gravel portion of the highway, which was the proper place for him to be with them. The child, a boy of 6 years and 7 months, was too young to appreciate the danger himself, and, in my judgment, in the circumstances of this case, it makes no difference where the junior defendant met the boys or whether he had got beyond the boys 10 or 25, or 35 or 70 feet, when the infant plaintiff was kicked. It was the junior defendant's duty to take all reasonable precautions to see that neither of the two children was endangered and not merely to assume that the moment he passed them there was no occasion for him even to look back to see if they were following. The obvious thing for him to do, the moment he saw the little fellows running towards him, was to lead the animals, which were so likely to attract them, away from the boulevard on to the gravel roadway. His failure to discharge this duty to the children must, in my opinion, in the circumstances of this case as disclosed by the evidence of the defendants themselves, be held to be both the primary and proximate cause of the accident, for the reason that no intervening act on the part of a child too young to be capable of appreciating an obvious danger, which primarily arises from the negligence of another, can avail to relieve that other from the consequences of his own negligence, unless the act of the child be such an act as

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could not reasonably have been foreseen. The act of the child in going upon the boulevard and following the pony and colt was, as above suggested, just such an act as the junior defendant ought to have anticipated as a likely consequence of his keeping the horses, of which he was in charge, as agent for his father, the co-defendant, on the boulevard, after he saw the children running towards them.

It may be that there was no negligence on the part of the junior defendant in going on to the grassy strip with the horses, when no children were about, though the gravel roadway ordinarily would surely be the proper place for the riding and driving of horses, but the approach of young children, for whose use, rather than that of horses, such a grassy strip along the gravel roadway would seem to have been intended, should have at once brought home to him the danger of continuing there and the necessity of getting out of the children's way. Assuming that he had a right of passage with his horses along the boulevard strip of the public highway, he was clearly under an obligation to exercise that right with due regard to the rights and safety of others thereon, whether young children or adults.

For these reasons I concur in the decision of the Court of Appeal and would dismiss this appeal with costs.

KERWIN J. (dissenting)—The appellant, W. C. Rickard, was the owner of a Percheron male colt which at the time of the occurrence complained of by the respondents was ten and one-half months old. It had been weaned four months earlier and had been handled since birth; it was halter broken and free from vice.

Having been exhibited at the Calgary Spring Horse Show the colt, on March 31st, 1933, was being taken thence to Rickard's home on the outskirts of Calgary and was in charge of the appellant, Herbert Rickard, W. C. Rickard's son. Herbert was then nearly eighteen years of age and, as the trial judge found, was a competent person for the purpose, having performed all the usual duties of a farm lad and having looked after the colt since its birth. Herbert was astride a pony; the colt was haltered and a stout rope reaching from the colt to the pommel of the saddle on the pony was turned twice around the pommel with the end in one of Herbert's hands. The length of the rope between the colt's head and the pommel was about eighteen

inches. W. C. Rickard followed his son in a wagon hauled by a team of horses. In the course of the journey from the show grounds the colt had balked at every set of street car tracks but upon being prodded by the tongue of the wagon driven by W. C. Rickard had proceeded on its way without any further difficulty. The trial judge found that the colt "was behaving very well up to and immediately preceding the time of the accident. He was under proper control."

When Herbert, on his pony, with the colt beside him, was at the corner of 19th avenue and Second street in Calgary and proceeding northerly on Second street, he turned from the gravel portion of the highway to a grassy strip at the east composed of virgin prairie. This was because the pony was lame. Second street is 66 feet wide; in the centre is the gravelled portion about 30 feet in width; adjoining on either side are strips of virgin prairie about 12 to 13 feet wide, and on the eastern limit of the street is a cinder path about 5 feet wide. There is no curb between the various sections of the highway. Midway between 19th and 20th avenues is a lane and when Herbert arrived at a point about 25 feet south of this lane he noticed two boys on the cinder path at 20th avenue running southerly. According to the evidence the boys were then about 155 feet north of Herbert.

The chief variations in the evidence at the trial were as to where these parties met, as to where they were when the colt kicked one of the boys, the infant respondent George Ramsay, then six years and seven months of age, and as to the part of the highway upon which the colt was travelling.

The respondents' contention is that the parties met at a point approximately 122 feet north of the lane, that the accident happened at the instant of meeting, and that the colt was either on the cinder path or on that part of the grass immediately adjoining the path. The appellants' view is that the parties met opposite a telephone pole approximately 70 feet north of the lane, that the accident occurred 35 feet north of the pole, and that the pony carrying Herbert Rickard was on the westerly edge of the grass plot with the colt immediately next to the pony on the east.

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The trial judge disregarded the evidence of Mrs. Thomas, the only witness for the respondents who attempted definitely to locate the point of meeting, as he considered she had not been in a position to fix it with any degree of precision. Apparently he deemed the evidence of Mrs. Ramsay and F. H. Bounds as of no assistance on the point, as he makes no mention of it. Irrespective of the findings of the trial tribunal, a perusal of the evidence leads me to the same conclusions. On the other hand, the trial judge found himself unable to accept the evidence of the adult appellant, W. C. Rickard, as that individual was about half a block south of the colt at the time of the accident and was paying no particular attention. With that I also agree. The trial judge apparently relied on the unsworn evidence of Herbert Osterbauer, the seven year old companion of the unfortunate child who was kicked, but, after a perusal of Osterbauer's evidence, I believe it would be unsafe to attach any weight to it. However, I see no reason to disagree with such reliance as the trial judge placed upon the evidence of Herbert Rickard.

In view of this and also of the evidence of the respondent James Ramsay (the father of the infant respondent George Ramsay) that he discovered a blood mark on the cinder path 35 feet north of the telephone pole, I conclude that, according to Herbert Rickard, he passed the boys at the pole, and that, according to the location of the blood stain, the accident happened at the latter point. I am also of opinion that the evidence of Herbert Rickard that his pony was on the westerly edge of the grass plot should be accepted. The trial judge did not make any finding in that connection.

No one testified that either of the young boys shouted or ran after the colt except Herbert Osterbauer, and, as already indicated, I place no reliance upon his statement. In view, however, of what I have already set forth, it would appear that the infant respondent, George Ramsay, did run towards the colt after it had passed him. While relying on the evidence of Herbert Rickard as to what transpired up to the time of the meeting, the trial judge states that "he (Herbert Rickard) did not give any particular attention to the boys after he passed them and that his evidence, outside of the location of the children, is not of

much value even although some of it is against his interest." The part underlined has reference to Herbert Rickard's statement that he watched the boys until the rear of the colt was about 10 feet beyond them and that he had proceeded possibly 5 feet further before he heard the sound of the impact.

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In dismissing the respondents' action the trial judge took the view that the plaintiff had failed to show how far past the meeting point Herbert Rickard had progressed with the colt before the accident happened, but in my view that problem is solved by the evidence indicated above. In view of the pony's lameness Herbert Rickard was acting prudently and properly in travelling on the grass plot, but, having seen the children, he was bound to proceed in a reasonable manner and so as not to endanger them. There was no *scienter;* the colt was under proper control, and Herbert Rickard had no reason to expect that the boy would run after the colt or that the animal would kick. I cannot find that he or his father as owner of the animal are responsible in law for the injury to the unfortunate infant respondent. I would allow the appeal with costs throughout and restore the judgment of the trial judge.

Appeal dismissed with costs.

Solicitors for the appellants: *Edwards & Cromarty.*
Solicitor for the respondents: *J. K. Paul.*

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REGAL OIL & REFINING COMPANY, LIMITED, AND REGAL DISTRIBUTORS, LIMITED (DEFENDANTS).... APPELLANTS;

* Mar. 19, 20.
* Apr. 21.

AND

FRED A. CAMPBELL (PLAINTIFF) .....RESPONDENT.

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

Negligence—Master and servant—Plaintiff, operating defendants' bulk station plant for handling gasoline and oil, injured by explosion—Construction of plant—Volenti non fit injuria—Contributary negligence—Liability of both defendants, having regard to acts, position, and occupancy, of each.

Defendant R.O. Co. refined and manufactured petroleum products, and engaged plaintiff, in February, 1929, to operate a bulk station plant,

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

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to be constructed at Beiseker, Alberta. R.O. Co. obtained a lease of land on April 29, 1929, on which it immediately had the plant constructed, and plaintiff, in April or early in May, 1929, began operating it. It contained platform scales and pumps for the handling of gasoline and oil, and, in a small room adjoining the main room and entered by a door from the platform and with no window, a gasoline engine to provide power to operate the pumps, and connected with them by a shaft running through a hole in the wall between the engine room and the warehouse proper, the hole having an unobstructed space of about 60 square inches through which fumes from the warehouse could pass into the engine room. The exhaust pipe of the engine was not extended out of the engine room. There were two storage tanks. On June 1, 1929, the defendant R.D. Co. took over the marketing facilities of R.O. Co. and later wrote to plaintiff that the refining and marketing were operated under different company names, that operations with which plaintiff was connected were to be under the name of R.D. Co., and that he should in future communications use that name. The said lease to R.O. Co. was never assigned to R.D. Co. prior to the accident in question. On Aug. 22, 1932, while tractor fuel was being pumped from a truck into a storage tank, plaintiff, as the pump seemed not working satisfactorily, placed a drum on the scales and made adjustments so that the rest of the fuel in the truck should go into drums. When a number of drums had been filled, and the fuel was coming irregularly and slowly, plaintiff left his position beside the drum to go to a point where he could exchange signals with a man on the truck and, receiving what appeared to be a signal that the truck was empty, he returned to close off the valves, but before that was done fuel overflowed from the drum. Plaintiff then went to the engine room to shut off the engine and while attending to this he saw a flame come from the exhaust, an explosion occurred, and he was injured. He sued for damages. The trial judge charged the jury that the determining factors were three issues of fact: (1) the charge against defendants of negligence in construction; (2) defendants' reply that in any case plaintiff accepted any hazards that were incident to the operation of the plant; and (3) defendants' contention that the accident was chargeable to plaintiff's own negligence in regard to the operation of filling the last drum immediately prior to the accident. The jury found a verdict for plaintiff for damages and judgment was given accordingly, which was affirmed on appeal. Defendants appealed to this Court.

Held: The appeal should be dismissed.

Per Duff C.J. and Davis and Kerwin JJ.: The doctrine of *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, could have no application to this case (*Toronto Power Co.* v. *Raynor*, 51 Can. S.C.R. 490, at 503, 505). An employer, though he does not warrant the safety of the plant and property used in the business in which the servant is employed, is under an obligation, arising out of the relation of master and servant, to take reasonable care to see that such plant and property is safe. (The question whether or not, by the common law, he can fulfil his obligation by delegating the performance of it to employees whose competence he has taken reasonable care to ensure, discussed, and *Toronto Power Co.* v. *Paskwan*, [1915] A.C. 734, *Ainslie Mining & Ry. Co.* v. *McDougall*, 42 Can. S.C.R. 420, *Brooks, etc., Co.* v. *Fakkema*, 44 Can. S.C.R. 412. *Bergklint* v. *Western Canada Power Co.*, 50 Can. S.C.R. 39,

54 Can. S.C.R. 285, and *Fanton* v. *Denville,* [1932] 2 K.B. 309, referred to. Where defendant relies upon delegation, the onus is upon him to establish it: *Canadian Northern Ry. Co.* v. *Anderson,* 45 Can. S.C.R. 355). There is no longer an independent rule that, for an employee to recover for injuries sustained from defects in the plant, there must be ignorance in himself and knowledge in the master of those defects (*Jury* v. *Commissioner for Railways,* 53 Comm. L.R. 273, at 282). As to the defence of *volenti non fit injuria,* the question is, did the employee agree that if injury befell him the risk would be his and not his master's? (*Smith* v. *Baker,* [1891] A.C. 325; *McPhee* v. *Esquimalt & Nanaimo Ry. Co.,* 49 Can. S.C.R. 43). The issue of *volens* in this case was one for the jury. As to contributory negligence—plaintiff was obviously much concerned about the manner in which the apparatus emptying the truck was working; the overflowing of the drum was not the consequence of any want of zeal on his part; and the jury might, without acting arbitrarily and unreasonably, have thought any slip, any miscalculation or error of judgment excusable, and not incompatible with the absence of negligence. In the view taken as aforesaid, the responsibility of R.D. Co. was not disputed; there would also appear to be a *prima facie* case against R.O. Co.

Per Rinfret, Cannon and Kerwin JJ.: On the evidence the jury could reasonably find in plaintiff's favour on the said three issues of fact submitted to them. For a defence on the ground of *volenti non fit injuria,* it must be found as a fact that plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, expressly or impliedly agreed to incur it (*Letang* v. *Ottawa Electric Ry Co.,* [1926] A.C. 725); it was not sufficient in this case that plaintiff knew it was a common thing for the engine to backfire, that any fault in construction of the building existed from the time he took over the plant, that he knew that the tractor fuel was a highly inflammable product and the vapour from it highly inflammable and dangerous, that he apprehended the danger of a spark exploding such vapour, that he would not light a match there, and that he never complained; the jury had to be satisfied that, not only did plaintiff know, but he accepted voluntarily to run, the risk (*Baade* v. *Hill,* [1934] 4 D.L.R. 385, referred to). Both defendants were liable—R.O. Co., which made the agreement with plaintiff, brought into the plant the dangerous substance for storage; it was, under its lease, the occupant of the land; R.D. Co., which in fact was only a continuing incorporated department of R.O. Co., also occupied the land either as tenant or employee of R.O. Co.; it was in charge of the premises at the time of the accident and had control over plaintiff; (*Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co. Ltd.,* [1921] 2 A.C. 465).

APPEAL by the defendants from the judgment of the Appellate Division of the Supreme Court of Alberta, affirming the judgment of Simmons C.J., on the verdict of a jury, in favour of the plaintiff against the defendants for $24,585, for damages for injuries suffered by the plaintiff in an explosion which occurred in a bulk station plant for the handling of gasoline and oil, which the plaintiff was oper-

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ating. The plaintiff alleged that the plant was supplied by the defendant Regal Oil & Refining Co. Ltd., on land in its possession under a lease, that plaintiff was in its employment as an agent to handle, expose and offer for sale its gasoline products in the district of Beiseker, in the province of Alberta; and that the defendant Regal Distributors Ltd. had (subsequent to the plaintiff's contract of employment) assumed the management and control of the plant. The plaintiff alleged that the explosion occurred by reason of negligence of the defendants. The material facts of the case and the questions involved are sufficiently stated in the judgment of Cannon J. now reported. The appeal to this Court was dismissed with costs.

O. M. Biggar K.C. for the appellants.

A. Macleod Sinclair K.C. and *L. A. Walsh K.C.* for the respondent.

DUFF C.J. (Davis and Kerwin JJ. concurring)—This appeal should be dismissed.

First, a word as to the law. By the common law, an employer is under an obligation arising out of the relation of master and servant to take reasonable care to see that the plant and property used in the business in which the servant is employed is safe. That is well settled and well known law. It is equally well settled that he does not warrant the safety of such plant and property. (*Wilson* v. *Merry* (1); *Young* v. *Hoffman* (2); *Fanton* v. *Denville* (3)). The question whether or not he can fulfil his obligation by delegating the performance of it to employees, whose competence he has taken reasonable care to ensure, is a question upon which it is not clear that the authorities are harmonious. The judgment of the Privy Council in *Toronto Power Co.* v. *Paskwan* (4), as interpreted in the head-note, would seem to say that he cannot discharge this duty by employing competent delegates for that purpose; that, in other words, he is responsible for the safe condition of the plant and premises so far as reasonable care can make them so.

There are two decisions of this court (*Ainslie Mining & Railway Co.* v. *McDougall* (5); and *Brooks, Scanlon, O'Brien Co.* v. *Fakkema* (6)) which would appear to

(1) (1868) L.R., 1 Sc. App. 326.
(2) [1907] 2 K.B. 646.
(3) [1932] 2 K.B. 309.
(4) [1915] A.C. 734.
(5) (1909) 42 Can. S.C.R. 420.
(6) (1911) 44 Can. S.C.R. 412.

sanction the rule as stated in the head-note in *Toronto Power Co.* v. *Paskwan* (1). In the subsequent case of *Bergklint* v. *Western Canada Power Co.* (2), the distinction is drawn between the original installation of the plant and the maintenance of it. As to original installation, the duty to take reasonable care for the safety of the employee is, under the decisions of this Court, as finally interpreted in *Bergklint's* case (2), one of which the employer cannot divest himself by appointing competent delegates, while, under the common law, the opposite is the case in respect of subsequent maintenance. These decisions are, perhaps, in conflict with the decision of the Court of Appeal in *Fanton* v. *Denville* (3), and, possibly, with other decisions of that Court.

In the present case, we are really not concerned with this conflict (if such there be) for two reasons. First, no evidence was offered to show that the employers had exercised care in entrusting the duty of making the plant safe for the employees to competent delegates; and, where the defendant relies upon delegation, the onus is upon him to establish it (*Canadian Northern Ry. Co.* v. *Anderson* (4)). Second, the doctrine of common employment has been abrogated in Alberta (R.S.A. 1922, c. 178, s. 2).

I cannot endorse the argument that the employee can only succeed by establishing ignorance in himself and knowledge in the master. I agree with the following passage in the judgment of Rich and Dixon JJ. in *Jury* v. *Commissioner for Railways* (5):

> There is no longer an independent rule demanding ignorance in the servant and knowledge in the master. But negligence in the master, or those for whom he is responsible, if any there be, must be proved, and knowledge is one way but not the only way of proving it. The servant must not have consented to the consequences of the master's negligence, but his mere knowledge does not prove consent. He must not have been guilty of contributory negligence, but still less does his mere knowledge prove that he was.

(1) [1915] A.C. 734.
(2) Reported first in (1914) 50 Can. S.C.R. 39, and afterwards (as *Western Canada Power Co* v. *Bergklint*) in (1916) 54 Can. S.C.R. 285.
(3) [1932] 2 K.B. 309.
(4) (1911) 45 Can. S.C.R. 355.
(5) (1935) 53 Commonwealth L.R. 273, at 282.

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Such being the state of the law, I have only to add that the doctrine in *Rylands* v. *Fletcher* (1) can have no application. This was expressly held by the majority of this Court in *Toronto Power Co.* v. *Raynor* (2). In my judgment in that case I said:

> The judgment of Mr. Justice Clute in the Court of Appeal proceeds, as far as I can gather, on the application of the doctrine of *Rylands* v. *Fletcher* (1).
>
> This doctrine has never been applied and could not, without bringing the direst confusion into the law on the subject, be applied in cases of this description between master and servant, where apart from statute the question must always be (the master being charged with responsibility for harm coming to the servant in the course of his employment): Was the harm caused by the failure of the master in any duty to the servant arising out of the relation subsisting between them? The duty of protecting or compensating the servant for harm arising from the perils incidental to the service which cannot be avoided by any reasonable degree of care on the part of the master, is not one of the duties which the law casts upon the master.

On the contrary,

> The doctrine of *Rylands* v. *Fletcher* (1) imposes a responsibility which in the first place is, speaking generally, absolute for the consequences of the escape of the noxious agent (excepting where the escape is due to the act of God or the mischievous intervention of a third party) and in the second place cannot be discharged by employing independent contractors or servants never so competent and never so well equipped as to skill and means.

The appellants can only succeed, then, on one of two grounds: contributory negligence or *volenti non fit injuria.* As regards the defence of *volens,* the question, as Lord Watson said in *Smith* v. *Baker* (3), is, did the employee agree that if injury befell him the risk would be his and not his master's? This defence was very fully discussed in *McPhee* v. *Esquimalt & Nanaimo Ry. Co.* (4) where *Smith* v. *Baker (supra)* and *Williams* v. *Birmingham Battery & Metal Co.* (5) were applied.

I do not think it is seriously open to question that the issue of *volens* was in this case one for the jury.

There is much more to be said in favour of the appeal under the contention that the finding of the jury negativing contributory negligence cannot be supported. After, however, carefully considering and reconsidering the evidence in its bearing upon this issue, my conclusion is that the judgment of the Court of Appeal ought not to be reversed.

(1) (1868) L.R. 3 H.L. 330.
(2) (1915) 51 Can. S.C.R. 490, at 503, 505.
(3) [1891] A.C. 325.
(4) (1913) 49 Can. S.C.R. 43.
(5) [1899] 2 Q.B. 338.

The respondent was obviously much concerned about the manner in which the apparatus emptying the truck was working. The overflowing of the drum was not the consequence of any want of zeal on his part. In the result, I am not satisfied that the jury might not, without exposing themselves to a charge of acting arbitrarily and unreasonably, have thought any slip, any miscalculation or error of judgment excusable; and not incompatible with the absence of negligence either as commonly understood by laymen or in the sense of the law.

In the view just expressed, the responsibility of the Regal Distributors, Ltd., is not disputed; there would also appear to be a *prima facie* case against the other company.

The appeal should be dismissed with costs.

CANNON J. (Rinfret and Kerwin JJ. concurring)—The appellants appealed before this Court from a judgment of the Appellate Division of the Supreme Court of Alberta, dismissing their appeal from the judgment of the trial Court based upon the verdict of a jury which awarded the plaintiff damages to the sum of $24,585. The appellant, the Regal Oil and Refining Co. Ltd. (hereinafter called the Refining Co.), is engaged in the refining and manufacture of petroleum products, and the appellant, Regal Distributors Ltd. (hereinafter called the Distributing Co.), in the distribution of such products. The Refining Company engaged the respondent by an agreement in writing dated February 15, 1929, to operate for it a bulk station plant at Beiseker. The Refining Co. was granted a lease of land on the 29th of April, 1929, on which immediately thereafter was erected the plant in question by a contractor engaged by the Refining Co. The building and equipment were turned over to the respondent late in April or early in May, 1929. It consisted of a building constructed of corrugated iron on a wooden frame and contained platform scales and Blackmore twin pumps for the handling of gasoline and oil. In addition to the main room of the plant there was an adjoining room about 6 feet square in which was housed a Fairbanks-Morse gasoline engine. This engine room contained no window and was entered by a door from the platform. The power to operate the pumps was provided by the engine which was connected with the pumps by a shaft 1½ inches in diameter which ran

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from the engine through the wall between the engine room and the warehouse proper. This shaft passed through a hole in the wall which was about 10 inches from the floor and about 10 inches in diameter. Notwithstanding the presence of a gear box, there would be left, after taking this obstruction into account, approximately an area of 60 square inches, through which fumes from the warehouse could pass into the engine room. The exhaust pipe of the gasoline engine was not extended out of the engine room and any fumes or sparks from the engine were projected into the room. The equipment in addition included two storage tanks. No. 1 was used for gasoline and No. 2 for tractor fuel.

On the 1st June, 1929, the Distributing Company took over the marketing facilities of the Refining Company. On the 16th of September, 1929, the Distributing Company wrote a letter on the notepaper of the Refining Company to the respondent, informing him of the change in "the organization of the different branches of our Company," and that his operations were to be carried on under the name of the Regal Distributors Limited. After some changes in the mechanical equipment to permit the shipping of the petroleum products to this station in automobile tank trucks, the first such shipment was received at about 3.30 p.m. on the 22nd of August, 1932. The respondent had received instructions pointing out to him the importance of emptying such trucks as speedily as possible. The trucks had been hired by the Refining Company and contained tractor fuel, which is admitted to be of a highly inflammable nature. During the operation of pumping the contents of the truck into the storage tank No. 2, the pump was not working to the respondent's satisfaction and he decided that the remainder of the tractor fuel, about 500 gallons, should be placed into drums. To do so he placed the drum on scales; and by an adjustment of valves, the destination of the flow from the truck was changed from the storage tank to the drum. After filling seven or eight drums in this manner, he found that the fuel was coming very irregularly and very slowly. One Schultz was on top of the truck watching the progress of the pumping and exchanged signals with the respondent, who would move from his position to a point on the platform from which he

could see Schultz to determine if the truck was about empty. Having received from Schultz a signal which he understood as meaning that the tank was empty, the respondent turned to go in and turn off the quick closing valve located immediately above the scales, and at that moment he saw the tractor fuel overflow from the drum and Russel, the truck driver, run and close the valve. The respondent then went into the engine room and shut off the engine by closing the fuel valve and turning down the oil cup. As he was leaning over the engine to close the latter, he saw a bunch of flame come from the exhaust. There were one or two explosions which blew the respondent through the wall of the engine room and deposited him on the ground at the rear of the truck with his clothing in flames. As a result of the accident, the respondent has lost completely the use of both hands, after undergoing great pain and suffering and actual out of pocket expense of $584.90.

In his charge, the learned trial judge stated that the determining factors in the case were three issues of fact: first, the claim by the respondent that the appellants were negligent in the construction and maintenance of this plant for the storage and delivery of dangerous explosives; second, the reply by the defendants that in any case the respondent accepted any hazards that were incident to the operation of that plant; and third, that the accident was chargeable in whole or in part to the respondent's own negligence in regard to the operation of filling the last drum immediately prior to the accident.

Respecting the first point, complaints in regard to the structure were: (*a*) the exhaust pipe was not carried out from the smaller enclosure in which the gasoline engine was placed; (*b*) there was an opening in the wall near the floor of that structure that would allow vapour fumes to get into the engine room. The learned trial judge pointed out, and my reading of the record confirms his view, that the evidence of Mr. Robb, the expert, which was not contradicted, is to the effect that if these features had not existed, it would have been a safer structure for the purpose for which it was intended; he added that it was the duty of the appellants to construct the building and plant in a way that would not expose employees or anyone who had occasion

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to come around it, to unnecessary danger. Referring to the first ground of defence, that the respondent had accepted the hazard which would naturally be incident to a plant of this kind, knowing that naphtha and gasoline are very volatile and would evaporate in warm weather and the vapour spread around, and also to the fact that the respondent knew from long experience how to run the engine, the jury were asked to decide whether or not the respondent could be reasonably justified in assuming that the appellants' construction engineer should be capable of determining what would be a reasonably safe arrangement, and whether or not the respondent would be chargeable with a technical examination of all the plant to satisfy himself it was absolutely safe before he entered on his employment. It was also pointed out that the plant was not there at all when he entered this employment.

As to the third issue, the learned trial judge also put the question to the jury, whether or not the respondent was negligent when he left his position at the scales when he thought that the drum was only about one-half full.

> Was it necessary for him to go away from that drum, go to the point on the platform where he could not readily turn off that quick acting valve. If there is an explanation which you think is proper and reasonable, having regard to his duties, I suppose you would be justified in saying he was not negligent; but then on the other hand, if it was not necessary for him to investigate this condition of the tank, then it would seem that he might better have stayed at his own point of duty. Secondly, I would say that if it could be reasonably contemplated that what happened might happen as a result of him leaving that point of duty, it would be a very serious question for you to consider whether he is chargeable with negligence.

The learned trial judge then said that independently of the overflow of gasoline which the jury might or might not attribute to the negligence of the respondent, it was the uncontradicted evidence of Mr. Robb, the expert, to the effect that there would be a certain amount of gasoline vapour expelled from the drums and that if that vapour from the drums got into the engine room, it must have contributed to the accident.

The appellants, realizing that they have to contend against the verdict of the jury and the concurrent judgments of both courts below on these three questions of fact, submit:

1st. There is no negligence proven against either of the appellants;

2nd. There is certainly no justification for a judgment against both defendants;

3rd. The plaintiff respondent's contributory negligence disentitles him to any verdict;

4th. The maxim: *Volenti non fit injuria,* affords a complete defence.

5th. The learned trial judge failed to instruct the jury properly or at all for the failure of the appellants to instal an automatic barrel filler and the liability of the appellants with respect thereto. This point was not insisted upon at the argument before us. The jury came back to court and asked for the reading of the evidence on that point. Appellants never asked for a special direction, and, in any case, the absence of instructions would seem to have favoured the appellants more than the respondent, because the latter suggested to the appellants' inspector the desirability of such an addition to the plant which would have prevented any overflow.

6th. The damages awarded were excessive and unreasonable.

The position of the respondent in regard to all these points is that the jury has found in his favour on competent evidence, and he quotes the definition of the function of this Court by My Lord, the Chief Justice, in *C.N.R.* v. *Muller* (1), where he said:

> We premise that it is not the function of this Court, as it was not the duty of the Court of Appeal to review the findings of fact at which the jury arrived. Those findings are conclusive unless they are so wholly unreasonable as to show that the jury could not have been acting judicially. * * * In construing the findings, moreover, one must not apply a too rigorous critical method; if, on a fair interpretation of them, they can be supported upon a reasonable view of the evidence adduced, effect should be given to them.

The jury had before them the opinion of Mr. Charles A. Robb, Professor of Mechanical Engineering in the University of Alberta, who, the appellants readily admitted, was duly qualified as an expert, who said:

> Q. Will you tell His Lordship and the jury what in your opinion was the cause of that fire?
>
> A. In my judgment the fire resulted in the bringing together of a mixture of gasoline fumes with air in proportions suitable for combustion.
>
> Q. Now just to deal with that while we are at it. Would you tell us what that mixture is that you speak of?

(1) [1934] 1 D.L.R. 768 at 769.

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A. We describe a mixture of gasoline or naphtha fumes and air as being inflammable when these are present in the proportion of one and a half per cent of gasoline fumes up to six per cent, the remainder being air.

* * *

Q. Mr. WALSH: When you have this mixture of from one point five per cent to six per cent by volume of gasoline fumes with air what else is needed to cause trouble?

A. The introduction of a spark or flame is sufficient.

The professor also told the jury that in this case the naphtha was simply a mechanical mixture with the distillate and, as such, is as dangerous to handle for all practical purposes as if it were pure gasoline and he ends his direct examination as follows:

Q. Mr. WALSH: It was as inflammable as gasoline? What we laymen speak of as gasoline that we use in our cars?

A. The answer is in the affirmative, yes.

Q. Here is another question, in your opinion would this plant have been capable of safer operation with the engine house in a building entirely separate from the warehouse?

A. Yes.

Q. So then to recapitulate you say that the first safety measure that might have been taken was some form of separation of the engine room from the warehouse?

A. Yes.

Q. Having in view the object of preventing fumes of gasoline and tractor fuel from the warehouse entering the engine room?

A. Yes.

Q. And you say second, that you would have piped the exhaust from that engine to a place of safety outside the building?

A. Yes.

Q. You agree with me that the automatic drum filler would have been of some assistance as a safety measure?

A. I do.

Q. And finally you say that it would have been better if they had had them in a separate building?

A. Yes.

In view of the facts proven and of this competent evidence, the jury could reasonably find, as they did, and return a verdict in favour of plaintiff on the three issues of fact submitted to their consideration, as shown above.

As to the application of the maxim "*volenti non fit injuria,*" as it was clearly set out in *Letang* v. *Ottawa Electric Railway Co.* (1), it must be found as a fact, in order to afford a defence to an action for damages for personal injuries due to the dangerous condition of the premises to which the plaintiff has been invited on an errand of business, that he freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, expressly

(1) [1926] A.C. 725.

or impliedly agreed to incur it. Lord Shaw, at page 730, quoting Bowen L.J., in *Thomas* v. *Quartermaine* (1), says:

> "The maxim, be it observed, is not '*scienti' non fit injuria*—but '*volenti.*' It is plain that mere knowledge may not be a conclusive defence. * * * The defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with knowledge of a danger. * * * Knowledge is not a conclusive defence in itself. But when it is a knowledge under circumstances that leave no inference open but one, namely, that the risk has been voluntarily encountered, the defence seems to me complete."

The evidence adduced by the defendants was fully put to the jury by the learned trial judge to show that the respondent knew that it was a common thing for the engine to backfire from time to time; that if any fault existed in the construction of the building it existed from the time the respondent took over the plant; that he knew that the tractor fuel was a highly inflammable product and the vapour from it highly inflammable and dangerous; that he apprehended the danger of a spark exploding this kind of vapour; that he would not light a match there, and that he never complained. According to the rule above quoted, this would not be sufficient; the jury had to be satisfied that, not only did the plaintiff know, but that he accepted voluntarily to run the risk. See *Baade* v. *Hill* (2), and the authorities therein collected in the able judgment of Hughes J.

The appellant failed to show to the satisfaction of the Court that the damages awarded were excessive and unreasonable, and indeed did not insist before us for a reduction of the amount. The respondent proved that he was now totally incapacitated so far as manual labour was concerned, that he earned before the accident about $2,500 a year; according to the insurance statistics, his natural earning period would be about 32 years.

Even taking into account the natural vicissitudes, including accidents, diseases and possible death, we cannot say that the amount awarded under those circumstances is unreasonable.

Despite the able argument of Mr. Biggar, we must reach the conclusion that he has not successfully established that the findings of the jury or the courts below were clearly wrong on the facts of the case.

(1) (1887) 18 Q.B.D. 685, 696, 697.

(2) (1934) 4 D.L.R. 385.

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There remains the point of the joint liability of both appellants. Are they both liable if the verdict stands? The Refining Co. made the agreement, also secured the lease from the C.P.R. of the site where they built the plant and gathered the dangerous explosives. Both companies have the same general manager and the following notice was sent to the respondent:

REGAL OIL & REFINING COMPANY, LIMITED.

CALGARY, ALTA., Sept. 16, 1929.

The Agent,
Regal Distributors Ltd.

DEAR SIR,—For some time past there has been a change in effect with regard to the organization at the different branches of our Company. Each department such as Refining and Marketing are operated under different Company names.

All operations with which you are connected are to be operated under the name, of the REGAL DISTRIBUTORS LIMITED and we would ask, in future, that all communications or any other matters in which you may be called upon to use the name of the Company to use "Regal Distributors Limited" exclusively.

Yours very truly,

REGAL DISTRIBUTORS LTD.
H. E. McDONALD,
Sales Manager.

The Distributing Company is the one who was in charge of the premises at the time of the accident and had control over the respondent. Under the principle laid down in *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co. Ltd.* (1), both these companies would be liable towards the plaintiff. The Refining Company by the hands of its employees brought into the plant the dangerous substance for storage on the site which it had leased from the C.P.R. The lease provided that "the lessee will not during the said term, assign or sublet the said premises or any part thereof unto any person or persons, without first obtaining the written consent of the lessor." The lease was never assigned to the Distributing Company prior to the date when the plaintiff sustained his injuries. The Refining Company, therefore, was the occupant of the lands at all times prior to this action. As far as the Distributing Company is concerned, which in fact is only a continuing incorporated department of the Refining Company, it also occu-

(1) [1921] 2 A.C. 465.

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pied the land either as tenant or employee of the Refining Company. "They cannot escape any liability which otherwise attaches to them on storing it (the explosive) there merely because they have no tenancy or independent occupation of the land but use it thus by permission of the tenants or occupiers," quoting the words of Lord Sumner, in the above case, at page 479.

The appeal fails and must be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants: *Eric L. Harvie.*

Solicitors for the respondent: *A. Macleod Sinclair & Walsh.*

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* May 5, 6.
* May 27.

L'ACADÉMIE DE MUSIQUE DE QUÉBEC AND OTHERS (DEFENDANTS). } APPELLANTS;

AND

JULES PAYMENT (PLAINTIFF).....RESPONDENT;

AND

J. ARTHUR BERNIER AND OTHERS (DEFENDANTS);

AND

BERNARD PICHÉ (MIS-EN-CAUSE).

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

Competition for scholarship—Encouragement of music—Special jury—Examination of competitors—Verdict—Subsequent discovery of errors and partiality—Right of official body to revise verdict—Whether jury is functus officio—An Act for the Encouragement of Music, R.S.Q., 1925, c. 139—Art. 50 C.C.P.

The Academy of Music, in virtue of "An Act for the Encouragement of Music" (R.S.Q., 1928, c. 139), was receiving a yearly grant of $5,000, so that a scholarship called "Prix d'Europe" could be awarded, upon the verdict of a special jury of five members appointed by the Academy, to the competitor who would obtain the highest number of marks. In the year 1932, a competition was held; and, after the examination had been completed and all the judges had handed over to the secretary of the jury the ballots on which each of them had inscribed the respective number of marks allowed to each candidate, on each subject, and the number of marks for each candidate had been added up and arranged, it was found that the mis-en-cause Piché ranked first with 81·9 marks and the respondent, Payment, with 81·1 marks. Thereupon, one of the examiners, Morin, expressed the opinion that respondent's marks should be increased so that the

* PRESENT:—Rinfret, Cannon, Crocket, Kerwin and Hudson JJ.

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scholarship be awarded to him because in his opinion he deserved it; and another examiner, Bernier, in order to obtain such result, got back his ballot from the secretary and granted five marks more to respondent. The latter was accordingly declared the winner of the scholarship. A few days after the examination, another competitor, one Bélanger, wrote to the vice-president of the Academy that he had not been awarded for his musical dictation the marks he thought he was entitled to. The officers of the Academy ascertained the fact that an obvious error had occurred in Bélanger's case and thought that it would be expedient that the whole examination should be reviewed. The president of the Academy then called a meeting of the members of the jury and of the officials of the Academy, which took place on July 21, 1932. At that meeting, mistakes and errors in the allocation of marks to the respondent and Piché were admitted by the members of the jury, a rectification was made accordingly, and, as a result, the mis-en-cause Piché, having obtained 84·8 marks, while the respondent had only 76·9, was awarded the scholarship. The respondent, under art. 50 C.C.P., then took an action against the Academy of Music and the members of the jury for a declaration that he had won the scholarship and, claimed all the advantages deriving therefrom, and, also, for $5,000 damages. The trial judge dismissed the action, holding that the respondent had not won the scholarship, that the Academy of Music rightly refused to award it to him and that the Academy of Music could not be held liable for fraud committed by some of the examiners, and mistake by the others. The Court of King's Bench reversed this judgment, holding that the examiners were arbitrators, that they had become *functi officio* the moment they had signed their first report; that court annulled the decision of the jury rendered on July 21, 1932, and condemned the appellant to pay $1,000 damages to the respondent.

Held, reversing the judgment appealed from (Q.R. 59 K.B. 121) Cannon J. dissenting, that under the circumstances of this case, the respondent was not entitled to claim the scholarship and that the appellant was right in refusing to award it to him. Even admitting that the decision reached at the meeting of July 21, 1932, (which, according to the facts, cannot be considered as a second verdict, but as a rectification of the first verdict), was illegal and null, this Court had still the right and the duty to decide, what the court appealed from has failed to do, whether the first verdict was valid and legal, as such verdict had been contested by the appellant in its plea. It was not only the right, but also the duty, of the appellant, as mandatory of the legislature in the distribution of public moneys, to investigate the proceedings of the jury and, after having found evident errors and illegalities, which were admitted by the members of the jury at the meeting of July 21, 1932, and have been held as proven by the trial judge, to award the scholarship to the competitor who had obtained "the highest number of marks" according to the statute.

Per Cannon J. (dissenting).—The only regular competition for the scholarship of 1932 and the only official examination of the competitors had taken place on June 16 and 17, 1932. The respondent is entitled to claim the benefit of the unanimous decision of the jury rendered on June 17 and of the official document, bearing the seal of the Academy, which stated that he was the winner of the scholarship. The jury, after having rendered its verdict, had no more powers to act as such (*functus officio*). The proceedings subsequent to the first verdict as well as the

second verdict were illegal, as the statute incorporating the Academy does not provide for any appeal from the decision of the jury to the executive committee of the Academy or to the members of the jury individually or collectively. If the officials of the Academy were of the opinion that there had been fraud, partiality or errors in the conduct of the competition, they should have proceeded by way of action under art. 50 C.C.P. to annul the verdict of the jury.

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

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

Ls. St-Laurent K.C. and *Arthur Vallée K.C.* for the appellant.

J. M. Guérard K.C. for the respondent.

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

RINFRET J.:—L'Académie de Musique de Québec a été fondée en 1867 et constituée en corporation en 1870 par un Acte de la législature de Québec.

Le 24 mars 1911, le parlement de Québec a adopté une loi pour favoriser le développement de l'art musical, en vertu de laquelle le lieutenant-gouverneur en conseil a été autorisé à accorder à l'Académie une subvention annuelle ne dépassant pas $5,000.

Par cette loi, le paiement de cette subvention est déclaré sujet à l'accomplissement de certaines conditions stipulées dans le statut, en outre de toutes autres conditions qu'il plairait au lieutenant-gouverneur en conseil d'imposer.

Le statut pourvoit à ce que l'Académie, chaque année, ouvre un concours spécial pour le chant, le piano, l'orgue, le violon ou le violoncelle; à ce que les concurrents soient jugés par un jury spécial nommé par l'Académie de Musique de Québec et qui doit être composé de cinq membres, dont deux doivent être choisis en dehors des membres de l'Académie. Ne peuvent prendre part au concours que les porteurs de diplômes de lauréat de l'Académie de Musique

(1) (1935) Q.R. 59 K.B. 121.

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de Québec qui sont sujets britanniques, âgés de pas plus de vingt-cinq ans et qui résident dans la province de Québec depuis trois ans au moins. L'Académie doit cependant, aux conditions qu'elle juge équitables, admettre à concourir pour le diplôme de lauréat les élèves des autres institutions musicales de la province.

Les boursiers doivent, pour bénéficier des avantages que leur confère cette loi, suivre le programme d'études déterminé par l'Académie de Musique de Québec.

Et voici comment la loi définit de quelle façon doit être choisi le gagnant de la bourse:

(c) Celui des concurrents qui obtient le plus grand nombre de points a le droit d'aller, aux frais de l'Académie de Musique de Québec, passer deux ans en Europe pour y compléter ses études musicales.

Cela veut dire évidemment que le jury nommé par l'Académie pour juger le concours spécial ouvert chaque année doit attribuer un certain nombre de points à chaque concurrent, que celui des concurrents qui obtient le plus grand nombre de ces points se trouve être le gagnant de la bourse et qu'il acquiert, par le fait même, le droit d'aller en Europe, pendant deux ans, compléter ses études musicales aux frais de l'Académie.

Pour l'année 1932, l'Académie ouvrit le concours spécial et en fixa la date aux 16 et 17 juin de cette année. Le jury spécial fut composé de MM. J.-A. Bernier, président, Léo-Pol Morin, Raoul Paquet, Camille Couture et Henri Miro. L'Académie, ainsi qu'il lui appartenait et conformément à la coutume, indiqua les matières sur lesquelles le concours devait avoir lieu et fixa sur chaque matière le maximum des points qui pouvaient être accordés par le jury comme suit:

1. Solfège	15
2. Dictée musicale	15
3. Harmonie orale	5
4. Harmonie écrite	10
5. Histoire de la musique	5
6. Répertoire	25
7. Pièce imposée	25
Total des points	100

Le concours comportait donc des épreuves écrites et des épreuves orales, ou d'exécution. A cette fin, l'Académie chargea l'abbé Alphonse Tardif d'écrire une basse chiffrée de huit mesures et un chant donné, également de huit

mesures, qui devaient faire l'objet du concours d'harmonie écrite "en rapport avec le programme indiqué dans la circulaire du prix d'Europe". M. Emile Larochelle fut désigné pour écrire un solfège de seize mesures avec accompagnement, une dictée musicale de douze mesures et cinq questions d'histoire sur la musique. C'est ainsi que les conditions du concours furent fixées et qu'elles furent acceptées par le jury et par les concurrents qui se présentèrent au nombre de neuf.

De ces concurrents, il suffit de retenir trois noms: MM. Bernard Piché, Edwin Bélanger et Jules Payment (le demandeur-intimé). Au concours, d'après la preuve faite au procès, les membres du jury procédèrent de la façon suivante: les examens écrits furent confiés à un seul d'entre eux, M. Léo-Pol Morin, qui corrigea les copies et attribua les points. Le nombre de points ainsi accordés par lui fut ensuite communiqué aux autres membres du jury, qui s'en rapportèrent à lui sans faire d'examen individuel pour leur propre compte et inscrivirent sur le bulletin qui avait été remis à chacun d'eux à cet effet les chiffres octroyés par M. Morin pour l'examen écrit.

Après avoir rempli leurs bulletins, les membres du jury les remirent au secrétaire du concours; puis, dans le but de constater quel était celui des concurrents qui avait obtenu le plus grand nombre de points, le secrétaire procéda à établir, pour chaque matière, le pourcentage des points attribués à chaque candidat par chaque membre du jury, le total de la résultante sur chaque matière devant fixer le chiffre obtenu par chaque concurrent.

Lorsque ce calcul fut terminé, il fut constaté que Bernard Piché avait obtenu 81.9 et Jules Payment, l'intimé, 81.1. Sur quoi, M. Morin dit:

> M. Piché a 81-9 points; M. Payment en a 81.1. Le nombre des points de M. Payment doit être augmenté afin d'avoir la bourse, car il la mérite à tous les points de vue,

ou encore:

> Malgré les points que vous nous soumettez, [illegible] les juges ont déclarés d'après leurs bulletins, je persiste à vouloir nomn [illegible] M. Payment boursier du prix d'Europe.

D'après le témoignage de M. J.-A. Bernier, M. Morin avait une théorie

> qu'il fallait développer le musicien avant le technicien * * * et donner le prix à M. Payment, *sans égard aux points qui pouvaient marquer une majorité à* M. Piché.

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Alors, de sa propre admission, M. Bernier s'adressa au secrétaire et lui demanda:

De combien faudrait-il que j'augmenterais mon bulletin afin que M. Payment arrive en premier lieu?

Le secrétaire lui fit remarquer que, comme le calcul des points se faisait par pourcentage, il faudrait à M. Bernier augmenter de cinq points les chiffres déjà marqués sur son bulletin afin que, le pourcentage étant établi, le nombre des points de M. Payment fut augmenté d'une unité. Et c'est ce que fit immédiatement M. Bernier.

Au procès, la Cour lui posa la question:

Q. Vous avez augmenté les points de manière à donner la majorité à M. Payment?

R. Oui. Moi, je ne m'occupais que de ma copie. Là, on a proclamé que c'était M. Payment qui avait le prix. *Ce n'est pas tant le nombre de points* comme les aptitudes qui l'emportent

Pour expliquer ce procédé, on prétendit que les membres du jury étaient maîtres du concours tant que le résultat n'aurait pas été proclamé; le secrétaire exprima l'avis qu'il était encore temps pour faire le changement; les membres du jury acquiescèrent à cette remarque; et le rapport du jury fut, en conséquence, préparé attribuant à M. Payment le nombre de points ainsi modifié et qui lui donnait la majorité.

Le rapport fut transmis le soir même à l'Académie de Musique, qui tenait sa réunion annuelle et qui, sur la foi du rapport, proclama Payment vainqueur du concours.

Mais voilà que, quelques jours après, le secrétaire de l'Académie fit tenir à chaque concurrent le détail des points qui lui avaient été accordés et que M. Edwin Bélanger constata que, pour la dictée musicale, le jury lui avait accordé 0, alors qu'il avait bien conscience d'avoir remis une copie presque parfaite. Il fit part de sa surprise à son professeur, qui était en même temps vice-président de l'Académie de Musique. Ce dernier pensa qu'il ne pouvait y avoir d'inconvénient à vérifier s'il n'y avait pas erreur. Il en parla au président de l'Académie. On se procura la copie de Bélanger et l'on fut, en effet, d'avis que cette copie était tellement satisfaisante que l'attribution du chiffe 0 devenait inexplicable. La curiosité des membres de l'Académie étant ainsi éveillée, ils poussèrent plus loin leurs investigations et arrivèrent à la conclusion que les bulletins remis par les membres du jury contenaient de

telles erreurs qu'il y avait lieu d'obtenir des explications. Ils prièrent donc d'abord le président du jury d'en réunir les membres pour permettre aux officiers de l'Académie d'éclaircir la situation. Le président du jury refusa, sur quoi le président de l'Académie les convoqua d'office; et la réunion des membres du jury et des officiers de l'Académie eut lieu le 21 juillet 1932.

Dans l'intervalle, le secrétaire de l'Académie avait prévenu M. Payment de ne faire aucun préparatif pour son départ pour l'Europe "vu certaines difficultés survenues au sujet du prix".

A la réunion du 21 juillet, à laquelle assistaient quatre officiers de l'Académie, les erreurs découvertes dans l'attribution des points aux concurrents furent soumises aux membres du jury, qui étaient tous présents. Il y fut clairement spécifié que cette réunion était convoquée dans le but de faire une vérification des points qui avaient été accordés par les juges

afin de pouvoir fournir au gouvernement tous les renseignements qu'il pourrait exiger d'eux (les officiers de l'Académie) en leur qualité de fidéicommis.

L'Académie ne prétendait pas provoquer chez les membres du jury un changement d'appréciation sur les mérites de chaque concurrent; elle désirait seulement, comme il est dit dans le mémoire confidentiel qui leur fut communiqué et comme il a été répété à maintes reprises au cours de l'enquête dans la cause, savoir d'eux s'il n'y avait pas vraiment des erreurs dans le résultat "d'après les chiffres mêmes des juges", lors du concours. Le procès-verbal de l'assemblée du 21 juillet en fait foi. Le président y expliqua qu'il s'agissait

d'une rectification d'erreurs et omissions commises par le jury lors des examens du 17 juin dernier.

Et, en effet, séance tenante, les erreurs signalées par les officiers de l'Académie furent constatées par les membres du jury. Elles furent inscrites au procès-verbal de l'assemblée. Les corrections qu'elles comportaient furent faites; et, comme conséquence, il fut établi que le véritable résultat du concours, basé sur les seuls chiffres exacts, était que M. Bernard Piché, et non pas M. Jules Payment, avait obtenu le plus grand nombre de points.

Que l'on remarque que cette admission fut faite par les cinq membres du jury.

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Malgré cela, et après que, vérification étant faite et le bulletin de chaque candidat étant corrigé, le résultat démontrait que M. Bernard Piché avait obtenu 84.8 sur 100, alors que M. Jules Payment n'avait obtenu que 76.9 sur 100 points, l'on voit que M. Morin s'adressa alors aux quatre autres membres du jury et insista pour un remaniement des points en faveur de M. Payment, afin que la bourse lui fût accordée. On eut beau attirer son attention sur les prescriptions de la loi que c'est "celui des concurrents qui obtient le plus grand nombre de points" qui a le droit d'aller en Europe aux frais de l'Académie de Musique de Québec; après lecture de cet article de la loi, M. Morin persista quand même pour accorder la bourse à M. Payment; mais les quatre autres juges se prononcèrent en faveur de M. Piché, qui avait obtenu le plus grand nombre de points. Puis le document fut signé par les membres du jury, y compris M. Morin, qui se trouva par là certifier le véritable nombre de points alloués à chacun des neuf candidats, mais qui crut devoir ajouter à sa signature la note suivante:

> Leo-Pol Morin dissident, parce qu'il maintient son jugement du 17 juin 1932 en faveur de Jules Payment.

Il va sans dire que, comme résultat de cette rectification, M. Payment fut averti du changement survenu et qu'il ne pouvait compter sur la bourse du prix d'Europe pour cette année-là; et le secrétaire fut chargé de faire rapport, en conséquence, à l'Honorable Secrétaire Provincial, dont cette question dépend dans l'administration du gouvernement de la province de Québec.

C'est dans ces conditions que l'intimé intenta devant la Cour Supérieure une action dirigée contre l'Académie de Musique de Québec et contre chacun des membres du jury, mettant en cause, en plus, Bernard Piché, son heureux concurrent, et l'Honorable L.-A. Taschereau, Premier Ministre de la province de Québec, en sa qualité de Trésorier de la province, et l'Honorable Athanase David, en sa qualité de Secrétaire de la province. Il produisit cependant plus tard un désistement de la mise en cause de MM. Taschereau et David.

Les conclusions de l'action étaient qu'il fut déclaré que l'intimé avait gagné le prix d'Europe pour l'année 1932, comportant une bourse lui donnant le droit d'aller, pendant

deux ans, y parfaire ses études musicales; à ce qu'ordre fut donné à

l'Académie de Musique de Québec de donner suite immédiatement à la proclamation (de l'intimé) comme boursier du prix d'Europe; à ce que la revision, faite au sujet du verdict rendu le 17 juin 1932, soit annulée et à ce que le verdict soit maintenu; à ce que les résolutions, procès-verbaux, règlements et autres écrits et documents se rapportant à ce concours et qui ont été faits dans le but d'enlever ledit prix d'Europe au demandeur soient annulés et résiliés à toutes fins futures que de droit; à ce qu'à défaut par l'Académie de Musique de Québec de se conformer au jugement (à être rendu) dans la présente cause dans un délai de quinze jours, le demandeur soit autorisé à parfaire ses études musicales, pendant deux ans, en Europe, aux frais et dépens de l'Académie de Musique de Québec; à ce que la défenderesse, l'Académie de Musique de Québec, soit condamnée à payer au demandeur la somme de $5,000 à titre de dommages; le tout avec intérêt et dépens contre l'Académie de Musique de Québec, la défenderesse, pour les raisons mentionnées plus haut, et contre les autres parties, au cas de contestation de leur part seulement.

Bien naturellement, par son plaidoyer, l'Académie de Musique, à laquelle se joignirent MM. Couture et Miro, nia que Payment fût le gagnant de la bourse du prix d'Europe pour l'année 1932; elle affirma que la proclamation qui l'avait déclaré premier avait été faite par erreur et sur la foi de documents dont l'inexactitude fut ensuite établie et reconnue, ajoutant que ce que Payment appelait la "revision" du 21 juillet 1932 n'avait été, en fait, qu'une rectification provoquée après que l'erreur dans la proclamation eût été découverte, dans le but d'empêcher une injustice criante et pour pourvoir au redressement de justes griefs. Le véritable résultat de l'examen n'y avait pas été changé, mais, au contraire, il y avait été confirmé, après le redressement d'inexactitudes flagrantes. Comme conséquence, le demandeur était mal fondé, en fait et en droit, à demander d'être rétabli dans les prétendus droits qu'il n'avait pas et qu'il n'avait jamais eus.

La cause procéda devant l'honorable Juge Philippe Demers, qui, devant les faits prouvés et, en particulier, les omissions et les erreurs admises, prononça un jugement où il fait observer que

par l'article 2 du chapitre 139 S.R.P.Q (Loi pour favoriser le développement de l'art musical) le législateur veut que celui des concurrents qui obtient le plus grand nombre de points ait le droit d'aller, aux frais de l'Académie de Musique de Québec, passer deux ans en Europe, pour y compléter ses études musicales; * * * que l'intention du législateur, c'est que ce prix soit accordé à celui qui le mérite, d'après l'examen; que c'est ainsi que le demandeur l'interprète quand il demande à la Cour, par ses conclusions, de déclarer qu'il avait gagné le prix; * * * qu'il est

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clairement établi que le meilleur examen était celui de Piché; que c'est par favoritisme qu'un examinateur a accordé au demandeur les points qui lui manquaient pour être le premier; que le demandeur n'avait pas gagné le prix d'Europe et que la défenderesse a eu raison de le lui refuser, * * * que la défenderesse ne saurait être tenue responsable de la fraude de quelques-uns des membres du jury et de l'erreur des autres:

Et, pour ces motifs, l'honorable juge de première instance débouta le demandeur de son action.

Le résultat devant la Cour du Banc du Roi (1), où la cause fut portée par Payment, fut assez peu satisfaisant. Le jugement de cette cour constate que l'action est bien autorisée par l'article 50 du Code de Procédure Civile; mais il perd complètement de vue le véritable but et la vraie base de cette action qui est, d'une part, de faire déclarer que Payment a été le vainqueur du prix d'Europe de 1932 et qu'il a droit comme tel de réclamer de l'Académie de Musique la somme de $3,000 pour lui permettre d'aller compléter ses études musicales en Europe pendant deux ans; ou, à défaut par l'Académie de lui payer cette somme, d'être autorisé à y aller aux frais de l'Académie; et, d'autre part, l'allégation de la défense que Payment n'a pas été le véritable gagnant du concours mais qu'il a été proclamé par erreur, sur la foi d'un rapport dont l'inexactitude fut subséquemment reconnue et établie. Le jugement se contente de déclarer que l'assemblée du 21 juillet 1932 était irrégulière parce que le jury était alors *functus officio* et qu'il n'avait plus le pouvoir de reviser son rapport; et il annule cette prétendue revision comme illégale et *ultra vires*. Le jugement ajoute que comme

there is nothing before this Court to show that the respondent, the Academy of Music of Quebec, will refuse to act upon the first verdict, now that the second verdict has been set aside,

en conséquence,

reserving to the plaintiff all the rights accruing to him in virtue of the first verdict of the jury and the terms of the statute,

il casse "the second verdict", rendu le 21 juillet 1932; il accorde au demandeur la somme de $1,000 à titre de dommages

for the loss of pupils, the loss of his position with a radio company, for damages to his reputation, and for the loss of two years, at a very important time in the appellant's life, in completing his musical studies;

mais oubliant que ces dommages ont été le résultat des actes illégaux des membres du jury, et non le fait de l'Aca-

(1) (1935) Q.R. 59 K.B. 121.

démie, il condamne cette dernière à les payer et il met tous les frais de l'action et de l'appel conjointement et solidairement contre l'Académie de Musique et contre Couture et Miro, qui ont contesté. Au surplus, il laisse les parties dans l'état où elles étaient avant que l'action ne fût intentée.

Ce jugement a pour effet de ne rien décider sur le point principal de l'action de Payment; et, surtout, il ne tient aucun compte du fait que l'Académie de Musique avait obtenu devant la Cour Supérieure un jugement par lequel elle était relevée, à cause du favoritisme et de la fraude de certains membres du jury et de l'erreur des autres, de l'obligation de payer à Payment la somme de $3,000 et de l'envoyer en Europe pour deux ans à ses frais.

Sur ce dernier point, l'un des juges, après avoir exprimé l'avis que

there is, in my opinion, abundant evidence that Mr. Piché was, by the conduct of the jury, deprived of the award to which he was entitled;

que "Mr. Bernier arbitrarily increased his figures"; que "there can be little doubt but that Mr. Piché was unjustly treated", semble être amené à se rallier à la majorité de la Cour parce que le droit de contester la validité du verdict n'aurait appartenu qu'à M. Piché, le concurrent qui était véritablement arrivé le premier au concours:

Had Mr. Piché attacked this award, I am inclined to believe that he might have been successful in having it declared that the procedure was illegal.

Mais il se range à l'avis exprimé au nom de la majorité de la Cour par M. le juge Barclay

that the jury was, from the moment they made their first award, *functus officio*, that they had no power to revise their decision, and that, in consequence, the appeal should be allowed.

Quant aux raisons données par la majorité sur la même question, elles se lisent comme suit, après avoir fait allusion aux Considérants du juge de première instance:

Favoritism or fraud on the part of any of the jury does not confer upon the jury a power which no longer existed after it had rendered its verdict. As to whether or not these considerants are founded in fact, I do not need discuss, being of the opinion that under no circumstances could the jury revise its verdict. It may be for some other court to decide at the proper time and place as to whether the facts revealed show favoritism and fraud or a proper appreciation of the objects of the scholarship.

C'est comme conséquence de ce raisonnement que l'appel fut maintenu et que le jugement qui nous est maintenant soumis fut prononcé dans le sens plus haut indiqué.

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Nous avouons ne pas comprendre l'importance que l'on a donnée à la question de savoir si les membres du jury pouvaient être considérés ou non comme des arbitres et si, comme tels, ils avaient le pouvoir de reviser, le 21 juillet, le rapport qu'ils avaient fait le 17 juin. Sur ce point, il y aurait certainement lieu, comme l'ont suggéré les procureurs des appelants devant la Cour Suprême, d'examiner la portée du jugement du Conseil Privé dans la cause de *Lacoste* v. *Cedar Rapids Manufacturing Company* (1).

Dans cette affaire, comme on le sait, le Conseil Privé, en étant arrivé à la conclusion que la sentence arbitrale procédait d'un point de vue erroné de la loi, ordonna que la cause fut renvoyée devant les mêmes arbitres pour qu'ils prononcent une nouvelle sentence en tenant compte de la loi telle qu'elle était définie dans le jugement du Comité Judiciaire.

Mais admettons, pour les besoins de l'argument, que le rapport du 21 juillet fût un nouveau verdict, que le jury fût *functus officio* et n'eût pas le pouvoir de le rendre.

Mettre de côté ce prétendu second verdict n'avait pas pour effet de régler le litige. Cette conclusion, dans l'action instituée par Payment, n'était qu'un moyen subsidiaire pour arriver au véritable but de Payment: se faire déclarer vainqueur du concours du 17 juin et faire reconnaître son droit aux $3,000 du prix d'Europe. C'est en cela que consistait le procès et pour cela qu'il avait été intenté.

Le jugement de la Cour du Banc du Roi, non seulement ne tranche pas cette question, qui est le vrai fond de la cause, mais il oublie que la Cour Supérieure l'a jugée en faveur de l'Académie de Musique et que si, par ailleurs, les deux parties ont le droit d'avoir une décision sur ce point (Code civil, art. 11), l'Académie a, pour sa part, un droit acquis au jugement qui a maintenu sa défense et qui a, par là, décidé qu'elle ne devait pas à Payment les $3,000 qu'il réclamait. La Cour du Banc du Roi devait se prononcer là-dessus. Elle ne le faisait pas en écartant tout simplement la séance du 21 juillet. Elle laissait par là subsister le verdict du 17 juin. Elle va jusqu'à dire que,

> now that the second verdict has been set aside * * * there is nothing to show that * * * the Academy of Music of Quebec will refuse to act upon the first verdict.

(1) [1914] A.C. 569.

En tout respect, c'est précisément le contraire qui est exact. La plaidoirie écrite de l'Académie est là, dans le dossier, qui allègue que

la proclamation (du nom de Payment, le 17 juin) a été faite par erreur, et sur la foi de documents dont l'inexactitude a ensuite été établie et reconnue,

qu'elle refuse de donner effet au verdict "dans le but d'empêcher une injustice criante" et des "inexactitudes flagrantes"; que

le demandeur ne saurait être "rétabli" dans des droits qu'il n'a pas et qu'il n'a jamais eus.

C'est ainsi que la contestation a été liée. Bien plus, la Cour Supérieure a donné raison à l'Académie et a rejeté l'action de Payment qui demandait la mise à exécution du verdict et, comme conséquence, le versement des $3,000.

Dire que le jury n'avait plus le pouvoir de rectifier son verdict, ce n'est pas régler la question. C'est écarter un des obstacles. Mais il reste que le verdict lui-même est attaqué, que sa validité et sa légalité sont en jeu. La Cour Supérieure a le pouvoir et le droit d'en constater la nullité. Nous ne savons devant quelle autre cour l'Académie pourrait aller pour faire décider

at the proper time and place whether the facts revealed show favouritism and fraud or a proper appreciation of the objects of the scholarship.

Toute cette question était régulièrement soulevée devant la Cour Supérieure. C'était là le lieu et le temps pour la discuter et pour la décider. Comme c'est encore, devant la Cour du Banc du Roi, et devant nous, le lieu et le temps pour la trancher—même si la séance du jury, le 21 juillet, était à cet égard inefficace.

Mais, comme conséquence des faits que nous avons exposés au commencement de ce jugement, nous ne considérons pas que les membres du jury, réunis le 21 juillet, ont prononcé un second verdict. Ils se sont alors contentés de constater des erreurs et des omissions dans le premier verdict. Ils les ont reconnues et admises; ils les ont consignées dans un procès-verbal. Ils n'ont pas rendu une nouvelle sentence; ils se sont bornés, après avoir rectifié les erreurs et les omissions dont le premier verdict était entaché, de faire rapport que ce premier verdict était inexact et que le véritable verdict qui aurait dû être rendu le 17 juin, d'après les points alors alloués, aurait dû être un verdict en faveur de Bernard Piché, et non pas un

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verdict en faveur de Payment, le demandeur-intimé. Il en résulte qu'il n'y a pas eu, ce jour-là, de verdict qui avait à être mis de côté et même qui pouvait être mis de côté. Il n'y a eu qu'un procès-verbal et un rapport constatant les erreurs du premier verdict. Qu'on l'envisage de quelque côté que ce soit, on ne peut éviter que ce document constitue une admission de la part des membres du jury que le rapport fait le 17 juin 1932 était inexact et que la proclamation de Payment comme vainqueur du concours avait été faite par erreur, sur la foi d'un rapport erroné, alors que, suivant les termes de la loi, "celui des concurrents qui avait obtenu le plus grand nombre de points" aurait dû être le gagnant. Celui qui avait réellement obtenu le plus grand nombre de points à la suite du concours, c'était M. Bernard Piché.

En somme, il nous est vraiment indifférent que la réunion du 21 juillet ait eu lieu ou non, qu'elle soit mise de côté ou qu'elle ne le soit pas. Ce qui importe, c'est que les erreurs et les illégalités du concours, découvertes après coup par les officiers de l'Académie, aient toutes été établies dans la cause, que le juge de première instance les ait déclarées prouvées et qu'il les ait qualifiées de favoritisme et de fraude. Le demandeur se retranche derrière une question de plaidoirie et soumet devant cette Cour que le favoritisme et la fraude n'étaient pas allégués. Le plaidoyer, comme nous l'avons vu, a invoqué l'erreur du verdict et de la proclamation résultant d'une "injustice criante" et d'"inexactitudes flagrantes". Tous les faits sur lesquels le juge de la Cour Supérieure s'est basé ont été soumis à l'enquête sans objection de la partie adverse. Entre une "injustice criante" et le favoritisme il n'y a qu'une nuance. Entre des "inexactitudes flagrantes" et la fraude la distance n'est pas longue à parcourir. Et qu'est-ce que le favoritisme, si ce n'est une des nombreuses formes que revêt la fraude? D'ailleurs, l'erreur dans laquelle l'Académie a été induite est clairement invoquée, et la cause de cette erreur, c'est la fraude et le favoritisme de quelques-uns des membres du jury. Le résultat très clair de cette erreur, c'est que ce n'est pas M. Payment qui, conformément à la loi, a obtenu "le plus grand nombre de points" lors du concours. Et il s'ensuit que, indépendamment de toute autre considération, M. Payment n'a pas prouvé sa cause, et que, conséquemment, son action ne pouvait être maintenue.

Dans les circonstances, pourquoi refuserait-on à l'Académie de Musique le droit de méconnaître le rapport d'un jury qui a été reconnu erroné et inexact? Elle avait été constituée, par un acte du parlement de Québec, le fidéicommissaire des fonds publics octroyés par lui pour le développement de l'art musical et chargée de voir à ce que le prix d'Europe fût accordé à "celui des concurrents qui obtenait le plus grand nombre de points" lors du concours spécial qu'elle avait reçu mission d'organiser. C'était donc, non seulement son droit, mais son devoir, dès qu'elle était informée de la possibilité d'une erreur, de procéder à faire toutes les investigations nécessaires pour se rendre compte de l'exactitude de son information et de l'existence de cette erreur. Quel moyen plus juste et plus efficace pouvait-elle employer à cette fin que celui auquel elle a eu recours de convoquer les membres du jury, de leur soumettre la nature de ses informations et d'obtenir d'eux les explications requises pour constater si, oui ou non, ces erreurs et ces inexactitudes existaient, avec le résultat, dans le cas actuel, que les membres du jury eux-mêmes ont admis que le rapport du 17 juin 1932 était inexact et qu'il n'était pas conforme à la loi en vertu de laquelle, seule, M. Payment pouvait réclamer la bourse d'Europe?

Nous ne voulons pas entrer dans les détails de la preuve qui, à notre point de vue, justifiait pleinement la conclusion à laquelle en est arrivé l'honorable Juge Demers. Nous nous contentons de faire remarquer que la loi exige un jury composé de cinq membres; que l'esprit de cette loi est évidemment que chaque membre du jury doit se prononcer sur le mérite de chaque examen; que les membres du jury n'ont pas le droit de s'en rapporter, comme il a été fait ici, à la seule décision d'un d'entre eux sur la valeur des examens écrits; et que, de ce seul chef, l'on serait en droit de conclure qu'un concours conduit de cette façon n'était pas conforme à l'intention du parlement.

Mais nous ajouterons que tous les faits révélés relativement à la manière dont quelques-uns des membres du jury ont fini par octroyer à Payment un nombre de points suffisant pour lui permettre d'arriver premier et, en particulier, cette façon d'augmenter les points de Payment après que les bulletins de chaque membre du jury avaient été remis au secrétaire et par conséquent, après que chacun

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d'eux pouvait être considéré comme ayant arrêté le nombre de points qu'il octroyait, nous paraît suffisamment répréhensible pour que l'on ne soit pas surpris que le juge de première instance l'ait qualifiée de favoritisme. Il ne s'agit pas ici, en effet, d'un doute sur ce qui s'est passé, car nous avons l'admission du membre du jury lui-même. Il n'a pas ajouté après coup à son bulletin un certain nombre de points supplémentaires parce qu'il croyait consciencieusement que le concurrent les méritait; mais, de son propre aveu, parce qu'il voulait lui donner les points qu'il lui fallait pour arriver premier. Sur la déclaration qu'il a faite en cour, on serait justifiable de présumer qu'il était prêt à lui donner n'importe quel nombre de points dans le but d'arriver à ce résultat.

Nous ne croyons pas devoir insister sur la théorie préconisée par M. Morin, ainsi qu'elle a été rapportée au commencement de ce jugement; et il est suffisant, suivant le langage du Palais, de la laisser parler par elle-même.

En outre de ces différentes considérations, il n'a pas encore été mentionné que l'une des erreurs constatées lors de la réunion du 21 juillet, c'est que M. Morin, qui a corrigé les examens écrits, avait ensuite dicté aux autres membres du jury les points qu'il avait accordés à chaque concurrent. Ces points avaient été inscrits par lui sur chaque copie d'examen. Sur la matière de l'harmonie écrite, il y avait, comme on s'en souvient, deux parties: la basse chiffrée et le chant donné. Piché avait remis sa copie sur deux feuilles: une pour le chant donné et l'autre pour la basse chiffrée. Sur la première feuille, quatre points avaient été inscrits, et cinq points sur la seconde feuille. D'après la preuve, lorsque le résultat fut dicté aux autres examinateurs, ou bien, par méprise, Morin n'aurait dicté qu'un des chiffres, ou bien les autres n'en auraient compris qu'un. Toujours est-il que sur les bulletins il y eut erreur dans le chiffre qui aurait dû réellement être inscrit pour Piché. Il est évident que, d'après la façon de procéder, Piché aurait dû avoir le même nombre de points pour cet examen de l'harmonie écrite sur chacun des bulletins, puisque la note accordée provenait du seul M. Morin; et cependant, par suite d'un malentendu, au lieu de 9 que Piché aurait dû avoir, comme trois des membres du jury n'écrivirent que le chiffre 4, la moyenne ou le pourcentage lui donna

seulement 5.9. Il y avait là une omission de 3.1 qui, à elle seule, était suffisante pour changer le résultat du concours et pour donner encore "le plus grand nombre de points" à Piché, nonobstant l'addition que M. Bernier crut devoir faire aux points de Payment après que son bulletin avait été remis au secrétaire. C'est, entre autres, à cette constatation que le juge de première instance a fait allusion lorsque, dans son jugement, il dit que la proclamation du 17 juin a été le résultat de l'erreur des membres du jury.

Dans les circonstances, va-t-on prétendre que Payment, malgré les erreurs constatées et vérifiées et malgré qu'il n'avait pas réellement obtenu le plus grand nombre de points, devait quand même recevoir les fonds de la province de Québec des mains de l'Académie de Musique et partir pour l'Europe aux frais de cette dernière? Il ne nous paraît pas discutable que l'Académie avait à la fois le devoir et le droit de s'opposer à cette conséquence et que Piché n'était pas le seul à pouvoir porter plainte à ce sujet.

Comme nous l'avons déjà dit, nous n'avons pas besoin de nous demander, au cas où la réunion du 21 juillet eût réellement eu cet objet, si les membres du jury, ce jour-là, ont procédé à rendre un second verdict et s'ils avaient encore le pouvoir de le faire. Il nous suffit de savoir qu'en l'occurrence ils ont constaté et reconnu leur erreur. On ne saurait admettre que, l'erreur une fois constatée, la situation fût sans remède et que, comme l'ont prétendu les procureurs de l'intimé, la décision rendue le 17 juin était finale et sans appel.

Supposons le cas où, dans un concours de ce genre, régi par des conditions statutaires semblables à celles de la loi dont il s'agit ici, le fiduciaire, investi du devoir d'attribuer un prix payé sur les fonds publics, découvrirait, après la proclamation d'un candidat comme gagnant de ce concours que ce candidat s'est rendu coupable de plagiat. Il serait inadmissible que le fiduciaire fût lié irrévocablement par le verdict et par la proclamation et qu'il fût quand même obligé de verser l'argent au plagiaire.

Rapprochons-nous davantage du concours qui nous occupe. Prenons le cas d'Edwin Bélanger, tel qu'il a été révélé dans cette cause-ci. Nous avons commencé à en parler au début de ce jugement. Bélanger, recevant le détail des points qui lui avaient été attribués, s'aperçoit

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qu'il a obtenu 0 pour la dictée musicale qui, d'après les règlements du concours, comportait un maximum de 15 points. Il attire l'attention des officiers de l'Académie sur ce qui lui paraît être une erreur évidente. Les officiers de l'Académie prennent connaissance de sa copie et trouvent, comme lui, que le chiffre qui lui a été octroyé est injustifiable. Les bulletins des cinq membres du jury lui ont accordé 0, toujours en vertu de cette méthode qui avait confié la correction des examens écrits au seul M. Morin et qui leur avait fait transcrire sur chacun de leurs bulletins le chiffre accordé par M. Morin. Le 21 juillet, lorsque les officiers de l'Académie saisissent de la question les membres du jury tous sont d'accord pour admettre qu'il y a là une inexactitude flagrante, et voici comment le procès-verbal consigne l'explication de cette erreur:

> M. Morin, qui avait corrigé ces devoirs, déclare qu'il est convaincu qu'il a écrit sur la copie de Bélanger, par erreur, le chiffre 0 qu'il voulait mettre sur une autre copie, laquelle ne valait rien. M. Bernier donne la même explication.

Cette explication est inqualifiable et la coïncidence qui voudrait que M. Morin et M. Bernier aient tous deux commis une substitution aussi exceptionnelle est véritablement incroyable. On frémit à la pensée que des jeunes gens qui se soumettent à un examen ou à un concours puissent être exposés à un accident de ce genre. En cette circonstance tous les membres du jury convinrent que M. Bélanger avait droit à 13 points pour cette matière. Mais la question sur laquelle nous voulons surtout insister, en donnant cet exemple tiré du concours lui-même, est la suivante: s'il était arrivé que, par suite de cette rectification, Bélanger fût devenu le candidat qui avait obtenu le plus grand nombre de points, y a-t-il lieu de douter pour un seul instant que le devoir de l'Académie de Musique eût été de lui accorder le prix et qu'elle eût été empêchée de le faire sous prétexte que le verdict erroné du 17 juin était final et que ni l'Académie, ni aucun pouvoir constitué, n'eût eu le droit d'y porter remède.

La Cour du Banc du Roi elle-même déclare dans son jugement, que l'intimé est venu défendre devant cette Cour, que "the action is within the scope of article 50 of the Code of Civil Procedure." Si l'action était compétente pour faire mettre de côté ce que l'on a appelé le second verdict et si la Cour Supérieure, en vertu des pouvoirs qui

lui sont conférés par cet article du code, avait juridiction pour le déclarer nul, il est évident qu'elle avait ce même pouvoir et cette même juridiction pour se prononcer souverainement sur la validité et la légalité du premier verdict.

L'Académie de Musique aurait eu le droit, si c'était nécessaire, d'intenter une action pour faire annuler ce premier verdict. Elle avait même le devoir d'intenter cette action comme fidéicommissaire du parlement et à raison de la mission qu'elle avait reçue d'octroyer des fonds publics suivant des conditons définies par la loi. Ce qu'elle pouvait faire valoir par voie d'action, elle pouvait tout aussi bien le faire valoir par voie de défense à l'encontre de l'action prise par Payment pour se faire octroyer ces fonds, malgré qu'il n'y avait pas droit.

C'est ce que l'Académie de Musique de Québec a fait. Le juge de première instance lui a donné raison; et nous sommes d'avis que ce jugement était parfaitement bien fondé.

Il a été suggéré que, malgré le jugement qui déclare erroné le verdict du 17 juin 1932 comme n'étant ni conforme aux faits, ni conforme à la loi en vertu de laquelle le concours a été tenu, cette Cour pourrait quand même confirmer la condamnation aux dommages prononcée par la Cour du Banc du Roi contre l'Académie de Musique, à raison du tort que toute cette affaire a causé à l'intimé.

Nous admettons, en effet, que le sort de l'intimé est regrettable. Il a été la victime innocente d'une erreur grave et qui était certainement de nature à lui infliger injustement des dommages considérables.

Mais ce n'est pas l'Académie de Musique qui a été la cause de ce dommage. L'Académie de Musique a agi sur la foi du rapport des membres du jury. Elle a agi de bonne foi et dans l'ignorance des erreurs et des omissions qui affectaient ce rapport.

Les membres du jury n'étaient pas ses mandataires, ou ses agents, dans le sens qu'ils pouvaient engager sa responsabilité pour les actes qu'ils ont commis. C'est encore ce que décide avec raison le jugement de première instance en disant que "la défenderesse ne saurait être tenue responsable" des agissements et de l'erreur des membres du jury. Les membres du jury constituaient un corps indépendant

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nommé en vertu de la loi. C'est à eux, ou à tout le moins à quelques-uns d'entre eux, que l'intimé aurait dû s'attaquer pour la compensation de ses griefs. Il n'a pas jugé à propos, dans les conclusions de son action, de réclamer des dommages d'autres personnes que de l'Académie de Musique de Québec. Nous ne pourrions donc lui accorder au delà de ce qu'il a demandé.

Pour toutes ces raisons, nous sommes d'avis que l'appel doit être maintenu. Dans les conditions que nous avons exposées, le verdict tel que rendu et proclamé le 17 juin 1932 était absolument nul; et les tribunaux, constatant cette nullité, doivent refuser d'y donner effet. Il s'ensuit que le jugement de la Cour Supérieure doit être rétabli avec dépens, tant devant cette Cour que devant la Cour du Banc du Roi.

CANNON J. (dissenting):—Le renvoi de l'action par la Cour Supérieure est basé sur les Considérants suivants:

Considérant que par l'article 2 du chapitre 139 S.R.P.Q., le législateur veut que celui des concurrents qui obtient le plus grand nombre de points ait le droit d'aller, aux frais de l'Académie de Musique de Québec, passer deux ans en Europe, pour y compléter ses études musicales;

Considérant que l'intention du législateur, c'est que le prix soit accordé à celui qui le mérite, d'après l'examen; que c'est ainsi que le demandeur l'interprète quand il demande à la Cour, par ses conclusions, de déclarer qu'il avait *gagné* le prix;

Considérant qu'il est clairement établi que le meilleur examen était celui de Piché; que c'est par favoritisme qu'un examinateur a accordé au demandeur les points qui lui manquaient pour être le premier; que le demandeur n'a pas gagné le prix d'Europe et que la défenderesse a eu raison de le lui refuser;

Considérant que la défenderesse ne saurait être tenue responsable de la fraude de quelques-uns des membres du jury et de l'erreur des autres;

La Cour du Banc du Roi, à l'unanimité, a refusé d'accepter ces conclusions et a cassé et annulé le second verdict qu'un jury spécial, qui avait épuisé ses pouvoirs le 17 juin 1932, aurait rendu le 21 juillet 1932, et condamné l'Académie de Musique à payer à l'intimé $1,000 de dommages, réservant à ce dernier tous ses droits en vertu du premier verdict des examinateurs aux termes du statut. C'est ce dernier jugement, accepté par l'intimé, que les appelants nous demandent de mettre de côté.

Nous ne devons pas perdre de vue qu'il s'agit d'un litige entre Payment et l'Académie de Musique, et non pas entre Payment et Piché qui, d'après le juge de première instance, aurait dû être proclamé gagnant du prix d'Europe. La

Cour du Banc du Roi a-t-elle eu raison, vu la contestation liée et la preuve faite, de conclure à la responsabilité en dommages de l'Académie de Musique envers Payment?

Il est admis de part et d'autre que ce dernier était en tous points qualifié pour être candidat au concours annuel organisé en vertu du statut par l'Académie de Musique de Québec. Après avoir passé l'examen au lieu, au temps et de la manière voulus par l'Académie, cette dernière, dans sa séance solennelle, étant la seule assemblée générale de l'année 1932, le proclama *urbi et orbi* gagnant de ce prix d'Europe lui assurant, aux frais de l'Académie, un séjour de deux, et possiblement de trois ans, sur le Vieux Continent pour parfaire des études musicales. L'Académie de Musique lui adressa, en outre, le document suivant, authentiqué par l'apposition de son sceau officiel (art. 1207 C.C.):

M. Jules Payment,
9 rue Hébert, Québec.

Académie de Musique de Québec.
Concours "Prix d'Europe", 1932.
Classe Violon.

Concours de 19.... à ..... Rang obtenu au Concours: "1er".

1. Solfège	(15)	12.6
2. Dictée musicale	(15)	13.0
3. Harmonie orale	(5)	5.0
4. Harmonie écrite	(10)	6.0
5. Histoire de la musique	(5)	4.5
6. Répertoire	(25)	20.8
7. Pièce imposée	(25)	20.2
Total des points	(100)	82.1

J. Art. Bernier,
C. Couture,
H. Miro, R. LeBel.
Léopold Morin,
Raoul Paquet,
Membres du Jury.

qui confirmait le résultat officiel, suivant le procès-verbal aussi authentiqué de la même manière:

Prix d'Europe 1932.

Procès-verbal du concours du Prix d'Europe, tenu à Montréal, le 16 juin 1932. Le jury est composé, pour l'Académie, de MM. J. A. Bernier, Camille Couture et Raoul Paquet, et de MM. Henri Miro et Léopold Morin, comme membres étrangers à l'Académie. Il se réunit à 8.15 p.m. le 16 juin 1932, à l'Ecole Polytechnique, sous la présidence de M. J. A. Bernier.

Le 16 juin, de deux heures à cinq heures p.m., les candidats subissent l'examen écrit: l'harmonie, l'histoire de la musique et la dictée musicale.

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Le 17 juin, à 9 heurs a.m., les candidats subissent l'examen pratique, oral et le solfège. Les candidats inscrits sont:

1. Bernard Piché, cl. Orgue.
2. Muriel Walsh, cl. Piano.
3. L.-Aug. Guillemette, cl. Orgue.
4. Fleurette Trottier, cl. Piano.
5. Margaret Helen Wims, cl. Piano.
6. Jules Payment, cl. Violon.
7. Jeanne Servêtre, cl. Piano.
8. Edwin Bélanger, cl. Violon.
9. Willie Girard, cl. Orgue.

Le concours est à huis clos. Le président et le trésorier de l'Académie sont admis dans la salle du concours sur permission spéciale. Les candidats ont tous rempli les formalités de la loi.

Le jury, après délibération, attribue aux concurrents les points indiqués à la pièce "A" ci-annexée, et en conséquence accorde unanimement le prix de $3,000 à Jules Payment, violoniste.

Les membres du jury, après avoir pris connaissance du présent procès-verbal, l'ont signé devant le secrétaire de l'Académie, qui a signé avec eux, ce dix-septième jour de juin 1932, à Montréal.

7 hrs. p.m.

Le secrétaire du jury, E. LeBel.

Président, J.-Arthur Bernier.

Membres du jury, Camille Couture, Henri Miro, LéoPol Morin, Raoul Paquet.

(Signé) J.-Art. Bernier,
Camille Couture,
Henri Miro,
LéoPol Morin,
Raoul Paquet,
Membres du jury.
Edouard LeBel,
Secrétaire.

(A) ACADÉMIE DE MUSIQUE DE QUÉBEC

PRIX D'EUROPE 1932

Concours de 1932, à Montréal, le 17 juin 1932

	1	2	3	4	5	6	7	8	9
1. Solfège.....(15)	11·0	6·6	12·4	11·2	10·4	12·6	13·8	14·6	7·0
2. Dictée musicale..(15)	13·6	1·4	13·9	0·4	0·4	13·0	8·0	0·4	0·6
3. Harmonie orale...(5)	4·0	2·0	3·8	3·0	4·0	5·0	4·0	5·0	3·0
4. Harmonie écrite.(10)	5·9	2·0	1·0	3·0	7·0	6·0	4·0	4·0	4·0
5. Hist. musique....(5)	2·0	2·0	1·0	2·0	2·5	4·5	1·5	3·5	4·0
6. Répertoire.....(25)	23·2	12·2	21·2	16·6	15·8	20·8	19·0	17·4	18·0
7. Pièce imposée...(25)	22·2	12·0	19·8	15·2	14·8	20·2	17·8	16·2	17·8
(100) Total des points.	81·9	38·2	73·1	51·4	54·9	82·1	68·1	60·1	54·4

Subséquemment, le nouveau bureau de direction, avec le concours actif de M. J.-Arthur Paquet, trésorier de l'Académie, alla en arrière de ce document officiel, hors la

présence des membres du jury et des intéressés, par une enquête secrète, en scrutant les bulletins de vote des membres du jury et même les copies des candidats. Il est inutile pour moi d'entrer dans les détails des événements subséquents, qui sont fournis complètement dans les notes très élaborées de mon collègue, l'honorable juge Rinfret.

La première question qui se pose est la suivante:

Les membres du jury, lorsqu'ils rendirent leur verdict sur les différents bulletins de vote, ont-ils, oui ou non, réglé définitivement le mérite des différents candidats qui avaient subi l'examen, tant oral qu'écrit; et, surtout, M. Bernier, président du jury et l'un des trois représentants de l'Académie, a-t-il agi à la connaissance, avec le consentement et comme le représentant des autres examinateurs, lorsqu'il a ajouté cinq points, sur la suggestion de M. J.-Arthur Paquet, à ceux qu'il avait d'abord inscrits sur son bulletin, c'est-à-dire pour "Répertoire" 22 au lieu de 20, et "Pièce imposée" 20 au lieu de 17? M. Paquet, comme témoin des défendeurs, dans son examen en chef, explique l'incident comme suit:

M. Bernier est venu me trouver et m'a dit: "Monsieur Paquet, combien faudrait-il que j'augmente mon bulletin pour que je donne une majorité à Payment?"

Je lui ai dit: "Il lui faudrait absolument une unité; il faudrait que votre bulletin soit augmenté de cinq points afin que la moyenne divisée par cinq donne une unité." Si tous les juges avaient augmenté d'un point, très bien, mais il y avait seulement un qui augmentait; il fallait qu'il augmentât de cinq points afin d'avoir une moyenne d'un point.

Q. Afin que le chiffre 5 divisé par le nombre 5 rapporte une unité de plus?

R. Oui, c'est cela. M. Bernier m'a dit: "Je veux bien le faire, je veux être en bons termes avec la famille Gagnon, je consens à changer mon bulletin." Alors, j'ai dit à M. Bernier: *"Tu as le droit de le faire, le jugement final n'est pas rendu, vous êtes à discuter sur la valeur des candidats, etc.*; pour moi, je crois que tu as droit de le faire, mais regardes-y à deux fois."

C'est alors que le bulletin que vous verrez ici et sur lequel était mentionné 78.5 points est devenu 83.5 points.

Le président du jury, M. J.-Arthur Bernier, en réponse aux questions posées par la Cour, lors de son examen en chef, explique la situation comme suit:

Maintenant, lors du concours du prix d'Europe, le dix-sept (17) juin, nous arrivons en majorité pour M. Piché. M. Couture, M. Raoul Paquet
* * *

Par la Cour:

Q. Le dix-sept (17)?

R. Oui, lors du concours même. Là je reviens au concours du mois de juin. Alors, nous arrivions quatre pour M. Piché et un, M. Morin,

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pour M. Payment. Il y avait très peu de différence, du moins pour ce qui me regarde. Je crois que c'était 81.9 à 81.1.

Q. Comment se fait-il que vous étiez pour Piché et qu'il n'a pas été proclamé? Vous étiez quatre pour Piché et vous ne l'avez pas proclamé?

R. Parce que, avant de faire la proclamation, il y a eu la discussion qui existe toujours avant de proclamer l'élu. M. Morin a d'abord commencé par dire: "Enfin, pour moi, c'est M. Payment." Alors, M. Morin qui, à mon sens,—j'exprime mon opinion,— est une autorité en matière musicale, a émis cette théorie qu'il fallait développer le musicien avant le technicien. J'ai resté quelque peu surpris. Mais tout de même, comme je me suis toujours efforcé, surtout en matière musicale, de ne pas montrer un esprit fermé aux convictions, surtout quand je sais que c'est un homme éminemment supérieur à moi qui me donne des conseils et quand je sais que sa parole est infiniment plus expérimentée que la mienne, je me soumets. Alors, la discussion a continué toujours. * * *

Q. Vous étiez tous des juges égaux en pouvoirs?

R. Non. Je ne crois pas. * * *

Q. Vous n'aviez pas la même responsabilité?

R. Oui, mais on n'avait pas les mêmes talents, du moins pour ce qui me regarde. Sans fausse humilité, j'aime mieux me mettre le dernier des membres du jury. C'est pour cela qu'ayant foi en la parole de M. Morin * * * Quelque temps après aussi, M. Raoul Paquet, qui parle très sagement et sensément, disait: "A mon sens, M. Piché a fait ce qu'il a pu. Il est arrivé, je crois, au bout, au maximum de ses capacités, et quand bien même il irait passer un ou deux ans là-bas, je ne crois pas qu'il serait beaucoup plus fort en revenant. Tandis que M. Payment est un jeune, il n'a que 22 ans, il a le temps de parfaire * * * "

Q. Qu'est-ce que cela avait à faire avec la question des points de chacun? Il s'agissait de savoir qui avait passé le concours, vous n'aviez pas d'affaire à décider qui devait être envoyé en Europe, vous aviez à décider qui avait gagné le concours, c'était le nombre de points qui importait.

R. Les notes n'étaient pas terminées, il restait bien des petites choses à régler. Et alors, M. Raoul Paquet a dit ce que je viens de vous dire. La discussion a continué surtout entre M. Morin et M. Couture. Enfin, on a laissé parler beaucoup M. Morin. Comme président du jury, j'ai dit: "Messieurs, je fais parler M. Morin parce que je le considère comme expert en la matière." C'était mon opinion. Et alors nous avons continué à discuter. *Enfin nous sommes venus d'accord que nous pouvions, étant donné la théorie que M. Morin avait développée surtout, qu'il fallait développer le musicien avant le technicien et nous avons donné le prix à M. Payment, sans égard aux points qui pouvaient marquer une majorité à M. Piché.* Parce que ce n'était pas les points comme l'opinion que nous gardions de M. Payment, surtout, après le désaccord de M. Morin. Alors, pour ma part, j'avais, je suppose, 81.1—pour que mes points donnent une majorité il s'agissait d'augmenter chaque copie.

Q. Alors, vous les avez augmentées?

R. Nous avons augmenté.

Par Me Arthur Vallée, C.R., procureur des défendeurs:

Q. "Nous avons augmenté" ou "j'ai augmenté"?

R. J'ai augmenté.

Q. Vous êtes le seul à avoir augmenté?

R. *Nous arrivions d'accord d'abord.*

Par la Cour:

Q. Vous avez augmenté les points de manière à donner la majorité à M. Payment?

R. Oui. Moi, je ne m'occupais que de ma copie. Là, on a proclamé que c'était M. Payment qui avait le prix. Ce n'est pas tant le nombre de points comme les aptitudes qui l'emporte.

Me Arthur Vallée, C.R.: Je m'oppose à cette preuve, ceci étant une question d'opinion.

R. (Continuant) M. Payment a été proclamé vainqueur là et le soir, à l'assemblée générale, on a annoncé la chose. Moi, remarquez bien que je n'étais absolument ni pour l'un, ni pour l'autre. C'est-à-dire je ne penchais pas plus pour l'un que pour l'autre. Je ne pouvais pas faire cela, j'aurais eu une conscience absolument indigne en faisant une telle chose, parce que la responsabilité du prix d'Europe m'a toujours effrayé.

Pendant que nous étions en assemblée générale on a proclamé le vainqueur. On a demandé de faire entrer les journalistes, ils sont entrés. On leur a demandé—pour moi, on leur a demandé—s'ils voulaient bien annoncer le résultat du concours. Et un de mes confrères a demandé même, pour faire plaisir à la famille: Est-ce que l'on ne pourrait pas le faire annoncer à la radio? Tout le monde a dit: Oui.

Par Me Jean-Marie Guérard, C.R., procureur du demandeur:

Q. Maintenant, monsieur Bernier, M. J. A. Paquet a déclaré hier sur serment que vous lui aviez dit: "Je veux être bien avec la famille Gagnon, la famille de M. Henri Gagnon. et je vais donner le prix à Payment"?

R. Ah! jamais de la vie. Ah! jamais de la vie. Ah! lala, c'est renversant. Nous étions là tous dans l'assemblée, il aurait fallu que je parte de ma place pour aller trouver M. Paquet. Je le nie positivement, cela.

Il me faut conclure, en présence de ces témoignages, que le résultat proclamé n'était pas entaché d'erreur, tel que plaidé par l'Académie; c'était bien l'opinion solide et, après discussion, unanime du jury, telle que rapportée au procès-verbal, qui fut communiqué à l'Académie de Musique de Québec et proclamée en séance solennelle. Jusque-là il ne saurait être question d'erreur. Le procès-verbal était conforme aux bulletins de vote des examinateurs; et l'Académie n'a pas, par erreur, proclamé Payment comme ayant, d'après le jury, obtenu le plus grand nombre de points tant sur l'examen écrit que sur l'examen pratique et oral.

Le chapitre 139 des Statuts Refondus de 1925 dit qu'une subvention annuelle de $5,000 est sujette aux conditions suivantes:

1. Ouverture chaque année par l'Académie d'un concours spécial pour le chant, le piano, l'orgue, le violon ou le violoncelle;

2. Les concurrents sont jugés par un jury spécial nommé par l'Académie de Musique. Ce jury doit être composé de cinq membres dont deux doivent être pris en dehors des membres de l'Académie; et

3. Celui des concurrents qui obtient le plus grand nombre de points a le droit, aux frais de l'Académie de Musique de Québec, d'aller passer deux ans en Europe pour y compléter ses études musicales.

Pour l'année 1932, l'unique concours du Prix d'Europe annuel prévu par la loi fut organisé à une réunion de l'Académie, tenue le 8 juin 1932. Les deux juges étrangers

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à l'Académie, M. Léo-Pol Morin et M. Henri Miro, furent nommés juges du prix d'Europe et M. J.-Arthur Bernier, comme membre de l'Académie, devant agir avec deux collègues de Montréal. Le seul examen officiel est donc celui tenu les 16 et 17 juin 1932. Le demandeur s'en tient au document officiel portant le sceau de l'Académie, qu'il a reçu après la proclamation du 17 juin et prétend que les procédures subséquentes qui ont eu pour effet de changer le résultat du concours en substituant comme lauréat du prix d'Europe M. Piché sont illégales et nulles et que le jury, après avoir rendu sa décision en toute liberté, était complètement dépourvu de toute autorité, *functus officio* et n'avait plus aucun pouvoir pour reviser ou changer sa décision. Son jugement était acquis au demandeur et ne pouvait être mis de côté que par l'effet des seules voies admises par la loi. Le statut ne pourvoit à aucun appel au comité exécutif de l'Académie ou aux membres du jury individuellement ou collectivement. Les pouvoirs du tribunal étaient épuisés et l'Académie, par l'entremise de ses officiers ou par une réunion spéciale du jury, ne pouvait siéger en appel de cette décision. En d'autres termes, l'Académie ne pouvait pas se substituer à la Cour Supérieure pour exercer elle-même le droit de réforme et de surveillance, et le contrôle confiés à ce tribunal par l'article 50 du Code de Procédure Civile. Si les officiers de l'Académie croyaient avoir découvert des circonstances qui justifiaient l'intervention de la Cour pour réformer le verdict de son jury, elle aurait pu prendre l'action voulue et mettre en cause le demandeur et les juges accusés d'erreur ou de partialité. Mais elle ne pouvait juger elle-même le litige et encore moins forcer, comme elle l'a fait, les membres du jury à siéger de nouveau en appel de certaines de leurs décisions. Sur ce point, sans aller aussi loin que la Cour du Banc du Roi et sans assimiler les fonctions d'un jury d'examinateurs à celles d'arbitres, je partage cependant l'opinion de la Cour du Banc du Roi que les procédures subséquentes à la décision des jurés dans les circonstances ci-dessus relatées et à la proclamation solennelle du prix d'Europe sont illégales et ne sauraient entacher de nullité le certificat décerné par l'Académie au demandeur quant au nombre de points obtenus lors du seul concours régulier permis par la loi. Toute la preuve qui a été faite pour

prouver les procédés plus ou moins recommandables des membres du jury choisi par l'Académie ne saurait en aucune façon affecter le demandeur Payment. Pour s'excuser de lui avoir causé des dommages évidents, l'Académie ne peut faire valoir—ce qu'elle a réussi, sans même l'avoir allégué, à faire qualifier par le juge de première instance de fraude, de favoritisme et ne saurait ainsi invoquer la prétendue turpitude de ses propres agents. S'il y a eu des fautes d'omission ou de commission, elle, et non Payment, doit en porter la responsabilité; elle doit réparer le dommage causé par ses tergiversations subséquentes à un candidat parfaitement qualifié et qui s'est en tout conformé aux exigences de la loi.

Cette pratique d'admettre l'examen, par des enquêtes subséquentes, des griefs plus ou moins fondés de candidats désappointés par les résultats d'un concours, ne saurait être encouragée et n'est d'ailleurs pas prévue par la loi. Rien dans le statut n'autorise l'Académie de Musique à mettre en doute et à discuter après coup le verdict rendu par le jury de son choix ou à accorder comme des espèces de prix de consolation. C'est à elle d'organiser d'avance le concours convenablement et de confier l'examen à des personnes qui, une fois choisies, doivent être présumées dignes de confiance et capables de rendre justice à ceux qui se présentent comme candidats.

Piché, le principal intéressé, n'a jamais porté plainte, ni à l'Académie, ni au tribunal. Bien que mis en cause par le demandeur, il n'a pas contesté ses conclusions demandant à ce que le verdict du jury, rendu le 17 juin 1932, fût respecté. D'après moi, les officiers du nouveau bureau de direction élu à cette dernière date ont fait preuve d'un zèle intempestif qui a peut-être eu pour résultat de déprécier le mérite de ceux que l'Académie avait chargés de conduire l'examen de 1932 mais ne saurait avoir pour résultat de faire perdre au demandeur le bénéfice du prix d'Europe que l'Académie elle-même lui avait décerné, encore une fois sans aucune erreur de la part du jury.

Le dossier démontre que les points accordés à Payment l'ont été en toute liberté, après une discussion de tous les membres du jury, en présence de J.-Arthur Paquet, qui a fait au président la suggestion d'ajouter cinq points sur son bulletin pour donner effet à la décision unanime du jury

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que Payment, de tous les candidats, était celui qui devait aller en Europe pour réaliser le but du chapitre 139 des Statuts Refondus de la province de Québec qui est une loi "pour favoriser le développement de l'art musical". La base d'appréciation proposé par l'examinateur Léo-Pol Morin peut être discutable; mais après discussion elle a rallié les suffrages unanimes du jury chargé par la loi d'accorder le plus grand nombre de points à l'un des candidats au concours.

Les dommages soufferts ont été causés non par la proclamation du jury mais par l'action des officiers de l'Académie, subséquemment au 17 juin 1932. M. Frédéric Pelletier, président, M. Omer Létourneau, vice-président, M. Edouard LeBel, secrétaire, et M. J.-Arthur Paquet, trésorier, lors de la réunion à Montréal, mardi 28 juin 1932, n'avaient pas le droit, ni le pouvoir, de décider de faire une vérification complète des devoirs des candidats et des points qui leur avaient été accordés par les juges sous prétexte de pouvoir fournir au gouvernement tous les renseignements qu'il pourrait exiger d'eux en leur qualité de fidéicommis (sic). Il n'y a pas de preuve au dossier que le gouvernement ait demandé ces renseignements. Les officiers n'avaient ni juridiction, ni pouvoir, de faire les constatations insérées au mémoire confidentiel P12 au sujet des candidats Piché, Pelletier et Bélanger et de faire une nouvelle répartition des points entre ces derniers. Enfin, comme je l'ai déjà dit, ces officiers n'avaient pas le droit de convoquer les membres du jury qui avaient été nommés pour une fin spéciale, qui avaient rempli leur rôle au meilleur de leurs connaissances et jugement et dont la décision avait été acceptée et proclamée en faveur du demandeur; et surtout l'Académie ne pouvait exercer la pression qu'elle a évidemment mise en œuvre lors de la réunion du 21 juillet pour dépouiller Payment du prix d'Europe. L'Académie de Musique a donc dépassé ses pouvoirs et doit être tenue responsable du dommage causé à Payment par son fait, que ce soit le résultat d'imprudence, de négligence ou d'inhabilité (Art. 1053 C.C.).

Le montant accordé par la Cour du Banc du Roi me paraît raisonnable. Il est bon de remarquer que le plaidoyer des défendeurs, l'Académie de Musique, Couture et Miro, ne contient aucune allégation de fraude ou de favoritisme et

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que le juge de première instance est allé au delà de la contestation liée lorsqu'il semble accuser de favoritisme soit le président Bernier, soit le juge Léo-Pol Morin, quand ce dernier surtout n'avait pas eu l'occasion d'être entendu, vu son absence en Europe; et ce malgré la demande des procureurs du demandeur au cours de l'enquête.

De plus, le verdict de chaque membre du jury doit être constaté sur le bulletin remis et signé par chacun d'eux entre les mains du secrétaire de l'Académie. Ces documents, une fois de jugement rendu et entré au procès-verbal, ne peuvent être changés par une preuve verbale à moins d'être attaqués devant un tribunal compétent par l'un des candidats sur allégation de fraude. Mais l'Académie elle-même ne saurait être admise, au détriment du candidat heureux, à prouver le contraire du certificat écrit délivré au demandeur. Après la proclamation, ce dernier avait le droit de considérer ce certificat comme un droit acquis à tous les avantages qui pouvaient en découler en vertu du statut.

Je renverrais l'appel avec dépens.

Appeal allowed with costs.

Solicitors for the appellant: *Vallée, Vien, Beaudry & Fortier.*

Solicitors for the respondent: *Guérard & Pelland.*

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* Feb. 25.
* Apr. 21.

LA CORPORATION DU VILLAGE DE DESCHÊNES (PLAINTIFF).. APPELLANT;

AND

GEORGE C. LOVEYS (DEFENDANT).....RESPONDENT;

AND

WILLIAM BETCHERMAN AND OTHERS (MIS-EN-CAUSE).

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

Municipal corporation—Resolution adopted by council—Action attacking its legality—Judgment—Res judicata as to all other ratepayers—Art. 1241 C.C.—Arts. 4, 5, 430 M.C.

A judgment rendered upon an action brought by a ratepayer of a municipality in which it was alleged that a resolution adopted by

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

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a municipal council was illegal, constitutes *res judicata* as to all other ratepayers of that municipality; and such judgment can be invoked as such in a subsequent action where the legality of the same resolution is challenged. Municipal corporations represent before the courts all the ratepayers, and a judgment rendered in favour of the corporation or against it in an action brought by a ratepayer can be opposed to any other ratepayer. *Stevenson* v. *La cité de Montréal* (Q.R. 6 Q.B. 107; 27 Can. S.C.R. 593) app.

APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Trahan J. and dismissing the appellant's action for taxes.

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

J. W. Ste-Marie K.C. and *J. N. Beauchamp K.C.* for appellant.

Redmond Quain K.C. and *J. T. Wilson* for respondent.

The judgment of the Court was delivered by

CANNON, J.—Appel d'un jugement de la Cour du Banc du Roi renversant le jugement de la cour de première instance, avec le dissentiment de l'honorable juge-en-chef et de l'honorable juge Walsh.

La municipalité appelante ayant réclamé de l'intimé $2,682.83 pour taxes municipales imposées sur l'immeuble formant partie du lot 15A du premier rang du canton de Hull pour l'année commençant le 1er octobre 1931, alors qu'il était en possession à titre de propriétaire enregistré, et ayant mis en cause les détenteurs actuels de cet immeuble affecté par privilège au paiement de ces taxes, l'intimé a contesté cette action en alléguant que l'immeuble en question était exempt de taxes en vertu d'un règlement adopté en 1918 en faveur de la British American Nickel Corporation. Ce règlement, spécialement ratifié par la législature, dont la validité n'est pas contestable, assurait cette exemption à tous les ayants droit de la compagnie pour une période de vingt ans. Bien que la compagnie exemptée eût cessé d'exploiter son industrie depuis plusieurs années, l'appelante avait toujours considéré la propriété comme jouissant de cette exemption jusqu'à ce que, en 1931, on imposa pour la première fois sur l'immeuble les taxes réclamées par l'action.

Le défendeur-intimé attaquait aussi la régularité des procédures et ajoutait que l'évaluation au montant de $268,283 était vexatoire, injuste, oppressive et d'une nullité radicale.

Cette première contestation fut liée entre les parties en février 1933 et la cause resta en suspens jusqu'à janvier 1934, alors qu'un plaidoyer *puis darrein continuans* fut produit alléguant qu'aux termes d'une résolution adoptée par l'appelante le 9 mars 1933 une entente était intervenue entre les parties suivant laquelle en considération d'une somme de $500, dont $250 payable dans les trente jours et la balance le 1er mai 1933, la corporation s'était engagée à déclarer la présente action réglée hors de cour, chaque partie payant ses frais. Vu le paiement de cette somme de $500 à l'appelante, l'action aurait été éteinte et devait être renvoyée.

En réponse à ce plaidoyer supplémentaire, l'appelante a allégué:

Qu'au commencement du mois de mars 1933, le mis-en-cause Betcherman a rencontré le maire et les conseillers de la demanderesse-intimée et leur a représenté qu'une compagnie nouvelle connue sous le nom de Canadian Gold Seal Electrical Corporation Limited se proposait d'occuper une partie des immeubles sur lesquels les taxes municipales étaient réclamées par la présente action, ajoutant que ladite compagnie y construirait une industrie qui emploierait un grand nombre de personnes, ce qui serait un grand avantage au progrès et développement du village de Deschênes; que ces représentations ont été faites par le mis-en-cause Betcherman alors qu'il était accompagné d'un nommé Klein, organisateur ou promoteur de l'industrie susmentionnée; que ledit mis-en-cause a alors offert de négocier pour et au nom de la corporation pour amener ladite industrie à Deschênes, à condition que le montant des taxes qui étaient dues par lui sur les propriétés qu'il occupait et qui sont réclamées par la présente action, seraient réduites à la somme de $500; que ces offres de service dudit Betcherman ont été soumises au conseil de la corporation-intimée, et que c'est alors, le 9 mars 1933, à une assemblée dudit conseil, que la résolution ci-dessus a été adoptée.

Et elle ajoute:

Que lesdites représentations n'ont jamais eu de suite et que ladite compagnie Canadian Gold Seal Electrical Corporation Limited n'a jamais, avant le mois de mai ou en aucun temps, fait aucune construction ou installé aucune industrie dans le village de Deschênes; et que n'y aurait-il que ces faits, ladite résolution n'aurait aucune force et effet, les conditions n'ayant pas été remplies;

Que ladite résolution est en outre illégale et nulle, le conseil ayant dans les circonstances excédé ses pouvoirs et ne pouvant de par la loi faire remise de taxes sur lesdites propriétés par une résolution et ladite résolution étant contraire aux dispositions du Code Municipal qui régit la corporation demanderesse;

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Que sur les $500 que devait payer le mis-en-cause Betcherman, $250 ont été encaissés et appliqués en acompte sur les taxes; mais ajoute qu'elle n'a jamais déposé le chèque du mis-en-cause pour le paiement de balance, afin que l'acceptation dudit chèque ne soit pas interprétée comme étant en paiement entier du montant de toutes les taxes dues sur lesdites propriétés; et elle conclut

Que ladite résolution du conseil du 9 mars 1933 soit déclarée irrégulière, nulle et de nul effet et à ce que le plaidoyer *puis d'arrein continuance* soit renvoyé avec dépens.

L'intimé, dans sa réponse, a allégué, entre autres choses, que la légalité de la résolution, base du plaidoyer supplémentaire, a fait l'objet d'une contestation devant la Cour du Magistrat de Hull, dans une cause intentée par une électrice de la corporation contre elle et le mis-en-cause Betcherman et que, par le jugement rendu par la Cour du Magistrat, la résolution a été déclarée légale et dans les limites des attributions de l'appelante et que partant il y a chose jugée entre les parties quant à la validité de ladite résolution.

Ces deux plaidoyers ont été rejetés par la cour de première instance, qui a maintenu l'action de l'appelante pour $2,183.83, donnant crédit à l'intimé pour $500 que ce dernier avait payés pour se conformer à l'entente du 9 mars 1933.

La majorité de la Cour du Banc du Roi a jugé que le premier juge avait à tort rejeté la résolution du 9 mars et a maintenu le plaidoyer *puis d'arrein continuance.*

Le différend entre les deux cours porte sur l'interprétation et la portée de la résolution du 9 mars et sur sa légalité. Les éminents magistrats qui ont étudié la cause se sont également divisés sur l'effet qu'il faut donner au jugement de la Cour du Magistrat déclarant légale et *intra vires* la résolution du conseil municipal de l'appelante.

Pour bien réaliser les circonstances qui ont amené les parties à transiger, il est bon de rappeler que, non seulement la municipalité, mais aussi la commission scolaire de Deschênes, étaient intéressées dans le recouvrement des taxes qu'on avait imposées sur l'immeuble en question. Or, il appert que la commission scolaire avait été poursuivie par Betcherman et autres pour l'annulation des rôles d'évaluation en vigueur dans le village de Deschênes; que cette cause avait été entendue au mérite en janvier 1933 et était en délibéré le 28 février 1933 devant l'honorable juge Coderre. Il appert à cette même résolution que Betcher-

man a offert de consentir à ce que cette action soit renvoyée sans frais et a aussi offert d'user de son influence pour obtenir l'établissement dans le village de Deschênes et le fonctionnement, avant le 1er juillet 1933, d'une manufacture de la Canadian Seal Electrical Corporation Limited. Il a, de plus, offert de payer la somme de $3,000 en règlement de toutes taxes scolaires et autres dues et qui pourraient être dues par lui et ses auteurs et ses successeurs jusqu'à la fin de l'année fiscale 1932-1933. La commission scolaire considéra avantageux d'accepter ces propositons, en vue de la crise qui existait et du besoin urgent de la commission scolaire pour le maintien de ses écoles et des difficultés que la commisson scolaire pourrait avoir à percevoir les taxes qu'elle réclamait dudit Betcherman.

Quelques jours après, le 9 mars 1933, la municipalité, à son tour, passa la résolution suivante, qui fut acceptée par Betcherman comme garant de l'intimé Loveys, envers qui il s'était rendu responsable du paiement des arrérages de taxes:

Whereas William Betcherman and others are owners of land and buildings in the village of Deschênes, viz: Part of lot 15A in the first range of the township of Hull, and have been assessed by this corporation, and suit has been entered into by the said council to recover the sum of $2,683 for taxes which suit is pending to be heard at the present moment;

Whereas the said William Betcherman and others are at present negotiating an agreement with the Canadian Gold Seal Electrical Corporation Limited for locating this important industry in Deschênes thereby rendering a considerable service to the population of the village of Deschênes, and the said Wm. Betcherman and others have offered to settle with the council all existing difficulties with regard to above taxes by paying to the said council the sum of five hundred dollars in full settlement of all taxes up to and including 1932-1933;

It is in consequence resolved that in consideration of the sum of five hundred dollars payable $250 within thirty days and the balance before the first of May, 1933, to the said council by Mr. Wm. Betcherman and others, and paying all their own costs, the council will cause to have above action declared settled out of court and pay their costs, the council will assess the Canadian Gold Seal Electrical Corporation Limited for the year 1933-34 as mutually agreed upon between the company and the council and will assess Wm. Betcherman and others for the balance of their property; Mr. Wm. Betcherman to employ for construction work, people from Deschênes, preferably and if possible.

Le procureur de la municipalité, par une lettre du 15 avril 1933, disait:

The secretary-treasurer has given me a copy of the resolution adopted by the council on the ninth of March last.

I give to the resolution the interpretation that upon payment of the sum of $500 the case actually pending before the court, shall be declared settled out of court and that the council is paying its own costs

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We do not intend to proceed with the case during the next term but as soon as we are informed that the payment has been made, we are ready to put before the court, a document with a certified copy of the resolution of the council that the case has been settled out of court. Judgment may be entered then according to the resolution of the council which has been accepted by Mr. Betcherman.

Le 3 mai 1933, un M. Klein, représentant de la firme qui devait s'établir à Deschênes, comparut devant le conseil de l'appelante et obtint, pour commencer ses travaux, une extension de délai jusqu'au 17 mai. Dans l'intervalle, Betcherman avait payé à l'appelante un premier chèque de $250 qui fut présenté à la banque et payé le 21 avril.

Le 17 juillet, le secrétaire-trésorier écrivit au mis-en-cause Betcherman au sujet de la réception par l'appelante du second versement de $250, disant que le conseil ne pouvait l'accepter parce qu'une action avait été prise contre la municipalité, demandant l'annulation de la résolution qui acceptait ces cinq cents dollars en règlement des taxes réclamées par la présente action.

On remarquera que, par cette lettre, la municipalité ne mentionne aucune condition affectant la résolution et ne se plaint pas à Betcherman du retard de la Gold Seal Corporation à commencer les travaux proposés. Ce second versement fut encaissé par l'appelante qui en donne crédit aux défendeur et mis-en-cause.

L'action mentionnée par l'appelante dans cette lettre fut jugée par la Cour du Magistrat. L'appelante s'en étant rapportée à justice, c'est le mis-en-cause Betcherman qui contesta cette action. Voici les principaux considérants de ce jugement qui intéressent la présente cause:

Considérant que le 11 avril 1932, la corporation défenderesse dans cette cause a institué devant la Cour Supérieure de ce district, une action portant le nº 3933 contre un nommé George Loveys, défendeur, et Wm. Betcherman et al., mis-en-cause;

Considérant que Wm. Betcherman mentionné comme mis-en-cause à l'action citée plus haut est le même Wm. Betcherman, mis-en-cause dans la présente instance;

Considérant que ladite cause nº 3933 ci-dessus mentionnée a été dûment inscrite pour preuve et audition le 6 février 1933;

Considérant qu'en date du 9 mars 1933 la corporation défenderesse a adopté une résolution en vertu de laquelle elle acceptait la somme de $500 en règlement d'une réclamation de $2,683 qu'elle avait contre ledit Geo. Lovey et Wm. Betcherman, mis-en-cause et autres personnes pour taxes municipales, et réglait par le fait même sadite action nº 3933 pendante devant la Cour Supérieure comme susdit;

Considérant que par son action, la demanderesse en cette cause, demande la nullité de ladite résolution de la défenderesse, en date du

9 mars 1933, comme étant illégale et nulle, parce que cette résolution aurait été adoptée à l'encontre des articles 684 et 687 du Code Municipal, et du chapitre 116 des S.R.Q. 1925 qui, entre autre chose, défend à toute municipalité de venir en aide soit directement ou indirectement à un établissement industriel ou commercial en lui accordant une exemption de taxes;

Considérant qu'il ne s'agit pas dans la présente instance d'une remise d'intérêt sur des arrérages de taxes ou d'une exemption de taxes à un établissement commercial ou industriel, mais bien plutôt d'une transaction entre la corporation-défenderesse et le mis-en-cause, par laquelle on réglait le procès existant entre eux, la corporation-défenderesse décidant à tort ou à raison qu'il valait mieux régler que de plaider ledit procès;

Considérant que ce règlement semble avoir été l'aboutissement et la conclusion de pourparlers entre lesdites parties intéressées, et paraît avoir été fait de bonne foi de part et d'autre; la corporation-défenderesse croyant préférable d'accepter $500 en règlement de sa réclamation pour un montant plus élevé, plutôt que de courir le risque d'un procès qu'elle pouvait perdre sans compter les frais qu'elle aurait eus à payer en plus advenant ce résultat.

Considérant qu'une corporation municipale a le pouvoir de transiger plutôt que de continuer un procès qu'elle pourrait perdre, et que hors le cas de fraude, il n'appartient pas aux tribunaux de reviser les décisions adoptées par les conseils municipaux dans l'exercice de leurs pouvoirs administratifs, même si des décisions sont apparemment inopportunes et désavantageuses pour la corporation: *Gravel* v. *La corporation de la paroisse de Dolbeau,* mise-en-cause (1).

* * *

Considérant que la demanderesse n'a pas établi les allégués essentiels de sa déclaration, et que le mis-en-cause a établi la partie essentielle de sa défense;

La Cour, pour les raisons contenues dans la première partie de ce jugement, rejette l'action de la demanderesse avec dépens.

Les procureurs de l'appelante ne donnent aucune raison à l'appui de la prétention que la Cour Supérieure, non plus que la Cour du Banc du Roi, ne peuvent considérer comme décisif un jugement de la Cour de Magistrat ayant acquis entre les parties force de chose jugée. La présomption *juris et de jure* en résultant doit être respectée par la Cour Supérieure et la Cour du Banc du Roi, même si elle résulte d'un jugement rendu par une cour inférieure, mais compétente. Je suis d'avis que ce moyen invoqué par l'appelante est mal fondé en droit.

La contestation liée entre les parties est-elle suffisamment sérieuse pour pouvoir servir de base à une transaction valide?

Dans *Gravel & al* v. *La Corporation de la Paroisse de Dolbeau* (1), la Cour du Banc du Roi a jugé qu'une corpo-

(1) (1931) Q.R. 51 K.B. 491.

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ration municipale a le pouvoir de transiger plutôt que de s'engager dans un procès et que, hors le cas de fraude, il n'appartient pas aux tribunaux de reviser les décisions adoptées par les conseils municipaux dans l'exercice de leurs pouvoirs administratifs, même si ces décisions sont inopportunes et désavantageuses pour la corporation.

Le tribunal était composé du juge-en-chef LaFontaine et des honorables juges Dorion, Tellier, Bernier et Galipeault.

L'honorable juge Tellier disait:

L'arrangement pouvait n'être pas avantageux; il est assez probable qu'il ne l'était pas; mais il paraît avoir été fait de bonne foi; et le conseil avait le pouvoir de le faire.

C'est véritablement une transaction que l'on a faite. * * * De part et d'autre, on redoutait le procès; et, pour le prévenir, on a fait des concessions réciproques. * * * A tort ou à raison, le conseil a cru qu'il valait mieu régler que plaider. C'était son affaire. Du moment qu'il n'a pas outrepassé ses pouvoirs, qu'aucune fraude n'est établie, et qu'il a procédé légalement, la Cour n'a pas à intervenir; elle n'en a pas le droit.

C'est sur ce jugement que monsieur le magistrat de district a basé sa décision; et une étude attentive m'a convaincu que, dans les circonstances dévoilées au dossier, l'acte des corporations scolaire et municipale, en transigeant avec Betcherman pour obtenir immédiatement le paiement de trois mille dollars ($3,000) n'était pas un acte de mauvaise administration et ne constituait pas, non plus, une dérogation à la prohibition de venir en aide à un établissement industriel ou commercial en lui accordant une exemption de taxes. C'était, de la part du conseil municipal, une première tentative de déroger à la loi spéciale qui avait accordé spécifiquement au terrain en question une exemption de taxes pour une période de vingt ans, à la condition que l'on y construirait une usine et que cette usine emploierait un certain nombre d'ouvriers " when in operation," " as the requirements of the British American Nickel Corporation, Limited, may require." Bien que les portes de cette usine eussent été fermées depuis 1920, l'on avait tout de même interprété la loi en faveur des détenteurs du site et la taxe n'avait pas été imposée. Ce n'est qu'en 1931 que l'on décida de s'attaquer aux défendeurs et aux mis-en-cause. On évalua cette usine abandonnée à au delà d'un quart de million et l'on imposa les taxes réclamées par la présente action.

Le plaidoyer faisant valoir l'exemption, l'illégalité de la confection du rôle et l'exagération presque frauduleuse de l'évaluation municipale n'était pas, à sa face même, futile, ni de mauvaise foi. Les négociations entre les parties prouvent que l'on était, de part et d'autre, de bonne foi et que l'on croyait sincèrement, dans le meilleur intérêt de la municipalité appelante et de ses contribuables, devoir mettre fin au procès. Betcherman offrit $3,000 en règlement des taxes sur ce terrain pour les années 1931, 1932 et 1933; et, suivant l'entente intervenue entre les commissaires d'écoles et les conseillers municipaux, dont plusieurs membres siégeaient dans les deux bureaux, l'on accorda $2,500 aux écoles et $500 à la municipalité.

Après avoir accepté cet argent, l'appelante a refusé de remplir la promesse faite par la résolution, suivant l'interprétation de son propre procureur, et a contesté le plaidoyer *puis darrein continuans* en voulant ajouter à cette résolution une condition qui ne s'y trouve pas, savoir: que si la nouvelle usine n'était pas établie avant le 1er mai 1933, la transaction serait nulle et de nul effet. La preuve verbale que l'on a tenté de faire à ce sujet et qui a été admise par le premier juge, même si elle pouvait être considérée comme légale, ne serait pas suffisante. Il est prouvé clairement par le témoignage de M. Fournier, Conseil du Roi et député du comté, que cette condition, qui avait d'abord été proposée, a été refusée par Betcherman, sur son avis.

Nous restons donc purement et simplement avec cette partie de la résolution qui dit que, sur paiement de $500, la présente action devra être retirée, chaque partie payant ses frais. Nous n'avons pas, pour le moment, à approuver la commutation de taxes pour 1932 et 1933, ni ce qui concerne l'évaluation future du terrain suivant entente à intervenir entre l'appelante et la Gold Seal Electrical Corporation. Nous n'avons à considérer cette résolution qu'en autant qu'elle prouve la transaction alléguée comme mettant fin à la poursuite. Elle a certainement cette portée et à la seule condition du paiement des $500.

Reste la question de la légalité de la résolution et de la transaction qu'elle autorise. Devons-nous appliquer, en faveur de l'intimé, l'autorité de la chose jugée, qu'il invoque?

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L'article 1241. L'autorité de la chose jugée (*res judicata*) est une présomption *juris et de jure*; elle n'a lieu qu'à l'égard de ce qui fait l'objet du jugement, et lorsque la demande est fondée sur la même cause, est entre les mêmes parties agissant dans les mêmes qualités et pour la même chose que dans l'instance jugée.

Le premier juge a refusé de se considérer lié par le jugement de la Cour de Magistrat qui d'ailleurs, d'après lui, ne constituait pas chose jugée entre les parties; et l'honorable juge-en-chef Tellier a considéré que le défendeur dans la présente cause était un tiers qui n'était pas partie dans la cause jugée par la Cour de Magistrat. Le savant juge-en-chef dit:

> Il est vrai que l'action en cassation qui fut intentée devant ladite Cour de Magistrat en vertu de l'article 430 du Code municipal, était une action publique, mis à la disposition de tout électeur municipal et de tout intéressé; mais l'exercice de cette action, par un électeur ou un intéressé, ne pouvait affecter en rien, soit favorablement, soit défavorablement, au moins en cas d'insuccès, les droits, obligations ou recours de droit commun de la corporation à l'égard des tiers, ou de ces derniers envers elle.

On ajoute que le jugement rendu n'était pas entre les mêmes parties. Or, il a été décidé dans une cause de *Stevenson* v. *La Cité de Montréal* (1),

> Les corporations municipales représentent en justice leurs contribuables et un jugement rendu en faveur d'une telle corporation ou contre elle, peut, lorsqu'il y a identité d'objet et de cause, être opposé à tout autre contribuable.

Notons, en passant, que ce jugement a été confirmé par cette Cour (2).

L'article 4 du Code municipal dit:

> Les habitants et les contribuables de chaque municipalité * * * de village forment une corporation ou corps politique.

connu, dans notre cas, sous le nom de "La Corporation du Village de Deschênes"; et, d'après l'article 5, "toute corporation peut transiger dans les limites de ses attributions". Loveys et tous les autres habitants et contribuables étaient représentés devant le magistrat par la corporation appelante dont ils forment partie comme tels.

Voir à ce sujet les autorités citées par feu le juge Blanchet dans *Stevenson* v. *La Cité de Montréal* (3),

Betcherman, mis en cause devant le magistrat, est le même William Betcherman qui est présentement mis en cause par l'appelante. Loveys, le défendeur-intimé, ne fut pas nommément partie au procès institué devant la Cour

(1) (1896) Q.R. 6 Q.B. 107. (2) (1897) 27 Can. S.C.R. 593.
(3) (1896) Q.R. 6 Q.B. 107, at 114, 115.

de Magistrat: il y était comme contribuable de l'appelante qui était défenderesse.

De plus, et d'abondant, il était suffisamment représenté par Betcherman pour pouvoir invoquer le jugement rendu en faveur de ce dernier. Quelles étaient les relations juridiques entre eux?

En octobre 1931, lors de l'imposition des taxes réclamées dans la présente cause, Loveys apparaissait au bureau d'enregistrement comme le propriétaire de l'immeuble affecté au paiement de ces taxes. Il faut cependant admettre que, dès décembre 1930, l'intimé avait vendu cet immeuble à M. Gordon Adams, avec obligation pour l'acheteur de payer les taxes qui seraient imposées à l'avenir sur l'immeuble. Quelques jours après, Adams avait transporté tous ses droits dans cet immeuble à Betcheman qui, naturellement, assuma toutes les obligations de son vendeur envers Loveys. Il résulte de ce fait que Betcherman, lors de l'institution de la présente action, était le véritable débiteur des taxes en question, que Loveys poursuivi aurait pu appeler en garantie son acquéreur Adams qui, à son tour, aurait pu appeler en sous-garantie William Betcherman. Ce dernier, d'ailleurs, a été mis en cause par la corporation appelante et les conclusions de délaissement ont été prises contre lui à titre de propriétaire enregistré de l'immeuble affecté par les taxes réclamées; et c'est pourquoi Betcherman, détenteur de l'immeuble et garant des taxes vis-à-vis du défendeur Loveys, a conclu directement avec l'appelante l'arrangement qui a fait l'objet du litige devant la Cour de Magistrat et qui fait encore l'objet de la présente contestation.

Il faut partager l'opinion de la majorité de la Cour du Banc du Roi que William Betcherman, lorsqu'il a transigé avec la corporation, agissait tant en son nom personnel qu'au nom de ses auteurs et à leur décharge: et de même que, lors du procès devant la Cour de Magistrat où il était mis en cause, il a contesté l'action de la demanderesse Ayotte qui concluait à la nullité de la résolution tant pour lui-même que pour ses auteurs dont il était le garant. Or, je crois que la doctrine et la jurisprudence sont à l'effet que le garanti, dans l'espèce, Loveys, a droit d'invoquer le jugement qui a été rendu en faveur de son garant.

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Nous avons donc identité d'objet, identité de cause et identité de parties, relativement à l'un des deux moyens invoqués par l'appelante pour l'annulation de la résolution du 9 mars, savoir: le défaut de capacité de la corporation intimée. C'est ce même moyen d'excès de pouvoir qui a servi de base au jugement de première instance; et nous croyons que, sur ce point, la Cour du Banc du Roi a eu raison d'appliquer l'autorité de la chose jugée.

Cette autorité de la chose jugée ne s'applique pas cependant à l'autre moyen invoqué par le premier juge, savoir: que le règlement intervenu entre les parties était subordonné à l'exploitation de la nouvelle compagnie dès le 1er mai.

Même si cette condition avait été suffisamment alléguée, il faut, je crois, en venir à la conclusion que la preuve orale et les circonstances qui ont précédé et suivi l'adoption de cette résolution par Betcherman démontrent que le règlement n'était nullement subordonné à l'éventualité du succès ou de l'insuccès des efforts de Betcherman pour persuader Klein et la Canadian Gold Seal Electrical Corporation de s'établir sur son terrain et introduire une nouvelle industrie dans Deschênes. D'ailleurs, malgré les efforts de l'appelante, Betcherman a carrément refusé de garantir l'établissement de cette industrie comme condition du compromis, et la résolution, amputée de cette clause, a été adoptée. L'article 1234 C.C. s'applique et la preuve testimoniale doit être rejetée si elle tend à contredire la résolution ou à en changer les termes.

Je renverrais l'appel avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Ste-Marie & Ste-Marie.*

Solicitor for the respondent: *Redmond Quain.*

IN THE MATTER OF A REFERENCE AS TO WHETHER THE PARLIAMENT OF CANADA HAD LEGISLATIVE JURISDICTION TO ENACT SECTION 498A OF THE CRIMINAL CODE, BEING CHAPTER 56 OF THE STATUTES OF CANADA, 1935.

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* Jan. 15, 16, 17.
* June 17.

Constitutional law—Section 498A Cr. C.—Persons engaged in trade or commerce or industry—Certain acts by them declared to be criminal offences—Whether section is intra vires of Parliament of Canada—Whether subsection (a) encroaches upon legislative authority of the provinces.—B.N.A. Act, ss. 91, 92.

Subsections (*a*), (*b*) and (*c*) of section 498A of the Criminal Code, which enact that "every person engaged in trade or commerce or industry is guilty of an indictable offence and liable" to punishment in respect thereof who does any of the acts or series of acts denoted by these subsections, are *intra vires* of the Parliament of Canada, being enactments creating criminal offences in exercise of the powers vested in Parliament in virtue of the 27th head of section 91 of the B.N.A. Act (Criminal law). Cannon and Crocket JJ. dissenting as to subsection (*a*).

Per Cannon and Crocket JJ.—Subsection (*a*) deals directly with matters of civil rights and describes an act which lacks every element of what is ordinarily associated with criminal law. Its incorporation in the Criminal Code is a mere colourable attempt on the part of the Parliament of Canada to encroach upon the legislative authority of the provinces.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada in the exercise of the powers conferred by s. 55 of the *Supreme Court Act* (R.S.C. 1927, c. 35), of the following question: Is section 498A of the Criminal Code, or any or what part or parts of the said section *ultra vires* of the Parliament of Canada?

The Order in Council referring the question to the Court is as follows:

The Committee of the Privy Council have had before them a report, dated 30th October, 1935, from the Minister of Justice, referring to an Act to amend the Criminal Code, being chapter 56 of the Statutes of Canada, 1935, and in particular to section 9 of the said Act, whereby the Criminal Code was amended by inserting therein after section 498 the following section:

"498A. Every person engaged in trade or commerce or industry is guilty of an indictable offence and liable to a

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

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penalty not exceeding one thousand dollars or to one month's imprisonment, or, if a corporation, to a penalty not exceeding five thousand dollars, who

(*a*) is a party or privy to, or assists in, any transaction or sale which discriminates, to his knowledge, against competitors of the purchaser in that any discount, rebate or allowance is granted to the purchaser over and above any discount, rebate or allowance available at the time of such transaction to the aforesaid competitors in respect of a sale of goods of like quality and quantity;

The provisions of this paragraph shall not, however, prevent a co-operative society returning to producers or consumers, or a co-operative wholesale society returning to its constituent retail members, the whole or any part of the net surplus made in its trading operations in proportion to purchases made from or sales to the society;

(*b*) engages in a policy of selling goods in any area of Canada at prices lower than those exacted by such seller elsewhere in Canada, for the purpose of destroying competition or eliminating a competitor in such part of Canada;

(*c*) engages in a policy of selling goods at prices unreasonably low for the purpose of destroying competition or eliminating a competitor."

The Minister observes that said section 498A was enacted for the purpose of giving effect to certain recommendations contained in the Report of the Royal Commission on Price Spreads but that doubts exist or are entertained as to whether the Parliament of Canada had legislative jurisdiction to enact this section, in whole or in part, and that it is expedient that such question should be referred to the Supreme Court of Canada for judicial determination.

The Committee, accordingly, on the recommendation of the Minister of Justice, advise that the following question be referred to the Supreme Court of Canada, for hearing and consideration, pursuant to section 55 of the *Supreme Court Act:*

Is said section 498A of the Criminal Code, or any or what part or parts of the said section, ultra vires of the Parliament of Canada?

E. J. LEMAIRE,
Clerk of the Privy Council.

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* *N. W. Rowell K.C., Louis St-Laurent K.C.,* and *C. P. Plaxton K.C.* for the Attorney-General of Canada.

A. W. Roebuck K.C. (Attorney-General) and *I. A. Humphries K.C.* for Ontario.

Charles Lanctot K.C. and *Aimé Geoffrion K.C.* for the Attorney-General of Quebec.

D. V. White for the Attorney-General of New Brunswick.

G. McG. Sloan K.C. (Attorney-General) and *J. W. deB. Farris K.C.* for British Columbia.

J. Allen K.C. for the Attorney-General of Manitoba.

W. S. Gray K.C. for the Attorney-General of Alberta.

S. Quigg for the Attorney-General of Saskatchewan.

The judgment of Duff C.J. and Rinfret, Davis and Kerwin JJ. was delivered by

DUFF C.J.—Section 498A, the validity of which is in question, is in these terms:

498A. (1) Every person engaged in trade or commerce or industry is guilty of an indictable offence and liable to a penalty not exceeding one thousand dollars or to one month's imprisonment or, if a corporation, to a penalty not exceeding five thousand dollars, who

(*a*) is a party or privy to, or assists in, any transaction of sale which discriminates, to his knowledge, against competitors of the purchaser in that any discount, rebate or allowance is granted to the purchaser over and above any discount, rebate or allowance available at the time of such transaction to the aforesaid competitors in respect of a sale of goods of like quality and quantity;

The provisions of this paragraph shall not, however, prevent a co-operative society returning to producers or consumers, or a co-operative wholesale society returning to its constituent retail members, the whole or any part of the net surplus made in its trading operations in proportion to purchases made from or sales to the society;

(*b*) engages in a policy of selling goods in any area of Canada at prices lower than those exacted by such seller elsewhere in Canada, for the purpose of destroying competition or eliminating a competitor in such part of Canada;

(*c*) engages in a policy of selling goods at prices unreasonably low for the purpose of destroying competition or eliminating a competitor.

This section in substance declares that everybody is guilty of an indictable offence and liable to punishment in respect thereof who does any of the acts or series of acts denoted by subsections (*a*), (*b*) and (*c*). We see no good reason for denying the authority of Parliament, under subdivision 27 of section 91 of the B.N.A. Act, to pass these enactments.

Reporter's note: Same counsel also appeared at the argument of all the other References reported.

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Prima facie, they are enactments in relation to matters comprehended within the subject designated by the words of the 27th head of section 91, under any definition of "the criminal law." The prohibitions seem to be aimed at the prevention of practices which Parliament conceives to be inimical to the public welfare; and each of the offences is declared in explicit terms to be an indictable offence.

There is nothing in the circumstances or the operation of these provisions to show that Parliament was not exercising its powers under that subdivision. Whatever doubt may have previously existed, none can remain since the decision of the Judicial Committee in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (1), that, in enacting laws in relation to matters falling within the subject of the criminal law, as these words are used in section 91, Parliament is not restricted by any rule limiting the acts declared to be criminal acts to such as would appear to a court of law to be "in their own nature" criminal. The jurisdiction in relation to the criminal law is plenary; and enactments passed within the scope of that jurisdiction are not subject to review by the courts.

It is true that the term "criminal law" in section 91, subdivision 27, must be read subject to some qualification upon the ordinary sense of the words. When it is said that "criminal law" in section 91 (27) is criminal law in its widest sense, it is not meant that by force of section 92, including subdivision 15 of that section, the provinces have no power to pass enactments which would fall within the scope of the "criminal law," as that phrase would ordinarily be understood as applied to the enactments of a legislature possessing a general competence in relation to the criminal law. People in Canada are familiar with a network of prohibitions and regulations, the violation of which is punishable by fine, and sometimes by imprisonment, under municipal bylaws passed under the authority of provincial legislative measures. It has been held in many cases that prohibitions enforceable by fine and imprisonment enacted by the provincial legislatures may be valid enactments under section 92. Notable instances are the prohibitions enacted under the local option law

(1) [1931] A.C. 310.

of Ontario which was in question in *A.G. for Ontario* v. *A.G. for Dominion* (1); and the conditional and qualified prohibitions enforceable in the same way which were upheld in *Hodge* v. *The Queen* (2). Then there are the groups of provincial statutes passed under the authority of section 92 (1) dealing with the disqualification of voters; the disqualification of persons elected to sit and vote as members of the provincial legislatures; in which offences are created punishable by fine and imprisonment. These enactments which, in part at least, have the purpose of securing public order, and protecting the integrity of the representative system in the provinces, would, as I have said, fall within almost any definition of criminal law.

By the introductory clause of section 91, it is declared:

* * * 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;

which classes of subjects include the "criminal law"; and the final paragraph of that section declares, in effect, that "any matter coming within" the criminal law shall not be deemed to come within any matter 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.

Clearly, if the term "criminal law" is used in an absolutely unrestricted sense (in subdivision 27), then nothing in the nature of criminal law could be enacted under the authority of section 92. As Lord Herschell observed in the course of the argument on the reference already mentioned, in 1896, respecting the Ontario Local Option Statute, the term "criminal law" in subdivision 27 must be construed in such a way as to leave room for the operation of enactments of a provincial legislature under section 92 of the character just adverted to. It is also well settled that the Parliament of Canada cannot acquire jurisdiction over a subject which belongs exclusively to the provinces by attaching penal sanctions to legislation which in its pith and substance is legislation in relation to that subject in its provincial aspects alone (*In re Insurance Act of Canada*) (3).

(1) [1896] A.C. 348. (2) (1883) 9 A.C. 117.
(3) [1932] A.C. 41, at 53.

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We do not think any of these considerations are properly applicable to the statute before us. We think there is no ground on which we can hold that the statute, on its true construction, is not what it professes to be: an enactment creating criminal offences in exercise of the powers vested in Parliament in virtue of the 27th head of section 91.

The statute being *intra vires*, the interrogatory addressed to us should be answered in the negative.

CANNON J.—Paragraph (*a*) of 498A injects into every contract of sale by a person engaged in trade, commerce or industry a stipulation, obligatory under pain of a fine or imprisonment, in favour of the competitors of the purchaser, that any discount, rebate or allowance granted to the purchaser would be available at the time of the transaction to the aforesaid competitors in respect of a sale of goods of like quality and quantity.

This would, in every such case, be an application, by force of law, to every competitor of the purchaser as against the vendor of the "stipulation pour autrui" provided for by article 1029 of the Civil Code of the province of Quebec, which says:

"A party in like manner may stipulate for the benefit of a third person, when such is the condition of a contract which he makes for himself, or of a gift which he makes for another; and he who makes the stipulation cannot revoke it, if the third person have signified his assent to it."

Prima facie, therefore, Parliament has legislated directly in a matter of civil rights and has simply annexed to it a sanction, which would, by force of 91 (27) transfer the subject-matter from the provincial to the federal realm.

Blackstone, in his Commentaries, divides the wrongs known to the law into two species, private and public wrongs, considering torts under the former and crimes under the latter denomination. He says:

The distinction seems principally to consist in this: that private wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals considered merely as individuals; public wrongs or crimes are a breach and violation of the public rights and duties due to the whole community, considered as a community in its social aggregate capacity. As if I detain a field from another man, to which the law has given him a right, this is a civil injury and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public which of us is in possession of the land; but treason, murder and robbery are properly ranked among crimes; since, beyond the injury done to individuals, they strike at the very being of

the society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity.

The first characteristic of a crime, therefore, is the danger to the community as a whole which the conduct of the offender is felt to involve. It may, from this point of view, be said to be the breach of a general obligation imposed by the law for the benefit of the State; whereas a tort is the breach of a particular obligation imposed by the law for the benefit of the individual.

The second characteristic by which a crime may be recognized is to be found, not in the nature of the conduct itself, but in the consequences to which that conduct gives rise. Whereas the object of the law in the case of a tort is primarily the *compensation* of the party injured, its object in the case of crime is primarily the *punishment* of the offender. The civil law looks rather to the plaintiff, the criminal law to the defendant. If, then, the result of the proceedings is the satisfaction of the plaintiff, we may expect to find that the conduct in question amounts to a tort; if it is the punishment of the defendant, then it will be a crime. The result of this difference in attitude is reflected in the royal power of *Pardon*. The King may pardon a criminal, but not a civil offence. It is reasonable that he should have the power to waive an injury to the State of which he is the representative, and to put an end to proceedings which are carried on in his name; but he cannot absolve a defendant in a civil action from the duty of making compensation to the individual whom he has injured.

The above is taken from Stephen's Commentaries of the Laws of England, 19th ed., vol. IV, pp. 3, 4 and 5, where he gives as an approximate definition of crime that it is the breach of an obligation imposed by law for the benefit of the community and which results in the punishment of the offender.

Every command involves a sanction; and thus every law forbids every act which it forbids at all under pain of punishment. This makes it necessary to give a definition of punishment as distinguished from sanction.

The sanctions of all laws of every kind will be found to fall under two great heads; those who disobey them may be forced to indemnify another person either by damages or by specific performance, or they may themselves be subjected to some sufferings. In each case the legislator

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enforces his commands by sanctions, but in the first case the sanction is imposed entirely for the sake of the injured party. Its enforcement is in his discretion and for his advantage. In the second, the sanction consists in suffering imposed on the person disobeying. It must be imposed for public purposes, and have no direct reference to the interests of the person injured by the act punished. Punishments are thus sanctions, but they are sanctions imposed for the public, and at the discretion and by the direction of those who represent the public. The result of the cases appears to be that the infliction of punishment in the interest of the public is the true test by which criminal are distinguished from civil proceedings, and that the moral nature of the act has nothing to do with the question. It is sufficient in this place to observe that they illustrate the general proposition that the province of criminal law must not be supposed to be restricted to those acts which popular language would describe as crimes, but it extends to every act, no matter what its moral quality may be, which the law has forbidden, and to which it has affixed a punishment in the interest of the public.

I conclude that the first paragraph (*a*) does not fill the foregoing requirements, inasmuch as it has in view only the protection of the individual competitors of the vendor, not the maintenance of public order or the promotion of the public weal. It deals exclusively with the civil law, and the only logical sanction to enforce the stipulation in favour of an aggrieved competitor would be to give him against the discriminating vendor a recourse in damages for compensation of any damage resulting from a refusal to sell to him at the same price goods of like quality and quantity. The penalty imposed amounts only to a colourable attempt to invade the provincial field.

Sections (*b*) and (*c*), on the other hand, are genuine criminal legislation, according to the above *criteria.*

I, therefore, say that subsection (*a*) of section 498A, with the penalties attached, does not come within the definition of criminal law and is *ultra vires;* subsections (*b*) and (*c*) would be *intra vires* of the Parliament of Canada.

CROCKET, J.—It must, I think, be taken as established by the decisions of this Court and the Judicial Committee of the Privy Council that the Parliament of Canada cannot arrogate to itself any legislative jurisdiction, which it would otherwise not possess, in relation to any of the classes of subjects enumerated in s. 92 of the B.N.A. Act, by merely dealing with any such subject as criminal law under head 27 of s. 91; and that if, when examined, any legislation, though inserted in the Criminal Code, is found to deal with matters exclusively committed to the legislative jurisdiction of the provinces by s. 92, and not to be criminal in its essence, such legislation ought to be declared to be invalid. This principle was clearly affirmed by the Judicial Committee of the Privy Council in its judgment in *Attorney-General for Ontario* v. *Reciprocal Insurers* (1), delivered by the present Chief Justice of this Court. In that case the Judicial Committee was considering an amendment to s. 508 of the Criminal Code, adding thereto a provision which declared it to be an indictable offence for any person to solicit or accept any insurance risk except on behalf of a company or association licensed under the Dominion *Insurance Act*, 1917. The Board held that the amendment was invalid, since, in substance though not in form, it was in regulation of contracts of insurance, subjects not within the legislative competence of the Dominion. The Right Honourable Mr. Justice Duff (as he then was) in delivering the judgment of the Board, after reviewing the relevant previous decisions of the Judicial Committee, including the *Board of Commerce* case (2), and quoting extensively from the judgment of the Supreme Court of the United States in *Hammer* v. *Dagenhat* (3), said at pp. 339 and 340:

> It is not seriously disputed that the purpose and effect of the amendment in question are to give compulsory force to the regulative measures of the *Insurance Act*, and their Lordships think it not open to controversy that in purpose and effect s. 508C is a measure regulating the exercise of civil rights. But, on behalf of the Dominion, it is argued that, although such be the true character of the legislation, the jurisdiction of Parliament, in relation to the criminal law, is unlimited, in the sense, that

(1) [1924] A.C. 328. (2) [1922] 1 A.C. 191.
(3) (1918) 247 U.S. 251.

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in execution of its powers over that subject-matter, the Dominion has authority to declare any act a crime, either in itself or by reference to the manner or the conditions in which the act is done, and consequently that s. 508C, being by its terms limited to the creation of criminal offences, falls within the jurisdiction of the Dominion.

The power which this argument attributes to the Dominion is, of course, a far-reaching one. Indeed the claim now advanced is nothing less than this, that the Parliament of Canada can assume exclusive control over the exercise of any class of civil rights within the provinces, in respect of which exclusive jurisdiction is given to the provinces under s. 92, by the device of declaring those persons to be guilty of a criminal offence who in the exercise of such rights do not observe the conditions imposed by the Dominion.

And later, at pp. 342 and 343 His Lordship added:

And indeed, to hold otherwise would be incompatible with an essential principle of the Confederation scheme, the object of which, as Lord Watson said in *Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1), was "not to weld the Provinces into one or to subordinate the Provincial Governments to a central authority," "Within the spheres allotted to them by the Act the Dominion and the Provinces are," as Lord Haldane said in *Great West Saddlery Co.* v. *The King* (2), "rendered in general principle co-ordinate Governments."

Their Lordships think it undesirable to attempt to define, however generally, the limits of Dominion jurisdiction under head 27 of s. 91; but they think it proper to observe, that what has been said above does not involve any denial of the authority of the Dominion Parliament to create offences merely because the legislation deals with matters which, in another aspect, may fall under one or more of the subdivisions of the jurisdiction entrusted to the Provinces. It is one thing, for example, to declare corruption in municipal elections, or negligence of a given order in the management of railway trains, to be a criminal offence and punishable under the Criminal Code; it is another thing to make use of the machinery of the criminal law for the purpose of assuming control of municipal corporations or of Provincial railways.

In the *Board of Commerce* case (3) in 1921 the Judicial Committee considered the question of the validity of an order made by the Board of Commerce, under the *Board of Commerce Act* and the *Combines and Fair Prices Act,* enacted by the Dominion Parliament in 1919, restraining certain manufacturers of clothing in the city of Ottawa in respect of sale prices of their products. Parliament purported to authorize the Board of Commerce to restrain and prohibit the formation and operation of such trade combinations for production and distribution in the provinces as the Board might consider to be detrimental to the public interest and to give the Board authority also to restrict accumulation of food, clothing and fuel beyond

(1) [1892] A.C. 437. (2) [1921] 2 A.C. 100.
(3) [1922] 1 A.C. 191.

the amount reasonably required in the case of a private person for his household and in the case of a trader for his business, and to require the surplus to be offered for sale at fair prices. The Board was also authorized to attach criminal consequences to any breach of the Act which it determined to be improper. The Judicial Committee held that both these Acts were ultra vires the Dominion Parliament, since they interfered seriously with property and civil rights in the provinces, a subject reserved exclusively to the provincial legislatures by s. 92, and were not passed in any highly exceptional circumstances, such as war or famine, which conceivably might render trade combinations and hoarding outside the heads of s. 92 and within the general power given by s. 91. Counsel for the Dominion in that case argued that the legislation fell under s. 91 (2): The regulation of Trade and Commerce, and also that it fell within s. 91 (27): The Criminal Law, etc. Both these contentions were rejected for the reasons stated. Dealing with the criminal law contention, Lord Haldane, in delivering the judgment of the Board said—

> For analogous reasons the words of head 27 of s. 91 do not assist the argument for the Dominion. It is one thing to construe the words "the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters," as enabling the Dominion Parliament to exercise exclusive legislative power where the subject-matter is one which by its very nature belongs to the domain of criminal jurisprudence. A general law, to take an example, making incest a crime, belongs to this class. It is quite another thing, first to attempt to interfere with a class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions, designated as new phases of Dominion criminal law which require a title to so interfere as basis of their application.

The learned counsel for the Dominion in the present case strongly argued that the authority of both the *Board of Commerce* (1) and the *Reciprocal Insurers* (2) cases had been materially modified by the decision of the Judicial Committee in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (3). I can find nothing in the judgment in the last-named case, as delivered by Lord Atkin, which detracts in any manner from the authority of either the *Board of Commerce* (1) or the

(1) [1922] 1 A.C. 191. (2) [1924] A.C. 328.
(3) [1931] A.C. 310.

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Reciprocal Insurers (1) cases, as regards the interpretation of 91 (27).

The Board in the later case was dealing with the validity of this very section of the Criminal Code, as it stood in Revised Statutes of Canada, 1927, ch. 36, which made it an indictable offence, punishable by fine or imprisonment, to conspire, combine or agree unduly to limit transportation facilities, restrain commerce or lessen manufacture or competition, as well as with s. 36, Revised Statutes of Canada, 1927, ch. 26 (*The Combines Investigation Act*), which made it an indictable offence punishable by fine or imprisonment to be a party to the formation or operation of a combine, as defined by s. 2, viz: a combine "which is to the detriment of the public and restrains or injures trade or commerce." Lord Atkin at p. 317, as reported, said:—

> Both the Act and the section have a legislative history, which is relevant to the discussion. Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be *ultra vires;* nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment. *But one of the questions to be considered is always whether in substance the legislation falls within an enumerated class of subject, or whether on the contrary in the guise of an enumerated class it is an encroachment on an excluded class.* On this issue the legislative history may have evidential value.

And His Lordship, after setting out the history of the Act and of section 498, as it stood in the Revised Statutes, 1927, distinctly stated:—

> Their Lordships have dealt at some length with the provisions of the Acts of 1919 inasmuch as the appellants relied strongly on the judgment of the Board in *In re Board of Commerce Act,* 1919 (2), which held both Acts to be *ultra vires.* Unless there are material distinctions between those Acts and the present, it is plainly the duty of this Board to follow the previous decision. It is necessary therefore to contrast the provisions of the Acts of 1919 with the provisions of the Act now in dispute.

He then proceeded to point out that by the new Act combines were defined as combines "which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers or others," and which "are mergers, trusts or monopolies, so-called," or result from the acquisition by any person of any control over the business of any other person or result from any agreement which has the effect of limiting facilities for production, manufacture or transport, or of fixing a common

(1) [1924] A.C. 328. (2) [1922] 1 A.C. 191.

price, or enhancing the price of articles or of preventing or lessening competition in or substantially controlling production or manufacture, or "otherwise restraining or injuring trade or commerce." After reviewing the provisions of the Act, His Lordship added:—

In their Lordships' opinion s. 498 of the Criminal Code and the greater part of the provisions of the Combines Investigation Act fall within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects, "the criminal law including the procedure in criminal matters" (s. 91, head 27). The substance of the Act is by s. 2 to define, and by s. 32 to make criminal, combines which the legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto been considered to be criminal. But only those combines are affected "which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers, or others"; and if Parliament genuinely determines that commercial activities, which can be so described, are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes. "Criminal law" means "the criminal law in its widest sense.": *Attorney-General for Ontario* v. *Hamilton Street Ry. Co.* (1). It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes. Criminal law connotes only *the quality* of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality—unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished. Their Lordships agree with the view expressed in the judgment of Newcombe J. that the passage in the judgment of the Board in the *Board of Commerce* case (2), to which allusion has been made, was not intended as a definition. In that case their Lordships appear to have been contrasting two matters—one obviously within the line, the other obviously outside it. For this purpose it was clearly legitimate to point to matters which are such serious breaches of any accepted code of morality as to be obviously crimes when they are prohibited under penalties. The contrast is with matters which are merely attempts to interfere with Provincial rights, and are sought to be justified under the head of "criminal law" colourably and merely in aid of what is in substance an encroachment.

I do not think it can fairly be said that any of the passages which I have quoted at such length from Lord

(1) [1903] A.C. 524. (2) [1922] 1 A.C. 191.

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Atkin's speech were intended to disapprove of anything previously laid down in the judgments of the Board in either the Board of Commerce or the *Reciprocal Insurers* case (1). The most that can be said is that Their Lordships agreed that the allusion which Lord Haldane made in the *Board of Commerce* case (2) to Parliament exercising "exclusive legislative power where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence" was not intended as a definition of criminal law as used in 91 (27), and that the quoted reference was made merely for the purpose of illustrating the difference between Parliament legislating genuinely on a matter which was obviously one of criminal law and legislating on a matter which was merely a colourable attempt to encroach upon provincial legislative jurisdiction. I think the same thing may be said of the observations which Lord Atkin himself made regarding the quality of a criminal act, that none of those observations were intended to lay down definitely the principle that the mere fact of Parliament prohibiting an act and attaching penal sanctions thereto must in all cases be taken as conclusive evidence of the criminal character of any legislation, the constitutional validity of which is called in question. Indeed, the whole judgment, in my opinion, indicates quite the contrary. One cannot read it throughout without seeing that the Board in that case itself considered very carefully the character of the legislation there under review in determining whether or not it was or was not genuine criminal legislation within the meaning of 91 (27). Indeed, the decision, in my opinion, far from modifying, actually confirms the principle laid down in the previous cases, as witness the statement that "one of the questions to be considered," in case of controversy between the two legislative powers "is always whether in substance the legislation falls within an enumerated class of subject or whether, on the contrary, in the guise of an enumerated class it is an encroachment on an excluded class."

I cannot therefore agree to the proposition that the jurisdiction of Parliament in relation to criminal law is plenary and that enactments passed within the scope of

(1) [1924] A.C. 328. (2) [1922] 1 A.C. 191.

that jurisdiction are not subject to review by the courts, if by that it is meant to say that the courts have no right to review the quality and character of any legislation which Parliament chooses to place in the criminal code. Once it is determined that any such legislation in reality is of a criminal character, the courts of course will not presume to consider its wisdom or unwisdom, but in my opinion it is not only their right, but their clear duty to scrutinize any enactments, which are inserted in the criminal code, for the purpose of deciding whether they are or are not of such a quality or character as can properly be described as criminal law within the meaning of s. 91 (27). I can conceive of no other way in which a controversy as to legislative jurisdiction to enact a criminal law within the meaning of s. 91 (27) can properly be decided. If the mere fact of its enactment is itself to be regarded by the courts as conclusive, there would, as pointed out in the *Reciprocal Insurers'* case (1), be no class of civil rights over which the Parliament of Canada could not assume exclusive legislative control by the mere device of declaring those persons to be guilty of a criminal offence who in the exercise of such rights do not observe the conditions imposed by the Dominion.

Having examined the three subsections, which Parliament added to s. 498 of the Criminal Code, as we must do in order to determine their purpose and effect and answer the question, which the Governor in Council has submitted to us in regard to them, I have concluded that (*b*) and (*c*) allege offences which might reasonably be held to be of a criminal character, inasmuch as both require a specific intent to destroy competition or to eliminate a competitor —a thing which is bound in the end to operate to the detriment or against the interest of the public. The essential ingredient of the offence, as described in each of these subsections, is the intent to cause injury to the public or to an individual. They both, therefore, present on their face the characteristic feature of crime, viz: the intent to do wrong. In this respect they are in marked contrast with (*a*), which purports to make it a crime for anyone to be a party to any transaction of sale, which discriminates to his knowledge against the competitors of the purchaser in that any discount, rebate or allowance is granted to the

(1) [1924] A.C. 328.

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purchaser, over and above any discount, rebate or allowance available at the time to such competitors in respect of a sale of goods of like quality or quantity. No intent to destroy competition or to eliminate an individual competitor is required. On the contrary its apparent object is to prevent the granting of discounts, rebates or allowances to large scale purchasers of manufactured and all other goods for any reason whatever and to make the price of commodities uniform, as far as possible, and by this expedient to raise retail prices throughout the country and thus to deprive the great mass of the consuming population of the benefit of real competition in trade. Such a policy may be desirable and beneficial to a particular class of the population, but its purpose and effect is purely economic and involves the virtual control by Parliament of such subjects as contracts of sale, which the B.N.A. Act has assigned to the exclusive jurisdiction of the Provincial Legislatures, which, in my judgment, if I may say so, are in a much better position to deal with such subjects as matters of local and provincial concern than the federal Parliament. The crucial question, however, with which we are called upon to deal is as to whether such agreements as those described in (*a*) can legitimately be classed as falling under the head of criminal law. In my opinion s.s. (*a*) describes an act, which lacks every element of what is ordinarily associated with criminal law, either in the minds of lawyers or of laymen. It describes a thing which is neither civilly nor moraly wrong in itself under the cloak of discrimination. I have no hesitation in saying that in my opinion it is not genuine criminal legislation and that, dealing as it does with a subject matter of such a character, its incorporation in the criminal code should be held to be a mere colourable attempt on the part of Parliament to encroach upon the legislative authority of the provinces.

I shall, therefore, answer the question which has been submitted to us in respect of these enactments that s.s. (*a*) of 498A of the Criminal Code is *ultra vires* of the Parliament of Canada.

IN THE MATTER OF A REFERENCE AS TO WHETHER THE PARLIAMENT OF CANADA HAD LEGISLATIVE JURISDICTION TO ENACT THE DOMINION TRADE AND INDUSTRY COMMISSION ACT, 1935, BEING 25-26 GEO. V, C. 59.

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*Jan. 17, 20, 22.
*June 17.

Constitutional law—Dominion Trade and Industry Act—Constitutional validity—Agreements between persons in same industry to modify undue competition—National Research Council—"Canada Standard" as trade-mark—Director of Public Prosecutions.

Section 14 of the Dominion Trade and Industry Act provides *inter alia* that agreements between persons engaged in any specific industry, entered into in order to modify wasteful or demoralizing competition existing in such industry, may be approved by the Governor in Council on the advice of the Commission.

Held that said section is *ultra vires* of the Parliament of Canada. Its enactments are not necessarily incidental to the exercise of any powers of the Dominion in relation to criminal law, nor can such section be sustained as legislation in relation to the regulation of trade and commerce.

Sections 16 and 17 of the same Act enacts *inter alia* that, in addition to its powers and duties, under any other statute or law, the National Research Council shall, on the request of the Commission, study, investigate, report and advise upon all matters relating to commodity standards as defined in the Act; and subsection 3 of section 17 provides that such advices and reports shall be privileged.

Held that these two sections are *intra vires* of the Parliament of Canada. In view of the responsibilities of the Dominion Parliament in respect of the criminal law and trade and commerce, Parliament may exercise a wide latitude in prosecuting investigations for ascertaining the facts with regard to fraudulent commercial practices, including adulteration.

Sections 18 and 19 of the same Act provide that the words "Canada standard" or initials "C.S." shall be a national trade-mark vested in His Majesty in the right of the Dominion of Canada which may be used only under the conditions prescribed, including the condition that the commodity, to which such trade-mark is applied, shall conform to the requirements of a commodity standard for such commodity or class of commodity established under the provisions of an Act of the Parliament of Canada.

Held that both sections are *ultra vires* of the Parliament of Canada. The so-called trade-mark is not a trade-mark in any proper sense of the term and the function of the letters "C.S." as declared by subsection 1 of section 18 is different from the function of an ordinary trade-mark: that subsection is really an attempt to create a civil right of novel character and to vest it in the Crown in right of the Dominion. Subsection 2 of section 18 is also objectionable as attempting to control the exercise of a civil right in the provinces.

Section 20 of the same Act provides that the Commission may receive complaints respecting unfair trade practices and may investigate the same and recommend prosecutions if of opinion that the practice com-

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

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REFERENCE *re* DOMINION TRADE AND INDUSTRY COMMISSION ACT.

plained of constitutes an offence against any one of the Dominion Laws mentioned in s. 2 (*h*) of the Act.

Held that such section is *intra vires* of the Parliament of Canada in so far as the enactments enumerated in section 2 (*h*) of the Act may be *intra vires*.

Sections 21 and 22 of the same Act provide for the appointment of an officer to be called the Director of Public Prosecutions to assist in the prosecution of offences against any of these laws mentioned in section 2 (*h*) of the Act.

Held that these sections (as applicable to the criminal offences created by such of the enactments enumerated in section 2 (*h*) as may be *intra vires*) are not *ultra vires* of the Parliament of Canada. Authority of the Parliament to enact these provisions is necessarily incidental to the exercise of legislative authority in relation to the criminal offences created by the laws "prohibiting unfair trade practices" validly enacted in such of the statutes enumerated in section 2 (*h*) as may be competent.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, in the exercise of the powers conferred by section 55 of the *Supreme Court Act* (R.S.C. 1927, c. 35) of the following question: Is the *Dominion Trade and Industry Commission Act,* or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

The Order in Council referring the question to the Court is as follows:

The Committee of the Privy Council have had before them a report, dated 30th October, 1935, from the Minister of Justice, referring to the *Dominion Trade and Industry Commission Act,* 1935, being chapter 59 of the statutes of Canada, 1935, which was passed, as appears from the recitals contained in the preamble of the said Act, for the purpose of giving effect to certain recommendations contained in the report of the Royal Commission on Price Spreads.

The Minister observes that doubts exist or are entertained as to whether the Parliament of Canada had legislative jurisdiction to enact the said Act, either in whole or in part, and that it is expedient that such question should be referred to the Supreme Court of Canada for judicial determination.

The Committee, accordingly, on the recommendation of the Minister of Justice, advise that the following question be referred to the Supreme Court of Canada, for hearing

and consideration, pursuant to section 55 of the *Supreme Court Act*,—

Is the *Dominion Trade and Industry Commission Act*, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

E. J. LEMAIRE,
Clerk of the Privy Council.

Section 2 (*h*) of the Act, referred to in the judgment, reads as follows:

"Laws prohibiting unfair trade practices" means the provisions of the *Agricultural Pests Control Act, The Canada Grain Act,* the *Combines Investigation Act,* the *Dairy Industry Act,* the *Electrical Units Act, The Electricity Inspection Act, 1928,* the *Feeding Stuffs Act,* the *Fertilizer Act,* the *Fish Inspection Act,* the *Food and Drugs Act, The Fruit, Vegetables and Honey Act,* the *Gas Inspection Act,* the *Inspection and Sale Act,* the *Live Stock and Live Stock Products Act, The Maple Sugar Industry Act, 1930,* the *Meat and Canned Foods Act, The Natural Products Marketing Act, 1934, The Patent Act, 1935,* the *Petroleum and Naphtha Inspection Act, The Precious Metals Marking Act, 1928,* the *Proprietary or Patent Medicine Act,* the *Seeds Act,* the *Trade Mark and Design Act, The Unfair Competition Act, 1932,* the *Water Meters Inspection Act,* the *Weights and Measures Act,* and of sections 404, 405, 406, 415A and 486 to 504, inclusive, of the *Criminal Code,* and of this Act and regulations under the said Acts, which provisions prohibit acts or omissions connected with industry as being fraudulent, misrepresentative or otherwise unfair or detrimental to the public interest."

* The judgment of the Court was delivered by

DUFF C.J.—The sections which require consideration are sections 14, 16, 17, 18, 20, 21 and 22.

As to section 14, we cannot perceive any ground for holding that the enactments of this section are necessarily incidental to the exercise of any powers of the Dominion in relation to the criminal law. Nor can the section, we think, be sustained as legislation in relation to the regulation of trade and commerce consistently with the passage

* *Reporter's note:* Counsel on the argument of this Reference were the same as those mentioned at p. 365.

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quoted from the judgment of the Judicial Committee in *Snider's* case (1), in the reasons given in the judgment upon the Reference concerning the *Natural Products Marketing Act*. It is to be observed that this section contemplates action by the Commission and by the Governor in Council in respect of individual agreements which may relate to trade that is entirely local.

If confined to external trade and interprovincial trade, the section might well be competent under head no. 2 of section 91; and if the legislation were in substance concerned with such trade, incidental legislation in relation to local trade necessary in order to prevent the defeat of competent provisions might also be competent; but as it stands, we think this section is invalid.

As regards sections 16 and 17, it would appear that in view of the responsibilities of the Dominion Parliament in respect of the criminal law and trade and commerce, Parliament may (as seems to be suggested by the judgments of the Judicial Committee in the *Board of Commerce* case (2) and in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (3), exercise a wide latitude in prosecuting investigations for ascertaining the facts with regard to fraudulent commercial practices, including adulteration; for that reason we think these two sections, 16 and 17, are *intra vires*. Subsection 3 of section 17 would seem to be reasonably ancillary to the principal provisions of the two sections.

As to sections 18 and 19, it is not necessary to pass upon the question whether or not the exclusive legislative jurisdiction of the Dominion extends to the subject of trade marks in virtue of subdivision 2 of section 91, "The regulation of trade and commerce." The so-called trade mark is not a trade mark in any proper sense of the term. The function of a trade mark is to indicate the origin of goods placed on the market and the protection given to a trade mark is intended to be a protection to the producer or seller of his reputation in his trade. The function of the letters "C.S.," as declared by section 18 (1), is something altogether different. That subsection is really an attempt to create a civil right of novel character and to vest it in

(1) [1925] A.C. 396. (2) [1922] 1 A.C. 191, at 201.
(3) [1931] A.C. 310.

the Crown in right of the Dominion. Generally speaking, except when legislating in respect of matters falling within the enumerated subjects of section 91, Parliament possesses no competence to create a civil right of a new kind which, if validly created, would be a civil right within the scope and meaning of head no. 13 of section 92. The second subsection is also objectionable as attempting to control the exercise of a civil right in the provinces.

Section 19 is merely subsidiary to section 18 and necessarily falls with it.

The first part of section 20 would appear to be unobjectionable as respects enactments mentioned in section 2 (*h*) which may be *intra vires* of Parliament. As regards the validity of these enactments we have only heard argument in respect of two of them; the *Natural Products Marketing Act* and section 498A of the Criminal Code. We have elsewhere given our reasons for considering the first of these *ultra vires*. As to the second of them (section 498A of the Criminal Code) a majority of the Court hold that section to be *intra vires* in its entirety (Cannon and Crocket JJ. dissenting as to subsection (*a*) of that section).

As to sections 21 and 22, it would appear that authority to enact these provisions is necessarily incidental to the exercise of legislative authority in relation to the criminal offences created by the laws "prohibiting unfair trade practices" validly enacted in such of the statutes enumerated in section 2 (*h*) as may be competent. We do not think it can be said that the authortiy to provide for the prosecution of criminal offences falls "strictly" within the subject "Criminal law and criminal procedure,"—head 27 of the enumerated heads of section 91; but our view is that the authority to make such provision, and the authority to enact conditions in respect of the institution and the conduct of criminal proceedings is necessarily incidenal to the powers given to the Parliament of Canada under head no. 27 (*Proprietary Articles Trade Association* v. *Attorney-General for Canada*) (1).

This reasoning would appear to apply to the question of the validity of subsection 1 of section 15 and the second part of section 20, which, accordingly, seem to be valid.

(1) (1931) A.C. 310, at 326-7.

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*Feb. 4, 5.
*June 17.

IN THE MATTER OF A REFERENCE AS TO WHETHER THE PARLIAMENT OF CANADA HAD LEGISLATIVE JURISDICTION TO ENACT THE FARMERS' CREDITORS ARRANGEMENT ACT, 1934, 24-25 GEO V, C. 53, AS AMENDED BY THE FARMERS' CREDITORS ARRANGEMENT ACT AMENDMENT ACT, 1935, 25-26 GEO. V, C. 20.

Constitutional law—The Farmers' Creditors Arrangement Act—Constitutional validity—Bankruptcy and insolvency—B.N.A. Act, 1867, s. 91, ss. 21.

The Farmers' Creditors Arrangement Act, which is entitled "An Act to Facilitate Compromises and Arrangements between Farmers and their Creditors," provides by its enactments a procedure whereby a farmer may make a proposal for a composition, extension of time or a scheme of arrangement, to his creditors. If the proposal is accepted by the ordinary creditors and the secured creditors whose rights are affected concur, it is submitted to the Court for approval. If it is not accepted by the ordinary creditors or if a secured creditor whose rights are affected by it does not concur, the matter is referred to a Board of Review to formulate a proposal. If the proposal is accepted by the creditors and approved by the Court, or if it is formulated by the Board of Review and is approved by the creditors and the debtor, or if, though not so approved, it is confirmed by the Board of Review, it shall be binding upon all the creditors and the debtor.

Held, Cannon J. dissenting, that the Act is *intra vires* of the Parliament of Canada. The power of the Parliament to enact this statute is derived from subdivision 21 of section 91 of the B.N.A. Act, in virtue of which the exclusive legislative authority of the Parliament of Canada extends to the subject of Bankruptcy and Insolvency. The provisions of the statute affect farmers who are in such a situation that they are unable to pay their debts as they fall due; and it is competent to Parliament, possessing plenary authority in respect of bankruptcy and insolvency, to treat this condition of affairs as a state of insolvency.

Per Cannon J. dissenting:—In view of the accepted aims and past history of the bankruptcy and insolvency legislation, the Parliament of Canada, in enacting the Act, has exceeded the domain of bankruptcy and insolvency to which its jurisdiction is limited. More particularly, the Act does not provide, as in the case of an insolvent person, for the rateable distribution of the assets of the debtor among his creditors nor for the discharge of the debt. Section 17 of the Act, which fixes the rate of interest, is *intra vires* of the Parliament of Canada under ss. 19 of section 91 of the B.N.A. Act.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, in the exercise of the powers conferred by s. 55 of the *Supreme Court*

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

Act (R.S.C. 1927, c. 35) of the following question: Is the *Farmers' Creditors Arrangement Act,* 1934, as amended by the *Farmers' Creditors Arrangement Act Amendment Act,* 1935, or any of the provisions thereof, and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

The Order in Council referring the question to the Court reads as follows:

The Committee of the Privy Council have had before them a report, dated 13th November, 1935, from the Minister of Justice, referring to *The Farmers' Creditors Arrangement Act,* 1934, chapter 53 of the statutes of Canada, 1934, being an Act to Facilitate Compromises and Arrangements between Farmers and their Creditors, and to its amending Act, *The Farmers' Creditors Arrangement Act Amendment Act,* 1935, chapter 20 of the statutes of Canada, 1935, the principal of which Acts was enacted as appears from the preamble thereof upon the recital that in view of the depressed state of agriculture the present indebtedness of many farmers was beyond their capacity to pay; that it was essential in the interest of the Dominion to retain the farmers on the land as efficient producers and for such purpose it was necessary to provide means whereby compromises or rearrangements might be effected of debts of farmers who were unable to pay.

The Minister states that doubts exist or are entertained as to whether the Parliament of Canada had jurisdiction to enact the said Acts; or either of them, in whole or in part, and that it is expedient that such question should be referred to the Supreme Court of Canada for judicial determination.

The Committee, accordingly, on the recommendation of the Minister of Justice, advise that the following question be referred to the Supreme Court of Canada for hearing and consideration, pursuant to Section 55 of the Supreme Court Act: —

> Is the *Farmers' Creditors Arrangement Act,* 1934, as amended by the *Farmers' Creditors Arrangement Act Amendment Act,* 1935, or any of the provisions thereof, and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

E. J. LEMAIRE,
Clerk of the Privy Council.

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REFERENCE *re* FARMERS' CREDITORS ARRANGEMENT ACT, 1934, AND ITS AMENDING ACT, 1935.

The counsel mentioned in the report of the judgments on the Reference *re* Section 498A of the Criminal Code (p. 365) appeared on this Reference, except that *Aimé Geoffrion K.C.* for Quebec and *G. McG. Sloan K.C.* (Attorney-General) and *J. W. deB Farris K.C.* for British Columbia were not present; and *J. L. Ralston K.C.* appeared for the Attorneys-General for Quebec and British Columbia.

The judgment of Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ. was delivered by

DUFF C.J.—The title of the Act, which is really an office consolidation of a statute of 1934 with another of 1935, is "An Act to facilitate compromises and arrangements between farmers and their creditors."

The Act provides a procedure whereby a farmer may make a proposal for a composition, extension of time or scheme of arrangement to his creditors. If the proposal is accepted by the ordinary creditors, and secured creditors whose rights are affected agree to it, it is submitted to the Court for approval. If it is not accepted by the ordinary creditors, or if a secured creditor whose rights are affected does not agree, there is a reference to a board of review to formulate a proposal. If a proposal is formulated by the board of review and approved by the creditors and the debtor; or if, though not so approved, it is confirmed by the board of review, it is binding on all the creditors and the debtor.

"Farmer" means "a person whose principal occupation consists in farming or the tillage of the soil." "Creditor" includes "secured creditor."

Subsection 2 of section 2 makes the provisions of the *Bankruptcy Act* and rules applicable and is in these words:

> Unless it is otherwise provided or the context otherwise requires, expressions contained in this Act shall have the same meaning as in the *Bankruptcy Act*, and this Act shall be read and construed as one with the *Bankruptcy Act*, but shall have full force and effect notwithstanding anything contained in the *Bankruptcy Act*, and the provisions of the *Bankruptcy Act* and Bankruptcy Rules shall, except as in this Act otherwise provided, apply *mutatis mutandis* in the case of proceedings hereunder including meetings of creditors.

We are chiefly concerned with the provisions with regard to compositions. It is provided that a farmer who is unable to meet his liabilities as they become due may make a proposal for a composition, an extension of time or scheme of arrangement, and file a proposal with the Official Re-

ceiver who shall forthwith call a meeting of the creditors.

The Official Receiver is to perform the duties and functions required by the *Bankruptcy Act* to be performed by a trustee in the case of a proposal for a composition, extension of time or scheme of arrangement. These duties and functions are, generally, the submission to the meeting of the proposal, and, on its acceptance by the creditors, the application to the Court to approve it. A proposal may be one in relation to a debt owing to a secured creditor or owing to a person who has acquired property subject to a right of redemption, but except in the case of a proposal confirmed by the Board of Review, the concurrence of such creditor is required. Such a creditor, if the proposal relates to the debt owing to him, may value his security, and is entitled to vote only in respect of the balance of his claim after deducting the amount of his valuation, but no proposal is to be approved by the Court which provides for payment in excess of the valuation.

The provisions of the *Bankruptcy Act* preventing the approval of a proposal which does not provide for a payment of not less than fifty cents on the dollar, and priority of payment of certain debts are made inapplicable. Power is given to the Court to order a farmer to execute instruments necessary to give effect to the proposal when it has received the approval of the Court or the confirmation of the Board of Review. On the filing of a proposal, the property of the debtor is deemed to be under the authority of the Court, and creditors' remedies may not be exercised without leave of the Court for ninety days, or such further time as the Court may order.

Provision is made for the establishment in any province of a Board of Review consisting of a Chief Commissioner, who must be a Judge having jurisdiction in bankruptcy, and two Commissioners, one as representative of creditors and one as representative of debtors. When the Official Receiver reports that no proposal has been approved by the creditors, although one has been made, the Board, on the written request of a creditor or the debtor, is required to endeavour to formulate an acceptable proposal, and to consider representations by the parties interested. If any such proposal is approved by the creditors and the debtor, it is binding on them. If such a proposal is not approved, the

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Board may confirm it and it becomes binding upon all the creditors and the debtor. The full Board must deal with every request to formulate a proposal, and the determination of the majority prevails. The Board must base its proposal upon the present and prospective capability of the debtor to perform the obligations prescribed and the productive value of the farm, and may decline to formulate a proposal where it does not consider it can do so in fairness and justice to the debtor and the creditors. The Board is invested with the powers of a Commissioner appointed under the *Inquiries Act*. Special provision is made for insolvent farmer debtors residing in Quebec, whereby they may make an assignment for the general benefit of their creditors.

Section 17 provides that whenever any rate of interest exceeding seven per cent is stipulated for in any mortgage of farm real estate, after tender or payment of the amount owing, together with three months' further interest, no interest, after the expiry of the three months, shall be chargeable at any rate in excess of five per cent per annum.

As above mentioned, the provisions of the statute are made a part of the general system for the administration of the assets of bankrupts and insolvents established by the *Bankruptcy Act;* and they come into operation only where a farmer who is unable to meet his liabilities as they become due makes a proposal for a composition, extension of time or scheme of arrangement.

The grounds upon which the validity of the statute is impeached are, mainly, two: First, it is argued that it is not competent to the Parliament of Canada, in exercising its powers in relation to bankruptcy and insolvency, to enact legislation depriving a secured creditor of his right to realize his security fully for the recovery of the debt owing to him, where such security consists of a conventional charge upon the property of the insolvent or affecting that right by subjecting him in respect of it to the discretionary order of a tribunal.

Second, it is contended that the Parliament of Canada is incompetent to legislate in such a way as to affect the rights of the government of a province as creditor of an insolvent in the manner in which this statute professes to do.

The general scope of the jurisdiction in relation to bankruptcy or insolvency conferred under section 91 is thus described by Lord Selburne in *L'Union St. Jacques* v. *Bélisle* (1):—

> The words describe in their own legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation.

These words would indicate that Parliament, in providing for the administration of the estates of bankrupts and insolvents, has a very wide discretion and is not necessarily limited in the exercise of that discretion by reference to the particular provisions of bankruptcy legislation in England prior to the date of the B.N.A. Act. It is not necessary, however, for the purpose of passing upon the validity of this statute to determine to what extent Parliament is empowered, when making provision for the administration of such estates, to depart from the broad lines of such legislation as known and understood in 1867.

It is not open to dispute in this Court that legislation in respect of "compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law" (*In re Companies' Creditors Arrangement Act* (2). Nor can the authority of Parliament be controverted to enact provisions by which the security of a creditor of an insolvent may be prejudicially affected without his consent. That was decided in the case just referred to. By the statute under consideration on that reference, it is enacted (section 4) that

> Where a compromise or arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of such creditors, or class of creditors, and, if the court so determines, of the shareholders of such company, to be summoned in such manner as the court directs.

By section 5 it is provided that,

> If a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections three and four of this Act, or either of such sections, agree to any compromise or arrangement either as proposed . . . . or modified at such meeting or meetings, the compromise

(1) (1875) L.R. 6 P.C. 31, at 36. (2) [1934] S.C.R. 659.

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or arrangement may be sanctioned by the court, and if so sanctioned shall be binding on all the creditors, or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and shall also be binding on the company. . . .

"Secured creditors" include the "holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company. . . ."

In the case mentioned, this statute was held to be *intra vires*. The decision necessarily involves the proposition that Parliament may legislate in such a way as to make the terms of a compromise, to which a majority of three-fourths in value of secured creditors, or any class of secured creditors, in the sense mentioned, are parties, where the composition has received judicial sanction, binding upon a secured creditor who is not a party to the composition and has not given his assent to it. The principle of the legislation, in a word, is that a secured creditor under the conditions mentioned may be required by law to accept a composition to which he has not given his assent.

It has, of course, been a familiar characteristic of the operation of bankruptcy and insolvency legislation that a creditor possessing security on the property of his debtor in virtue of a judgment or of an execution should lose his privileged position to the extent to which the judgment or execution remains unsatisfied on bankruptcy supervening. But the argument under consideration distinguishes between the kind of security given by law to a judgment creditor and a conventional security and, in particular, a security in the nature of mortgage. From the point of view of the judgment creditor, the distinction, perhaps, does not rest upon very satisfactory grounds. It was at one time the law in some of the provinces of Canada that a judgment registered in a land registry office constituted a charge upon the lands of the judgment debtor enforceable in the same manner as an equitable charge for securing the payment of money; and a confession of judgment at one time was a form of security well known. Such security, although it derived its effectiveness from the privileges conferred by the law upon judgment creditors, had its origin in convention. Moreover, the judgment creditor who, by the law of the province, is the holder of a hypothec upon the lands of the judgment debtor or by virtue of the registration of his judgment, has what

amounts to an equitable charge upon such lands may suffer as great a deprivation by bankruptcy legislation which takes away his privilege upon a supervening bankruptcy as would a mortgagee affected in the same way. Nevertheless, it is true that, traditionally, mortgages have not, by bankruptcy legislation, been prejudicially affected in their right to resort to their securities.

Mr. Rowell has called our attention to section IX of chapter 19 (21 Jac. 1), and it appears that from the date of that enactment (1623) down to 1869, English bankruptcy legislation has contained a substantially similar provision. The section is in these words:—

IX. And, for the better division and distribution of the lands, tenements, hereditaments, goods, chattels and other estate of such bankrupt, to and amongst his or her creditors; Be it enacted, That . . .; and that all and every creditor and creditors having security for his or their several debts, by judgment, statute, recognizance, specialty with penalty or without penalty, or other security, or having no security, or having made attachments in London, or any other place, by virtue of any custom there used, of the goods and chattels of any such bankrupt, whereof there is no execution or extent served and executed upon any of the lands, tenements, hereditaments, goods, chattels, and other estate of such bankrupts, before such time as he or she shall or do become bankrupt, shall not be relieved upon any such judgment, statute, recognizance, specialty, attachments, or other security for any more than a rateable part of their just and due debts, with the other creditors of the said bankrupt, without respect to any such penalty or greater sum contained in any such judgment, statute, recognizance, specialty with penalty, attachment or other security.

By force of another section of the same statute, mortgages of real or personal property are not within the general words "other security." The section in itself, however, is of significance. Among the securities mentioned are "statutes and recognizances."

Statutes merchant and statutes staple are discussed by Blackstone (Ed. 1766, Clarendon Press, Vol. II, ch. 10, s. 4, p. 160). This section is devoted to one species of estates defeasible on condition and is preceded, in section 3, by a discussion of estates held *in vadio,* or pledge, which are said to be of two kinds—*vivum va dium,* or living pledge, and *mortuum vadium,* or dead pledge or mortgage. These sections (3 and 4) are introduced thus:

There are some estates defeasible upon condition subsequent, that require a more peculiar notice. Such are

Section 4 is in these words:

A fourth species of estates, defeasible on condition subsequent, are those held by *statute merchant,* and *statute staple;* which are very nearly

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related to the *vivum vadium* before mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into pursuant to the statute 13 Edward I *de marcatoribus*, and thence called a statute merchant; the other pursuant to the statute 27 Edw. III, c. 9, before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom formerly held by act of parliament in certain trading towns, and thence this security is called a statute staple. They are both, I say, securities for debts, originally permitted only among traders, for the benefit of commerce; whereby the lands of the debtor are conveyed to the creditor, till out of the rents and profits of them his debt may be satisfied: and during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple. There is also a similar security, the recognizance in the nature of a statute staple, which extends the benefit of this mercantile transaction to all the king's subjects in general, by virtue of the statute 23 Hen. VIII, c. 6.

The statutes which introduced these forms of securities were repealed in 1863. These securities, it should be observed, were effected by recognizance, the debtor's lands being bound as from the date of the recognizance. Blackstone, however, treats the security as one arising from conveyance, and Blackstone may be safely accepted as giving the current professional view of such transactions. The effect of the section quoted was that the holders of such securities were put in the same position as a judgment creditor; and upon bankruptcy a creditor holding such a security ranked on the assets rateably with unsecured creditors.

Even if it were open to us to depart from our recent decision in the reference concerning the *Companies' Creditors Arrangement Act* (1), we should, treating the matter as *res integra*, have thought that the history of bankruptcy legislation down to the year 1867 would not justify a conclusion that provisions such as those in the *Companies' Creditors Arrangement Act*, or those in the statute before us dealing with secured creditors were provisions beyond the discretion of Parliament to incorporate in a system for the administration of the estates of insolvents.

Before turning to the second ground upon which the legislation is attacked, it is convenient to refer to the nature of the proposal which is authorized in the case of secured creditors. That appears from section 7 which is in these words:

7. A proposal may provide for a compromise or an extension of time or a scheme of arrangement in relation to a debt owing to a secured

(1) [1934] S.C.R. 659.

creditor, or in relation to a debt owing to a person who has acquired movable or immovable property subject to a right of redemption, but in that event the concurrence of the secured creditor or such person, shall be required, except in the case of a proposal formulated and confirmed by the Board of Review as hereinafter provided.

It will be observed that the character of proposal contemplated in such cases is strictly limited to one which provides for a compromise, an extension of time or scheme of arrangement in relation to a debt owing to the secured creditor. The statute apparently, as counsel for the Dominion argued, does not envisage any interference with the rights of secured creditors except in relation to the debts owing to them and then (in the absence of the assent of the creditor) only to a compromise or extension of time or scheme of arrangement embodied in the proposal formulated and confirmed by the Board of Review.

As to the second ground of objection, the judgment of the Judicial Committee *in Re Silver Brothers* (1) seems very clearly to lay down and decide that it is competent to the Dominion, in legislating in relation to bankruptcy or insolvency, to deal with the privilege attaching to debts owing to the Crown in the right of a province and to take away any priority accorded to such debts by the law of a province. The legislative authority in bankruptcy matters to deal with debts owing to a province is no less than the authority to deal with debts owing to the Dominion.

To summarize: The power to enact this statute is derived from subdivision 21 of section 91 of the B.N.A. Act —in virtue of which the exclusive legislative authority of the Parliament of Canada extends to the subject of Bankruptcy and Insolvency. The broad purpose of the statute is, in the words of the title, " to facilitate compromises and arrangements between farmers and their creditors." The provisions of the statute affect farmers who are in such a situation that they are unable to pay their debts as they fall due. It is competent to Parliament, possessing plenary authority in respect of bankruptcy and insolvency, to treat this condition of affairs as a state of insolvency. The provisions of the statute only come into operation where such a state of insolvency exists. *Prima facie,* therefore, it is, within the ordinary meaning of the words, a statute dealing with insolvency. The statute is, by its express terms, incor-

(1) [1932] A.C. 514, at 519-521.

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porated into the general system of bankruptcy legislation in force in Canada and it is not open to dispute that legislation in respect of "compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law" (see page 5 of the judgment).

It is contended on behalf of the provinces that the jurisdiction of the Dominion in relation to this subject is limited to the enactment of legislation which at least in its broad lines, conforms to the systems of bankruptcy and insolvency legislation which had prevailed in Great Britain or in Canada down to the time of the passing of the B.N.A. Act. We do not consider it necessary to decide upon the question whether or not the powers vested in Parliament in relation to this subject are for all time restricted by reference to the legislative practice which obtained prior to the passing of the B.N.A. Act. The attack upon the statute was mainly directed against the provision which makes it possible to force the terms of a composition upon a secured creditor by which a secured creditor may be compelled to submit to a reduction of the debt owing to him by the insolvent.

This is not a new feature of insolvency legislation although, down to the enactment of the *Companies' Creditors Arrangement Act* in 1933, mortgagees had never been by legislation placed in such a position. The statute now under consideration does not in this respect differ from the *Companies' Creditors Arrangement Act* and the principle of our decision on the Reference respecting that statute (1) is applicable; that this, although a departure from previous practice in bankruptcy or insolvency legislation, was not beyond the discretionary authority bestowed upon Parliament under head no. 21 of section 91.

The statute being *intra vires*, the interrogatory addressed to us should be answered in the negative.

CANNON J.—This Court, on a previous reference reached the conclusion that the *Companies' Creditors Arrangement Act* (1), 23-24 Geo. V, ch. 36, was *intra vires* of the Parliament of Canada because the matters dealt with came within the domain of "bankruptcy and insolvency" within the intent of sec. 91, par. 21, of the B.N.A. Act.

(1) [1934] S.C.R. 659.

The Chief Justice said at p. 662:—

It seems difficult, therefore, to suppose that the purpose of the legislation is to give sanction to arrangements in the exclusive interest of a single creditor or of a single class of creditors and having no relation to the benefit of creditors as a whole. The ultimate purpose would appear to be to enable the court to sanction a compromise which, although binding upon a class of creditors only, would be beneficial to the general body of creditors as well as to the shareholders.

In my judgment, with the concurrence of Lamont, J., I found that arrangements, as provided for by the *Companies' Creditors Arrangement Act,* are, and have been, before and since Confederation component part of any system "devised to protect the creditors and at the same time help the honest debtor to rehabilitate himself and obtain a discharge."

In the dissenting judgment of Mr. Justice Badgley, whose conclusions were subsequently upheld by the Privy Council, *re L'Union St. Jacques & Bélisle* (1), I find the following at pp. 455 & 456:—

A statutory bankrupt and insolvent legislation had been in force in the two Canadas since the first *Insolvent Act* of 1864, which was continued with amendments to the time of the making of the Dominion Law of Insolvency in 1869, which repealed the provincial enactments and substituted a general Dominion Law upon the subject. By the Provincial Act of 1864, the first section specially enacts that "*the Act should apply in Lower Canada to traders only*" "AND IN Upper Canada to all persons whether traders or not," and this provision was not interfered with in the subsequent statutory amendments of that Provincial Act.

By the Dominion "Act respecting Insolvency" of 1869, the Lower Canada statutory restriction is extended throughout the Dominion of the four provinces, and it is enacted by the first section of the Dominion Act of 1869. "This Act shall apply to traders only." Now it is nothing but just to read the general subject of bankruptcy and insolvency by the light of the Dominion legislation itself, as indicating the intent of that legislature as to the enumerated subjects for its action, and it becomes undeniable therefore, that the Society, the appellant here, comes within the express limitation and restriction of the general law, and being neither in character nor purpose commercial nor a trader, and solely and simply what it has always been, a charitable and eleemosynary institution in and for the province of Quebec, the provincial enactment for its relief can, under no circumstances be brought within the operation of the laws of Bankruptcy and Insolvency attributed to the Dominion legislature.

It must also be borne in mind that a farmer, before and since Confederation, as far as the province of Quebec was concerned, even when insolvent, was not subject to bankruptcy proceedings; he could not be compelled to assign in the other provinces, where he could voluntarily make

(1) (1872) 2 Rev. Critique 449.

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an assignment for the distribution of his assets among his creditors, but could not be forced into insolvency. This latter provision was first made applicable to Quebec in 1919, but a special provision was subsequently passed to withdraw it from its operation. (1919, ch. 36, sec. 9; 1923, ch. 31, sec. 11; 1932, ch. 39, sec. 6.)

It may be reasonably said, as a matter of history, that nobody contemplated for a long period after Confederation that "bankruptcy or insolvency" proceedings and their essentially compulsory features could or would apply to farmers.

But the paramount consideration is that the Act which we are considering lacks the essential elements of bankruptcy legislation, to wit: the distribution of the debtor's assets rateably among his creditors, in the case of an insolvent person, whether he is willing that his assets be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. See: *Voluntary Assignment* case, *Attorney-General of Ontario* v. *Attorney-General of Canada* (1).

The Act does not provide for the rateable distribution of the assets of the debtor nor for the discharge of the debt. On the contrary, the only aim of the Act is to keep the farmer on his land at the expense of his creditors; the proposal for arrangement must come from him and covers only a composition, extension of time or scheme of arrangement either before or after an assignment has been made.

Another difference with the *Companies' Creditors Arrangement Act* is found in an entirely new feature which gives the Board of Review, under clause 12, paragraphs 6, 7, 8 and 9, extraordinary powers:—

(6) If the creditors or the debtor decline to approve the proposal so formulated, the Board may nevertheless confirm such proposal, either as formulated or as amended by the Board, in which case it shall be approved by the Court and shall be binding upon all the creditors and the debtor as in the case of a proposal duly accepted by the creditors and approved by the court.

(7) Every request to formulate a proposal shall be dealt with by the full Board, but a determination of the majority shall be deemed to be the determination of the Board.

(1) [1894] A.C. 189, at 200.

(8) The Board shall base its proposal upon the present and prospective capability of the debtor to perform the obligations prescribed and the productive value of the farm.

(9) The Board may decline to formulate a proposal in any case where it does not consider that it can do so in fairness and justice to the debtor or the creditors.

These evidently are not provisions similar to what we considered proper proceedings in insolvency in the *Companies' Creditors Arrangement Act*, because they lack the essential element of a compromise: the mutual agreement of the debtor and of at least a fixed majority of the creditors.

Under subsection 6, the Board may impose an entirely new contract to the parties, confiscate, if they deem it advisable, in whole or in part, the principal due to the creditors and consider only under subsection 12, sec. (8), the present and prospective capability of the debtor to perform the obligation prescribed by the Board and the productive value of the farm, which is not to be considered as an asset to be distributed among the creditors but as an intangible and unseizable asset reserved for the enjoyment and protection of the debtor.

In the judgment of Lord Selborne in *L'Union St. Jacques* v. *Bélisle* (1), we find, at page 38:—

> The fact that this particular society appears to have been in a state of embarrassment, and in such a financial condition that unless relieved by legislation, it might have been likely to come to ruin, does not prove that it was in any legal sense within the category of insolvency. And in point of fact the whole tendency of the Act is to keep it out of that category, and not to bring it into it. The Act does not terminate the company; it does not propose a final distribution of its assets on the footing of insolvency or bankruptcy; it does not wind it up. On the contrary, it contemplates its going on, and possibly at some future time recovering its prosperity and then these creditors, who seem on the face of the Act to be somewhat summarily interfered with, are to be reinstated.

Their Lordships were clearly of opinion that this was not a case for insolvency legislation, but a local and private matter within the provincial jurisdiction.

Applying this test, I would say that the *Farmers' Creditors Arrangement Act* is one which might be within the competence of the provincial legislature, for the same reasons, applicable in each province to each individual farmer who finds himself in difficulties, which then applied

(1) (1875) L.R. 6 P.C. 31.

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to L'Union St. Jacques, in order to enable him to carry on and, possibly at some future time, to recover his prosperity. But I cannot in view of the accepted aims and past history of the bankruptcy and insolvency legislation, reach the conclusion that Parliament, in passing this legislation, did not exceed the domain of bankruptcy and insolvency, to which its jurisdiction is limited. It has set up a charitable or eleemosynary institution, to be established in each separate province by proclamation; such local charities are to be established, maintained and managed under provincial legislation by virtue of 92 (7). The legislation has nothing to do directly with agriculture, with the science, the art or the process of supplying human wants by raising the products of the soil.

I answer the question in the affirmative, for the whole Act excepting clause 17 which fixes the rate of interest, under certain conditions which do not clearly exceed the powers of Parliament under 91 (19).

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* Feb. 3, 4.
* Jun. 17.

IN THE MATTER OF A REFERENCE AS TO WHETHER THE PARLIAMENT OF CANADA HAD LEGISLATIVE JURISDICTION TO ENACT THE NATURAL PRODUCTS MARKETING ACT, 1934, BEING CHAPTER 57 OF THE STATUTES OF CANADA, 1934, AND ITS AMENDING ACT, THE NATURAL PRODUCTS MARKETING ACT AMENDMENT ACT, 1935, BEING CHAPTER 64 OF THE STATUTES OF CANADA, 1935.

Constitutional law—The Natural Products Marketing Act, 1934, 24-25 Geo. V, c. 57, as amended in 1935 by 25-26 Geo. V, c. 64—Constitutional validity—Regulation of trade.

The Natural Products Marketing Act, 1934, and *The Natural Products Marketing Act Amendment Act,* 1935, are *ultra vires* of the Parliament of Canada.

In effect, these statutes attempt and, indeed, profess, to regulate in the provinces of Canada, by the instrumentality of a commission or commissions appointed under the authority of the statute, trade in individual commodities and classes of commodities. The powers of regulation vested in the commissions extend to external trade and matters connected therewith and to trade in matters of interprovincial concern; but also to trade which is entirely local and of purely local

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

concern. Regulation of individual trades, or trades in individual commodities in this sweeping fashion, is not competent to the Parliament of Canada and such a scheme of regulation is not practicable "in view of the distribution of legislative powers enacted by the Constitution Act, without the co-operation of the provincial legislatures" (*Board of Commerce* case, [1922] 1 A.C. 191, at 201). The legislation is not valid as an exercise of the general authority of the Parliament of Canada under the introductory words of section 91, B.N.A. Act, to make laws "for the peace, order and good government of Canada."

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, in the exercise of the powers conferred by s. 55 of the *Supreme Court Act* (R.S.C., 1927, c. 35), of the following question: Is *The Natural Products Marketing Act,* 1934, as amended by *The Natural Products Marketing Act Amendment Act,* 1935, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

The Order in Council referring the question to the Court reads as follows:

The Committee of the Privy Council have had before them a report, dated 31st October, 1935, from the Minister of Justice, referring to the *Natural Products Marketing Act,* 1934, being chapter 57 of the statutes of Canada, 1934, and according to its long title "An Act to improve the methods and practices of marketing of natural products in Canada and in export trade, and to make further provision in connection therewith" and to its amending Act, *The Natural Products Marketing Act Amendment Act,* 1935, being chapter 64 of the statutes of Canada, 1935.

The Minister observes that doubts exist or are entertained as to whether the Parliament of Canada had jurisdiction to enact the said Acts, or either of them, in whole or in part, and that it is expedient that the question should be referred to the Supreme Court of Canada for judicial determination.

The Committee, accordingly, on the recommendation of the Minister of Justice, advise that the following question be referred to the Supreme Court of Canada, for hearing and consideration, pursuant to section 55 of the *Supreme Court Act,*—

Is *The Natural Products Marketing Act,* 1934, as amended by *The Natural Products Marketing Act Amendment*

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Act, 1935, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

E. J. LEMAIRE,
Clerk of the Privy Council.

The Natural Products Marketing Act, 1934, by s. 3 authorizes the Governor in Council to establish a board, consisting of such number of persons as he may from time to time determine, to be known as the Dominion Marketing Board, to regulate the marketing of natural products as in the Act provided. By s. 2 (*c*) "'marketing' includes buying and selling, shipping for sale or storage and offering for sale." By s. 2 (*e*) as amended "'natural product' includes animals, meats, eggs, wool, dairy products, grains, seeds, fruit and fruit products, vegetables and vegetable products, maple products, honey, tobacco, lumber and such other natural product of agriculture and of the forest, sea, lake or river and such article of food or drink wholly or partly manufactured or derived from any such product, and such article wholly or partly manufactured or derived from a product of the forest as may be designated by the Governor in Council." The powers of the Board are made exercisable in respect of a "regulated product"; and this expression is defined by sec. 2 (*g*) as follows: "regulated product" means a natural product to which a scheme approved under this Act relates, but does not include (i) in case the said scheme relates only to the product of a part of Canada, such product in so far as it is produced outside that part of Canada; (ii) in case the said scheme relates only to the product marketed outside the province of production, such product in so far as it is marketed within the province of production; (iii) in case the said scheme relates only to the product exported, such product in so far as it is not exported. The powers of the Board are set forth in broad terms in par. (*a*) of sec. 4, ss. 1, of the Act as follows: "The Board shall, subject to the provisions of this Act, have power (*a*) to regulate the time and place at which, and to designate the agency through which the regulated product shall be marketed, to determine the manner of distribution, the quantity and quality, grade or class of the regulated product that shall be marketed by any person at any time, and to prohibit the marketing of any of the regulated product of any grade,

quality or class." Then follows a series of paragraphs in which are more specifically described the Board's functions and powers. To exempt from any determination or order any person or class of persons engaged in the production or marketing of the regulated product or any class, variety or grade of such product; to conduct a pool for the equalization of returns received from the sale of the regulated product and to compensate any person for loss sustained by withholding from the market or forwarding to a specified market any regulated product pursuant to an order of the Board, except in specified cases; to compensate any person in respect of any shipment made pursuant to any determination or order of the Board to a country whose currency is depreciated, in relation to Canadian currency, for loss due to such depreciation; to assist by grant or loan the construction or operation of facilities for preserving, processing, storing, or conditioning the regulated product and to assist research work relating to the marketing of such product; to require any or all persons engaged in the production or marketing of the regulated product to register their names, addresses and occupations with the Board, or to obtain a licence from the Board, subject to cancellation for violation of any provision of the Act or regulation made thereunder; to require returns of full information relating to the production and marketing of the natural product from all persons engaged therein and to inspect the books and premises of such persons; to pay the operating and necessary expenses of the Board; to co-operate with any board or agency established to regulate the marketing of any natural product of such province and to act conjointly with any such provincial board or agency. In addition, by sec. 4, ss. 2 to 8, inclusive, the Board is empowered whenever a scheme for regulation by a local board has been approved, to authorize the local board to exercise such of the powers of the Board outlined in s. 4 as may be necessary for the proper enforcement of the scheme of regulation, and at any time to withdraw such authority from the local Board; to require the local Board to furnish full information from time to time relating to the production and marketing of the regulated product and to advise the local board in all matters relating to the exercise of its powers; to impose (whether the Board be exercising the powers conferred by this Act or by provincial legislation or whenever

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the Board or a local board co-operates or acts conjointly with any provincial board or agency) for the purposes of any scheme of regulation, charges and tolls in respect of the marketing of the whole or any part of the regulated product which shall be payable by such persons engaged in the production or marketing of the regulated product as the Board decides to authorize the local board or such provincial board or agency to act as its agent to collect and disburse the charges or tolls imposed; to utilize, or authorize the local board or provincial board or agency to utilize, the fund created by charges or tolls so imposed for the purposes of such scheme of regulation including the creation of reserves; and any charge or toll so imposed by the Board is declared to be a debt due to the Board recoverable by legal action. The "schemes" to which the Act applies are such marketing schemes as are approved by the Governor in Council and s. 5, ss. (4) provides as follows: (4) Before any scheme is approved the Governor in Council shall be satisfied, (*a*) that the principal market for the natural product is outside the province of production; or (*b*) that some part of the product produced may be exported. Under s. 5, ss. (1) schemes may be submitted for approval by a representative number of persons engaged in the production and marketing or the production or marketing of a natural product, or under s. 9 the Minister designated by the Governor in Council to administer the Act may propose a scheme for the marketing or the regulation of the marketing of a natural product in interprovincial or export trade whenever he is satisfied that the trade and commerce in such product is injuriously affected by marketing conditions through the lack of a local board. Section 10 provides that, whenever a scheme of regulation relates to an area of production which is confined within the limits of a province, the Governor in Council may authorize any marketing board or agency established under the law of that province to be, and to exercise the functions of, a local board with reference to the said scheme. Section 11 empowers the Board to exercise any power conferred upon it by or pursuant to provincial legislation with reference to the marketing of a natural product and to authorize the local board to exercise any such power. In point of fact each of the nine provinces in 1934 passed statutes to enable their respective governments to give

effect, in their respective provinces, to the provisions of the Dominion Act and regulations made thereunder. Section 12 authorizes the Governor in Council to regulate or restrict the importation into Canada of any natural product which enters Canada in competition with a regulated product or regulate or restrict the exportation from Canada of any natural product. Part II of the Act (ss. 16 to 26) provides for investigations by the Minister at the request of the Board or upon his own initiative, "into the cost of production, wages, prices, spread, trade practices, methods of financing, management, policies, grading, transportation and other matters in relation to the production and marketing, adaptation for sale, processing or conversion of any natural or regulated product." (s. 17). The term "spread" is defined in s. 16 (*b*) as follows: (*b*) "spread" means and includes: (i) the charge made by any person by way of commission, flat charge or otherwise for selling any natural or regulated product; (ii) the charge made by any person for the storage, conditioning, re-conditioning, packing, wrapping or otherwise preparing for market any natural or regulated product; (iii) the difference or spread between the price at which any natural or regulated product is purchased and the price at which it is sold; (iv) the difference between the price at which any natural or regulated product is purchased and the sale price of the product resulting from the adaptation for sale, processing or conversion of the aforesaid natural or regulated product." Section 22 provides as follows: "22. Every person who, to the detriment or against the interest of the public, charges, receives or attempts to receive any spread which is excessive or results in undue enhancement of prices or otherwise restrains or injures trade or commerce in the natural or regulated product, shall be guilty of an indictable offence and liable to a penalty not exceeding five thousand dollars or to two years' imprisonment, or, if a corporation, to a penalty not exceeding ten thousand dollars." Sections 23 and 24 provide for prosecutions in a manner similar to that provided for in the *Combines Investigation Act.*

* The judgment of the Court was delivered by

DUFF C.J.—Counsel on behalf of the Dominion based his argument in support of the validity of this statute

* *Reporter's note:* Counsel on the argument of this Reference were the same as those mentioned at p. 365.

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upon two grounds. It is argued, first, that it is competent legislation under the general authority "to make laws for the peace, order and good government of Canada"; and, second, it is competent legislation in relation to matters coming within the second of the enumerated heads of section 91—"The regulation of trade and commerce." It will be convenient to discuss first the last mentioned ground.

In substance, we are concerned with sections, 3, 4 and 5 of the statute.

By section 3, the Governor General is empowered to

establish a Board to be known as the Dominion Marketing Board to regulate the marketing of natural products as hereinafter provided.

By section 4 (1) the Board is invested with power

(*a*) to regulate the time and place at which, and to designate the agency through which the regulated product shall be marketed, to determine the manner of distribution, the quantity and quality, grade or class of the regulated product that shall be marketed by any person at any time, and to prohibit the marketing of any of the regulated product of any grade, quality or class;

"Marketed" is used in an extended sense as embracing "buying and selling, shipping for sale or storage and offering for sale."

The Board is also empowered,

(*c*) to conduct a pool for the equalization of returns received from the sale of the regulated product; * * *

(*f*) to require any or all persons engaged in the production or marketing of the regulated product to register their names, addresses and occupations with the Board, or to obtain a licence from the Board, and such licence shall be subject to cancellation by the Board for violation of any provision of this Act or regulation made thereunder;

Section 5 contains provisions for marketing schemes under which the marketing of a natural product, to which the scheme applies, is regulated by a local board under the supervision of the Dominion Board.

For the purposes of the discussion, it will not be necessary further to particularize the enactments of the statute. These enactments, in our opinion, are not enactments within the contemplation of the second head of section 91, "The regulation of trade and commerce" in the sense which has been ascribed to those words by decisions which are binding upon us and which it is our duty to follow.

It was argued by Mr. Rowell that two recent decisions, *Proprietary Articles Trade Association* v. *Attorney-General*

for Canada (1) and the *Aeronautics* Reference (2) manifest a departure by the Judicial Committee of the Privy Council from the principles governing the application of the residuary clause, as well as of this particular enactment which is also couched in very sweeping terms. In view of the argument addressed to us, and, in view of the character of the enactments under consideration, passed as recently as July, 1934, it would appear to be desirable, if not, indeed necessary, to review afresh the decisions and the grounds of the decisions by which this Court has hitherto supposed itself to be governed in the interpretation and application of head no. 2.

The judgment of the Board in *Parsons* case (3) contains the well known elucidation of the words "regulation of trade and commerce" which received the express approval of the Judicial Committee in *Wharton's* case (4). The later cases, in which the Board had to consider the scope of the sphere of jurisdiction designated by head no. 2 are the *Montreal Street Railway* case (5); *A.G. for Canada* v. *A.G. for Alberta* (6); the *Board of Commerce* case (7); *A.G. for B.C.* v. *A.G. for Canada* (8); *Toronto Electric Commissioners* v. *Snider* (9).

The discussion in *Parsons* case (10) has been many times considered and sometimes criticized. It is, we think, worth while to quote it in full (p. 112):

> The words "regulation of trade and commerce," in their unlimited sense are sufficiently wide if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of parliament, down to minute rules for regulating particular trades. But a consideration of the Act shews that the words were not used in this unlimited sense. In the first place, the collocation of No. 2 with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the mind of the legislature, when conferring this power on the Dominion parliament. If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in section 91 would have been unnecessary; as 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest; and even 21, bankruptcy and insolvency.

(1) [1931] A.C. 310.
(2) [1932] A.C. 54.
(3) (1881) 7 A.C. 96, at 112 *et seq.*
(4) [1915] A.C. 340.
(5) [1912] A.C. 333.
(6) [1916] 1 A.C. 588.
(7) [1922] 1 A.C. 191.
(8) [1924] A.C. 222.
(9) [1925] A.C. 396.
(10) (1881) 7 A.C. 96.

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"Regulation of trade and commerce" may have been used in some such sense as the words "regulations of trade" in the Act of Union between England and Scotland (6 Anne, c. 11), and as these words have been used in Acts of State relating to trade and commerce. Article V of the Act of Union enacted that all the subjects of the United Kingdom should have "full freedom and intercourse of trade and navigation" to and from all places in the United Kingdom and the Colonies; and Article VI enacted that all parts of the United Kingdom from and after the union should be under the *same* "prohibitions, restrictions, and *regulations of trade.*" Parliament has at various times since the Union passed laws affecting and regulating specific trades in one part of the United Kingdom only, without its being supposed that it thereby infringed the Articles of Union. Thus the Acts for regulating the sale of intoxicating liquors notoriously vary in the two kingdoms. So with regard to Acts relating to bankruptcy, and various other matters.

Construing, therefore, the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of interprovincial concern, and it may be that they would include general regulations of trade affecting the whole Dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the legislature of Ontario by No. 13 of section 92.

Having taken this view of the present case, it becomes unnecessary to consider the question how far the general power to make regulations of trade and commerce, when competently exercised by the Dominion parliament, might legally modify or affect property and civil rights in the provinces, or the legislative power of the provincial legislatures in relation to those subjects;

The actual decision, it will be observed was that the authority to legislate for the regulation of trade and commerce does not contemplate the power to regulate by legislation the contracts of a particular business or trade in a single province. But the judgment suggests, although it does not decide, that this power of regulation does not extend to the unlimited regulation of particular trades and occupations. On the other hand, there is nothing in the judgment to indicate that the regulation of external trade is excluded from the scope of the authority, nor is there anything to suggest, whatever the precise scope of the power may be, that, when Parliament is legislating with reference to matters strictly within the regulation of trade and commerce, it is disabled from legislating in regard to

matters otherwise exclusively within the provincial authority if such legislation is necessarily incidental to the exercise of its exclusive powers in relation to that subject.

The subject was further elucidated by the judgment of the Judicial Committee in *A.G. for Canada* v. *A.G. for Alberta* (1). There it was held that this authority does not extend to regulation by a licensing system of "a particular trade in which Canadians would otherwise be free to engage in the provinces." Here again there is no suggestion that trade in a particular commodity, in so far as it is external trade or interprovincial trade, is not within the exclusive regulative authority of the Dominion.

It is convenient at this point to revert to the discussion of the subject which occurred in the *Montreal Street Railway* case (2). The judgment of the Board was written by Lord Atkinson, and the Board included Lord Loreburn and Lord MacNaghten. The controversy concerned the validity of an order made by the Board of Railway Commissioners under the authority of a provision of the Dominion Railways Act which required the owners of the Montreal Street Railway, a local work within the meaning of the 10th heading of section 92, and normally subject, exclusively to the control of the provincial legislature, to enter into an agreement with the owners of the Montreal Park and Island Railway which was a railway subject to the exclusive jurisdiction of the Parliament of Canada, and which connected with the street railway, in relation to the rates to be charged by the proprietors of the street railway in respect of through traffic passing over the street railway and the Park and Island Railway.

Admittedly, the legislature of Quebec had no authority to legislate in relation to such a matter as regards the Dominion undertaking, and on various grounds it was contended that the Dominion Parliament necessarily possessed authority to legislate in relation to through traffic and for the provincial railway in respect of such traffic. This authority was said to be bestowed by, *inter alia*, the residuary clause and by head no. 2 of section 91, "The regulation of trade and commerce." It was necessary for the determination of the appeal that their Lordships should pronounce upon both these contentions. They were examined

(1) [1916] 1 A.C. 588. (2) [1912] A.C. 333.

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in a single passage which we now quote. From the judgment in *A.G. for Ontario* v. *A.G. for Canada* (1) their Lordships adduced the following principles as applicable to the case before them:

(1) that the exception contained in s. 91, near its end, was not meant to derogate from the legislative authority given to provincial legislatures by the 16th subsection of s. 92, save to the extent of enabling the Parliament of Canada to deal with matters, local or private, in those cases where such legislation is necessarily incidental to the exercise of the power conferred upon that Parliament under the heads enumerated in s. 91; (2) that to those matters which are not specified amongst the enumerated subjects of legislation in s. 91 the exception at its end has no application, and that in legislating with respect to matters not so enumerated the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to the provincial Legislature by s. 92; (3) that these enactments, ss. 91 and 92, indicate that the exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in s. 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any classes of subjects enumerated in s. 92; (4) that to attach any other construction to the general powers which, in supplement of its enumerated powers, are conferred upon the Parliament of Canada by s. 91 would not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces; and, lastly, that if the Parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject upon which it might not legislate to the exclusion of provincial legislation. (1912, A.C. at p. 343).

Their Lordships then proceeded,

The same considerations appear to their Lordships to apply to two of the matters enumerated in s. 91, namely, the regulation of trade and commerce. Taken in their widest sense these words would authorize legislation by the Parliament of Canada in respect of several of the matters specifically enumerated in s. 92, and would seriously encroach upon the local autonomy of the province. In their Lordships' opinion these pronouncements have an important bearing on the question for decision in the present case, though the case itself in which they were made was wholly different from the present case, and the decision given in it has little if any application to the present case. They apparently established this, that the invasion of the rights of the province which the Railway Act and the Order of the Commissioners necessarily involve in respect of one of the matters enumerated in s. 92, namely, legislation touching local railways, cannot be justified on the ground that this Act and Order concern the peace, order and good government of Canada nor upon the ground that they deal with the regulation of trade and commerce.

The general expressions in this passage must, of course, be read in the light of the controversy with which their

(1) [1896] A.C. 491.

Lordships were dealing. They were, as we have seen, discussing the question raised as to the authority of the Dominion in exercise of its powers in regard to regulation of trade and commerce to legislate for a local work or undertaking of the character assigned, *prima facie,* exclusively to the jurisdiction of the province by section 92 (10). But the passage, as was pointed out in this court in *Lawson* v. *Interior Tree Fruit & Vegetable Committee* (1), signalizes the distinction between that which is national in its scope and concern and that which in each of the provinces is of private or local, that is to say, of provincial interest, which must be observed in deciding whether a particular enactment falls within the Dominion authority respecting the regulation of trade and commerce.

In *A.G. for B.C.* v. *A.G. for Canada* (2), the Board dealt with the subject of the regulation of external trade. The question before the Board in that case concerned the authority of the Dominion of Canada to impose customs duties upon alcoholic liquors imported into Canada by the Government of British Columbia for the purpose of sale by that government. It was pointed out in the judgment delivered by Lord Buckmaster; that the imposition of customs duties may have for its object regulation of trade and commerce, or it may have the twofold purpose of regulating trade and commerce and raising money; and it was held that section 125 of the B.N.A. Act, which prohibits the taxation of the property of the Crown, ought not to be so construed and applied as to interfere with the authority of the Parliament of Canada to regulate trade and commerce and to impose customs duties for that purpose.

This decision seems very plainly to involve the proposition that, by an enactment of the Parliament of Canada, trade in a particular commodity or class of commodities may be subjected to regulation through the instrumentality of customs duties.

There is another decision the mention of which ought not to be omitted, viz., the decision of 1885 of the Judicial Committee on the reference concerning the validity of the Dominion Liquor Licence Acts where their Lordships held that a system for the local licensing of the liquor trade was

(1) [1931] S.C.R. 357, at 367. (2) (1924) A.C. 222.

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beyond the competence of the Dominion Parliament to establish.

It would appear to result from these decisions that the regulation of trade and commerce does not comprise, in the sense in which it is used in section 91, the regulation of particular trades or occupations or of a particular kind of business such as the insurance business in the provinces, or the regulation of trade in particular commodities or classes of commodities in so far as it is local in the provincial sense; while, on the other hand, it does embrace the regulation of external trade and the regulation of interprovincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers.

There is another class of regulation which has been held to fall within the purview of head no. 2 (*John Deere Plow Co.* v. *Wharton* (1): regulation which is auxiliary to some Dominion measure dealing with matters not falling within section 92, such, for example, as the incorporation of Dominion companies.

Obviously, these propositions do not furnish a complete definition of the authority given by the second subdivision of section 91. Logically, they leave scope for a possible jurisdiction in relation to "general trade and commerce" or in relation to "general regulations of trade applicable to the whole Dominion"—phrases employed in the judgment in Parson's case. Broadly speaking, they have their basis in the consideration mentioned in *Parsons* case (2) arising from the specification of particular subjects in section 91 and from the necessity to limit the natural scope of the words,

> in order to preserve from serious curtailment, if not from virtual extinction, the degree of autonomy, which as appears from the scheme of the Act as a whole, the provinces were intended to enjoy. (*Lawson's* case (3)).

Restrictions upon the natural meaning of the words, in so far as they are dictated by force of such considerations, may properly be accepted as the necessary result of the application of settled principles of construction pursuant to which, from the beginning, it has been recognized that, in considering sections 91 and 92, the language of each must be read in light of the other and in some cases even modified for the purpose of giving effect to the two sections.

(1) [1915] A.C. 330. (2) (1881) 7 A.C. 96.
(3) [1931] S.C.R. 357 at 366.

The necessity for some such restriction seems to be demonstrable by reference to the concluding clause of s. 91 which is in these words:

> Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

In *A.G. for Ontario* v. *A.G. for Canada* (1) it was held that the language of this exception was meant to include all matters enumerated within the sixteen heads of s. 92; and in *A.G. for Canada* v. *A.G. for Ontario* (2) it was laid down and decided that section 91 contains a legislative declaration that legislation upon any matter falling strictly within any of the classes of subjects specially enumerated in s. 91 is not within the competence, as matter of legislation, of a provincial legislature under s. 92.

> Whenever * * * a matter is within one of these specified classes, their Lordships said, legislation in relation to it by a Provincial Legislature is in their Lordships' opinion incompetent.

The decision in *Hodge* v. *The Queen* (3) that it is competent to a province to regulate by a local licensing system the trade in liquor seems incompatible with the contention that such local regulation of the trade in particular commodities is strictly within any of the classes of matters comprehended under the general words "The regulation of trade and commerce"; and this was the view taken by the Board in the case of *A.G. for Alberta* v. *A.G. for Canada* (4). Such was also, it would appear, the necessary effect of the judgment of the Board on the Reference in 1885 in relation to the Dominion Licensing Acts which has already been mentioned.

It does not seem to admit of serious dispute that, if, regards natural products, as defined by the Act, the provinces are destitute of the powers to regulate the dealing with natural products in respect of the matters designated in section 4 (1), a, the powers of the provinces are much more limited than they have generally been supposed to be. If this defect of power exists in relation to natural products

(1) (1896) A.C. 359.
(2) (1898) A.C. 700, at 715.
(3) (1883) 9 A.C. 117.
(4) [1928] A.C. 475.

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it exists in relation to anything that may be the subject of trade. Furthermore, if the Dominion has power to enact section 4 (1) f, as a provision falling strictly within "the regulation of trade and commerce," then the provinces are destitute of the power to regulate, by licensing persons engaged in the production, the buying and selling, the shipping for sale or storage and the offering for sale, in an exclusively local and provincial way of business of any commodity or commodities. The acceptance of this view of the powers of the provinces would seem to be inconsistent, not only with *Hodge* v. *The Queen* (1), but with the judgment in the *Montreal Street Railway* case (2) as well as with the judgment in the *Board of Commerce* case (3). The judgment in this latter case seems very plainly to declare that in the absence of very special circumstances such as those indicated in the judgment of the Board, such matters as subjects of legislation fall within the jurisdiction of the provinces under section 92.

The enactments in question, therefore, in so far as they relate to matters which are in substance local and provincial are beyond the jurisdiction of Parliament. Parliament cannot acquire jurisdiction to deal in the sweeping way in which these enactments operate with such local and provincial matters by legislating at the same time respecting external and interprovincial trade and committing the regulation of external and interprovincial trade and the regulation of trade which is exclusively local and of traders and producers engaged in trade which is exclusively local to the same authority (*King* v. *Eastern Terminal Elevators* (4)).

It should also be observed that these enactments operate by way of the regulation of dealings in particular commodities and classes of commodities. The regulations contemplated are not general regulations of trade as a whole or regulations of general trade and commerce within the sense of the judgment in Parson's case.

We come now to the judgments in the *Board of Commerce* case and *Snider's* case (5).

In *Snider's* case (5), the view of the Board is stated in the following passage:

(1) (1883) 9 A.C. 117.
(2) [1912] A.C. 33.
(3) [1922] 1 A.C. 191.
(4) [1925] S.C.R. 434.
(5) [1925] A.C. 396.

Nor does the invocation of the specific power in s. 91 to regulate trade and commerce assist the Dominion contention. In *Citizens Insurance Co.* v. *Parsons* (1), it was laid down that the collocation of this head (No. 2 of s. 91), with classes of subjects enumerated of national and general concern, indicates that what was in the mind of the Imperial Legislature when this power was conferred in 1867 was regulation relating to general trade and commerce. Any other construction would, it was pointed out, have rendered unnecessary the specific mention of certain other heads dealing with banking, bills of exchange and promissory notes, as to which it had been significantly deemed necessary to insert a specific mention. The contracts of a particular trade or business could not, therefore, be dealt with by Dominion legislation so as to conflict with the powers assigned to the Provinces over property and civil rights relating to the regulation of trade and commerce. The Dominion power has a really definite effect when applied in aid of what the Dominion Government are specifically enabled to do independently of the general regulation of trade and commerce, for instance, in the creation of Dominion companies with power to trade throughout the whole of Canada. This was shown in the decision in *John Deere Plow Co.* v. *Wharton* (2). The same thing is true of the exercise of an emergency power required, as on the occasion of war, in the interest of Canada as a whole, a power which may operate outside the specific enumerations in both ss. 91 and 92. And it was observed in *A.G. for Canada* v. *A.G. for Alberta* (3), in reference to attempted Dominion legislation about insurance, that it must now be taken that the authority to legislate for the regulation of trade and commerce does not extend to the regulation, for instance, by a licensing system, of a particular trade in which Canadians would otherwise be free to engage in the provinces. It is, in their Lordships' opinion, now clear that, excepting so far as the power can be invoked in aid of capacity conferred independently under other words in s. 91, the power to regulate trade and commerce cannot be relied on as enabling the Dominion Parliament to regulate civil rights in the provinces.

It is quite obvious that their Lordships are here not dealing with the regulation of external trade or the regulation of trade in matters of interprovincial concern. For our present purpose, it seems sufficient to say that their Lordships deemed it necessary or expedient for the purpose of dealing with an argument addressed to them to discuss the scope of the power conferred by head no. 2 of section 91; and that, on any conceivable construction of the words, it would appear to be impossible consistently with them to support the authority of the statute under consideration.

As to the decision on the *Aeronautics Reference* (4) and the *Radio Reference* (5), it does not seem necessary to enter upon a minute analysis of the judgments in those cases. The decision on the *Radio Reference* (5) proceeded on two grounds: first, for the reasons fully explained in the judg-

(1) (1881) 7 A.C. 96, at 112.
(2) [1915] A.C. 330, at 340.
(3) [1916] 1 A.C. 588, at 596.
(4) [1932] A.C. 54.
(5) [1932] A.C. A.C. 304.

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ment, the legislation in question (being legislation for giving effect to an international obligation binding upon Canada) was within the ambit of the powers conferred by the residuary clause; and, second, that instruments employed in radio transmission fall within the class of undertakings which, by the combined operation of head no. 10 of section 92 and head no. 29 of section 91, are within the exclusive jurisdiction of Canada. In the last mentioned judgment it was pointed out that the decisions in the *Aeronautics Reference* (1) proceeded mainly upon the application of section 132. The subject-matters of the enactments and regulations actually or hypothetically considered in those two cases have no sort of resemblance to the subject matter of this legislation.

There is nothing in either of these judgments to justify an inference that their Lordships intended to overrule the long series of their own decisions hereinbefore mentioned; or the reasons upon which those decisions were founded.

There is one further observation which, perhaps, ought not to be omitted although it may be a mere corollary of what has already been said. Legislation necessarily incidental to the exercise of the undoubted powers of the Dominion in respect of the regulations of trade and commerce is competent although such legislation may trench upon subjects reserved to the provinces by section 92, but it cannot, we think, be seriously contended that sweeping regulation in respect of local trade, such as we find in this enactment, is, in the proper sense, necessarily incidental to the regulation of external trade or interprovincial trade or both combined.

The scheme of this statute in respect of its essential enactments would not appear to be practicable as a legislative scheme.

> in view of the distribution of legislative powers enacted by the Constitution Act, without the co-operation of the provincial legislatures

to quote from the judgment of the Judicial Committee *in Re the Board of Commerce Act* (2).

Turning now to the contention that this statute is a valid exercise of the power of Parliament under the introductory clause of section 91, there is a preliminary observation to be made. This argument has been pressed upon us in

(1) [1932] A.C. 54.

(2) [1922] 1 A.C. 191, at 201.

support of six of the statutes which have been referred to us for consideration. These are the statutes relating to the *Minimum Wages,* to *Limitation of Hours of Work,* to a *Weekly Rest Day;* to *Employment and Social Insurance;* to *Farmers' Creditors Arrangements* and to the statute immediately under consideration, the *Natural Products Marketing Act.* The discussion which follows was written with special reference to the first three of these statutes; the argument upon the reference relating to them being that, apart altogether from the circumstance that the subject matters of the enactments are subjects of international agreements in respect of which international obligations have been assumed, they are dealt with in aspects which do not fall under section 92 and can only be the subject matter of legislation under the initial clause of section 91. What follows, however, in substance pertains to the argument as presented in support of all the statutes mentioned and it has been thought convenient to produce it in this place.

It is important not to lose sight of the language of the statute itself. The initial words of section 91 empower

> the Queen by and with the advice and consent of the Senate and the House of Commons 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 this Act assigned exclusively to the legislatures of the provinces.

By section 92,

> in each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects

enumerated. These classes of subjects include (No. 13) Property and Civil Rights in the Province.

By section 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.

Section 94, it will be observed, has no application to Quebec.

Language could not be more plain or, indeed, more explicit to declare that the subjects, Property and Civil Rights,

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are not subjects assigned to the Parliament of Canada under the initial words of section 91.

We are not concerned with the enumerated subjects assigned to Parliament under the second limb of that section; or with the concluding paragraph of the section which, as the Courts have recognized, has obviously no application to the first limb of the section, which alone is now pertinent.

It is settled by the decisions of the Judicial Committee that the phrase "Property and Civil Rights" is used in the "largest sense," subject, of course, to the limitations arising expressly from the exception of the enumerated heads of section 91, and impliedly from the specification of subjects in section 92.

> It is to be observed, said the Board in *Citizens Insurance Co.* v. *Parsons* (1), that the same words, "civil rights," are employed in the Act of 14 Geo. 3, c. 83, which made provision for the Government of the Province of Quebec. Section 8 of that Act enacted that His Majesty's Canadian subjects within the province of Quebec should enjoy their property, usages, and other civil rights, as they had before done, and that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada, and be determined agreeably to the said laws. In this statute the words "property" and "civil rights" are plainly used in their largest sense; and there is no reason for holding that in the statute under discussion they are used in a different and narrower one.

The legislation admittedly affects civil rights and interferes with, and controls, and regulates the exercise in every one of the provinces of the civil rights of the people in those provinces; but it is said that the real subject matter of the legislation is not these civil rights, which are controlled and regulated, but something else.

The initial clause of section 91 has been many times considered. There is no dispute now that the exception which excludes from the ambit of the general power all matters assigned to the exclusive authority of the legislatures must be given its full effect. Nevertheless, it has been laid down that matters normally comprised within the subjects enumerated in section 92 may, in extraordinary circumstances, acquire aspects of such paramount significance as to take them outside the sphere of that section.

The argument is mainly supported by two sentences in the judgment of the Board in *A.G for Ontario* v. *A.G. for Canada* (2). The judgment of the Board in that case was

(1) (1881) 7 A.C. 96, at 111. (2) [1896] A.C. 348.

directed to the answers to be given to certain questions submitted by the Governor General in Council to this Court, all of which questions immediately concerned the jurisdiction of a provincial legislature in respect of the prohibition of certain phases of the liquor traffic. The two sentences occur in the discussion of the seventh question which relate to the jurisdiction of the Ontario Legislature to enact a section of a statute of that Province entitled "An Act respecting local option in the matter of liquor selling." In the course of that discussion, their Lordships dealt with the general authority given to the Parliament of Canada under the first of the introductory enactments of section 91 which is quoted above, and their Lordships observed,

* * * to those matters which are not specified among the enumerated subjects of legislation, the exception from s. 92, which is enacted by the concluding words of s. 91, has no application; and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by s. 92. These enactments appear to their Lordships to indicate that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures.

Their Lordships proceeded, in the two sentences which are now mainly relied upon,

Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.

It seems to us right, if these two sentences are to be properly understood, that they should be read with the preceding sentences; and experience seems to shew that there

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has been a disposition not to attend to the limits implied in the carefully guarded language in which the Board expressed itself. It has been assumed, apparently, that they lay down a rule of construction the effect of which is that all matters comprised in any one of the enumerated subdivisions of section 92 may attain "such dimensions as to . . . cease to be merely local or provincial" and become in some other aspect of them matters relating to the "peace, order and good government of Canada" and subject to the legislative jurisdiction of the Parliament of Canada.

The difficulty of applying such a rule to matters falling within the first subdivision, for example, of section 92, which relates to the amendment of the provincial constitutions "notwithstanding anything in this Act," must be very great. On the face of the language of the statute, the authority seems to be intended to be absolute. In other words, it seems to be very clearly stated that matters comprised within the subject matter of the constitution of the province "except as regards the office of Lieutenant-Governor" are matters local and provincial, and that they are not matters which can be comprised in any of the classes of subjects of section 91.

Then the decision in the *Montreal Park & Island Railway v. City of Montreal* (1) seems to be final upon the point that local works and undertakings, subject to the exceptions contained in subdivision no. 10 of section 92 and matters comprised within that description, are matters local and provincial within the meaning of section 92 and excepted from the general authority given by the introductory enactment of section 91.

The same might be said of the solemnization of marriage in the province. Marriage and divorce are given without qualification to the Dominion under subdivision 26 of section 91, but the effect of section 92 (12), it has been held, is to exclude from the Dominion jurisdiction in relation to marriage and divorce the subject of solemnization of marriage in the province. It is very difficult to conceive the possibility of solemnization of marriage, in the face of this plain declaration by the legislature, assuming aspects which would bring it within the general authority of the

(1) [1912] A.C. 333.

Dominion in relation to peace, order and good government, in such fashion, for example, as to enable the Dominion to prohibit or to deprive of legal effect a religious ceremony of marriage. The like might be said of no. 2, Taxation within the Province; the Borrowing of Monies on the Sole Credit of the Province; Municipal Institutions in the Province; and the Administration of Justice, including the constitution of the Courts and Procedure in Civil Matters in the Courts.

In the *Manitoba Licence Holders* case (1), Lord Macnaghten, speaking for a Board which included Lord Hobhouse, Lord Davey, Lord Robertson and Lord Lindley, said that, in their Lordships' view, it was doubtful if the Canada Temperance Act could be sustained as valid legislation by the Dominion on the assumption that the matter of statute was comprised within section 13.

* * * a careful perusal of the judgment (in *A.G. for Ontario* v. *A.G. for the Dominion* (2)), leads to the conclusion that, in the opinion of the Board, the case fell under No. 16 rather than under No. 13. And that seems to their Lordships to be the better opinion (3).

The judgment proceeds:—

Indeed, if the case is to be regarded as dealing with matters within the class of subjects enumerated in No. 13, it might be questionable whether the Dominion Legislature could have authority to interfere with the exclusive jurisdiction of the province in the matter.

Lord Davey, who took part in this judgment, was a member of the Board which pronounced the judgment containing the two sentences under discussion.

As we have said, Lord Watson's language is carefully guarded. He does not say that every matter which attains such dimensions as to effect the body politic of the Dominion falls thereby within the introductory matter of section 91. But he said that "some matters" may attain such dimensions as to affect the body politic of the Dominion and, as we think the sentence ought to be read having regard to the context, in such manner and degree as may "justify the Canadian Parliament in passing laws for their regulation or abolition. . . ." So, in the second sentence, he is not dealing with all matters of "national concern" in the broadest sense of those words, but only those which are matter of national concern "in

(1) [1902] A.C. 73. (2) [1896] A.C. 348.
(3) [1902] A.C. 78.

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such sense" as to bring them within the jurisdiction of the Parliament of Canada.

The application of the principle implicit in this passage must always be a delicate and difficult task. That is shewn by reference to the history of the Canada Temperance Act. The prohibitory clauses of the legislation undoubtedly do affect civil rights directly but, in *Russell v. The Queen* (1), the Board took the view that the real subject matter of the legislation was not property and civil rights, but matter connected with public order and having a close relation to the criminal law. It was likened to "laws which place restrictions on the sale or custody of poisonous drugs, or of dangerously explosive substances . . . on the ground that the free sale or use of them is dangerous to public safety, and making it a criminal offence . . . to violate these restrictions. . . ." It was described as "legislation . . . relating to public order and safety," and belonging to the class of "Laws . . . for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment. . . ."

Unfortunately, on this point, the case was unargued, Mr. Benjamin conceding that the enactments would have fallen within the general authority of the Dominion if it had been brought into force immediately throughout every part of the Dominion. The difficulty has been pointed out more than once of reconciling this decision with the subsequent decision of a very powerful Board in the Dominion Liquor Licence case, in which an Act of the Dominion Parliament regulating by licence the sale of liquor throughout the Dominion was held to be *ultra vires* notwithstanding the following preamble:

> Whereas it is desirable to regulate the traffic in the sale of intoxicating liquor, and it is expedient that the law respecting the same should be uniform throughout the Dominion, and that provision should be made in regard thereto for the better preservation of peace and order;

And, in the judgment of Lord Watson in *A.G. for Ontario* v. *A.G. for Canada* (2) it is observed (p. 362):

> The judgment of this Board in *Russell* v. *Regina* (2) has relieved their Lordships from the difficult duty of considering whether the Canada Temperance Act of 1886 relates to the peace, order and good government of Canada, in such sense as to bring its provisions within the competency of the Canadian Parliament.

(1) (1881) 7 A.C. 829. (2) [1896] A.C. 348.

Russell v. *The Queen* (1) has been explained in a more recent decision and we shall come to that in a moment. The point we are now concerned with is this: The question whether the prohibition and the regulation of the right to manufacture or deal in intoxicating liquors throughout the Dominion could, by reason of its analogy to legislation regulating or suppressing the sale of poisonous drugs or explosives, the manufacture and sale of poisonous drugs and explosives, and the connection between the matters dealt with and public order and the criminal law, be justified as legislation within the initial clause of section 91 is a question in respect of which the great judges who had to consider the cases we have mentioned found themselves in doubt and difficulty. Lord Watson's admonition to the courts to observe "great caution" in considering such matters is one that will not be lightly disregarded by prudent judges. The words of the passage in Lord Watson's judgment in themselves are not intended, obviously, to provide a test for determining in any given case whether a matter falling within "Property and Civil Rights" in the province has acquired such aspects as to take it out of the classes of subjects dealt with in section 92. The interpretation of Lord Watson's language in this sense by the judgment of the Board in *Montreal* v. *Montreal Street Railway* (2) is, if we may say so, fully justified by that judgment when read as a whole. We may add that Lord Macnaghten, who wrote the judgment in the *Manitoba Licence Holders* case (3), was also a member of the Board who decided the *Montreal* case (2). In performing the very difficult task of deciding upon such questions, the courts must have regard to the provisions of the B.N.A. Act as a whole and to the practical application of the introductory enactment of section 91 in the decisions of the courts. In considering these decisions, it is important to read what is said in the light of the thing that was decided; and it is fundamental that the interpretation and application of sections 91 and 92 of the B.N.A. Act cannot be controlled by particular expressions used in a judgment torn from their context and given the broadest meaning of which the words are capable without any reference

(1) (1881) 7 A.C. 829. (2) [1912] A.C. 333.
(3) [1902] A.C. 73.

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to that context or to the particular controversy to which the language was directed.

The necessity for Lord Watson's admonition becomes more clear when we recall that there is only one case in which the Judicial Committee has held that legislation with regard to matters which were admittedly *ex facie* civil rights within a province, had by reason of exceptional circumstances acquired aspects and relations bringing them within the ambit of the introductory clause. That case is *Fort Frances Pulp & Power Co.* v. *Manitoba Press* (1).

Before dealing with the *Fort Frances* case (1), it will be necessary to refer to two other decisions, in the *Board of Commerce Act* case (2) and in *Toronto Electric Commissioners* v. *Snider* (3).

In the Board of Commerce case the Judicial Committee had to consider legislation by which a Dominion Board was constituted and empowered, broadly speaking, to inquire into, and prohibit, profiteering and practices in connection therewith in dealings in the necessaries of life. In particular, the Board had authority to regulate the prices of such necessaries of life.

The question arose upon a case stated as to the validity of an order made by the Board regulating the prices of ready made clothing in certain establishments in Ottawa. The validity of the order was attacked by the associations of manufacturers concerned and was supported by counsel on behalf of the Board and of the Dominion. The litigation raised the concrete question *inter partes* as to the legality of the particular order; and the answer to that question turned upon the answer to the question concerning the validity of the legislation, which it was, therefore, essential to determine. The statute was supported on various grounds and, among others, on the ground that in the year 1919, when it was enacted, the evils of hoarding and high prices in respect of the necessaries of life had attained such dimensions "as to affect the body politic of Canada." Nobody denied the existence of the evil. Nobody denied that it was general throughout Canada. Nobody denied the importance of suppressing it. Nobody denied that it prejudiced and seriously prejudiced the well being of the

(1) [1922] A.C. 695. (2) [1922] 1 A.C. 191.
(3) [1925] A.C. 396.

people of Canada as a whole, or that in a loose, popular sense of the words it "affected the body politic of Canada." Nevertheless, it was held that these facts did not constitute a sufficient basis for the exercise of jurisdiction by the Dominion Parliament under the introductory clause in the manner attempted. The Board said that in special circumstances, such as those of a great war, the interest of the Dominion in the matters might conceivably become of such paramount and overriding importance as to lie outside the heads of section 92 and not be covered by them. But it is, they held, quite another matter to say that under normal circumstances, general Canadian policy can justify interference, on the scale of the statutes then in controversy, with the property and civil rights of the inhabitants of the provinces.

It has already been observed that circumstances are conceivable, such as those of war or famine, when the peace, order and good government of the Dominion might be imperilled under conditions so exceptional that they require legislation of a character in reality beyond anything provided for by the enumerated heads in either s. 92 or s. 91 itself. Such a case, if it were to arise, would have to be considered closely before the conclusion would properly be reached that it was one which could not be treated as falling under any of the heads enumerated. Still, it is a conceivable case, and although great caution is required in referring to it, even in general terms, it ought not, in the view their Lordships take of the British North America Act, read as a whole, to be excluded from what is possible. For throughout the provisions of that Act there is apparent the recognition that subjects which would normally belong exclusively to a specifically assigned class of subject may, under different circumstances and in another aspect, assume a further significance. Such an aspect may conceivably become of paramount importance, and of dimensions that give rise to other aspects. This is a principle which, although recognized in earlier decisions, such as that of *Russell* v. *The Queen* (1), both here and in the Courts of Canada, has always been applied with reluctance, and its recognition as relevant can be justified only after scrutiny sufficient to render it clear that the circumstances are abnormal. In the case before them, however important it may seem to the Parliament of Canada that some such policy as that adopted in the two Acts in question should be made general throughout Canada, their Lordships do not find any evidence that the standard of necessity referred to has been reached, or that the attainment of the end sought is practicable, in view of the distribution of legislative powers enacted by the Constitution Act, without the co-operation of the Provincial Legislatures (2).

The reluctance of the Courts to give effect to such arguments as that now under consideration is illustrated also in *Snider's case* (3). The legislation in question there was

(1) (1881) 7 A.C. 829. (2) [1922] 1 A.C. 191, at 200.
(3) [1925] A.C. 396.

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framed for the purpose of dealing with industrial disputes and authorized the Minister of Labour to take steps to convene, in the case of such a dispute, a Board composed of a representative of the workmen, a representative of the employer, and a third person to be nominated by the Minister of Labour himself. The Act prohibited a strike or lock-out pending the consideration of a dispute by the Board. The importance of the matters dealt with by the statute, the fact that the statute was making a provision for meeting a condition which prevailed throughout the whole of Canada and for dealing with industrial disputes which, in many and, indeed, most cases, would affect people in more than one province, the fact that the machinery provided had proved to be a valuable instrument in the interests of industrial peace, were not disputed. Nevertheless, the Board negatived the existence of

> the general principle that the mere fact that Dominion legislation is for the general advantage of Canada, or is such that it will meet a mere want which is felt throughout the Dominion, renders it competent if it cannot be brought within the heads enumerated specifically in section 91.

The judgment of the Board proceeds:—

> No doubt there may be cases arising out of some extraordinary peril to the national life of Canada, as a whole, such as the cases arising out of a war, where legislation is required of an order that passes beyond the heads of exclusive Provincial competency. Such cases may be dealt with under the words at the commencement of s. 91, conferring general powers in relation to peace, order and good government simply because such cases are not otherwise provided for. But instances of this, as was pointed out in the judgment in *Fort Frances Pulp & Power Co.* v. *Manitoba Free Press* (1) are highly exceptional. Their Lordships think that the decision in *Russell* v. *The Queen* (2) can only be supported to-day, not on the footing of having laid down an interpretation, such as has sometimes been invoked in the general words at the beginning of s. 91, but on the assumption of the Board, apparently made at the time of deciding the case of *Russell* v. *The Queen* (2), that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster. An epidemic of pestilence might conceivably have been regarded an analogous. It is plain from the decision in the *Board of Commerce* case (3) that the evil of profiteering could not have been so invoked, for Provincial Powers, if exercised, were adequate to it. Their Lordships find it difficult to explain the decision in *Russell* v. *The Queen* (4) as more than a decision of this order upon facts, considered to have been established at its date rather than upon general law.

The principle enunciated in this last paragraph had been applied in the *Fort Frances* case (1), the authority of which

(1) [1923] A.C. 695.
(2) (1881) 7 A.C. 829.
(3) [1922] 1 A.C. 191.
(4) [1932] A.C. 71.

seems to be recognized in the judgment in the *Aeronautics Reference* (1).

On behalf of the Dominion it is argued that the judgment in the *Aeronautics* case (1) constitutes a new point of departure. The effect of that judgment, it seems to be argued, is that if, in the broadest sense of the words, the matters dealt with are matters " of national concern " matters which " affect the body politic of the Dominion," jurisdiction arises under the introductory clause. One sentence is quoted from the judgment in the *Aeronautics* case (1) which we will not reproduce because we do not think their Lordships can have intended in that sentence to promulgate a canon of construction for sections 91 and 92. We see nothing in the judgment in the *Aeronautics* case (1) to indicate that their Lordships intended to detract from the judicial authority of the decisions in the *Combines* case (2) and *Snider's* case (3).

In the *Aeronautics* case (1), it is true, their Lordships called attention to the circumstance that, by section 132, the Dominion possesses powers to legislate in relation to matters which, in the domestic sense, would fall within section 92 when these matters have become affected by an international obligation by which Canada is bound; and in the subsequent case, reported in the same volume of the Appeal Cases, the *Radio Reference* (4), it was held that matters affected by an obligation arising under an international arrangement, not falling within section 132, but constituted in virtue of powers acquired in course of the recent constitutional developments, would fall within the general authority of section 91 because such international obligations were not comprehended within any of the specific subjects enumerated within section 91 or section 92; and in the *Aeronautics* case (1), as already observed, the authority of the decision in the *Fort Frances* case (5) is expressly recognized. The judgments in the *Combines* case (2), the *Fort Frances* case (5), *Snider's* case (3), obviously have no reference to legislation dealing with matters of civil right

(1) [1932] A.C. 71.
(2) [1922] 1 A.C. 191.
(3) [1925] A.C. 396.
(4) [1932] A.C. 305.
(5) [1923] A.C. 695.

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from the international point of view. We are bound, in our view, by the decisions in the *Combines* case (1) and in *Snider's* case (2) as well as by the decision in the *Fort Frances* case (3), and, consistently with those decisions, we do not see how it is possible that the argument now under discussion can receive effect.

To summarize: in effect, this statute attempts and, indeed, professes, to regulate in the provinces of Canada, by the instrumentality of a commission or commissions appointed under the authority of the statute, trade in individual commodities and classes of commodities. The powers of regulation vested in the commissions extend to external trade and matters connected therewith and to trade in matters of interprovincial concern; but also to trade which is entirely local and of purely local concern.

Regulation of individual trades, or trades in individual commodities in this sweeping fashion, is not competent to the Parliament of Canada and such a scheme of regulation is not practicable

> in view of the distribution of legislative powers enacted by the Constitution Act, without the co-operation of the provincial legislatures

to quote from the judgment of the Judicial Committee in the *Board of Commerce* case (4).

The legislation, for the reasons given, is not valid as an exercise of the general authority of the Parliament of Canada under the introductory words of section 91 to make laws "for the peace, order and good government of Canada."

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(1) [1932] 1 A.C. 191.
(2) [1925] A.C. 396.
(3) [1923] A.C. 695.
(4) [1922] 1 A.C. 191 at 201.

IN THE MATTER OF A REFERENCE AS TO WHETHER THE PARLIAMENT OF CANADA HAD LEGISLATIVE JURISDICTION TO ENACT THE EMPLOYMENT AND SOCIAL INSURANCE ACT, BEING CHAPTER 38 OF THE STATUTES OF CANADA, 1935.

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*Jan. 31,
*Feb. 1, 3.
*June 17.

Constitutional law—The Employment and Social Insurance Act, 25-26 Geo. V, c. 38—Constitutional validity—Taxation—Property and civil rights.

The *Employment and Social Insurance Act* provides (Part I, sections 4 to 9 inclusive) for the administration of the Act by a Commission consisting of three members to be called the Employment and Social Insurance Commission, whose duties are defined in these sections. Part II (sections 10 to 14 inclusive) of the Act provides for the organization and administration by the Commission of an employment service for the Dominion of Canada with regional divisions and a central employment office and employment offices within each division. Part III (sections 15 to 38 inclusive) of the Act provides for the establishment of an Unemployment Insurance Fund out of which unemployment insurance benefits would be payable to all persons of the age of sixteen years and upwards who are engaged in any of the insurable employments specified in the Act. Such fund is to be derived partly from moneys provided by Parliament and partly from compulsory contributions by employers and workers. The statutory conditions governing the eligibility and ineligibility of insured contributors for the receipt of benefits are defined in the Act. Penalties are provided for fraudulently obtaining benefits or evading payment and for other violations of the Act or the regulations under it. Part IV (sections 39 to 41 inclusive) of the Act, under the heading "National Health," charges the Commission with the duty of collecting information concerning any scheme, actual or proposed, for providing medical, dental, surgical and hospital care, and compensation for loss of earnings due to ill-health or accident. (Further particulars of the Act are contained in the judgments reported).

Held, per Rinfret, Cannon, Crocket and Kerwin JJ., that the Act is *ultra vires* of the Parliament of Canada; Duff C.J. and Davis J. holding that the Act is *intra vires*.

Per Rinfret, Cannon, Crocket and Kerwin JJ.—The validity of the legislation cannot be supported either as an exercise of the residuary power to make laws for the peace, order and good government of Canada, or as an exercise of the power to regulate trade and commerce.

The proposition that the Act could be supported in virtue of the power of the Dominion Parliament concerning statistics or criminal law need not retain our attention.

The legislation is not based on the Treaty of Peace (1919) and, therefore, no reliance for its validity can be made on section 132 of the B.N.A. Act.

Nor can it be supported under "the power to raise money by any mode or system of taxation," or "the power to appropriate public money for any public purpose." The statute, in its substance, is not an

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

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exercise of those powers. It clearly indicates that the Parliament of Canada intended primarily to legislate with regard to employment service, to unemployment insurance and to health matters. It is not concerned either with public debt and property or with the raising of money by taxation. Its provisions for levying contributions for the creation of the Unemployment Insurance Fund are nothing more than provisions to enable the carrying out of the true and only purpose of the legislation. These contributions (or taxes, if they are to be so called) are mere incidents of the attempted regulation of employment service and unemployment insurance.

It being well understood, and in fact conceded, that the subject-matters of the Act fall within the legislative authority of the provinces, the Dominion Parliament may not, under pretext of the exercise of the power to deal with its property or to raise money by taxation, indirectly accomplish the ends sought for in this legislation.

The effect of the Act under submission is "to attach statutory terms to contracts of employment" (Lord Haldane in *Workmen's Compensation Board* v. *Canadian Pacific Railway,* [1920] A.C. 184); and its immediate result is to create civil rights as between employers and employees. The Dominion Parliament cannot use its power of taxation to compel the insertion of conditions of that character in ordinary employment contracts.

Per Duff C.J. and Davis J. dissenting.—The aims stated in the preamble of the Act are legitimate, provided, of course, that the enactments themselves are within the ambit of the legislative powers possessed by Parliament. Reading subdivision 1 of section 91 and subdivision 3 of the B.N.A. Act together, the proper conclusion is that Parliament has exclusive authority to raise money by any mode or system of taxation for disposition by Parliament for any purpose for which it is competent to Parliament to apply the assets of the Dominion in virtue of subdivision 1. In effect, subdivision 1 endowes the High Court of Parliament with full discretionary authority to dispose of the public assets of the Dominion, and no other court is invested with jurisdiction to examine any purported exercise of that authority with a view to pronouncing upon its validity, subject only to the rule that the courts are always entitled to determine whether, in truth, any given enactment of Parliament professing to be an exercise of a given authority is not really an enactment of that character; but one relating to a subject over which Parliament has no jurisdiction.

The provisions requiring compulsory contributions by employers and employed possess the essential elements of legislation respecting taxation. On their true construction, they have that character because, first, it would not be competent to a provincial legislature to enact them in the context in which they stand, which demonstrates that the contributions are exacted for the purpose of raising moneys for exclusive disposition by Parliament; and, second, there is no adequate ground for holding that they are, either in purpose or in immediate effect, outside the ambit of the powers under subdivision 3.

So also as regards the enactments concerning the disposition of the proceeds of the levies upon employers and employed and of the contribution from the Dominion treasury. They are not enactments in respect of property and civil rights in any one province or in all of the provinces. They would not be competent as enactments by any or all of the provincial legislatures, and there is no adequate ground for affirming that these enactments are not legislation in relation to the subjects within the scope of subdivision 1.

Parliament can in the legitimate exercise of its exclusive authority under subdivisions 1 and 3 of section 91 of the B.N.A. Act, levy taxes for the purpose of raising money to constitute a fund to be expended, in conformity with the directions of Parliament, in unemployment benefits, and provide for a contribution to that fund from the Dominion treasury, and in executing these exclusive powers, Parliament is not subject to any control by the courts as to the form of the taxation or the incidence of it or as touching the manner or conditions of the payment of benefits.

Complete discretionary authority respecting the form and incidence of taxation under subdivision 3, and respecting the disposal of all public assets under subdivision 1, are essential to enable Parliament to discharge the responsibilities entrusted to it.

Legislation for raising money for disposition by Parliament under subdivision 3 of section 91, and directing the disposition of it under subdivision 1, is necessarily excluded from the jurisdiction of the provinces by the concluding words of section 91; and there is no sufficient ground for affirming that, in the enactments of this statute, Parliament is not exercising its powers under these subdivisions, or, in other words, that under the guise of doing so it is invading a provincial field from which it is excluded, for the purpose of attaining a result which it has full power to attain by legislating within fields in which it has exclusive authority.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, in the exercise of the powers conferred by section 55 of the *Supreme Court Act* (R.S.C. 1927, c. 35), of the following question: Is the *Employment and Social Insurance Act*, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

The Order in Council referring the question to the Court reads as follows:

The Committee of the Privy Council have had before them a report, dated 31st October, 1935, from the Minister of Justice, referring to the *Employment and Social Insurance Act*, chapter 38 of the statutes of Canada, 1935, which was passed for the purposes set out in the recitals contained in the preamble of the said Act.

The Minister observes that doubts exist or are entertained as to whether the Parliament of Canada had legislative jurisdiction to enact the said Act, either in whole or in part, and that it is expedient such question should be referred to the Supreme Court of Canada for judicial determination.

The Committee, accordingly, on the recommendation of the Minister of Justice, advise that the following question be referred to the Supreme Court of Canada, for hearing

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and consideration, pursuant to section 55 of the *Supreme Court Act*,—

Is the *Employment and Social Insurance Act*, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

E. J. LEMAIRE,
Clerk of the Privy Council.

* The judgment of Duff C.J. and Davis J. was delivered by

DUFF C.J.—The preamble to the statute is as follows:—

WHEREAS the Dominion of Canada was a signatory, as part of the British Empire, to the Treaty of Peace made between the Allied and Associated Powers and Germany, signed at Versailles, on the 28th day of June, 1919; and whereas the said Treaty of Peace was confirmed by the *Treaties of Peace Act* 1919; and whereas, by article 23 of the said Treaty, each of the signatories thereto agreed that they would endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and by article 427 of the said Treaty declared that the well-being, physical, moral and intellectual, of industrial wage-earners is of supreme international importance; and whereas it is desirable to discharge the obligations to Canadian labour assumed under the provisions of the said Treaty; and whereas it is essential for the peace, order and good government of Canada to provide for a National Employment Service and Insurance against unemployment, and for other forms of Social Insurance and for the purpose of maintaining on equitable terms, interprovincial and international trade, and to authorize the creation of a National Fund out of which benefits to unemployed persons throughout Canada will be payable and to provide for levying contributions from employers and workers for the maintaining of the said Fund and for contributions thereto by the Dominion: Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

No one of the aims stated in this preamble is illegitimate as an ultimate aim of legislation by the Parliament of Canada. If the subject matter of the enactment is within the ambit of the powers vested in Parliament it is lawful for Parliament to exercise those powers for the attainment of any or all of the objects set forth.

The immediate effect of the statute is to provide, by the means prescribed, a system of unemployment insurance. The essential elements of the scheme are the creation of the Fund—the Unemployment Insurance Fund—which is provided in part from compulsory contributions by em-

* *Reporter's note:* Counsel on the argument of this Reference were the same as those mentioned at p. 365.

ployers and employees in the insured employments, and in part by contributions from the Dominion Treasury under the authority of Parliament. The administration of the Fund is entrusted to a Board and unemployment benefits are payable by the Board out of the Fund to designated classes of unemployed persons under prescribed statutory conditions.

The exclusive legislative authority of Parliament extends *inter alia* to the subject "The Public . . Property." It cannot be doubted, we think, that "property" here is used in its broadest sense, and includes every kind of asset. This legislative authority is exercisable "notwithstanding anything in this Act." There is always, of course, the qualification, and everything hereinafter said is subject to that qualification, that Parliament is incapable of acquiring jurisdiction over matters within the exclusive competence of the provinces by legislating upon those matters under the pretence of exercising a power which does not embrace within its ambit the real subject matter of the legislation. Subject to that qualification, we know of no authority by which His Majesty's Courts have jurisdiction to examine, with a view to pronouncing upon its validity, legislation by Parliament in relation to the disposition of the assets committed to its control by section 91, B.N.A. Act.

Some reference was made on the argument to sections 102 and 106 B.N.A. Act, but we cannot find anything in those sections which in any way qualifies the authority bestowed by section 91. The phrase in section 106 "shall be appropriated by the Parliament of Canada for the public service" cannot, with propriety, be read, especially in view of the words already mentioned "notwithstanding anything in this Act," as restricting the discretion of the High Court of Parliament to determine finally what objects are and what objects are not within the scope of the words "for the public service of Canada."

It cannot, therefore, we think—and we do not think this was disputed on the argument, although we do not desire to put what we have to say upon any suggested admission—at all events, it cannot, we think, be disputed, even with plausibility, that, in point of strict law, Parliament has authority to make grants out of the public monies to individual inhabitants of any of the provinces, for example,

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for relief of distress, for reward of merit, or for any other object which Parliament in its wisdom may deem to be a desirable one. The propriety of such grants, the wisdom of such grants, the convenience or inconvenience of the practice of making such grants, are considerations for Parliament alone, and have no relevency in any discussion before any other Court concerning the competence of Parliament to authorize them.

We are satisfied, therefore, that, if Parliament, out of public monies exclusively, were to constitute a fund for the relief of unemployment and to give to unemployed persons a right to claim unemployment benefits, to be paid out of that fund upon such conditions as Parliament might see fit to prescribe, no plausible argument could be urged against the validity of such legislation.

It seems equally clear that it is exclusively within the discretion of Parliament to determine the manner in which the public assets shall be appropriated and applied for such purposes. The proceeds of any given tax, the sales tax, for example, might be validly appropriated for the purposes of such a fund. The appropriation might be affected antecedently by a direction that all or part of the proceeds of the tax should form such a fund in the hands of the Minister of Finance, or of any agency that might be designated for the purpose. The statute might take the form of requiring the Minister of Finance to pay into the fund monies from time to time provided by Parliament. True, the expectations of the authors of the scheme or of the intended beneficiaries might in any such case be falsified. Future Parliaments might find themselves in a state of financial embarrassment making it impossible to carry out the plan, or, if you like, regardless of the consequent disappointment and suffering, under altered views of policy or duty, abrogate the scheme and discontinue the payment of the benefits. But such possibilities and contingencies have no bearing upon the validity of such an enactment.

By section 35 (2) the statute now before us enacts as follows:—

> The Minister of Finance shall also deposit in like manner from time to time out of moneys provided by Parliament an amount equal to one-fifth of the aggregate deposits from time to time made as aforesaid after deducting from the said aggregate deposits any refunds of contributions from time to time made under the provisions of this Act from the Fund.

Some comment was made upon this provision; but the gist of the comment was that the observance of the mandate laid upon the Minister of Finance is necessarily contingent upon some further legislative act making available "monies provided by Parliament."

The enactment, nevertheless, is an enactment dealing with the public assets of the Dominion; it gives an explicit direction to the Minister of Finance as to the application of "monies provided by Parliament" for the purposes of the statute. The circumstance that the fate of the scheme may be dependent upon the action of future Parliaments is a circumstance which is of no pertinence in a question of the authority of the Parliament to give such a direction.

The real weight of the arguments against the legislation is to be found in the contention that the provisions of the statute are enactments on the subject of "property and civil rights" and not enactments touching any subject falling within the enumerated heads or the introductory words of section 91 B.N.A. Act. This argument has two branches. First of all, it is said that, as regards compulsory contributions, the legislation creates a compulsory contract between the persons liable to contribute and the Crown, or the Minister of Finance, to whom, in effect, the contributions are payable. Second, it is said, adapting the language of Lord Haldane in delivering the judgment in *Workmen's Compensation Board* v. *C.P.R.* (1), that the statute attaches statutory terms to contracts of employment; and that this is the real pith and substance of it.

The Dominion contends that the compulsory contributions are contributions which Parliament is competent to exact under the third subdivision of section 91, by which the exclusive legislative authority of Canada extends to all matters within the subject "The raising of money by any mode or system of taxation." As introductory to an examination of the argument on behalf of the Dominion, some brief general observations on this third subdivision of section 91 will not be out of place.

The authority, it will be noticed, is an authority to legislate in relation to the raising of money. There is no

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limitation in those words as respects the purpose or purposes to which the money is to be applied. An enactment, the real purpose of which is to raise "money by any mode or system of taxation," is not examinable by the courts as to its validity by a reference to the motives by which Parliament is influenced, or the ultimate destination of the proceeds of the tax. We speak, of course, subject to the qualification explained above which we shall not restate. There is one express qualification in the B.N.A. Act. That is contained in section 125 and precludes the taxation of the public property of the Dominion or of the provinces. Reading the words of subdivisions 1 and 3 together, we have no doubt that the words of subdivision 3 necessarily mean that Parliament is empowered to raise money, for the exclusive disposition of Parliament, by any mode or system of taxation.

In passing, it will not be out of place to observe that, reading the words of head no. 3 in this way helps to remove the difficulty which has been suggested in reconciling the language of head no. 3 of section 91 with head no. 2 of section 92, "direct taxation for provincial purposes within the province." If you read head no. 2 of section 92 with section 126, and by the light of the observations of Lord Watson in *St. Catherine Milling Co.* v. *The Queen* (1) there is, we think, solid ground for the conclusion that the words "for provincial purposes" mean neither more nor less than this: the taxing power of the legislatures is given to them for raising money for the exclusive disposition of the legislature. In this view, the subdivision of section 91 which deals with taxation, and section 92 which deals with the same subject, are on different planes and cannot come into conflict.

Even if to the words "for provincial purposes" in head no. 2 of section 92 there be ascribed a more restrictive operation, it seems clear enough that the power to legislate for taxation under that head, which is concerned with taxation for the purpose of raising monies for the exclusive disposition of the local legislature (even assuming, as we say, that in such disposition the provincial legislature is subject to some additional limitation imposed by the phrase

(1) (1888) 14 A.C. 46.

" provincial purposes ") there is nothing in this head which can conflict with the exclusive authority given by the third head of section 91 " notwithstanding anything in this Act " to raise money by any mode or system of taxation for the exclusive disposition of Parliament. The two enactments are still on different planes. The one is concerned with raising money to be appropriated by the provincial legislatures exclusively, the other is concerned with raising money to be appropriated by Parliament exclusively for those purposes to which it thinks it advisable to devote the public assets of the Dominion.

At all events, it seems to be abundantly clear that there is nothing in either section 91 or section 92 which precludes the Dominion from raising money by any mode or system of taxation to be expended in the relief of distress among the inhabitants of any one or more provinces by direct application for the benefit of the inhabitants as individuals, still less for raising money to be expended for the relief of the inhabitants of the Dominion, almost all of whom are necessarily inhabitants of the provinces. The inhabitants of the provinces are taxable by the Dominion in order to raise moneys for any purpose in the furtherance of which it is competent to the Dominion to expend such moneys in exercise of its exclusive and plenary control over the public assets.

It is not improper here, we think, to advert to the character of the legislative powers of Parliament. We have had occasion to observe in connection with one of the other references that certain negative provisions of the Statute of Westminster emphasize in the most significant way the scope and character of these powers. First, there are the Recitals that

* * * it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom:

and that,

* * * it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion:

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Then, there is the enactment, section 7 (1), which, in categorical terms, provides that nothing in the Act shall be deemed to apply to the repeal, amendment or alteration of the *British North America Acts,* 1867 to 1930, or any order, rule or regulation made thereunder.

Subject to the restrictions in the Statute of Westminster and the *British North America Act,* and to whatever restrictions may be implied in the status of the Dominion, as owing a common allegiance to the Crown with the other members of the British Commonwealth, the Parliament of Canada is invested with plenary authority to legislate for the peace, order and good government of Canada over the whole field of legislative action, saving only those fields which, by the enactments of the *British North America Act,* have been withdrawn from it and assigned exclusively to the provincial legislatures.

This authority is not a delegated authority, as, for example, that of the legislative bodies of the United States. It is an authority which exists in virtue of the supreme law of the state and is of the same order, subject, of course, to the restrictions mentioned, as the legislative authority of the Imperial Parliament.

The language of subdivision 3 could hardly be broader. "Any mode or system of taxation" leaves in Parliament unlimited discretion so long as the essentials of taxation are present.

By section 17 of the statute now before us, the employed and employer are "liable" to pay contributions in accordance with the provisions of the second schedule of the Act which prescribes the rate of contribution. The payments are to be made by means of revenue stamps and section 18 authorizes the Governor in Council by regulation to provide for the payment of contributions

> by means of revenue stamps affixed to or impressed upon books or cards * * * and such stamps and the devices for impressing the same shall be prepared and issued in such manner as may be prescribed by such regulation.

By subsection 2,

> * * * the Commission may make regulations providing for any matters relating to the payment and collection of contributions payable under this Act, and in particular for—
>
> (*a*) regulating the manner, times and conditions, in, at and under which payments are to be made;

(*b*) the entry in or upon unemployment books or cards of particulars of contributions and benefits paid in respect of the persons to whom the unemployment books or cards relate;

(*c*) the issue, sale, custody, production and delivery up of unemployment books or cards and the replacement of unemployment books or cards which have been lost, destroyed or defaced; and

(*d*) the offering of reward for the return of an unemployment book or card which has been lost and for the recovery from the person responsible for the custody of the book or card at the time of its loss of any reward paid for the return thereof.

By section 31, the failure to pay any contribution which an employer or an employee is liable to pay under the Act is constituted an offence punishable by fine or imprisonment or both. By section 35 (1) it is provided:

The Minister of Finance shall from time to time deposit in the Bank of Canada, to the credit of the Commission, in an account to be called "The Unemployment Insurance Fund" (hereinafter referred to as "The Fund"), all revenue received from the sale of unemployment insurance stamps and all contributions, if any, paid otherwise than by means of such stamps (including contributions recovered by process of law) under the provisions of this part of this Act.

The Governor General in Council, by section 18 (1) is authorized to make regulations touching the payment and collection of contributions payable under the Act. This section (35 (1)) which in unqualified terms lays upon the Minister of Finance the duty to pay into the Fund "all revenue received from the sale of unemployment insurance stamps and all contributions and all contributions (if any) paid otherwise than by means of such stamps (including those recovered by process of law)" manifests very clearly the intention that the compulsory contributions shall be paid to the government and shall be recoverable by process of law; although it is left to the Governor General in Council to make specific provision by regulation for the collection and payment of such contributions.

Now let it be observed, in the first place, that on the hypothesis on which we are proceeding, if the monies raised by these compulsory contributions are monies raised "by any mode or system of taxation," these enactments are within the powers of Parliament, but, if the attack upon the legislation is well founded, Parliament has no authority to obtain money in this way. It would appear that, having regard to the nature of the legislative authority vested in Parliament, and to the wide discretion reposed in Parliament touching the manner in which monies are to be raised under subdivision 3, a court ought to observe

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a high degree of caution in pronouncing upon the invalidity of an enactment, by which monies become by compulsion of law payable by individuals to the Dominion Treasury for a public purpose, on the ground that, in truth, it does not possess its *prima facie* character, that of a taxing statute, but is legislation intending to do what Parliament has otherwise no manner of authority to do. We are disposed to think that something approaching a demonstration ought to be required to lead one to such a conclusion.

Let it not be overlooked that we are not here dealing with an attempt on the part of Parliament to do something it has no power to do. We have not before us an attempt under the guise of taxation to regulate insurance contracts, or an attempt under the guise of criminal legislation to regulate insurance contracts, or an attempt under the guise of legislation for the regulation of mines to regulate in relation to aliens. The statute before us has nothing of that character. If we are right in what we have already said, it is entirely competent to Parliament to resort, as sources for the provision of the unemployment fund, to taxes levied on employers and employees and to taxes levied "by any mode or system" which Parliament in its discretion may adopt.

We ask ourselves then, What are the indicia in this statute which compel us to conclude that Parliament, instead of resorting to taxation which it had authority to do, has resorted to legislation in regard to civil rights which it had no authority to enact?

The essentials of taxation are present. The contributions are levied by Parliament directly. That the contributions are to be paid by revenue stamps is prescribed by Parliament; but the Governor General in Council is to regulate payment and collection. Payment is compulsory. Contributions are recoverable by process of law and failure to pay is an offence punishable by fine and imprisonment. The contributions are payable into the public treasury of the Dominion, and are to be paid by the Minister of Finance into a fund which is to be applied as directed by Parliament.

In *Lower Mainland* v. *Crystal Dairy* (1) Lord Thankerton, speaking for the Judicial Committee of the Privy Council, said:—

In the opinion of their Lordships, the adjustment levies are taxes. They are compulsorily imposed by a statutory Committee consisting of three members, one of whom is appointed by the Lieutenant-Governor in Council, the other two being appointed by the dairy farmers within the district under s. 6 of the Act. They are enforceable by law, and a certificate in writing under the hand of the chairman of the Committee is to be *prima facie* evidence in all Courts that such amount is due by the dairy farmer (s. 11). A dairy farmer who fails to comply with every determination, order or regulation made by Committee under the Act is to be guilty of an offence against the Act (s. 13) and to be liable to a fine under s. 19. Compulsion is an essential feature of taxation: *City of Halifax* v. *Nova Scotia Car Works, Ltd.* (2). Their Lordships are of opinion that the Committee is a public authority, and that the imposition of these levies is for public purposes. Under s. 22 the Lieutenant-Governor in Council has power to suspend the functions of a Committee, if its operations are adversely affecting the interests of consumers of milk or manufactured products, and the Committee is to report annually to the Minister and to send him every three months the auditor's report on their accounts (s. 12, subs. 2, and s. 8A). The fact that the moneys so recovered are distributed as a bonus among the traders in the manufactured products market does not, in their Lordships' opinion, affect the taxing character of the levies made.

The judgment of the majority of this Court in *Lawson* v. *Interior Tree, Fruit and Vegetable Committee of Direction* (3) is to the same effect.

In *Workmen's Compensation Board* v. *C.P.R.* (4), assessments upon employers, for the purpose of providing an accident fund out of which compensation was payable by the Compensation Board to persons injured by accident in the course of their employment and to dependents in case of death, were held to fall within the denomination "direct taxation" within the meaning of section 92 (2) of the *British North America Act.*

Subsection 3 of section 17 and subsection 1 of section 33 require notice in this connection. As to the first of these enactments, the subject does not appear to admit of extended argument, but we ourselves are unable to perceive any valid reason for holding that the authority to make laws in relation to the "raising of money by any mode or system of taxation" does not embrace the authority to require "A" to pay in the first instance a tax in

(1) [1933] A.C. 168.
(2) [1914] A.C. 992, at 998.
(3) [1931] S.C.R. 357 at 362.
(4) [1920] A.C. 184.

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respect of which "B" is liable, and to give "A" a right to reimbursement from "B" out of "B's" monies in "A's" hands, or otherwise.

As to section 33, we are disposed to think that the provision in question, although unusual, is not beyond the power of Parliament to enact as an additional means for insuring the payment of contributions by employers and the satisfactory working of the scheme. However that may be, that provision is plainly severable. It is not a necessary part of the legislative scheme. Assuming it to be *ultra vires* and to afford some evidence of an intention on the part of Parliament to legislate for regulating the relations between employer and employee, such evidence is not sufficiently powerful to deprive the legislation of its *prima facie* character, which, as we have said, is that of an enactment in respect of the subject matter of head no. 3 of section 91.

There remains the broad contention that the provisions of the statute viewed as a whole disclose a scheme under which a statutory contract arises imposing upon employers and employees a contractual duty to contribute to an insurance fund and conferring upon insured persons contractual rights to be paid unemployment benefits out of that fund when the statutory prerequisites are observed.

In *Workmen's Compensation Board* v. *C.P.R.* (1), it was held, as we have seen, that the assessments levied upon employers in order to provide an accident fund out of which compensation was to be paid to employees injured by accident were in the nature of taxes.

Their Lordships' Board in that case had to consider a section of the Compensation Act under which, where the accident happened on a ship or a railway outside the province, and the workman was a resident of the province, and the nature of the employment was such that the work or service performed by the workman had to be performed both within and without the province, the workman or his dependents should be entitled to recover compensation if the circumstances were such that he would have possessed such a right had the accident happened within the province. It was held that it was competent to the provincial legis-

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

lature to give such a right of recovery in such circumstances, as a statutory condition of the contract of employment made with a workman resident within the province.

This right, it was said, arises, not out of tort, but out of the workman's statutory contract, and, it was added, their Lordships think it is a legitimate provincial object to secure that every workman resident within the province who so contracts should possess it as a benefit conferred on himself as a subject of the province.

The statute also provides that in any case where compensation was payable in respect of an accident happening elsewhere than in the province, if the employer had not contributed fully to the accident fund in respect of his workmen engaged in the service in which the accident happened, the employer should pay to the Board the full amount of the compensation payable in respect of the accident, and that the payment of this sum should be enforceable in the same manner as an assessment. As regards this provision, their Lordships observed:

* * * it also appears to them to be within the power of the province to enact that, if the employer does not fully contribute to the accident fund out of which the payment is normally to be made, the employer should make good to that fund the amount required for giving effect to the title to compensation which the workman acquired for himself and his dependents.

The question before their Lordships concerned the competence of the provincial legislature under the powers vested in it by section 92 to enact this legislation. A ship, the property of the C.P.R. Co., had been lost at sea outside Canadian territorial waters, and it was argued, on behalf of the respondent company, that the right the legislature professed to give the workman in such circumstances, and the liability the legislation professed to impose upon the owner of the ship, was necessarily a right and a liability having a situs outside the province, and consequently not within the authority of the province to create, in exercise of its jurisdiction concerning "property and civil rights" within the province. This argument was based mainly, if not exclusively, upon the decision of the Judicial Committee in *Royal Bank* v. *The King* (1).

The judgment does not in terms state that the liability of the ship owner, where he has not fully contributed to the accident fund in respect of the employees engaged in

(1) [1913] A.C. 283.

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the service in which the accident occurred, to make good such contribution in the manner mentioned was a liability arising out of the statutory term attached to the contract. The liability to pay assessments in the first instance is treated as a liability to pay a tax. As to the special duty arising from the failure to keep up his contributions, there seems to be no reason to think it was placed upon any other footing. At p. 192 (1) their Lordships point out that the fundamental question was whether or not

> a contract of employment made with persons within the province has given a title to a civil right within the province to compensation.

Their Lordships proceed,

> The compensation, moreover, is to be paid by the Board and not by the individual employer concerned.

Then their Lordships observe that the C.P.R. Co., carrying on business in the province of British Columbia, is subject to the jurisdiction of the provincial legislature to enact laws within certain limits imposing civil duties upon it. There is no suggestion that the liability under this special provision is of a character different from the civil duty in respect of assessments made for the purpose of providing compensation for employees whose duties are confined to the province.

It will be observed that the real effect of the decision is that these matters—the matter of constituting an accident fund by compulsory contributions from employers carrying on business by the province and employees resident in the province, and by an optional contribution from the provincial government, for the purpose of providing accident benefits for workmen resident in the province injured in the course of their employment—that these matters may, in their provincial aspects and for the purpose of establishing such a scheme of insurance, fall within the legislative authority of the province in relation to taxation, to property and civil rights, and, it may be, in relation to matters merely local and private within the province. Such a scheme it is within the authority of any province to establish. It does not follow that it is within the authority of any province, or all the provinces combined, validly to enact the legislation or, indeed, any part of the legislation necessary to give effect to the system set up by the statute before us.

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

It seems to me to be impossible to escape the conclusion that those parts of the enactment which concern the compulsory contributions are provisions relating to the subject of taxation. As pointed out in the *Crystal Dairy* case (1), and as appears from *Workmen's Compensation Board* v. *C.P.R.* (2), the circumstance that the fund is to be distributed for the benefit of private individuals does not militate against the view that these contributions have the character of taxes. As already observed, the essentials of taxation are indubitably present. Moreover, a provincial enactment providing for such contributions to be paid by revenue stamps to the Dominion Government, and to be collected according to regulations prescribed by the Governor in Council, and to be applied by the Minister of Finance in a manner provided by the statute, would plainly be *ultra vires*. A province has, obviously, no power to pass such an enactment. The Dominion has the power if it is an enactment in relation to taxation.

It is of supreme importance at this point to keep in mind the fundamental principle governing the construction of the *British North America Act:* matters which in one aspect and for one purpose may, as subjects of legislation, fall within subdivisions of s. 92 may, in another aspect, and for another purpose, fall within section 91. A provincial legislature may require such compulsory contributions for the purpose of some scheme of unemployment insurance set up by itself in the exercise of powers of legislation which it possesses. In such a case, it would appear, from the decisions in the *Workmen's Compensation Board* v. *C.P.R.* (2), in the *Crystal Dairy* case (1) and in *Lawson's* case (3), that such contributions have the character of taxes; and legislation with regard to them would not, therefore, fall within the category of legislation respecting civil rights within the meaning of section 92. But, even assuming that such legislation by a province could be regarded as legislation in relation to civil rights, as adding a statutory term to contracts of employment, it would appear to be extremely difficult to classify the enactments requiring the payment of the contributions now in question as belonging to the category of legislation in relation to civil rights

(1) [1933] A.C. 168. (2) [1920] A.C. 184.
(3) [1931] S.C.R. 357.

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within a province, especially in view of the provisions of the statute, already mentioned, under which the Dominion Government is the payee, and the Governor in Council possesses the power to regulate payment and collection of all contributions, and all such contributions are to be applied by the Finance Minister in the manner prescribed by the statute.

We find ourselves unable to conclude that, reading these provisions as a whole, these enactments requiring compulsory payments can be considered as enactments on the subject of property and civil rights within any province or within all the provinces.

Turning now to the provisions of the statute dealing with unemployment benefits. These provisions, again, if found in a scheme of unemployment insurance set up by a province, might be regarded, as similar provisions in *Workmen's Compensation Board* v. *C.P.R.* (1) were regarded by the Judicial Committee, as having the effect of annexing a statutory term to contracts of employment. But one thing seems to be clear,—no single province, nor all the provinces combined, could enact this legislation in the exercise of their powers in regard to civil rights within the respective provinces. The enactments constitute directions for the application of a fund constituted by contributions out of the public funds of the Dominion and no province possesses any authority to legislate in relation to the application of such a fund.

Our conclusion, therefore, is, first, that in its main provisions this statute ought on its true construction to be sustained as a valid exercise of the powers of the Dominion Parliament under subdivisions 1 and 3 of section 91. Second, that as to many of its provisions, they are plainly outside any authority possessed by any province or all the provinces under section 92 and, in so far as they do not fall within the ambit of the subdivisions mentioned, must be embraced within the general authority of the Dominion to make laws for the peace, order and good government of Canada.

We should add that we are unable to agree with Mr. Rowell's contention that this legislation can be supported

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

as legislation under head no. 2 of section 91, or that, in its entirety, it falls within the ambit of the residuary clause as interpreted and applied in recent decisions which are binding upon us.

To summarize:—

The aims stated in the preamble are legitimate, provided, of course, that the enactments themselves are within the ambit of the legislative powers possessed by Parliament. Reading subdivision 1 of section 91 and subdivision 3 together, the proper conclusion is that Parliament has exclusive authority to raise money by any mode or system of taxation for disposition by Parliament for any purpose for which it is competent to Parliament to apply the assets of the Dominion in virtue of subdivision 1. In effect, subdivision 1 endows the High Court of Parliament with full discretionary authority to dispose of the public assets of the Dominion, and no other court is invested with jurisdiction to examine any purported exercise of that authority with a view to pronouncing upon its validity, subject only to the rule that the courts are always entitled to determine whether, in truth, any given enactment of Parliament professing to be an exercise of a given authority is not really an enactment of that character; but one relating to a subject over which Parliament has no jurisdiction.

The provisions requiring compulsory contributions by employers and employed possess the essential elements of legislation respecting taxation. On their true construction, they have that character because, first, it would not be competent to a provincial legislature to enact them in the context in which they stand, which demonstrates that the contributions are exacted for the purpose of raising monies for exclusive disposition by Parliament; and, second, there is no adequate ground for holding that they are, either in purpose or in immediate effect, outside the ambit of the powers under subdivision 3.

So also as regards the enactments concerning the disposition of the proceeds of the levies upon employers and employed and of the contribution from the Dominion treasury. They are not enactments in respect of property and civil rights in any one province or in all of the provinces. They would not be competent as enactments by

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any or all of the provincial legislatures, and there is no adequate ground for affirming that these enactments are not legislation in relation to the subjects within the scope of subdivision 1.

It is hardly susceptible of dispute that Parliament could, in the legitimate exercise of its exclusive authority under subdivisions 1 and 3 of section 91, levy taxes for the purpose of raising money to constitute a fund to be expended in conformity with the directions of Parliament, in unemployment benefits, and provide for a contribution to that fund from the Dominion treasury, or to maintain that, in executing these exclusive powers, Parliament is subject to any control by the courts as to the form of the taxation or the incidence of it or as touching the manner or conditions of the payment of benefits.

It is, perhaps, not too much to say that complete discretionary authority respecting the form and incidence of taxation under subdivision 3, and respecting the disposal of all public assets under subdivision 1, are essential to enable Parliament to discharge the responsibilities entrusted to it.

In a word, legislation for raising money for disposition by Parliament under subdivision 3 of section 91, and directing the disposition of it under subdivision 1, is necessarily excluded from the jurisdiction of the provinces by the concluding words of section 91; and there is no sufficient ground for affirming that, in the enactments of this statute, Parliament is not exercising its powers under these subdivisions, or, in other words, that under the guise of doing so it is invading a provincial field from which it is excluded, for the purpose of attaining a result which it has full power to attain by legislating within fields in which it has exclusive authority.

The statue is, therefore, *intra vires*.

RINFRET J. (Cannon and Kerwin JJ. concurring)—The constitutionality of the *Employment and Social Insurance Act* (see ch. 38 of the statutes of Canada, 25-26 Geo. V, assented to 28th June, 1935) was referred by the Governor

in Council to the Supreme Court of Canada under sec. 55 of the *Supreme Court Act*.

The statute is entitled "An Act to establish an Employment and Social Insurance Commission, to provide for a National Employment Service, for Insurance against Unemployment, for aid to Unemployed Persons, and for other forms of Social Insurance and Security, and for purposes related thereto." The preamble refers to the Treaty of Peace made between the Allied and Associated Powers and Germany, signed at Versailles on the 28th day of June, 1919. It states that it is desirable to discharge the obligations to Canadian Labour flowing from articles 23 and 427 of the Treaty, and that it is essential for the peace, order and good government of Canada to adopt such an Act for the purpose of maintaining on equitable terms interprovincial and international trade, to authorize the creation of a National Fund out of which benefits to unemployed persons throughout Canada will be payable and to provide for the levying of contributions from employers and workers for the maintaining of the said fund and for contributions thereto by the Dominion.

After making provision for the short title and the interpretation clauses, the Act is divided into five parts. Part 1 relates to the Employment and Social Insurance Commission, which is thereby brought into existence. Part II relates to Employment service. Part III relates to Unemployment Insurance. Part IV relates to National Health. Part V contains general provisions concerning regulations; the annual report to be submitted by the Commission; all other reports, recommendations and submissions required to be made to the Governor in Council; the disposition of fines; repeal, audit and the coming into force of the Act.

It is followed by three schedules, the first of which defines employment within the meaning of Part III of the Act and enumerates the "excepted employments." The second schedule fixes the weekly rates of contribution and establishes the rules as to payment and recovery of compulsory payments by employers on behalf of unemployed persons. The third schedule fixes the rates of unemployment benefits.

Under Part I, the Act is to be administered by a Commission consisting of three members to be called the Em-

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ployment and Insurance Commission, with wide powers of investigation for assisting unemployed persons and for providing to them physical and industrial training and instruction.

Under Part II, the Commision is to organize an Employment Service for the Dominion of Canada. The Act provides for the constitution and management of such Employment service on a very large scale. Regional divisions are established. There is to be in each such division a central employment office and as many employment offices as the Commission will deem expedient and desirable for the purposes of the Act. The Commission is to have the direction, maintenance and control of all employment offices so established. The Commission may make regulations authorizing advances by way of loans towards meeting the expenses of workers travelling to places where employment has been found for them through an employment office.

Part III of the Act provides for Unemployment Insurance. The persons to be insured against unemployment are defined. The Act regulates the manner in which the funds required shall be collected partly from monies provided by Parliament, partly from contributions by employed persons and by the employers of those persons. But the employer shall, in the first instance, be liable to pay both the contribution payable by himself and also, on behalf of the employed person, the contribution payable by that person, subject to the right to recover by deduction from the wages or otherwise. The payment of contributions is to be made by means of revenue stamps affixed to or impressed upon books or cards specially prescribed for that purpose. There follows statutory conditions for the receipt of unemployment benefits. One of them is that the person insured shall not be entitled to the benefit until contributions on his behalf have been made for not less than forty full weeks. The manner in which and the conditions under which the contributions are to be paid are defined in numerous sections and subsections.

All questions concerning the rights of persons under the Act are to be determined by the Commission. The Commission may employ insurance officers in each regional division; and the Governor in Council is further authorized to designate such number of persons as are necessary

in each such division to act as umpires, deputy-umpires, courts of referees, chairmen of those courts, etc., for the purpose of examining and determining all claims for benefit, with elaborate provisions for appeal.

Then follow a number of sections dealing with penalties, legal proceedings, civil proceedings by the employee against the employer for neglect to comply with the Act, including the authorization for the Commission to institute proceedings on behalf of the employed person, or for the recovery as civil debts of sums due to the Unemployed Insurance Fund established under the Act.

Inspectors are to be appointed for the purpose of the execution of the Act with power to do all or any of several things, including the right to enter premises other than private dwellings, to make examinations and inquiries, to examine persons and to exercise such other powers as may be necessary to carry the Act into effect.

Then come the financial provisions. The revenue from the sale of the stamps and from all contributions are to be deposited from time to time in the Bank of Canada, by the Minister of Finance, to the credit of the Commission, in an account to be called "The Unemployment Insurance Fund." And in a similar way are to be deposited the monies provided by Parliament; and there is to be an Investment Committee of three members consisting of one member nominated by the Government, one by the Minister of Finance, and one by the Governor of the Bank of Canada, to look after the investment of such sums standing to the credit of the Fund as are not required to meet current expenditures.

In addition to all the above officials, there will be appointed an Advisory Committee, the duties of which are to give advice and assistance to the Commission in relation to the discharge of its functions under the Act and to make reports on the financial condition of the Fund. This Committee shall consist of a Chairman and not less than four, nor more than six, other members. Further, the Commission is given authority to make regulations relating to persons working under the same employer partly in insurable employment and partly in other occupations; also for prescribing the evidence to be required as to the fulfilment of the conditions for receiving unemployment benefits; for

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prescribing the manner in which claims for unemployment benefit may be made, the proceedings to be followed in the consideration and examination of claims; and also regulations with respect to the references to the central or local committees, and to persons employed on night work and to penalties for the violation of any regulation.

Under Part IV, the duties and powers of the Commission are defined with respect to its co-operation in matters of health and health insurance. It may undertake special investigations in regard thereto, subject to the approval of the Governor in Council.

The weekly rates of contribution provided for under the second schedule are graduated according to the class and the wages of the employed person. The weekly contributions are made payable for each calendar week during the whole or any part of which an employed person has been employed by an employer. The payment of contributions both by the employer and by the employee is compulsory. All conditions prescribed for the payment of these contributions including the right of the employer to recover from the employed person the amount of any contributions paid by him on behalf of the employed person are made essential and necessary conditions of the contract of engagement between the employer and the employee. In fact, Part II of the second schedule contains any number of these conditions and provides for further regulations which may be made by the Commission in connection therewith.

The Court is asked to give its opinion upon the question whether the Act, or any of the provisions thereof, is *ultra vires* of the Parliament of Canada.

The written submission of the Attorney-General of Canada was that the Act in its entirety was within the legislative power of the Parliament of Canada in virtue of

(1) its residuary power to make laws for the peace, order and good government of Canada, and

(2) its exclusive power (*a*) to regulate trade and commerce, (*b*) to raise money by any mode or system of taxation, (*c*) to appropriate public money for any public purposes, (*d*) to provide for the collection of statistics; and, incidentally, (*e*) to enact criminal laws.

It is unnecessary for me to add anything to what has already been said—and so well been said—by my Lord

the Chief Justice in connection with the other References made to the Court at the same time as the present one (more particularly those concerning the *Natural Products Marketing Act,* 1934 (p. 403), and the *Dominion Trade and Industry Commission Act,* 1935 (p. 381), to indicate the reasons why I think that the validity of this legislation cannot be supported as an exercise of the residuary power to make laws for the peace, order and good government of Canada, or as an exercise of the power to regulate trade and commerce.

Insurance of all sorts, including insurance against unemployment and health insurances, have always been recognized as being exclusively provincial matters under the head "Property and Civil Rights," or under the head "Matters of a merely local or private nature in the Province." By force of the *British North America Act,* the power to make laws for the peace, order and good government of Canada is given to the Dominion Parliament only "in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

The exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in section 91 was, by more than one pronouncement of the Judicial Committee of the Privy Council, declared to be "strictly confined to such matters as are unquestionably of Canadian interest and importance" (*Attorney General for Ontario* v. *Attorney General for Canada*) (1); it will be recognized by the Courts "only after scrutiny sufficient to render it clear that circumstances are abnormal . . . such as cases of war or famine" (2); and "instances of these cases . . . are highly exceptional" (3).

In this particular matter, there is no evidence of an emergency amounting to national peril; but, moreover and still more important, the statute is not meant to provide for an emergency. It is not, on its face, intended to cope with a temporary national peril; it is a permanent statute dealing with normal conditions of employment. There was accordingly here no occasion, nor foundation, for the exercise of the residuary power.

(1) [1896] A.C. 348. (2) [1922] 1 A.C. 200.
(3) [1923] A.C. 695; [1925] A.C. 396.

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Nor is this legislation for the regulation of trade and commerce. It is not trade and commerce as defined by the Privy Council in its numerous decisions upon the subject. It deals with a great many matters which are trade and commerce in no sense of the word, such as the contract of employment, employment service, unemployment insurance and benefit, and health.

The proposition that the Act could be supported in virtue of the powers of the Dominion Parliament derived from Head 6 (Statistics), or Head 27 (Criminal Law) of section 91 need not retain our attention and it was not pressed at the argument.

It may be stated further that the legislation is not based on the Treaty of Peace, although it is referred to in the preamble. In fact, counsel for the Attorney General of Canada positively stated at bar that he was not relying on any treaty or on section 132 of the *British North America Act*.

There remains, therefore, in the submission made on behalf of the Dominion Government, only two heads that have to be considered in support of the legislation; and they are: "the power to raise money by any mode or system of taxation" (91-3), and "the power to appropriate public moneys for any public purpose."

In truth, these powers were only faintly advanced by counsel for the Dominion in favour of the legislation Nevertheless, they were referred to, and more particularly as I understand that they were accepted in support of the validity of the Act by my Lord the Chief Justice, I realize that my reasons for holding a different view must be explained as fully, though as concisely, as possible.

The critical question is whether or not the statute is, in its substance, an exercise of those powers to raise money by taxation and to make laws for the disposal of the public property.

At the outset, let us remember the remark of Lord Coke (4 Inst. 330) that the preamble of a statute is "the key to open the minds of the makers of the Act and the mischiefs which they intended to remedy."

The recitals of the preamble have already been referred to. They mention the Treaty of Versailles and the promise of the signatories to endeavour to secure and maintain

fair and humane conditions of labour for industrial wage earners. They indicate the desirability of discharging certain obligations to Canadian Labour. They invoke the importance for the peace, order and good government of Canada to provide for a National employment service, for insurance against unemployment and for other forms of social insurance. They allege the necessity of maintaining on equitable terms interprovincial and international trade. They mention the purpose of creating a national fund, out of which benefits to unemployed persons throughout Canada will be payable, and of providing for the levy of contributions from employers and workers for the maintaining of this fund and for contribution thereto by the Dominion.

With deference, it seems to me that these recitals clearly indicate that the Parliament of Canada intended primarily to legislate with regard to employment service, to unemployment insurance, and to health matters; that it was not concerned with the public debt and property or with the raising of money by taxation; and that the provisions for levying contributions for the creation of the national fund were nothing more than provisions to enable the carrying out of the true and only purposes of the legislation. The Act is one dealing with and regulating employment service and unemployment insurance. The contributions (or the taxes, if we are to call them so) are mere incidents of the regulation.

It is hardly necessary to repeat that, when investigating whether an Act was competently passed by Parliament, the courts must ascertain the " true nature and character " of the enactment, its " pith and substance," and the legislation must be " scrutinized in its entirety " for the purpose of determining within which of the categories of subject-matters mentioned in sections 91 and 92 the legislation falls (*Citizens Insurance Co.* v. *Parsons* (1); *Union Colliery Company* v. *Bryden* (2); *Great West Saddlery Company* v. *The King* (3); *Reciprocal Insurers* case (4); *Toronto Electric Commissioners* v. *Snider* (5).

(1) (1881) 7 App. Cas. 96.
(2) [1899] A.C. 580.
(3) [1921] 2 A.C. 91, at 117.
(4) [1924] A.C. 328, at p. 337.
(5) [1925] A.C. 396, at p. 407.

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In my humble view, the subject-matter of the Act is employment service and social insurance, not public debt and property or taxation. The object of the Act, the end sought to be accomplished by it is a scheme for employment service and unemployment insurance; the contributions levied from the employers and employees are only incidents of the proposed scheme, and, in fact, merely means of carrying it into effect. The Act does not possess the character of a taxing statute, but it is legislation intending to do precisely what the title says: to establish an employment insurance commission, to provide for a national employment service, for insurance against unemployment, for aid to unemployed persons, or other forms of social insurance and security and for purposes related thereto.

It being well understood and, in fact, conceded that these are subject-matters falling within the legislative authority of the provinces, the Dominion Parliament may not, under pretext of the exercise of the power to deal with its property, or to raise money by taxation, indirectly accomplish the ends sought for in this legislation. If it were otherwise, the Dominion Parliament, under colour of the taxing power, would be permitted to invade almost any of the fields exclusively reserved by the Constitution to the legislatures in each province.

One of the effects of the Act under submission is, in the language of Lord Haldane, in *Workmen's Compensation Board* v. *C.P.R.* (1), "to attach statutory terms to contracts of employment," and to impose contractual duties as between employers and employees. In its immediate result, the Act creates civil rights as between the former and the latter.

I doubt whether the contribution received from the employee can properly be described as a tax. In fact, it would seem to me to partake more of the nature of an insurance premium or of a payment for services and individual benefits which are to be returned to the employee in proportion to his payments. Be that as it may under all circumstances, the benefits conferred on the employees by the Act are not gifts with conditions attached, which

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

the employees are free to accept or not; the conditions attached to the benefits are made compulsory terms of all contracts in the specified employments, and I deprecate the idea that the Dominion Parliament may use its power of taxation to compel the insertion of conditions of that character in ordinary contracts between employers and employees.

It may be that some of the provisions of the Act are not open to objection. But I fail to see how they can be severed from the general scheme organized under the Act or from the powers conferred on the Commission; and the legislation as it stands must undoubtedly fall as a whole.

In the premises, the Act submitted to the Court is not a mere encroachment on the provincial fields through the exercise of powers allegedly ancillary or incidental to one of the enumerated powers of section 91; in its pith and substance, it is a direct and unwarranted appropriation of the powers attributed to the legislatures by force of Section 92 of the Constitution.

For these reasons, and also for the reasons given by my brother Kerwin, with whom I entirely concur, I have come to the conclusion that the *Employment and Social Insurance Act* (chapter 38 of the statutes of Canada, 25-26 Geo. V) is wholly *ultra vires* of the Parliament of Canada.

CROCKET, J.—For the reasons given by my brother Rinfret, I agree that the above statute is wholly *ultra vires* of the Parliament of Canada.

KERWIN J. (Rinfret and Cannon JJ. concurring)—The Governor General in Council has referred to this Court for hearing and consideration pursuant to section 55 of the *Supreme Court Act* the following question: "Is the *Employment and Social Insurance Act*, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?"

Section 1 of the Act merely gives its short title; section 2 is the interpretation section, while section 3 provides that the remainder of the Act may be referred to as follows:

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PART I, sections four to nine inclusive, relating to the Employment and Social Insurance Commission;

PART II, sections ten to fourteen inclusive relating to Employment Service;

PART III, sections fifteen to thirty-eight inclusive relating to Unemployment Insurance;

PART IV, sections thirty-nine to forty-one inclusive relating to National Health;

PART V, sections forty-two to forty-eight inclusive, General.

The sections included in Part II provide that The Employment and Social Insurance Commission constituted under Part I shall organize an employment service for the Dominion of Canada, and contain supplementary provisions for the collection of information, advances to workers seeking employment, etc.

The sections included in Part IV enact that the duties and powers of the Commission under that Part shall be exercised so far as may be found practicable and expedient in co-operation with any department or departments of the Government of Canada, with the Dominion Council of Health, with any province or any number of provinces collectively, or with any municipality or any number of municipalities collectively, or with associations or corporations, and provide that it shall be the duty of the Commission to assemble reports, publications, etc., concerning certain schemes or plans for medicinal, dental or surgical care, including medicines, drugs or hospitalization, or compensation for loss of earnings arising out of ill-health, accident or disease.

By themselves the provisions of Part II and of certain portions of Parts IV and V might be unobjectionable but in my opinion they are so inextricably interwoven with the powers of the Commission set up under Part I and with the scheme of unemployment insurance referred to in Part III that they must stand or fall according to the validity or otherwise of sections 15 to 38 inclusive which form Part III.

As to Part III serious questions arise. In addition to the arguments of counsel, I have had the advantage of reading the opinion of My Lord the Chief Justice but with deference I find myself unable to agree with the conclusions

expressed therein that this Part of the Act may be justified as an exercise by Parliament of its powers under Head 1 "The Public Debt and Property" and Head 2 "The Raising of money by any mode or system of taxation" of section 91 of the *British North America Act*, 1867. It is quite true that Parliament, by properly framed legislation may raise money by taxation and dispose of its public property in any manner that it sees fit. As to the latter point, it is evident that the Dominion may grant sums of money to individuals or organizations and that the gift may be accomplished by such restrictions and conditions as Parliament may see fit to enact. It would then be open to the proposed recipient to decline the gift or to accept it subject to such conditions. As to the first point, it is also undoubted, I conceive, that Parliament, by properly framed legislation may raise money by taxation, and this may be done either generally or for the specific purpose of providing the funds wherewith to make grants either before or after the conferring of the benefit.

But in my view, after a careful consideration of all the sections in Part III of the Act, in substance Parliament does not purport to do either of these things. Section 15 provides that the designated persons, referred to as "unemployed persons" shall be insured against unemployment in the manner provided for by the Act. Section 17 enacts that the funds required for providing "unemployment benefit" and for making any other payments which are to be made out of the Unemployment Insurance Fund established later under Part III shall be derived partly from moneys provided by Parliament, partly from contributions from employed persons and partly from contributions from employers of those persons, which contributions shall be paid by means of revenue stamps or otherwise as may be prescribed by the Commission. Rates of contribution are set forth in the second schedule to the Act, and by ss. 3 of s. 17 except where regulations under the Act otherwise prescribe, the employer shall in the first instance be liable to pay both the contribution payable by himself and also the contribution payable by the employed person with power to the employer, subject to regulations, to recover from the employed persons to the amount of the contributions so paid on behalf of the latter by the employer. By

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section 19 every unemployed insured person who complies with prescribed "statutory conditions" is entitled to receive what is known as an "unemployment benefit." There is a provision by which certain employed persons may be exempted from the provisions of the Act, but subject to that, the individuals covered by this Part are obliged to become insured by means of a statutory condition attached to the contract of employment.

While there are numerous other provisions, I believe I have correctly set forth the marrow of Part III of the Act and I am unable to ascertain in what maner they may be termed an exercise of the power conferred upon Parliament to tax. It occurs to me that if it were otherwise the Parliament of Canada might in connection with any matter whatsoever, by the mere imposition of a tax, confer upon itself authority to legislate upon matters over which the legislature of each province would ordinarily have jurisdiction. This must be understood, of course, as not referring to any power in the legislatures of the various provinces to originate or assist its local scheme by indirect taxation.

That, with this qualification, the subject matter of Part III would ordinarily fall within the ambit of the powers of the provinces within their respective boundaries was not, I think seriously disputed. It deals with contracts of employment and attaches thereto a statutory condition. It interferes with property and civil rights. A reference particularly to section 15 and to the recitals in the Act indicates that the very pith and substance of this part of the Act deals with unemployment insurance.

In re The Insurance Act of Canada (1) was an appeal from the judgment of the Court of King's Bench (Appeal Side) for the Province of Quebec in answer to the following questions referred to that Court by the Lieutenant-Governor in Council of the Province:

1. Is a foreign or British insurer who holds a licence under the Quebec Insurance Act to carry on business within the Province obliged to observe and subject to ss. 11, 12, 65 and 66 of the Insurance Act of Canada, or are these sections unconstitutional as regards such insurer?

2. Are ss. 16, 20 and 21 of the Special War Revenue Act within the legislative competence of the Parliament of Canada? Would there be any difference between the case of an insurer who has obtained or is bound

(1) [1932] A.C. 41.

to obtain under the Provincial law a licence to carry on business in the Province and any other case?

In delivering the judgment of their Lordships, Viscount Dunedin after referring to *Attorney-General for Canada* v. *Attorney-General for Alberta* (1), and stating that that decision conclusively and finally settled that regulations as to the carrying on of insurance business were a provincial and not a Dominion matter, concluded: "It really only carried to their logical conclusion the two cases already cited"; the two cases being *Citizens Insurance Company* v. *Parsons* (2) and *John Deere Plow Company's* case (3). He then discussed the *Reciprocal Insurers* case (4), pointing out that the Board had there decided that section 508C of the Criminal Code was not a genuine amendment of the criminal law, but was really an attempt by a soi-disant amendment of the criminal law to subject insurance business in the Province to the control of the Dominion—that which had exactly been determined to be *ultra vires* the Dominion by the judgment of 1916. Their Lordships therefore in the 1931 case decided that the first part of question 1 should be answered in the negative. They then proceeded to the second question and quoted the only section of the *Special War Revenue Act* that in their opinion needed to be considered. That section was as follows:

16. Every person resident in Canada, who insures his property situate in Canada, or any property situate in Canada in which he has an insurable interest, other than that of an insurer of such property, against risks other than marine risks: (*a*) with any British or foreign company or British or foreign underwriter or underwriters, not licensed under the provisions of the Insurance Act, to transact business in Canada; or (*b*) with any association of persons formed for the purpose of exchanging reciprocal contracts of indemnity upon the plan known as inter-insurance and not licensed under the provisions of the Insurance Act, the chief place of business of which association or of its principal attorney-in-fact is situate outside of Canada; shall on or before the thirty-first day of December in each year pay to the Minister, in addition to any other tax payable under any existing law or statute a tax of five per centum of the total net cost to such person of all such insurance for the preceding calendar year.

The judgment continues:

Now as to the power of the Dominion Parliament to impose taxation there is no doubt. But if the tax as imposed is linked up with an object which is illegal the tax for that purpose must fall.

On page 53 Viscount Dunedin quoted the following extract from the judgment of the Board in the *Reciprocal Insurers'* case (4):

In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of

(1) [1916] 1 A.C. 588.
(2) [1881] 7 A.C. 96.
(3) [1915] A.C. 330.
(4) [1924] A.C. 328.

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Canada cannot, by purporting to create penal sections under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid.

He then continued:—

If instead of the words "create penal sanctions under s. 91, head 27" you substitute the words "exercise taxation powers under s. 91, head 3," and for the word "criminal" substitute "taxing," the sentence expresses precisely their Lordships' views.

If this be the case where the Court decides that Parliament has colourably invaded the field of provincial jurisdiction, how much more cogent is the reasoning if one comes to the conclusion that the legislation in question does not even purport to be a taxing Act.

In the present reference that is the conclusion to which I am impelled and it follows that in my view Part III may not be justified under either of the heads of section 91 of the *British North America Act* to which I have referred. For the reasons already given the remainder of the Act is in the same position.

Elsewhere in his consideration of other Acts referred at this time to this Court, my Lord the Chief Justice has dealt exhaustively with the powers of Parliament under the residuary clause of s. 91 of the *British North America Act* and also with the powers of the Dominion under head 2, "The Regulation of Trade and Commerce," of that section. It is unnecessary, therefore, for me to refer to the decisions and I content myself with expressing the opinion that even if the object aimed at by Part III of the present Act may be praiseworthy and if the desired result might better be obtained by the Dominion than all or some of the provinces acting within their constitutional limitations might accomplish, the matter is not translated from the jurisdiction of the provincial legislature to that of Parliament. In the same way I am unable to see how, in view of the summary of the powers of the Dominion with reference to trade and commerce also given elsewhere by the learned Chief Justice, the matter could be considered as falling within that head of section 91.

For these reasons, and for the reasons given by my brother Rinfret which I have had the opportunity of perusing, I have come to the conclusion that the Act *in toto* is *ultra vires* of the Parliament of Canada.

IN THE MATTER OF A REFERENCE AS TO WHETHER THE PARLIAMENT OF CANADA HAD LEGISLATIVE JURISDICTION TO ENACT THE WEEKLY REST IN INDUSTRIAL UNDERTAKINGS ACT, BEING CHAPTER 14 OF THE STATUTES OF CANADA, 1935; THE MINIMUM WAGES ACT, BEING CHAPTER 44 OF THE STATUTES OF CANADA, 1935; AND THE LIMITATION OF HOURS OF WORK ACT, BEING CHAPTER 63 OF THE STATUTES OF CANADA, 1935.

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* Jan. 23, 24, 27, 29, 30, 31.
* June 17.

Constitutional law—The Weekly Rest in Industrial Undertakings Act, 25-26 Geo. V, c. 14—The Minimum Wages Act, 25-26 Geo. V, c. 44—The Limitation of Hours of Work Act, 25-26 Geo. V, c. 63—Constitutional validity—Treaty of Peace of Versailles, 1919—Art. 405 of the Treaty—League of Nations—Draft Conventions of the International Labour Conference—Approval of Treaty by Dominion Parliament—B.N.A. Act, s. 132—Property and civil rights—B.N.A. Act. s. 92.

The *Weekly Rest in Industrial Undertakings Act*, which gave effect to the Draft Convention of the International Labour Conference on that subject, applies to industrial undertakings as defined in art. 1 of the Draft Convention, and requires employers to grant a rest period of at least twenty-four consecutive hours in every seven days to all employees, with the exception of persons who hold positions of supervision or management or who are employed in a confidential capacity. The rest period is, wherever possible, to be granted to the whole staff simultaneously, and to coincide with the Lord's Day as defined by the Lord's Day Act, R.S.C. 1927, c. 123. *The Minimum Wages Act* is designed to give effect to the provisions of the Draft Convention concerning the creation of minimum wage-fixing machinery adopted by the International Labour Conference in 1928. By s. 4 (1), the Governor in Council, on the recommendation of the Minister of Labour, may create and by regulation provide for the operation, by or under the Minister, of machinery whereby minimum rates of wages can be fixed for workers in specified rateable trades. Employers and workers concerned are to be associated in the operation of such machinery in such manner as the Governor in Council may by regulation determine, but in any case in equal numbers and on equal terms. "Rateable trades" are defined in accordance with the terms of the Convention as "those trades or parts of trades (in particular, homeworking trades) in which no arrangements exist for the effective regulation of wages by collective agreement or otherwise and wages are exceptionally low." "Trade" includes manufacture and commerce and "worker" includes any employed person not under 16 years of age. By s. 4 (2), Minimum wages so fixed are to be binding on employers and workers concerned so as not to be subject to abatement by means of individual agreement, or, except with the general or particular authorization of the Minister, by collective agreement.

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

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REFERENCES *re* THE WEEKLY REST IN INDUSTRIAL UNDERTAKINGS ACT, THE MINIMUM WAGES ACT, AND THE LIMITATION OF HOURS OF WORK ACT.

The Limitation of Hours of Work Act gives effect to the Draft Convention of the International Labour Conference adopted in 1919, limiting hours of work in industrial undertakings as defined in article 1 of the Convention.

Held, per Duff C.J. and Davis and Kerwin JJ., that these Acts are *intra vires* of the Parliament of Canada; *per* Rinfret, Cannon and Crocket JJ., that they are *ultra vires*.

Per Duff C.J. and Davis and Kerwin JJ.—From two main considerations, the conclusion follows that legislative authority in respect of international agreements is, as regards Canada, vested exclusively in the Parliament of Canada. First, by virtue of section 132 of the *British North America Act,* jurisdiction, legislative and executive, for the purpose of giving effect to any treaty obligation imposed upon Canada, or any one of the provinces of Canada, by force of a treaty between the British Empire and a foreign country, is committed to the Parliament and Government of Canada. This jurisdiction of the Dominion the Privy Council held, in the *Aeronautics* case and in the *Radio* case ([1932] A.C. 54 and 304) is exclusive; and consequently, under the *British North America Act,* the provinces have no power and never had power to legislate for the purpose of giving effect to an international agreement: that, as a subject of legislation, is excluded from the jurisdiction envisaged by section 92. Second, as a result of the constitutional development of the last thirty years (and more particularly of the last twenty years) Canada has acquired the status of an international unit, that is to say, she has been recognized by His Majesty the King, by the other nations of the British Commonwealth of Nations, and by the nations of the world, as possessing a status enabling her to enter into, on her own behalf, international arrangements, and to incur obligations under such arrangements. These arrangements may take various forms. They may take the form of treaties, in the strict sense, between heads of states, to which His Majesty the King is formally a party. They may take, *inter alia,* the form of agreements between governments, in which His Majesty does not formally appear, Canada being represented by the Governor General in Council or by a delegate or delegates authorized directly by him. Whatever the form of the agreement, it is now settled that, as regards Canada, it is the Canadian Government acting on its own responsibility to the Parliament of Canada which deals with the matter. If the international contract is in the form of a treaty between heads of states, His Majesty acts, as regards Canada, on the advice of His Canadian Government.

Necessarily, in virtue of the fundamental principles of our constitution, the Canadian Government in exercising these functions is under the control of Parliament. Parliament has full power by legislation to determine the conditions under which international agreements may be entered into and to provide for giving effect to them. That this authority is exclusive would seem to follow inevitably from the circumstances that the Lieutenant-Governors of the provinces do not in any manner represent His Majesty in external affairs, and that the provincial governments are not concerned with such affairs; the effect of the two decisions above referred to is that in all these matters the authority of Parliament is not merely paramount, but exclusive.

The first of the two cardinal questions raised by the contentions of the provinces has two branches, and may be stated thus: Has Parliament authority to legislate for carrying out a treaty or convention or agreement with a foreign country containing stipulations to which effect can only be given by domestic legislation changing the law of the provinces (*a*) in matters committed by the *British North America Act* (in the absence of any such international agreement) to the legislatures of the provinces exclusively, and (*b*) in relation to such matters where they are *ex facie* of domestic concern only and not of international concern, such, for example, as the matters dealt with by the conventions to which effect is given by the statutes now before the Court: the regulation of wages and of hours of labour.

The view that the exclusive authority of Parliament extends to international treaties and agreements relating to such subjects rests on the grounds now outlined. (1) As touching the view advanced that the subject-matters of the stipulations in the international agreements in question are of exclusively domestic and not at all of international concern: the language of section 132 B.N.A. Act is unqualified and that section would appear *prima facie* to extend to any treaty with a foreign country in relation to any subject-matter which in contemplation of the rules of constitutional law respecting the royal prerogative concerning treaties would be a legitimate subject-matter for a treaty; and there would appear to be no authority for the proposition that treaties in relation to subjects, such as the subject-matter of the status in question are not within the scope of that prerogative. Legislative authority to give effect to treaties within section 132 remained, of course, after the B.N.A. Act, down to the enactment of the Statute of Westminster in the Imperial Parliament, although by section 132, it also became and is vested in the Parliament of Canada; but, since the Statute of Westminster, no Act of the Imperial Parliament can have effect in Canada without the consent of Canada. The practice of modern times and, in particular, the provisions of the Covenant of the League of Nations embodied in the Treaty of Versailles would appear to demonstrate that by common consent of the nations of the world, such matters are regarded as of high international as well as of domestic concern and proper subjects for treaty stipulation. (2) As touching the view that the legislative authority committed to the Parliament and Government of Canada by section 132 (and by the introductory clause of section 91 in relation to international matters) does not extend to matters which would fall exclusively within the legislative jurisdiction of the provinces, in the absence of any international obligation respecting them, it is to be observed: First, section 132 relates *inter alia* to obligations imposed upon any province of Canada by any treaty between the British Empire and a foreign country. Section 132 obviously contemplates the possibility of such an obligation arising as a diplomatic obligation under such a treaty, even although legislation might be necessary in order to attach to it the force of law. In such case, the Parliament and Government of Canada appear to be endowed with the necessary legislative and executive powers. This provision with regard to the obligations of the provinces taken together with the generality of the language employed in section 132 would seem to point rather definitely to the conclusion that the view under consideration is not tenable.

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Secondly, the established practice of the Parliament of Canada and the decisions of the Courts in relation to that practice do not accord with this view. Statutes giving effect to the International Waterways Treaty (1911) with the United States, and the Treaty with Japan (1913) are instances in which treaties dealing with matters of civil right within the provinces and the management of the public property of the provinces were given the force of law by Dominion statutes. The legislation concerning the Japanese Treaty was held to be valid and to nullify a statute of the province inconsistent with it by the Judicial Committee of the Privy Council in *Attorney-General for British Columbia* v. *Attorney-General for Canada,* ([1924] A.C. 203). The jurisdiction of Parliament to enforce international obligations under agreements which are not strictly "treaties" within section 132 is co-ordinate with the jurisdiction under this last named section.

It is contended by the provinces that the Dominion cannot, by reason merely of the existence of an international agreement (within section 132 or within the residuary clause) possess legislative authority enabling the Parliament of Canada to legislate in derogation of certain fundamental terms which, it is said, were the basis of the Union of 1867, and are expressly or impliedly embodied in the B.N.A. Act. For the purposes of the present reference, it is unnecessary to make any observation upon this contention further than what has already been said, viz., that the exclusive authority of the Dominion to give the force of law to an international agreement is not affected by the circumstances alone that, in the absence of such an agreement, the exclusive legislative authority of the provinces would extend to the subject matter of it.

The second of the cardinal questions requiring determination concerns the construction and effect of article 405 of the Treaty of Versailles.

The draft conventions now in question were brought before the House of Commons and the Senate, received the assent of both Houses in the form of resolutions, which resolutions approved the ratification of them, and the statutes in question were passed for the purpose of giving legislative effect to their stipulations, the operative clauses of the statute being in each case preceded by a preamble in which it is recited that the draft conventions have been ratified by Canada. The procedure followed, if we put aside the provisions of article 405, was the usual and proper procedure for engaging in and giving effect to agreements with foreign governments. The propriety of this procedure is questioned on the ground that under the special provisions of article 405, and especially those of paragraphs 5 and 7 of the article, it was an essential condition of the jurisdiction of Parliament to legislate for the enforcement of the conventions that the conventions should have been submitted to, and should have received the assent of, the provincial legislatures before the enactment of such legislation by Parliament.

Paragraphs 5 and 7 must be read together and, reading them together, it would appear that the "competence" postulated is the "competence" to enact legislation or to take other "action" contemplated by the article.

The obligations upon consent of the competent authority or authorities to ratify and, upon like consent after ratification, "to make effective the provisions of the convention" are both treaty obligations; and the authority or authorities competent to take legislative action where

legislative action may be necessary to make the provisions of the convention effective would appear plainly to be included within the authority or authorities before whom it is provided that the draft conventions shall be brought.

It follows from what has been said that this treaty obligation is an obligation within section 132 and, consequently, that the authority to make the convention effective exclusively rests in the Parliament and Government of Canada and, therefore, that the Parliament of Canada is, at least, one of the authorities before which the convention must be brought under the terms of article 405. The provincial legislatures may also be competent authorities within the contemplation of paragraph 5 of that article, but it is unnecessary to decide that question for the purposes of this reference.

The Governor General in Council is designated by the *Treaties of Peace Act*, 1919, enacted under the authority of section 132, to take all such measures as may seem to him to be necessary for the purpose of carrying out the Treaties of Peace and for giving effect to the terms of such treaties. He it was, therefore, upon whom devolved the duty of performing the obligation of Canada under art. 405 to bring the draft convention before the authority or authorities possessing "competence" under the Constitution of Canada. He it was also on whom devolved the duty to communicate to the League of Nations the ratification by Canada upon the assent of the competent authority or authorities. Moreover, the Parliament of Canada, possessing exclusive jurisdiction in relation to international agreements, the creation as well as the enforcement of them, declared, by the statutes now under examination, that the conventions in question were ratified by Canada. The executive authority, therefore, charged with the duty of acting for Canada in performing the treaty obligations, of submitting the conventions to the proper constitutional authorities and of communicating ratification to the League of Nations upon the assent of those authorities, and His Majesty the King in Parliament have, in effect, combined in declaring that the ratification was assented to by the proper constitutional authorities of Canada in conformity with the stipulations of art. 405. That would appear to be sufficient to constitute a diplomatic obligation binding upon Canada to observe the provisions of the conventions.

Per Rinfret J.—Apart from any consideration resulting from their aspect as laws intended to carry out the obligations of Canada under Draft Conventions agreed upon at general conferences of the International Labour Conference of the League of Nations, the subject-matter of these Acts is undoubtedly one in relation to which, under the Constitution of our country, the legislature in each province may exclusively make laws. It follows that, in order to support the validity of the Acts, the Attorney-General of Canada has the burden of demonstrating that, in the premises, the subject-matter of the disputed legislation has, for some special reason, been transferred to the jurisdiction of the Parliament of Canada.

The Acts cannot be supported as an exercise of the legislative powers of the Dominion either to make laws for the peace, order and good government of Canada, or for the regulation of trade and commerce, or in relation to the criminal law.

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These conventions are not treaties within the meaning of section 132 of the B.N.A. Act, such as was the case in the *Aeronautics* Reference to the Privy Council ([1932] A.C. 54); nor are they conventions belonging to that class of conventions submitted to the Privy Council in the *Radio* Reference ([1932] A.C. 304). So that the judgments of the Privy Council in those two References do not constitute authorities in support of the Dominion Government's or the Dominion Parliament's power to act alone in the performance of the obligations deriving from conventions of the present character.

Besides that, both in the *Aeronautics* and in the *Radio* references, the Privy Council, at the same time as it declared that the validity of the legislation in respect thereto could be supported as an exercise of the power derived from section 132, B.N.A. Act, or from the residuary power to make laws for the peace, order and good government of the country, also came to the conclusion that the subject of aeronautics and the subject of radio came under one or more of the enumerated heads of section 91 of the B.N.A. Act, which is not the case here.

But the critical point in the present reference is whether the Draft Conventions were competently ratified—a point which was not raised nor decided in the *Aeronautics* or *Radio* references.

A very great distinction must be made between the power to create an international obligation and the power to perform it when once it has been created.

Under the distribution of legislative powers, the subject matters of the three Acts now submitted are assigned to the exclusive jurisdiction of the legislature in each province under the head "Property and Civil Rights in the Province," of section 92, B.N.A. Act. A civil right does not change its nature just because it becomes the subject matter of a convention with a foreign state. It is always the same civil right. It is not within the spirit of the Constitution that the Dominion Parliament might acquire exclusive jurisdiction over such matters merely as a consequence of the fact that the Dominion Government, in regard to them, decides to enter into a convention with a foreign power. It would be directly against the intendment of the B.N.A. Act that the King or the Governor General of Canada should enter into an international agreement dealing with matters exclusively assigned to the jurisdiction of the provinces solely upon the advice of the Federal Ministers who, either by themselves or through the instrumentality of the Dominion Parliament, are prohibited by the Constitution from assuming jurisdiction over these matters.

Moreover, article 405 of the Treaty of Versailles must be interpreted as requiring, in Canada, the consent and approval of the provinces before Draft Conventions of the nature of those now submitted can be properly and competently ratified by Canada as a member of the League of Nations.

In this Court, the question as to where lies the power to create an international obligation dealing with matters within the exclusive jurisdiction of the provinces is concluded by our decision on the reference *Re: Legislative Jurisdiction over Hours of Labour* ([1925] S.C.R. 505).

It follows that the Draft Conventions not having received the consent and the approval of the legislatures of the provinces, nor even of the pro-

vincial governments, were not properly and competently ratified; and the Acts adopted in relation to these Draft Conventions and allegedly for the purpose of performing the obligations arising under them are *ultra vires* of the Parliament of Canada.

Per Cannon J.—When an Act of Parliament is challenged before this Court as unconstitutional, the article of the Constitution which is invoked should be laid beside the statute which is challenged in order to decide whether the latter squares with the former. The only power of this Court is to announce its judgment upon the question. This Court neither approves nor condemns any legislative policy. Its office is to ascertain and declare whether the legislation is in accordance with or in contravention of the provisions of the Constitution. The question is not what power the Federal Government ought to have, but what powers, in fact, have been given to it by the B.N.A. Act. There is in this country a dual form of government, and in every province there are two governments. Our country differs from nations where all legislative power, without restriction, is vested in a parliament, or other legislative body, subject to no restriction.

If any changes are required to face new situations or to cope with the increased importance of Canada as a nation, they may be secured by an amendment to the B.N.A. Act; but neither this Court nor the Privy Council should be called upon to legislate outside of its provisions.

The labour draft conventions in this case, binding Canada independently from the rest of the Empire, do not fall under section 132, B.N.A. Act; they were not even contemplated as feasible in 1867 when that Act was passed. Radio and aeronautics are also new matters not existing at that time and had to be dealt with by the Privy Council as outside the enumerated subjects of 91 and 92 B.N.A. Act; and these two decisions must be considered as *arrêts d'espèce* and confined to the subject-matters which both had necessarily interprovincial and international aspects.

But the payment of wages for labour, the weekly rest and the rate of wages and length of hours of work were well known subjects in 1867 and they were, by common agreement, reserved by the Imperial Parliament to the provinces as purely local and private matters of property and civil rights.

Therefore, in the words of section 405 of the Treaty of Versailles, Canada as a federal state has only a "power to enter into convention on labour matters *subject to limitations*" and the draft conventions should have been treated as "recommendation only." Such recommendation is to be submitted to the members for "consideration with a view to effect being given to it by national legislation or otherwise." The Versailles Treaty recognizes that in certain cases, effect can be given to a labour agreement "otherwise" than by national legislation. In these cases, it does not appear that either the recommendations or the draft conventions were submitted to the provinces, i.e., the "authorities within whose competence the matter lies for the enactment of legislation or other action"; and this is fatal to the validity of the ratification of these labour conventions by the Federal authorities.

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As an internal matter, such changes in the respective constitutional powers of the provinces and of the Central Government cannot be justified by invoking some clauses of the Treaty of Versailles. Respect of their property and civil rights was guaranteed by the British Crown to the inhabitants of the original provinces as far back as the Treaty of Paris in 1763; this was confirmed by the constitution of 1867 which cannot be changed in this essential part except by an Imperial statute, as plainly set forth in the Act of Westminster of 1931, section 7. Therefore the Parliament and the Government of Canada cannot appropriate those powers, exclusively reserved to the provinces, by the simple process of ratifying a labour convention passed at Geneva with representatives of foreign countries. Neither the Governor General in Council, nor Parliament, can in any way, and specifically by an agreement with a foreign power, change the constitution of Canada or take away from the provinces their competency to deal exclusively with the enumerated subjects of section 92, B.N.A. Act. Before accepting as binding any agreement under section 405 of the Treaty of Versailles, foreign powers must take notice that this country's constitution is a federal, not a legislative union.

Per Crocket J.—The Acts passed by the Dominion Parliament embody legislation which is directly aimed at the regulation and control of contracts of employment, private as well as public, in every province of the Dominion, and thus deal in a very real and radical sense with civil rights in all the provinces of Canada alike; and the fundamental question before this Court is whether there is any authority within the B.N.A. Act for the exercise of such legislative power by the Parliament of Canada.

None of the draft conventions of the International Labour Conference of the League of Nations, upon the ratification of which by the Government of Canada it has been sought to justify the enactment of this legislation, fall within the terms of section 132 of the B.N.A. Act. Even if the Treaty of Versailles were a treaty between the British Empire, as an undivided unit, and those foreign states, whose plenipotentiaries signed it, and not a treaty purporting to have been entered into by the self-governing Dominions of the Empire as separate governments, it could not be said that there was any obligation for the performance of which the Parliament of Canada was empowered within the terms of section 132 to enact legislation as pertaining to an obligation imposed by that treaty upon Canada or any province thereof, as part of the British Empire.

As regards the residuary clause of section 91, this provision can only be invoked where the real subject matter of the legislation does not fall within the classes of subjects which are exclusively assigned to the provinces by section 92; once it appears that the real purpose and effect of a Dominion enactment is to interfere with private and civil rights in the provinces and that in that aspect it consequently falls within the sphere of legislation which has been exclusively reserved for the provinces, not only by the provisions of section 92, but by the saving clause in the introduction of section 91, such an enactment cannot be justified under the general authority conferred on the Parliament of Canada. If such legislation could be maintained on the ground that it was for the peace, order and good government of Canada, it could only be by ignoring the explicit limita-

tion, which is placed on the so-called general authority by the residuary clause itself with the obvious intention of preventing its application in the very sense now contended for, and thus protecting the provinces in the full enjoyment of their exclusive legislative rights as permanently guaranteed to them by section 91.

Although the Government of Canada must now be held to be the proper medium for the formal conclusion of international conventions, whether they affect the Dominion as a whole or any of the provinces separately, this fact cannot be relied on as altering in any way the provisions of the B.N.A. Act as regards the distribution of legislative power as between the Dominion Parliament and the provincial legislatures or as necessarily giving to any matter, which may be made the subject of legislation in Canada, any other meaning or aspect than that which it bears in our original constitution. Whether such a matter is one which falls under the terms of either section 91 or of section 92 or of section 132, must depend upon the real intendment of the B.N.A. Act itself, as gathered from the terms of those sections and the Act as a whole.

The legislation embodied in these three statutes is legislation which the Parliament of Canada has enacted to give effect to the draft conventions of the International Labour Conference of the League of Nations. These conventions are admittedly conventions, to which the Government of Canada were in no manner bound to assent or to formally ratify. They were submitted to the Government of this country as mere draft conventions, and stood as such until 1935, when the Government of Canada chose to approve them, several years after the expiration of the period fixed by article 405 of the Treaty of Versailles for their submission "to the authority or authorities within whose competence the matter lies for the enactment of legislation or other action." The provision of article 405 of the Peace Treaty of Versailles is clearly mandatory and not merely directory and the ratification of the conventions, upon which these three statutes purport to be founded, is null and void under the terms of that article. However, the provisions of the B.N.A. Act, not the terms of the Treaty of Versailles, should be looked at for the answers to the questions submitted on this reference concerning the constitutionality of these three statutes; and, accordingly, they are *ultra vires* of the Parliament of Canada.

REFERENCES by His Excellency the Governor General in Council to the Supreme Court of Canada, in the exercise of the powers conferred by section 55 of the *Supreme Court Act* (R.S.C. 1927, c. 35), of the following questions: Are *The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act* and *The Limitation of Hours of Work Act,* or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

The Order in Council referring the questions to the Court read as follows:

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The Committee of the Privy Council have had before them a report, dated 31st October, 1935, from the Minister of Justice, referring to the following Acts contained in the statutes of Canada, 1935, namely—

The Weekly Rest in Industrial Undertakings Act, cap. 14;

The Minimum Wages Act, cap. 44; and

The Limitation of Hours of Work Act, cap. 63,

which were respectively passed, as appears from the recitals set out in the preambles of the said Acts, for the purpose of enacting the necessary legislation to enable Canada to discharge certain obligations declared to have been assumed by Canada under the provisions of the Treaty of Peace made between the Allied and Associated Powers and Germany, signed at Versailles, on the 28th day of June, 1919, and to which Canada, as part of the British Empire, was a signatory, and also under certain draft conventions concerning (*a*) the application of the weekly rest in industrial undertakings, (*b*) the creation of minimum wage fixing machinery, and (*c*) the limitation of hours of work in industrial undertakings, respectively adopted by the International Labour Conference in accordance with the relevant articles of the said Treaty.

The Minister observes that doubts exist or are entertained as to whether the Parliament of Canada had jurisdiction to enact the said Acts or any of them either in whole or in part, and that it is expedient that such questions should be referred to the Supreme Court of Canada for judicial determination.

The Committee, accordingly, on the recommendation of the Minister of Justice, advise that the following questions be referred to the Supreme Court of Canada, for hearing and consideration, pursuant to section 55 of the *Supreme Court Act,*—

1. Is *The Weekly Rest in Industrial Undertakings Act,* or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

2. Is *The Minimum Wages Act,* or any of the provisions thereof and in what particular or particulars or to what exent, *ultra vires* of the Parliament of Canada?

3. Is *The Limitation of Hours of Work Act,* or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

E. J. LEMAIRE,
Clerk of the Privy Council.

* The judgment of Duff C.J. and Davis and Kerwin JJ. was delivered by

DUFF C.J.—The validity of the legislation is attacked on various grounds which will be stated presently.

The draft convention respecting minimum wage fixing machinery was adopted by the General Council of the Labour Organization of the League of Nations on the 6th June, 1928, and a copy was communicated to Canada on August 23rd, 1928.

Resolutions declaring it to be "expedient that Parliament do approve of" the draft convention were passed by the House of Commons (on March 15th, 1935) and by the Senate (on April 2nd, 1935).

The draft convention was, under art. 7 thereof, transformed into a "convention," by the assent of two members of the Labour Organization on the 14th June, 1930. On the 12th April, 1935, the Governor General, by Order in Council, ordered on behalf of Canada that the convention "be confirmed and approved" and that "formal communication" of this confirmation and approval "be made to the Secretary General of the League of Nations." On 25th April, 1935, the formal instrument of ratification was deposited with the Secretary of the League of Nations. The statute in controversy was assented to on the 28th of June, 1935, in which there is the following preamble:

Whereas the Dominion of Canada is a signatory, as part of the British Empire, to the Treaty of Peace made between the Allied and Associated

*Reporter's note: Counsel on the argument of this Reference were the same as those mentioned at p. 365.

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Powers and Germany, signed at Versailles, on the 28th day of June, 1919; and whereas the said Treaty of Peace was confirmed by the *Treaty of Peace Act,* 1919; and whereas by article 23 of the said Treaty the signatories thereto each agreed that they would endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and by article 427 of the said Treaty it was declared that the well-being, physical, moral and intellectual, of industrial wage-earners is of supreme importance; and whereas a Convention concerning minimum wages was adopted as a Draft Convention by the General Conference of the International Labour Organization of the League of Nations in accordance with the relevant articles of the said Treaty, which said Convention has been ratified by Canada; and whereas it is advisable to enact the necessary legislation to enable Canada to discharge the obligations assumed under the provisions of the said Treaty and the said Convention, and to provide for minimum wages in accordance with the provisions of the said Convention, and to assist in the maintenance on equitable terms of interprovincial and international trade: Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

The immediate question put in precise form is this: Is the statute which, by its preamble, recites the adoption of the draft convention by the General Conference of the Labour Organization and the ratification of that convention by Canada, constitutionally effective, without the assent of the provinces, to alter the law of those provinces by bringing that law into conformity with the stipulations of the convention so ratified: the matter of these stipulations being, *ex hypothesi,* normally, (and saving certain specific fields of legislation with which we are not concerned) a subject matter of legislation within the exclusive competence of the respective provincial legislatures under section 92 of the B.N.A. Act?

The principal points now in controversy arise upon these contentions of the provinces:

First, that the Governor General in Council has no authority to enter into any international engagement; second, that, since the subject matter of the convention falls within the subdivision of s. 92, which relates to property and civil rights within the provinces, the assent of the provincial legislatures was an essential condition of a valid ratification under art. 405 of the Labour Part of the Treaty.

Third, that in view of the character of its subject matter, the provinces alone are competent to give the force of law to the Convention.

We shall discuss in another place (in the reasons for the answers in the Reference concerning the *Natural Products Marketing Act*) (p. 403) the contention that the Dominion, independently of her powers in respect of international obligations, possessed authority in the circumstances of the time to enact the statute under the residuary power to make laws for the peace, order and good government of Canada.

As a step preliminary to the examination of the arguments addressed to us in support of these contentions, some brief observations upon the legislative and executive authority of the Parliament and Government of Canada in respect of international agreements may be useful.

An interesting and valuable account was presented in argument of the development of Dominion status within the British Empire or the British Commonwealth of Nations. Stages in that development are marked by the Imperial War Conference of 1917, the proceedings in the negotiation, the signature and the ratification of the Treaty of Versailles and of the Fisheries Treaty of 1923, by the Imperial Conferences of 1923, 1926 and 1930, and finally by the Statute of Westminster, 1931. At the moment it is sufficient to observe—as to status—that two fundamental characteristics of it are defined in unmistakeable words in the Report of the Imperial Conference of 1926:

> * * * we refer to the group of self-governing communities composed of Great Britain and the Dominions. Their position and mutual relations may be readily defined. They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

Great Britain and the Dominions (1) are united by a common allegiance to the British Crown, and (2) are "autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs. . .and freely associated as members of the British Commonwealth of Nations."

The possession of equality of status with Great Britain in respect of all aspects of external as well as domestic affairs is thus affirmed in language admitting of no dis-

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pute as to its intent or effect. This equality of status, as the report later explains, does not necessarily imply identity of function. It does, however, indisputably involve two very definite things. In the legislative sphere (subject to the disabilities imposed expressly or by necessary implication by the B.N.A. Act, and the Statute of Westminster, and to whatever restrictions may be implicit in her position as a member of the British Commonwealth of Nations owing a common allegiance to the Crown) the legislative authority reposed in the Parliament and Legislatures of Canada is plenary and embraces the whole field of external as well as domestic matters; and, in the executive sphere, while the executive authority for Canada is vested in the King, it is exercised according to the advice of the appropriate Canadian Government, and under the control of the appropriate legislature.

As regards legislative authority, this is precisely what is evidenced by the Statute of Westminster. The statute recognizes the common allegiance to the King as the bond uniting Great Britain and the Dominions. Extra-territorial legislative authority is in apt and express terms conferred upon the Dominion Parliaments. But three declarations signalize in a striking way the fundamental dogma of equality. The first is in the preamble, and is concerned with the royal style and title and the succession to the Throne. In respect of these, the preamble declares that no alteration in the law could be made consistently with the constitutional position except with the consent of all. Then there is the declaration that no statute of the United Kingdom should have effect in any Dominion as part of its law without the consent of that Dominion. And lastly, it is declared that nothing in the Act shall be deemed to give to the Parliament of Canada power to amend the B.N.A. Act. These reservations bring into relief the sweeping character of the legislative authority which is possessed by the Parliament of Canada and Legislatures combined.

As respects the executive sphere, the statute does not explicitly speak except in its recognition of the common allegiance to the Crown as the bond of union. In that field, however, the declarations of the Imperial Conferences leave

no doubt as to the constitutional position. First, as to the Governor General. In the report of 1926 his position is defined thus:

> We proceeded to consider whether it was desirable formally to place on record a definition of the position held by the Governor General as His Majesty's representative in the Dominions. That position, though now generally well recognized, undoubtedly represents a development from an earlier stage when the Governor General was appointed solely on the advice of His Majesty's Ministers in London and acted also as their representative.
>
> In our opinion it is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government.

This declaration of 1926 is repeated in 1930:

> The Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926 declared that the Governor General of a Dominion is now the
>
> > representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government.

As to the particular matter with which we are now concerned, the authority of the Government of Canada in relation to international arrangements, the Reports of the Imperial Conferences for 1923 and 1926 contain most important declarations. In substance, in so far as they are immediately pertinent, they amount to this—the Conferences recommend that the practice initiated in connection with the Halibut Fisheries Treaty of 1923 with the United States shall be continued and that, pursuant to that practice, agreements between Great Britain and a foreign country, or a Dominion and a foreign country, shall take the form of treaties between heads of states (except in the case of agreements between governments), the responsible government being in each case the Government of Great Britain or the Government of the Dominion concerned upon whose advice plenipotentiaries are appointed and full powers granted.

The argument on behalf of some of the provinces (while conceding equality of status between the Dominions and

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Great Britain in respect of such matters, and the political responsibility of the Dominion Government in respect of all treaties or agreements to which the Dominion is a party) denies the authority of the Governor General, acting on the advice of the Canadian Government, to conclude a treaty or an agreement with a foreign state. The prerogative, it is said, resides in the Crown and it is most earnestly contended that the power to exercise this prerogative has never been delegated to the Governor General of Canada or to any Canadian authority.

With reference to the Report of the Conference of 1926, which in explicit terms recognizes treaties in the form of agreements between governments (to which His Majesty is not, in form, a party), it is said that since an Imperial Conference possesses no legislative power, its declarations do not operate to effect changes in the law, and it is emphatically affirmed that, in point of strict law, neither the Governor General nor any other Canadian authority has received from the Crown power to exercise the prerogative.

The argument is founded on the distinction it draws between constitutional convention and legal rule; and it is necessary to examine the contention that, in point of legal rule, as distinct from constitutional convention, the Governor General in Council had no authority to become party by ratification to the convention with which we are concerned.

There are various points of view from which this contention may be considered. First of all, constitutional law consists very largely of established constitutional usages recognized by the Courts as embodying a rule of law. An Imperial Conference, it is true, possesses no legislative authority. But there could hardly be more authoritative evidence as to constitutional usage than the declarations of such a Conference. The Conference of 1926 categorically recognizes treaties in the form of agreements between governments in which His Majesty does not formally appear, and in respect of which there has been no Royal intervention. It is the practice of the Dominion to conclude with foreign countries agreements in such form, and agreements even of a still more informal character—merely by an exchange of notes. Conventions under the auspices of the Labour Organization of the League of Nations invariably are ratified by the Government of the Dominion

concerned. As a rule, the crystallization of constitutional usage into a rule of constitutional law to which the Courts will give effect is a slow process extending over a long period of time; but the Great War accelerated the pace of development in the region with which we are concerned, and it would seem that the usages to which I have referred, the practice, that is to say, under which Great Britain and the Dominions enter into agreements with foreign countries in the form of agreements between governments and of a still more informal character, must be recognized by the Courts as having the force of law.

Indeed, agreements between the Government of Canada and other governments in the form of an agreement between Governments, to which His Majesty is not a party, have been recognized by the Judicial Committee of the Privy Council as adequate in international law to create an international obligation binding upon Canada (*Radio* Reference (1). The Convention in question there was the Radio Telegraphic Convention of the 25th November, 1927, which was a convention between the Governments of Great Britain, Canada and other countries. The Convention was concluded "subject to ratification." The ratification was in the following form:

> Whereas a Convention together with General Regulations relating to Radio Telegraphy was signed at Washington on the 25th November, 1927, by the representatives of His Majesty's Government in Canada and of other Governments specified therein, which Convention and General Regulations are word for word as follows:—
>
> His Majesty's Government in Canada having considered the aforesaid Convention together with the General Regulations, hereby confirm and ratify the same and undertake faithfully to perform and carry out the stipulations therein contained, in witness whereof this instrument of ratification is signed and sealed by the Secretary of State for External Affairs for Canada.
>
> Ernest Lapointe,
> For the Secretary of State for External Affairs.
>
> OTTAWA, July 12, 1928.

This ratification, it was held by the Judicial Committee of the Privy Council, was effective, and created a diplomatic obligation binding on Canada which the Parliament of Canada was competent to enforce by legislation.

(1) [1932] A.C. 304.

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Ratification was the effective act which gave binding force to the convention. It was, as respects Canada, the act of the Government of Canada alone, and the decision mentioned appears, therefore, to negative decisively the contention that, in point of strict law, the Government of Canada is incompetent to enter into an international engagement.

It is, however, essential in considering the question now before us not to lose sight of the fact that the ratification with which we are concerned on this reference is one professedly effected pursuant to a treaty obligation arising under the Treaty of Versailles; and some reference to the general features of that treaty, well known though they are, is unavoidable.

It is a treaty of peace. It is a treaty between the British Empire and foreign countries. *Prima facie,* therefore, by section 132 of the *British North America Act,* the Parliament and Government of Canada have "all powers necessary or proper for performing the obligations of Canada . . . as part of the British Empire, towards foreign countries arising under" the Treaty.

By the terms of article 405, upon ratification of a convention notified to Canada, Canada incurs an obligation to take such action as may be necessary to "make effective" the provisions of the convention. The question whether or not there has been ratification of the convention within the contemplation of the article will be considered later. The point to be emphasized here is that the obligation to "make effective" the provisions of the convention is a treaty obligation and, *prima facie,* therefore, an obligation in respect of which the Dominion Parliament is invested with the authority bestowed by section 132. The *Treaties of Peace Act,* 1919, 10 Geo. V, ch. 30, is in the following terms. It is convenient to reproduce the statute in full:

AN ACT for carrying into effect the Treaties of Peace between His Majesty and certain other Powers.

(Assented to 10th November, 1919).

Whereas, at Versailles, on the twenty-eighth day of June, nineteen hundred and nineteen, a Treaty of Peace (including a Protocol annexed thereto), between the Allied and Associated Powers and Germany, a copy of which has been laid before each House of Parliament, was signed on behalf of His Majesty, acting for Canada, by the pleni-

potentiaries therein named; and whereas, a Treaty of Peace between the Allies and Associated Powers and Austria has since been signed on behalf of His Majesty, acting for Canada, by the plenipotentiaries therein named, and it is expedient that the Governor in Council should have power to do all such things as may be proper and expedient for giving effect to the said Treaties; Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. (1) The Governor in Council may make such appointments, establish such offices, make such Orders in Council, and do such things as appear to Him to be necessary for carrying out the said Treaties, and for giving effect to any of the provisions of the said Treaties.

(2) Any Order in Council made under this Act may provide for the imposition by summary process or otherwise, of penalties in respect of breaches of the provisions thereof, and shall be laid before Parliament as soon as may be after it is made, and shall have effect as if enacted in this Act, but may be varied or revoked by a subsequent Order in Council.

(3) Any expense incurred in carrying out the said Treaties shall be defrayed out of moneys provided by Parliament.

2. This Act may be cited as The Treaties of Peace Act, 1919.

The Governor in Council is, by this statute, the proper authority for authorizing ratification under article 405. The Parliament of Canada, it will be observed, consists of His Majesty the King, the Senate and the House of Commons (Section 17 B.N.A. Act); and this statute, enacted pursuant to the authority of section 132, in itself empowers the Governor General in Council to exercise any prerogative concerning foreign relations in order to carry out the stipulations of the Treaty. The Governor General acts as the delegate of His Majesty as well as the agent of Parliament. *A.G.* v. *Cain* (1). Moreover, section 132 itself invests the Government of Canada, as well as the Parliament of Canada, with all powers necessary or proper for performing the obligations of Canada under a treaty within the scope of that section; and the Governor General, by his Commission, is authorized and commanded to

> execute * * * all things that shall belong to his said office and to the trust We have reposed in him, according to * * * such laws as are or shall hereafter be in force in Our said Dominion. (6-7 Edw. VII, p. lv).

In virtue of section 132 of the B.N.A. Act and of the *Treaties of Peace Act*, 1919, the authority of the Governor in Council to authorize ratification, therefore, would seem *prima facie* to be indisputable.

As against this conclusion, two main objections are urged. First, it is said that the legislative authority created

(1) [1896] A.C. 542.

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by section 132 has no application to matters falling exclusively within the legislative authority of the provinces under the terms of s. 92. Second, it is said that the section is limited in its operation to matters which are properly the subjects of international arrangement, and that such matters as the regulation of the rates of wages, the hours of labour and days of rest are matters of purely domestic concern which do not fall within that category.

To deal first with the second of these objections. First of all, no authority seems to indicate that such matters are excluded from the scope of the prerogative in relation to treaties. Second, the Treaty of Versailles contains, as an integral part of it, the Covenant of the League of Nations. Art. 23 of the Covenant provides *inter alia*:

> Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:
>
> (*a*) will endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organizations;
>
> (*b*) undertake to secure just treatment of the native inhabitants of territories under their control;
>
> (*c*) will entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children, and the traffic in opium and other dangerous drugs;
>
> * * *

The Treaty also includes Part 13 which provides for a permanent Labour Organization and section 1 of that Part is in these terms:

> Whereas the League of Nations has for its object the establishment of universal peace, and such a peace can be established only if it is based upon social justice;
>
> And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required: as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures;

Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries;

The High Contracting Parties, moved by sentiments of justice and humanity, as well as by the desire to secure the permanent peace of the world, agree to the following: * * *

The signatories to the Treaty included almost all the organized states of the world; and the Treaty would appear, especially in view of the parts of it just quoted, to involve a declaration by all these states that matters such as those which are the subject of the convention now in question, are proper subjects for international engagements. Since the Covenant was entered into this view has been acted upon time and again by the nations of the world and it would appear to be scarcely tenable that a treaty dealing with such matters is excluded for that reason alone from the operation of section 132.

Turning to the contention that matters ordinarily falling, as subjects of legislation, within section 92 of the B.N.A. Act are excluded from the ambit of Dominion authority under section 132, it may be said at once that such a view would run counter to well established practice as well as to judicial authority. The Dominion Parliament has, in fact, exercised the powers vested in it for performing obligations arising under such treaties by legislating in relation to matters which otherwise would have fallen within the domain of property and civil rights within the several provinces, and of controlling the management and disposal of the public lands and other property of the Provincial Governments. A signal instance is the statute of 1911 which gave statutory effect to the agreements of the International Waterways Treaty of January 11, 1909 (1911 1-2 Geo. V, ch. 28). By s. 2 of that statute,

the laws of Canada and of the several provinces thereof are hereby amended and altered so as to permit, authorize and sanction the performance of the obligations undertaken by His Majesty in and under the said treaty; and so as to sanction, confer and impose the various rights, duties and disabilities intended by the said treaty to be conferred or imposed or to exist within Canada.

It is not necessary to particularize the terms of the Treaty, but, obviously, the treaty deals with matters that, but for s. 132, would indisputably have come, at the date of the statute (1911) within the exclusive spheres of the provincial legislatures.

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Then there is the Japanese Treaty Act (Stats. of Can. 1913, 3-4 Geo. V, ch. 27) which gave statutory effect to the treaty of the 3rd April, 1911, with Japan. By the second section, it is declared that the treaty shall have the force of law in Canada. The first four paragraphs of the first article of the Treaty are these:

> The subjects of each of the High Contracting Parties shall have full liberty to enter, travel and reside in the territories of the other and, conforming themselves to the laws of the country—
>
> 1. Shall, in all that relates to travel and residence, be placed in all respects on the same footing as native subjects.
>
> 2. They shall have the right, equally with native subjects, to carry on their commerce and manufacture, and to trade in all kinds of merchandise of lawful commerce, either in person or by agents singly or in partnerships with foreigners or native subjects.
>
> 3. They shall in all that relates to the pursuit of their industries, callings, professions, and educational studies be placed in all respects on the same footing as the subjects or citizens of the most favoured nation.
>
> 4. They shall be permitted to own or hire and occupy houses, manufactories, warehouses, shops, and premises which may be necessary for them, and to lease land for residential, commercial, industrial and other lawful purposes, in the same manner as native subjects.

In 1921, by ch. 49 of the statutes of that year, the legislature of British Columbia passed a statute giving legislative force to certain Orders in Council intended to put into effect a resolution of the legislature of 1902 by which it was resolved

> that in all contracts, leases and concessions of whatsoever kind entered into, issued, or made by the government, or on behalf of the government, provision be made that no Chinese or Japanese shall be employed in connection therewith.

This statute of 1921 was challenged in respect of the competence of the legislature to enact it, and it came before the Judicial Committee in two cases,—*Brooks-Bidlake* v. *A.G. for B.C.* (1) and *A.G. for B.C.* v. *A.G. for Canada* (2). By the decision in the first of these cases, it was held that, as respects Chinese, the statute was valid as an exercise of the functions of the provincial legislature under sec. 92(5) and sec. 109 of the B.N.A. Act in regulating the management of the property of the province, and in determining whether a grantee or licensee of that property should or should not employ persons of certain races; and that its validity was not affected by the circumstance that exclusive legislative authority respecting naturaliza-

(1) [1923] A.C. 450. (2) [1924] A.C. 203.

tion and aliens is vested in the Parliament of Canada by head no. 25 of section 91.

The legislation being valid as regards Chinese, as an exercise of the legislative authority of the province under sections 92 and 109, it was held in the second of the above mentioned decisions to be invalid as regards Japanese, that is to say, the subjects of the Emperor of Japan, because it conflicted with the Japanese Treaty Act. In the absence of the Japanese Treaty and the statute giving it the force of law throughout Canada, the legislation would have been operative in respect of Japanese as well as Chinese, but the powers of the Dominion under section 132, were held to be sufficient to enable the Dominion to lay down a rule, in conformity with its obligations under the Japanese Treaty, which the provincial legislature thereby became incompetent to infringe or disregard by the exercise of powers which otherwise it would undoubtedly have possessed under the sections mentioned of the Confederation statute.

The scope and effect of section 132 came again before the Judicial Committee of the Privy Council for consideration in two cases in the year 1932: first, the *Aeronautics* case (1), and, second, the *Radio* case (2). Each of these cases arose out of a reference to this Court, by the Governor General in Council.

In the first case, the first question submitted was as follows:

> Have the Parliament and Government of Canada exclusive legislative and executive authority for performing the obligations of Canada, or of any Province thereof, under the Convention entitled "Convention relating to the Regulation of Aerial Navigation?"

That question was unanimously answered in this Court in the negative. The Judicial Committee answered it in the affirmative; and the parts of their Lordships' judgment which specially relate to that interrogatory are in these words:

> There may also be cases where the Dominion is entitled to speak for the whole, and this not because of any judicial interpretation of ss. 91 and 92, but by reason of the plain terms of s. 132, where Canada as a whole, having undertaken an obligation, is given the power necessary and proper for performing that obligation.
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> * * *

(1) [1932] A.C. 54. (2) [1932] A.C. 304.

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In their Lordship's view, transport as a subject is dealt with in certain branches both of s. 91 and of s. 92, but neither of those sections deals specially with that branch of transport which is concerned with aeronautics.

Their Lordships are of opinion that it is proper to take a broader view of the matter rather than to rely on forced analogies or piecemeal analysis. They consider the governing section to be s. 132, which gives to the Parliament and Government of Canada all powers necessary or proper for performing the obligations towards foreign countries arising under treaties between the Empire and such foreign countries. As far as s. 132 is concerned, their Lordships are not aware of any decided case which is of assistance on the present occasion. It will be observed, however, from the very definite words of the section, that it is the Parliament and Government of Canada who are to have all powers necessary or proper for performing the obligations of Canada, or any Province thereof. It would therefore appear to follow that any Convention of the character under discussion necessitates Dominion legislation in order that it may be carried out. It is only necessary to look at the Convention itself to see what wide powers are necessary for performing the obligations arising thereunder.

* * *

It is therefore obvious that the Dominion Parliament, in order duly and fully to "perform the obligations of Canada or of any Province thereof" under the Convention, must make provision for a great variety of subjects. Indeed, the terms of the Convention include almost every conceivable matter relating to aerial navigation, and we think that the Dominion Parliament not only has the right, but also the obligation, to provide by statute and by regulation that the terms of the Convention shall be duly carried out. With regard to some of them, no doubt, it would appear to be clear that the Dominion has power to legislate, for example, under s. 91, item 2, for the regulation of trade and commerce, and under item 5 for the postal services, but it is not necessary for the Dominion to piece together its powers under s. 91 in an endeavour to render them co-extensive with its duty under the Convention when s. 132 confers upon it full power to do all that is legislatively necessary for the purpose (1).

In the second of these cases, the *Radio* case (2), Lord Dunedin, speaking for the Board, observed, with reference to the *Aeronautics* case (3).

For this must at once be admitted, the leading consideration in the judgment of the Board was that the subject fell within the provisions of s. 132 of the *British North America Act*. * * *

The tenor of these observations is hardly compatible with the notion that the authority to legislate under s. 132 does not apply to matters which, but for that section, would have fallen within the exclusive legislative jurisdiction of the provinces under other enactments of the B.N.A. Act. The power to legislate for the perform-

(1) [1932] A.C. 54, at 73, 74, 76, 77. (2) [1932] A.C. 304.
(3) [1932] A.C. 304, at 311.

ance of obligations under treaties within that section is reposed exclusively in the Dominion Parliament, their Lordships declare, and, as their Lordships imply, the language is general and the power in no way depends upon the condition that the matters with which the obligation is concerned shall be matters in respect of which Parliament is invested with jurisdiction under section 91 or any other section of the B.N.A. Act. This view of these observations is confirmed by a perusal of the judgment of Lord Dunedin, delivered on behalf of the Judicial Committee in the *Radio* case (1) the second of the cases above mentioned. Beginning at p. 311 (2), he says:—

> For this must at once be admitted; the leading consideration in the judgment of the Board was that the subject fell within the provisions of s. 132 of the British North America Act, 1867, which is as follows:
>
> > The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof as part of the British Empire towards foreign countries arising under treaties between the Empire and such foreign countries.
>
> And it is said with truth that, while as regards aviation there was a treaty, the convention here is not a treaty between the Empire as such and foreign countries, for Great Britain does not sign as representing the Colonies and Dominions. She only confirms the assent which had been signified by the Colonies and Dominions who were separately represented at the meetings which drafted the convention. But while this is so, the aviation case in their Lordships' judgment cannot be put on one side.
>
> Counsel for the Province felt this and sought to avoid any general deduction by admitting that many of the things provided by the convention and the regulations thereof fell within various special heads of s. 91. For example, provisions as to beacon signals he would refer to head 10 of s. 91—navigation and shipping. It is unnecessary to multiply instances, because the real point to be considered is this manner of dealing with the subject. In other words the argument of the Province comes to this: Go through all the stipulations of the convention and each one you can pick out which fairly falls within one of the enumerated heads of s. 91, that can be held to be appropriate for Dominion legislation; but the residue belongs to the Province under the head either of head 13 of s. 92—property and civil rights, or head 16—matters of a merely local or private nature in the Province.
>
> Their Lordships cannot agree that the matter should be so dealt with. Canada as a Dominion is one of the signatories to the convention. In a question with foreign powers the persons who might infringe some of the stipulations in the convention would not be the Dominion of Canada as a whole but would be individual persons residing in Canada. These persons must so to speak be kept in order by legislation and the only legislation that can deal with them all at once is Dominion legislation. This idea of Canada as a Dominion being bound by a convention equivalent

(1) [1932] A.C. 304. (2) [1932] A.C. 304, at 311.

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to a treaty with foreign powers was quite unthought of in 1867. It is the outcome of the gradual development of the position of Canada vis-à-vis to the mother country Great Britain, which is found in these later days expressed in the Statute of Westminster. It is not, therefore, to be expected that such a matter should be dealt with in explicit words in either s. 91 or 92. The only class of treaty which would bind Canada was thought of as a treaty by Great Britain, and that was provided for by s. 132. Being, therefore, not mentioned explicitly in either s. 91 or s. 92, such legislation falls within the general words at the opening of s. 91 which assign to the Government of the Dominion the power 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 this Act assigned exclusively to the legislatures of the Provinces." In fine, though agreeing that the Convention was not such a treaty as is defined in s. 132, their Lordships think that it comes to the same thing.

* * *

The result is in their Lordships' opinion clear. It is Canada as a whole which is amenable to the other powers for the proper carrying out of the convention; and to prevent individuals in Canada infringing the stipulations of the convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada.

His Lordship proceeds to observe that the view expounded in this passage "is destructive of the view urged by the province as to how the observance of the international convention should be secured."

It seems hardly open to dispute that their Lordships intended to lay down that international obligations, which are strictly treaty obligations within the scope of s. 132, as well as obligations under conventions between governments not falling within s. 132, are matters which, as subjects of legislation, cannot fall within s. 92 and, therefore, must fall within s. 91; and since they do not fall within any of the enumerated subjects of section 91, they are within the ambit of the Dominion power to make laws for the peace, order and good government of Canada. That seems to be the effect of what is said, because, at pp. 311 and 312, their Lordships dealt with the contention, advanced on behalf of the provinces, that legislative authority to deal with and give effect to the convention is vested, as regards matters falling within the enumerated heads of s. 91, in the Dominion Parliament; but that, as regards matters which would normally fall within s. 92, such authority is vested in the provincial legislatures. The contention is rejected, and rejected for the reasons given in the passage quoted, viz., that such matters, as the subjects of an international convention, are matters which

concern the Dominion as a whole and, therefore, exclusively within the competence of the Dominion Parliament.

It is, at this point, important to emphasize these two things: First, that by the combined effect of the judgments in the *Aeronautics* case (1) and the *Radio* case (2), the jurisdiction of the Dominion Parliament in relation to international obligations is exclusive; and, moreover, as such matters are embraced within the authority of Parliament in relation to peace, order and good government, its power is plenary.

It was at one time supposed that s. 132 was the sole source of authority for Parliament in respect of the enforcement of international obligations, as regards matters which, otherwise, would fall within s. 92, and, at the same time, would not fall within any of the enumerated heads of section 91: that, for the purpose of ascertaining the ambit of that authority, one must look to the scope of s. 132 (and the conditions under which that section operates): and that from the language employed it was a legitimate inference that the jurisdiction did not arise until there was a treaty obligation in existence within the contemplation of the section. Four of the judges of this Court who took part in the judgment in the *Aeronautics* case (3) expressed that view.

Moreover, it was supposed that, as regards matters normally falling within s. 92, the provinces might legislate for the purpose of giving effect to an international obligation. In the *Aeronautics* case (1), the members of this Court were unanimously of the opinion that, as regards such matters, the jurisdiction of the Parliament of Canada was not exclusive, even though paramount.

It is now plain (as a result of these two decisions of 1932) that the provinces have no jurisdiction to legislate for the performance of such obligations, whether they be obligations within s. 132 or whether they be outside that section and within the scope of the general power to make laws for the peace, order and good government of Canada. Such obligations, we repeat, it is now settled, are not

(1) [1932] A.C. 54. (2) [1932] A.C. 304.

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matters within the subjects of s. 92 or the enumerated subjects of s. 91.

It has been contended in respect of Dominion jurisdiction in relation to international matters, under section 132, as well as under the residuary clause (as pointed out in the judgment of Duff J. on the Reference relating to the employment of aliens (Japanese Treaty, 63 S.C.R. 330)) that there are certain fundamental terms of the arrangement upon which the B.N.A. Act was framed which it is difficult to suppose Parliament could in any case disregard; and that it is a necessary inference to be drawn from the B.N.A. Act as a whole as regards such terms that the Dominion cannot, without, at all events, the assistance of the Provinces, legislate in contravention of them, even in the exercise of its authority over international relations. It is not necessary to deal with this contention; it is sufficient to say that the statutes under discussion do not deal with matters excluded from Dominion jurisdiction by any such principle.

We now turn to a consideration of article 405 and, before discussing the text of that article, it may be desirable to recall what has been said with regard to the scope of legislative authority vested in the Parliament of Canada and the legislatures of the provinces combined. Subject to the reservations mentioned, the ambit of that legislative authority would appear to embrace any action of the Government of Canada in entering into international arrangements either directly, by way of agreements between governments or otherwise without the intervention of His Majesty, or, in the case of treaties between heads of states, by plenipotentiaries appointed by His Majesty on the advice of the Canadian Government; and, generally speaking, the conduct of external affairs by that Government. As regards all such international arrangements, it is a necessary consequence of the respective positions of the Dominion executive and the provincial executives that this authority resides in the Parliament of Canada. The Lieutenant-Governors represent the Crown for certain purposes. But, in no respect does the Lieutenant-Governor of a province represent the Crown in respect of relations with foreign governments. The Canadian executive, again, con-

stitutionally acts under responsibility to the Parliament of Canada and it is that Parliament alone which can constitutionally control its conduct of external affairs.

As the subject of agreements with foreign countries is not one of the subjects embraced within section 92, or within any of the enumerated heads of section 91, it follows that the authority must rest upon the residuary clause from which Parliament derives its power to make laws for the peace, order and good government of Canada; and it follows from what has already been said that this power is plenary. It is for the Parliament of Canada to determine the conditions upon which such agreements shall be entered into as well as the manner in which they shall be performed and this may be done by antecedent legislation or by legislation taking effect *ex post facto*. These propositions are, indeed, corollaries of the proposition that the power is plenary.

As regards League of Nations matters, the following passage from the last edition of Anson's Law and Customs of the Constitution seems to state the position accurately:

> (1) In all League of Nations matters each of the Dominions (except Newfoundland) is quite independent of the United Kingdom. Its representatives at the League Assembly are not accredited by the King on the advice of the Secretary of State for Foreign Affairs, but by the Governor General on the advice of his ministers, and they act independently of the British Empire or other Dominion delegates; consultation is, of course, possible but is by no means necessary. Moreover, the Dominions are eligible for seats on the Council, despite the permanent representation thereon of the British Empire in which the Dominions are included. Canada was elected to membership in 1927, then the Irish Free State in 1930, and the Commonwealth in 1933.
>
> (2) The Dominions are in like manner autonomous in relation to the Labour Organization of the League. Further, conventions arrived at under its auspices are ratified by Order of the Governor General in Council, not by the King, on the advice of the Secretary of State. (pp. 87, 88.)

As regards all these matters, it has never been doubted that it is the executive of Canada which represents Canada or that the executive is entirely under the control of Parliament.

The draft convention now in question was, as we have seen, brought before the House of Commons and the Senate, received the assent of both Houses in the form of resolutions, which resolutions approved the ratification of it, and the legislation now in question was passed for the

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purpose of giving legislative effect to the stipulations, the operative clauses of the statute being preceded by a preamble in which it was recited that the draft convention has been ratified by Canada. The propriety of this procedure is questioned on the ground that, under the special provisions of art. 405, and especially those of paragraphs 5 and 7 of the article, the draft conventions should have been submitted to the provincial legislatures.

There can, of course, in view of what has been said, be no dispute that the procedure followed, if we put aside the provisions of art. 405, was the usual and the proper procedure for entering into agreements with foreign governments. The Governor General in Council is exclusively invested with the executive authority to assent to an agreement, in the form of an agreement between Governments, with the Government of a foreign state. The Parliament of Canada is the legislative body that is exclusively invested with authority to legislate in respect of the creation of obligations through the instrumentality of such agreements. It is the legislative body exclusively invested with power to legislate for giving effect to such obligations. The course of the proceedings, prior to ratification, in which the convention was approved by resolutions of the Senate and the House of Commons respectively, was in accord with the settled general practice of the Canadian Parliament in the ratification of such agreements; and the statute which, in its preamble, declares that the convention has been ratified by Canada, in itself, would constitute sanction by legislative act of that ratification. Executive and legislative authority combined, each playing its appropriate part, according to the usual procedure, in the creation of the obligation and in the enactment of legislation to give effect to it.

On behalf of the provinces it is said that, granting all this, these proceedings are nevertheless affected with invalidity because they do not conform to the procedure prescribed in article 405 which requires the draft convention, antecedently to ratification, to be brought before

> the authority or authorities within whose competence the matter lies for enactment of legislation or other action;

and, therefore, it is argued, requires that, in the application of the article to Canada, the competent authorities to

which the draft convention must be submitted include the provincial legislatures.

Paragraphs 5 and 7 of article 405 are in these words:

> Each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference, bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.
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> In the case of a draft convention the Member will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention.

In considering the contention of the provinces that the competent authorities within the intendment of these paragraphs include the provincial legislatures, it is necessary that the paragraphs be read together. The "Competence" postulated is to enact legislation or to take other "action" contemplated by the article.

The seventh paragraph imposes upon members two conditional obligations; an obligation, upon the consent of the competent authority or authorities, to ratify; and an obligation, upon the like consent after ratification, "to make effective the provisions of (the) convention" within their territorial jurisdiction. Both these obligations are treaty obligations and the "action," legislative or other, by the competent "authority or authorities" which is contemplated by paragraph 5 would seem clearly to include the second of these obligations, if not both of them.

As concerns the second obligation, the answer to the question, What is the constitutional agency responsible for discharging it? would appear to be dictated by section 132 which is once again quoted verbatim:

> 132. The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards Foreign Countries arising under Treaties between the Empire and such foreign countries.

The power to perform the obligations of the Treaty to make the provisions of the convention effective, in so far as it requires legislative action, is by this section vested

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primarily in the Parliament of Canada. In so far as it requires executive action, it is vested in the Government of Canada. The judgments of the Judicial Committee of the Privy Council in the *Aeronautics* case (1) and the *Radio* case (2) constrain us to hold that jurisdiction to legislate for the purpose of performing the obligation—for bringing the law of the Canadian provinces into harmony with the provisions of the convention, for example—resides exclusively in the Parliament of Canada; and, by parity of reasoning, if not, indeed, as an obvious logical consequence of that proposition, jurisdiction resides, in so far as executive action is required, exclusively in the Government of Canada.

There can be no possible doubt, therefore, that the Parliament of Canada is at least one of the authorities before which the draft convention must be brought in the performance of the duty imposed upon Canada by paragraph 5. The question whether, by force of the *Treaties of Peace Act,* 1919, the Governor General in Council is empowered to act as the agent of Parliament in this respect was not discussed and is of no importance, since the assent of both Houses of Parliament and of the Governor General in Council was admittedly given.

The question remains: Are the provincial legislatures also comprehended under the phrase "authority or authorities within whose competence the matter lies, for the enactment of legislation or other action?"

At one time we thought that, since by s. 92 the jurisdiction, speaking generally, to legislate in relation to the subjects dealt with by the draft convention would, in the absence of any international agreement and of legislation by the Parliament of Canada under s. 132, fall within the exclusive legislative jurisdiction of the provinces, the provincial legislatures might fairly be said to be included within this description. But we have been forced to the conclusion above expressed that the "legislation or other action" contemplated by paragraph 5 is "action" concerning making "effective the provisions of the convention," and, perhaps, also, action concerning ratification. That seems to me to be the plain reading of this article; and

(1) [1932] A.C. 54. (2) [1932] A.C. 304.

where you have authorities (the Parliament and Government of Canada) which are exclusively invested with the power to take legislative and executive measures for the performance of international obligations, we can see no escape from the conclusion that such are the authorities designated by these paragraphs.

We were at one time much influenced by the consideration of the importance of obtaining the assent of the provincial legislatures, which would naturally be more conversant with the conditions prevailing in their respective provinces and more capable of estimating the difficulties of giving effect to a given convention therein than the Parliament of Canada could be expected to be; but such considerations, we have been forced to conclude, cannot justify a refusal to give effect to what seems to be the true construction of this article.

Upon the true construction, the provincial legislatures, it seems to me, after a prolonged examination of the question in all its bearings, are not authorities competent to enact legislation or to take executive action for the purposes contemplated by paragraph 5; that is to say, either for making "effective the provisions of the convention," or for ratification.

It will appear, however, from the observations which immediately follow that it is strictly not necessary to decide the question we have just dealt with. My view as to the validity of the legislation can be rested upon another ground.

Mr. Rowell contends as follows:

General authority to bind Canada by adherence to an international convention containing the substance of the stipulations of that in question is vested in the Government of Canada, and a general authority to legislate for giving effect to any obligation arising from such adherence is vested in the Parliament of Canada: the Parliament of Canada, moreover, is the legislative body which has power to legislate for Canada in relation to the creation, as well as the enforcement, of international obligations: ratification of a convention, therefore, it is argued, which has been authorized by the Government of Canada with the assent of the Houses of Parliament, and in respect of which

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legislation has been enacted recognizing the ratification and providing for the enforcement of the stipulations of the convention, is one which is diplomatically binding on Canada.

The duty of the member, Canada, under art. 405, to submit the draft convention to the competent authorities is a duty committed to the Government of Canada. It is committed to the Government of Canada by the *Treaties of Peace Act*, 1919, a statute indisputably within the jurisdiction of the Dominion under s. 132 of the B.N.A. Act. By that statute, the Governor General in Council, as we have seen, is entrusted with the performance of that duty. It is the same authority (the Governor General in Council) who is also entrusted, by force of the same statute, with the duty of ratifying the draft convention upon the assent of the competent authorities. Ratification by the Governor General in Council would seem to imply a representation that the conditions of the authority to ratify have been fulfilled.

By the *Treaties of Peace Act*, 1919, Parliament, that is to say, the King in Parliament, imposed upon the Governor General in Council the responsibility of passing such Orders in Council and doing such acts as to him might appear necessary for carrying out and giving effect to the provisions of the Treaty. Moreover, the statute now under consideration expressly by its preamble declares that the convention has been ratified by Canada. The Governor in Council, in authorizing the ratification, spoke as the agent of Parliament as well as the representative of His Majesty the King. The ratification was accepted by Parliament as a ratification binding upon His Majesty for Canada. It has all the force, therefore, of a ratification authorized by the King in Parliament. Considering the sweeping character of the legislative authority reposed in Parliament and the legislatures combined, and the scope of the powers which consequently devolve upon Parliament in respect of matters outside the provincial sphere (which matters include the creation as well as the enforcement of international obligations), it would seem that Canada could not be more solemnly committed as to the validity of the ratification in question as a ratification under art. 405.

Some reference is necessary to the answers given to the interrogatories addressed to this Court in 1925 on a reference in relation to one of the conventions now under consideration—the convention relating to Hours of Labour (1). We do not enter upon a systematic examination of that decision. The view expressed in the preceding pages as to the effect of the judgments of the Judicial Committee (2) (3) and its bearing upon the construction of article 405 require us to consider afresh the question of the "competence" of the provincial legislatures in so far as it is relevant within the meaning of art. 405 in the light of those decisions. We have already expressed the view that, in effect, they negative the "competence" of the provincial legislatures in the pertinent sense. The view expressed in the last preceding paragraph is, obviously, of course, not affected by what was decided in 1925.

The result is that "*The Minimum Wages Act*" is valid.

In substance, the foregoing reasoning govern the decision as to the answers to the interrogatories touching the validity of the statutes relating to *Weekly Rest in Industrial Undertakings* and the *Limitation of Hours of Work*, which are, therefore, also valid.

To summarize:—

From two main considerations, the conclusion follows that legislative authority in respect of international agreements is, as regards Canada, vested exclusively in the Parliament of Canada.

First, by virtue of section 132 of the *British North America Act*, jurisdiction, legislative and executive, for the purpose of giving effect to any treaty obligation imposed upon Canada, or any one of the provinces of Canada, by force of a treaty between the British Empire and a foreign country, is committed to the Parliament and Government of Canada. This jurisdiction of the Dominion, the Privy Council held, in the *Aeronautics* case (2) and in the *Radio* case (3) is exclusive; and consequently, under the *British North America Act*, the provinces have no power and never had power to legislate for the purpose

(1) [1925] S.C.R. 505. (2) [1932] A.C. 54.
(3) [1932] A.C. 304.

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of giving effect to an international agreement: that, as a subject of legislation, is excluded from the jurisdiction envisaged by section 92.

Second, as a result of the constitutional development of the last thirty years (and more particularly of the last twenty years) Canada has acquired the status of an international unit, that is to say, she has been recognized by His Majesty the King, by the other nations of the British Commonwealth of Nations, and by the nations of the world, as possessing a status enabling her to enter into, on her own behalf, international arrangements, and to incur obligations under such arrangements. These arrangements may take various forms. They may take the form of treaties, in the strict sense, between heads of states, to which His Majesty the King is formally a party. They may take, *inter alia*, the form of agreements between governments, in which His Majesty does not formally appear, Canada being represented by the Governor General in Council or by a delegate or delegates authorized directly by him. Whatever the form of the agreement, it is now settled that, as regards Canada, it is the Canadian Government acting on its own responsibility to the Parliament of Canada which deals with the matter. If the international contract is in the form of a treaty between heads of states, His Majesty acts, as regards Canada, on the advice of his Canadian Government.

Necessarily, in virtue of the fundamental principles of our constitution, the Canadian Government in exercising these functions is under the control of Parliament. Parliament has full power by legislation to determine the conditions under which international agreements may be entered into and to provide for giving effect to them. That this authority is exclusive would seem to follow inevitably from the circumstances that the Lieutenant-Governors of the provinces do not in any manner represent His Majesty in external affairs, and that the provincial governments are not concerned with such affairs: the effect of the two decisions reported in 1932 Appeal Cases is that in all these matters the authority of Parliament is not merely paramount, but exclusive.

The first of the two cardinal questions raised by the contentions of the provinces has two branches, and may be stated thus: Has Parliament authority to legislate for carrying out a treaty or convention or agreement with a foreign country containing stipulations to which effect can only be given by domestic legislation changing the law of the provinces (*a*) in matters committed by the *British North America Act* (in the absence of any such international agreement) to the legislatures of the provinces exclusively, and (*b*) in relation to such matters where they are *ex facie* of domestic concern only and not of international concern, such, for example (as the provinces argue), as the matters dealt with by the conventions to which effect is given by the statutes now before us: the regulation of wages and of hours of labour.

The claim of Parliament to authority to execute legislative changes in the law of the provinces in such matters naturally arouses concern and misgiving among the authorities charged with responsibility touching the status and rights of the provinces.

The view that the exclusive authority of Parliament extends to international treaties and agreements relating to such subjects rests on the grounds now outlined.

(1) As touching the view advanced that the subject matters of the stipulations in the international agreements in question are of exclusively domestic and not at all of international concern: the language of section 132 is unqualified and that section would appear *prima facie* to extend to any treaty with a foreign country in relation to any subject matter which in contemplation of the rules of constitutional law respecting the royal prerogative concerning treaties would be a legitimate subject matter for a treaty; and there would appear to be no authority for the proposition that treaties in relation to subjects, such as the subject matter of the statutes in question are not within the scope of that prerogative. The question whether the language of section 132 is, by necessary implication, subject to some restriction in order to preserve unimpaired radical guarantees evidenced by the B.N.A. Act as a whole is mentioned in the next succeeding paragraph. Legislative authority to give effect to treaties within section 132

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remained, of course, after the B.N.A. Act, down to the enactment of the Statute of Westminster, in the Imperial Parliament, although by section 132, it also became and is vested in the Parliament of Canada; but, since the Statute of Westminster, no Act of the Imperial Parliament can have effect in Canada without the consent of Canada. The practice of modern times and, in particular, the provisions of the Covenant of the League of Nations embodied in the Treaty of Versailles would appear to demonstrate that by common consent of the nations of the world, such matters are regarded as of high international as well as of domestic concern and proper subjects for treaty stipulation.

(2) As touching the view that the legislative authority committed to the Parliament and Government of Canada by section 132 (and by the introductory clause of section 91 in relation to international matters) does not extend to matters which would fall exclusively within the legislative jurisdiction of the provinces, in the absence of any international obligation respecting them, it is to be observed: First, section 132 relates *inter alia* to obligations imposed upon any province of Canada by any treaty between the British Empire and a foreign country, Section 132 obviously contemplates the possibility of such an obligation arising as a diplomatic obligation under such a treaty, even although legislation might be necessary in order to attach to it the force of law. In such case, the Parliament and Government of Canada appear to be endowed with the necessary legislative and executive powers. This provision with regard to the obligations of the provinces taken together with the generality of the language employed in Section 132 would seem to point rather definitely to the conclusion that the view under consideration is not tenable:

Secondly, the established practice of the Parliament of Canada and the decisions of the Courts in relation to that practice do not accord with this view. Statutes giving effect to the International Waterways Treaty (1911) with the United States, and the Treaty with Japan (1913) are instances in which treaties dealing with matters of civil right within the provinces and the management of the public property of the provinces were given the force of law by Dominion statutes. The legislation concerning

the Japanese Treaty was held to be valid and to nullify a statute of the Province inconsistent with it by the Judicial Committee of the Privy Council in *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1).

The jurisdiction of Parliament to enforce international obligations under agreements which are not strictly "treaties" within section 132 is co-ordinate with the jurisdiction under this last named section.

It is contended by the Provinces that the Dominion cannot by reason merely of the existence of an international agreement (within section 132 or within the residuary clause) possess legislative authority enabling the Parliament of Canada to legislate in derogation of certain fundamental terms which, it is said, were the basis of the Union of 1867, and are expressly or impliedly embodied in the B.N.A. Act. For the purposes of the present reference, it is unnecessary to make any observation upon this contention further than what has already been said, viz., that the exclusive authority of the Dominion to give the force of law to an international agreement is not affected by the circumstances alone that, in the absence of such an agreement, the exclusive legislative authority of the provinces would extend to the subject matter of it.

The second of the cardinal questions requiring determination concerns the construction and effect of article 405 of the Treaty of Versailles.

The draft conventions now in question were brought before the House of Commons and the Senate, received the assent of both Houses in the form of resolutions, which resolutions approved the ratification of them, and the statutes in question were passed for the purpose of giving legislative effect to their stipulations, the operative clauses of the statute being in each case preceded by a preamble in which it is recited that the draft conventions have been ratified by Canada. The procedure followed, if we put aside the provisions of article 405, was the usual and proper procedure for engaging in and giving effect to agreements with foreign governments. The propriety of this procedure is questioned on the ground that under the special provisions of article 405, and especially those of paragraphs

(1) [1924] A.C. 203.

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5 and 7 of the article, it was an essential condition of the jurisdiction of Parliament to legislate for the enforcement of the conventions that the conventions should have been submitted to, and should have received the assent of, the provincial legislatures before the enactment of such legislation by Parliament. Paragraphs 5 and 7 are as follows:

> Each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference, bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.
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> In the case of a draft convention, the Member will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention.

These paragraphs must be read together and, reading them together, it would appear that the "competence" postulated is the "competence" to enact legislation or to take other "action" contemplated by the article.

The obligations upon consent of the competent authority or authorities to ratify and, upon like consent after ratification, "to make effective the provisions of the convention" are both treaty obligations; and the authority or authorities competent to take legislative action where legislative action may be necessary to make the provisions of the convention effective would appear plainly to be included within the authority or authorities before whom it is provided that the draft conventions shall be brought.

It follows from what has been said that this treaty obligation is an obligation within section 132 and, consequently, that the authority to make the convention effective exclusively rests in the Parliament and Government of Canada and, therefore, that the Parliament of Canada is, at least, one of the authorities before which the convention must be brought under the terms of article 405. The question whether the provincial legislatures are also competent authorities within the contemplation of paragraph 5 would appear to be necessarily determined by the consideration that we are constrained by the decisions of the Judicial

Committee of the Privy Council (1), already referred to, to hold that the authority of Parliament in this matter is exclusive and that the provincial legislatures are not competent to legislate for giving effect to the provisions of any international convention. * * * Strictly, however, important as this question of the "competence" of the provincial legislatures in the sense of article 405 is, it is unnecessary to decide it for the purposes of this reference; as will appear from what immediately follows.

The Governor General in Council is designated by the *Treaties of Peace Act*, 1919, enacted under the authority of section 132, to take all such measures as may seem to him to be necessary for the purpose of carrying out the Treaties of Peace and for giving effect to the terms of such treaties. He it was, therefore, upon whom devolved the duty of performing the obligation of Canada under art. 405 to bring the draft conventions before the authority or authorities possessing "competence" under the Constitution of Canada. He it was also on whom devolved the duty to communicate to the League of Nations the ratification by Canada upon the assent of the competent authority or authorities. Moreover, the Parliament of Canada, as we have seen, possessing exclusive jurisdiction in relation to international agreements, the creation as well as the enforcement of them, declared, by the statutes now under examination, that the conventions in question were ratified by Canada. The executive authority, therefore, charged with the duty of acting for Canada in performing the treaty obligations of submitting the conventions to the proper constitutional authorities and of communicating ratification to the League of Nations upon the assent of those authorities, and His Majesty the King in Parliament have, in effect, combined in declaring that the ratification was assented to by the proper constitutional authorities of Canada in conformity with the stipulations of article 405.

That would appear to be sufficient to constitute a diplomatic obligation binding upon Canada to observe the provisions of the conventions.

The answer to the three interrogatories addressed to this Court under this Order of Reference is, therefore, the statutes being *intra vires* in each case, in the negative.

(1) [1932] A.C. 54 and 304.

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RINFRET, J.—For the purpose of giving answers to the questions referred to the Court by His Excellency the Governor General in Council concerning *The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act* and *The Limitation of Hours Act,* it is well to bear in mind that, apart from any consideration resulting from their aspect as laws intended to carry out the obligations of Canada under Draft Conventions agreed upon at general conferences of the International Labour Office of the League of Nations, the subject-matter of these legislations is undoubtedly one in relation to which, under the Constitution of our Country, the legislature in each province may exclusively make laws.

It follows that, in order to support the validity of the Acts, the Attorney-General of Canada had the burden of demonstrating that, in the premises, the subject-matter of the disputed legislation had, for some special reason, been transferred to the jurisdiction of the Parliament of Canada.

The written submission of the Attorney-General of Canada, as it was made to this Court, was that the Acts were within the legislative power of the Parliament of Canada in their entirety in virtue of

(1) its exclusive legislative power under sec. 132 of the *British North America Act;*

(2) its general power, conferred by sec. 91 of the said Act, to perform the obligations of Canada under the several draft conventions duly ratified by Canada as a Member of the International Labour Organization;

(3) its general power to make laws for the peace, order and good government of Canada;

(4) its exclusive legislative authority in relation to the regulation of trade and commerce;

(5) its exclusive legislative authority in relation to the criminal law.

It will only be necessary to consider the provisions contained in numbers 1 and 2 of the submission, for it seems to be evident that the subject-matter of the Acts is not criminal law (and the point was not pressed at the argument).

As for the contention that the legislation may be supported as an exercise of the general power conferred by sec. 91 to make laws for the peace, order and good government of Canada, or of the exclusive legislative authority in relation to the regulation of trade and commerce, the discussion, both comprehensive and exhaustive of the extent of those powers made by my Lord the Chief Justice in his reasons on the Reference concerning *The Natural Products Marketing Act* (p. 403) relieves me of the necessity of examining these contentions here, for, to my mind, they establish conclusively that the Dominion Parliament cannot rely on these powers in support of the validity of the legislation under submission.

It will only be necessary, therefore, to scrutinize the arguments put forward by the Dominion Government that the Acts are valid as an exercise of the power " necessary or proper for performing the obligations of Canada, or any province thereof . . . towards foreign countries, arising under the Draft Conventions duly ratified by Canada as a Member of the International Labour Organization."

Part XIII of the Treaty of Versailles is entirely devoted to labour questions. Under it, a permanent organization is established for the promotion of the objects set forth in that part. The original members of this organization are the original members of the League of Nations. Canada is such a member.

The permanent organization consists of a General Conference of the representatives of the members and an International Labour Office controlled by a Governing Body.

Meetings of the General Conference are held from time to time at which the Conference adopts proposals taking the form either (*a*) of a recommendation to be submitted to the members for consideration with a view to effect being given to it by national legislation or otherwise, or (*b*) of a draft international convention for ratification by the members.

The procedure is that, after the recommendation or draft convention has been identicated by the President and the Director of the Conference and after it has been deposited with the Secretary General of the League of Nations, the

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Secretary General is to communicate a certified copy to each of the members.

And then, under article 405,

Each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

In the case of a recommendation, the Members will inform the Secretary-General of the action taken.

In the case of a draft convention, the Member will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention.

If on a recommendation no legislative or other action is taken to make a recommendation effective, or if the draft convention fails to obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member.

In the case of a federal State, the power of which to enter into conventions on labour matters is subject to limitations, it shall be in the discretion of that Government to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this Article with respect to recommendations shall apply in such case.

The draft conventions here, by the Dominion Parliament, made the basis of the legislation now submitted to the Court were adopted by the General Conference of the International Labour Organization under the provisions just mentioned.

It should be stated, only for the purpose of accuracy, that, notwithstanding the fact that the proposals were adopted at the first session of the International Labour Conference, at its first annual meeting (29th October-29th November, 1919), it was not until 1935—and, therefore, sixteen years later—that the Dominion Government and the Federal Parliament undertook to take any action in regard to them and to enact legislation in order to carry them out.

Under article 405 just quoted, a Member undertook to bring a recommendation or a draft convention before the authority or authorities within whose competence the matter lies—

within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances

to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference.

This was not done; but it is claimed that the provision is directory only and that no consequence can follow from the fact that the delay prescribed in the order had long since expired when the Dominion Government took action and the Dominion Parliament undertook to pass this legislation.

In the meantime, however, a fact, to my mind of very great importance, had taken place.

On November 6, 1920, an Order in Council was passed on the report of the then Minister of Justice dealing in part with the obligations of the Dominion of Canada as a Member of the International Labour Conference with relation to the Draft Conventions or Recommendations which may from time to time be adopted by the Conference, so that appropriate legislative and other action may be taken to give effect to them. The opinion expressed by the Minister upon this point was set forth in the Order in Council. That opinion was

> that the provisions of the Labour Part of the Treaty of Versailles do not impose any obligation on the Dominion of Canada to enact into law the different draft conventions or recommendations which may from time to time be adopted by the Conference.
>
> The obligation as set forth is simply in the nature of an undertaking on the part of each Member to bring the recommendations or draft conventions before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action.

In the opinion of the Minister

> the Government's obligation would be fully carried out if the different conventions and recommendations are brought before the competent authority, Dominion or Provincial, accordingly as it may appear, having regard to the scope and objects, the true nature and character of the legislation required to give effect to the proposals of the conventions and recommendations respectively that they fall within the legislative authority of the one or the other.

This Order in Council of the 6th November, 1920, also embodied the Minister's opinion upon the question whether the provisions of the Draft Convention limiting the hours of work in industrial undertakings came within the legislative competence of the Parliament of Canada or of the provincial legislature.

The Minister reported that the proposals of this Convention

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involve legislation which is competent to Parliament in as far as Dominion works and undertakings are affected, but which the provincial legislatures have otherwise the power to enact and apply generally and comprehensively.

Notwithstanding the view expressed in the Order in Council of November 6, 1920, as doubt existed in certain quarters as to the jurisdiction of the federal and provincial authorities respectively, the Committee of the Privy Council of Canada, upon a report dated the 23rd December, 1924, from the Minister of Justice, considered it expedient that the question as to the respective powers of the Parliament of Canada and of the provincial legislature in relation to the enactment of the legislation required to give effect to the provisions of the said Draft Convention should be judicially determined; and accordingly the following questions were then referred to the Supreme Court of Canada:—

(1) What is the nature of the obligations of the Dominion of Canada as a member of the International Labour Conference, under the provisions of the Labour Part (Part XIII) of the Treaty of Versailles and of the corresponding provisions of the other Treaties of Peace, with relation to such draft conventions and recommendations as may be from time to time adopted by the said Conference under the authority of and pursuant to the aforesaid provisions?

(2) Are the legislatures of the provinces the authorities within whose competence the subject-matter of the said draft convention (The Limitation of the Hours of Work Act) in whole or in part lies before whom such draft convention should be brought, under the provisions of Article 405 of the Treaty of Peace with Germany, for the enactment of legislation or other action?

(3) If the subject-matter of the said draft convention be, in part only, within the competence of the legislatures of the provinces, then in what particular or particulars, or to what extent, is the subject-matter of the draft convention within the competence of the legislatures?

(4) If the subject-matter of the said draft convention be, in part only, within the competence of the legislatures of the provinces, then in what particular or particulars, or to what extent, is the subject-matter of the draft convention within the competence of the Parliament of Canada?

The answers of the Court and the reasons for those answers are reported (1).

To the first question, the answer was that

The obligation is simply in the nature of an undertaking to bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

(1) [1925] S.C.R. 505.

To the second question, the answer was

Yes, in part.

A reference to the reasons will show that the Court was unanimously of opinion that

Under the scheme of distribution of legislative authority in the *British North America Act*, legislative jurisdiction touching the subject-matter of this convention is, subject to a qualification to be mentioned, primarily vested in the provinces. * * * This general proposition is subject to this qualification, namely, that as a rule a province has no authority to regulate the hours of employment of the servants of the Dominion Government.

* * *

It is necessary to observe, also, that as regards these parts of Canada which are not included within the limits of any province, the legislative authority in relation to civil rights generally, and to the subject-matter of the convention in particular, is the Dominion Parliament.

The answer to the third question was:—

The subject-matter is generally within the competence of the legislatures of the provinces, but the authority vested in these legislatures does not enable them to give the force of law to provisions such as those contained in the draft convention in relation to servants of the Dominion Government, or to legislate for these parts of Canada which are not within the boundaries of a province.

The answer to the fourth question was:—

The Parliament of Canada has exclusive legislative authority in those parts of Canada not within the boundaries of any province, and also upon the subjects dealt within the draft convention in relation to the servants of the Dominion Government.

The conclusion of the unanimous judgment of this Court in the matter was that

the draft convention ought to be brought before the Parliament of Canada as being the competent legislative authority for those parts of Canada not within the boundaries of any province; and if servants of the Dominion Government engaged in industrial undertakings as defined by the convention are within the scope of its provisions, then the Dominion Parliament is the competent authority also to give force of law to those provisions as applicable to such persons.

The convention should also be brought before the Lieutenant-Governor of each of the provinces for the purpose of enabling him to bring it to the attention of the Provincial Legislature as possessing, subject to the qualification mentioned, legislative jurisdiction within the province in relation to the subject-matter of the convention.

The reference made in 1925 went no further and, therefore, the opinion then given may be regarded as binding upon this Court, except in so far as it may have been superseded by subsequent pronouncements of the Privy Council in the *Reference concerning the regulation and control of Aeronautics in Canada* (1), and the *Reference concerning the regulation and control of Radio communication in Canada* (2).

(1) [1932] A.C. 54. (2) [1932] A.C. 304.

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On the points that we are now discussing I find it impossible to distinguish between *The Limitation of the Hours of Work Act,* which was the subject-matter of the reference of 1925 to this Court (again submitted in the present reference) and *The Weekly Rest in Industrial Undertakings Act,* or *The Minimum Wages Act.*

These conventions are not treaties within the meaning of sec. 132 of the B.N.A. Act, more particularly as the word was understood at the time of the adoption of the Act by the Imperial Parliament. Moreover, they are not treaties between the Empire and Foreign Countries in respect of which "obligations of Canada or of any province thereof as part of the British Empire towards foreign countries" might have arisen. Consequently, sec. 132 in terms does not apply to these conventions.

It was decided, however, by the Privy Council on the *Radio* Reference (1), that certain class of conventions, of which Canada as a dominion was one of the signatories, not being mentioned explicitly in either sec. 91 or sec. 92 fell within the general words at the opening of sec. 91 assigning to the Parliament of the Dominion the power 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 this Act assigned exclusively to the legislatures of the provinces." And their Lordships "in fine, though agreeing that the convention was not such a treaty as is defined in s. 132, thought that it comes to the same thing."

Both in the *Aeronautics* Reference (2) and in the *Radio* Reference (1), however, the Privy Council, at the same time as it declared that the validity of the legislation could be supported as an exercise of the powers derived from sec. 132 or from the residuary power to make laws for the peace, order and good government of Canada, also came to the conclusion that the subject of aeronautics and the subject of radio came under one or more of the enumerated heads of sec. 91 of the B.N.A. Act, radio, moreover, belonging to such class of subjects as were expressly excepted in the enumeration of the classes of subjects by the Act assigned exclusively to the legislatures of the provinces (91-29).

(1) [1932] A.C. 304, at 312. (2) [1932] A.C. 54.

I will have to make further observations on this point later on.

Another remark to be made in connection with the aeronautics and radio judgments in the Privy Council is that, in the former case, their Lordships were dealing with a treaty convention under sec. 132, and, in the latter case, they were dealing with a convention of a character quite different from those under submission and of which they said that it " comes to the same thing as a treaty."

It would seem to me, therefore, that these two decisions are not authorities upon the question of wherein lies as between the Parliament of Canada and the Legislatures of the Provinces the powers necessary or proper for performing the obligations of Canada or of any province thereof arising out of conventions adopted by the International Labour Conference.

But on the present reference, as I view it, it is not necessary for this Court to enter into the discussion of this last point.

Whether treaty or convention, the questions under consideration in the *Aeronautics* (1) and the *Radio* (2) references were concerned with the validity of legislation enacted for the purpose of performing obligations arising as a result of international agreements already made and the validity whereof was not disputed.

In those references, the question whether the treaty or convention had been properly and competently signed, adopted or ratified was not in question, either in this Court or in the Privy Council.

Now, with deference, I make a very great distinction between the power to create an international obligation and the power to perform it when once it has been created.

We may leave aside the aeronautics and radio decisions, which were concerned merely with the validity of laws enacted for the purpose of performing foreign obligations, because in the present case what we have mainly to consider is the power to create foreign obligations. On that particular point, that is to say: on that point of where lies the power to create an international obligation, the only decision so far is the judgment of this Court on the refer-

(1) [1932] A.C. 54. (2) [1932] A.C. 304.

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ence In the matter of legislative jurisdiction over hours of labour (1). I fail to find anything in the subsequent judgments of the Privy Council superseding what was said unanimously by this Court on that subject. The authority, in my humble opinion, is as conclusive as it can be, since that reference was concerned with one of the draft conventions on which the Attorney General of Canada now seeks to rely in support of the validity of the legislation now submitted to us, and since no substantial distinction in the pertinent sense can be made between the draft convention then under consideration and the two other conventions dealing with *The Weekly Rest* and *The Minimum Wages*. With deference, I think the decision of 1925 (1) is certainly binding on this Court and that, as a consequence, it must follow that the obligation of Canada with respect to these draft conventions is simply to bring them before the authority within whose competence the matter lies for the enactment of legislation or other action, or, in the premises, before the legislatures of the provinces, except for the provisions of those draft conventions in relation to servants of the Dominion Government, or in relation to those parts of Canada which are not within the boundaries of a province.

Let it be granted that under the scheme of the *British North America Act* the provinces of Canada were "federally united into one Dominion"; that the Act provides for one nation, not for several nations; that the provinces have no status in international law, they are not States and are not recognized as such. Let it be conceded from these premises that the Government of Canada is the proper medium for all international relations and that "for international purposes, it should be regarded as a unity" (Keith on Responsible Government in the Dominions, 1909, pp. 134-135). It seems to me that, having regard to the fundamental spirit of the Constitution, a distinction must necessarily be drawn between the competency to discharge international obligations and the competency to enter into them.

While it is, no doubt, perfectly true that "overwhelming convenience—under the circumstances amounting to necessity" (Anglin C.J.C. in the *Radio* Reference) (2), dic-

(1) [1925] S.C.R. 505. (2) [1931] S.C.R. 541, at 545, 546.

tates the answers that the performance of obligations, both federal and provincial, arising out of international agreements must be left exclusively to the jurisdiction of the Dominion Parliament, I fail to see the same necessity with regard to the power to create these foreign obligations. When once they have been undertaken, Canada is in honour bound to perform them; but there is no necessity, nor even obligation, to undertake them. If the effect of the undertaking is that a subject of legislation within the exclusive jurisdiction of the province will thereby be transferred from that jurisdiction to the jurisdiction of the Dominion Parliament, I consider it to be within the clear spirit of the British North America Act that the obligation should not be created or entered into before the provinces have given their consent thereto. In the particular case that we are now considering, it is my humble view that such was the effect of the judgment of this Court in the matter of the Reference of 1925 (1). Such, it seems to me with respect, was the interpretation put by this Court upon the pertinent clause of article 405 of the Treaty of Peace.

Under the distribution of legislative powers, Property and Civil Rights in the Province were ascribed to the exclusive jurisdiction of the legislature in each province.

A civil right does not change its nature just because it becomes the subject-matter of a convention with foreign States. It continues to be the same civil right. When once the convention has been properly adopted and ratified, it is, no doubt, transferred to the federal field for the enactment of laws necessary or proper for performing the obligations arising under the convention. That is, as I understand it, the effect of the decisions of the Privy Council on the *Aeronautics* (2) and *Radio* (3) References. But before the international obligation has been properly and competently created, the civil right under the jurisdiction of the provinces is always the same civil right, and I cannot see where the Dominion Parliament in the *British North America Act* finds the power to appropriate it for the purpose of dealing with it internationally without having previously secured the consent of the provinces.

In the present cases, we are dealing with *Weekly Rest in Industrial Undertakings, Minimum Wages* in ordinary con-

(1) [1925] S.C.R. 505. (2) [1932] A.C. 54.
(3) [1932] A.C. 304.

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tracts of employment and *Limitation of Hours of Work*, matters which are fundamentally of the competence of the legislatures in each province. But in order to put the point more forcibly, let us assume that the subject matter of the convention was education, a subject in relation to which "in and for each province the legislature may exclusively make laws" (Sec. 93). Can it be said that it would be within the spirit of the Constitution that the Dominion Parliament might acquire exclusive jurisdiction over that very essential subject as a consequence of the fact that the Dominion Government would decide in regard to it to make a convention with a foreign power?

It might be objected that education would not be regarded as the proper subject matter of a treaty or an international convention as these arrangements are generally understood. Until comparatively recently, neither could it be said that questions affecting *The Weekly Rest in Undertakings, The Minimum Wages* or *The Limitation of Hours of Work* would be considered as proper subjects for international conventions.

The treaty-making power is the prerogative of the Crown. In ordinary practice, it is exercised on the recommendation of the Crown's advisers.

In Canada, the practice has grown gradually to enter into international conventions through the medium of the Governor in Council. It does appear that it would be directly against the intendment of the *British North America Act* that the King or the Governor General should enter into an international agreement dealing with matters exclusively assigned to the jurisdiction of the provinces solely upon the advice of the federal Ministers who, either by themselves or even through the instrumentality of the Dominion Parliament are prohibited by the Constitution from assuming jurisdiction over these matters.

I would like to conclude with the words of Lord Watson, in the *Maritime Bank* case (1):

> The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy.

(1) [1892] A.C. 437, at 441.

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It follows from all that I have said that, in my opinion, the draft conventions upon which is based the legislation now submitted to us have not been properly and competently ratified, that they could not be so ratified without the consent of the legislature in each province, both by force of the *British North America Act* and upon the proper interpretation of article 405 of the Treaty of Versailles; and that, for that reason, the Acts now submitted are *ultra vires* of the Parliament of Canada.

CANNON J.—When an Act of Parliament is challenged before this Court as unconstitutional, our duty is to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. Our only power is to announce our considered judgment upon the question. This Court neither approves nor condemns any legislative policy. Our delicate and difficult office is to ascertain and declare whether the legislation is in accordance with or contravention of the provisions of the Constitution. Having done so, our duty ends.

The question is not what power the Federal Government ought to have, but what powers, in fact, have been given to it by the B.N.A. Act. It hardly seems necessary to reiterate that ours is a dual form of government; that in every province there are two governments. We differ radically from nations where all legislative power, without restriction, is vested in a parliament, or other legislative body, subject to no restriction.

It must also be borne in mind that the attainment of a prohibited end may not be accomplished under the pretext of the exercise of powers which are granted. We may accept as established doctrine that any provision in an Act of Parliament ostensibly enacted under power granted by the constitution not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within the provincial jurisdiction is invalid and cannot be enforced.

Nor can it help to declare that local conditions throughout the nation have created a situation of national concern; for this is but to say that whenever there is a widespread similarity of local conditions, Parliament may ignore constitutional limitations upon its own powers and usurp those reserved to the provinces.

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Until recently there was no suggestion of the existence of any such power in the Federal Parliament. The opinion of the framers of the Constitution, the decisions of the courts and the writings of commentators, deny to the Federal Parliament the authority whereby every provision and every fair implication from the B.N.A. Act may be subverted, the autonomy of the provinces obliterated and the Dominion of Canada converted into a central government exercising uncontrolled police power in every province, superseding all local control or regulation of the affairs of the province. It was never suggested that any power granted by the constitution to Parliament, or necessarily implied, could be used for the destruction of self-government in the provinces. It never occurred to any of the commentators that the general welfare of the Dominion might be served by obliterating the constituent provinces. It seems to be contended that, under the residual power for peace, order and good government, Parliament has power to tear down the barriers, to invade the provincial jurisdiction and to impose Legislative Union for the whole of Canada, subject to no restriction, save such as are self-imposed.

That the provinces agreed only to a Federal Union appears abundantly by a perusal of what was said by Sir J. A. Macdonald, then Attorney General of Upper Canada, before the Canadian Parliament sitting in the city of Quebec on the 6th February, 1865

> The third and only means of solution for our difficulties was the junction of the provinces either in a Federal or a Legislative Union. Now, as regards the comparative advantages of a Legislative and a Federal Union, I have never hesitated to state my own opinions. I have again and again stated in the House, that, if practicable, I thought a Legislative Union would be preferable. I have always contended that if we could agree to have one government and one parliament, legislating for the whole of these peoples, it would be the best, the cheapest, the most vigorous, and the strongest system of government we could adopt. But, on looking at the subject in the Conference, and discussing the matter as we did, most unreservedly, and with a desire to arrive at a satisfactory conclusion, we found that such a system was impracticable. In the first place, it would not meet the assent of the people of Lower Canada, because they felt that in their peculiar position—being in a minority, with a different language, nationality and religion from the majority—in case of a junction with the other provinces, their institutions and their laws might be assailed, and their ancestral associations, on which they prided themselves, attacked and prejudiced; it was found that any proposition which involved the absorption of the individuality of Lower Canada—if I may use the expression—would not be received with favour by her people. We

found too, that though their people speak the same language and enjoy the same system of law as the people of Upper Canada, a system founded on the common law of England, there was as great a disinclination on the part of the various Maritime Provinces to lose their individuality, as political organizations, as we observed in the case of Lower Canada herself. Therefore, we were forced to the conclusion that we must either abandon the idea of union altogether, or devise a system of union in which the separate provincial organizations would be in some degree preserved. So that those who were, like myself, in favour of a Legislative Union, were obliged to modify their views and accept the project of a Federal Union as the only scheme practicable, even for the Maritime Provinces. Because, although the law of those provinces is founded on the common law of England, yet every one of them has a large amount of law of its own—colonial law framed by itself, and affecting every relation of life, such as laws of property, municipal and assessment laws; laws relating to the liberty of the subject, and to all the great interests contemplated in legislation; we found, in short, that the statutory law of the different provinces was so varied and diversified that it was almost impossible to weld them into a Legislative Union at once. Why, sir, if you only consider the innumerable subjects of legislation peculiar to new countries, and that every one of those five colonies had particular laws of its own, to which its people have been accustomed and are attached, you will see the difficulty of effecting and working a Legislative Union, and bringing about an assimilation of the local as well as general laws of the whole of the provinces. We in Upper Canada understand from the nature and operation of our peculiar municipal law, of which we know the value, the difficulty of framing a general system of legislation on local matters which would meet the wishes and fulfil the requirements of the several provinces.

The whole scheme of Confederation, as propounded by the Conference, as agreed to and sanctioned by the Canadian Government, and as now presented for the consideration of the people and the Legislature, bears upon its face the marks of compromise. Of necessity there must have been a great deal of mutual concession.

As I stated in the preliminary discussion, we must consider this scheme in the light of a treaty.

The Conference having come to the conclusion that a legislative union, pure and simple, was impracticable, our next attempt was to form a government upon federal principles, which would give to the General Government the strength of a legislative and administrative union, while at the same time it preserved that liberty of action for the different sections which is allowed by a Federal Union. And I am strong in the belief that we have hit upon the happy medium in those resolutions, and that we have formed a scheme of government which unites the advantages of both, giving us the strength of a legislative union and the sectional freedom of a federal union, with protection to local interests.

I shall not detain the House by entering into a consideration at any length of the different powers conferred upon the General Parliament as contradistinguished from those reserved to the local legislatures; but any honourable member on examining the list of different subjects which are to be assigned to the General and Local Legislatures respectively, will see that all the great questions which affect the general interests of the Confederacy as a whole, are confided to the Federal Parliament, while the local interests and local laws of each section are preserved intact, and entrusted to the care of the local bodies. As a matter of course, the

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General Parliament must have the power of dealing with the public debt and property of the Confederation. Of course, too, it must have the regulation of trade and commerce, of customs and excise. The Federal Parliament must have the sovereign power of raising money from such sources and by such means as the representatives of the people will allow. It will be seen that the local legislatures have the control of all local works; and it is a matter of great importance, and one of the chief advantages of the Federal Union and of local legislatures, that *each province will have the power and means of developing its own resources and aiding its own progress after its own fashion and in its own way. Therefore, all the local improvements, all local enterprises or undertakings of any kind, have been left to the care and management of the local legislatures of each province.*

The criminal law too—the determination of what is a crime and what is not and how crime shall be punished—is left to the General Government. This is a matter almost of necessity. It is of great importance that we should have the same criminal law throughout these provinces—that what is a crime in one part of British America, should be a crime in every part—that there should be the same protection of life and property as in another. It is one of the defects in the United States system, that each separate state has or may have a criminal code of its own,—that what may be a capital offence in one state, may be a venial offence, punishable slightly, in another. But under our Constitution we shall have one body of criminal law, based on the criminal law of England, and operating equally throughout British America, so that a British American belonging to what province he may, or going to any other part of the Confederation, knows what his rights are in that respect, and what his punishment will be if an offender against the criminal laws of the land. I think this is one of the most marked instances in which we take advantage of the experience derived from our observations of the defects in the Constitution of the neighbouring Republic.

Although, therefore, a legislative union was found to be almost impracticable, it was understood, so far as we could influence the future, that the first act of the Confederate Government should be to procure an assimilation of the statutory law of all those provinces, which has, as its root and foundation, the common law of England. But to prevent local interests from being over-ridden, the same section makes provision, that, while power is given to the General Legislature to deal with this subject, *no change in this respect should have the force and authority of law in any province until sanctioned by the Legislature of that province.*

Sir George Etienne Cartier closed his speech by stating:

So if these resolutions were adopted by Canada, as he had no doubt they would, and by the other Colonial Legislatures, the Imperial Government would be called upon to pass a measure which would have for its effect to give a strong central or general government and local governments, which would at once secure and guard the persons, the properties and the civil and religious rights belonging to the population of each section.

The *British North America Act,* in its preamble, says:

Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

Articles 3 and 4 provided for the proclamation of the Dominion, composed of four provinces Ontario, Quebec, Nova Scotia and New Brunswick; which preserved their identity and never ceased at any time to form distinct and separate governments. The provinces created, by their union, a new power; but it is impossible to say that they owe to it their existence. On the contrary, the provinces created the Dominion.

Lord Carnavon, in the House of Lords, on the second reading of the B.N.A. Act, said:

A legislative union is under existing circumstances impracticable. The Maritime Provinces are ill-disposed to surrender their separate life, and to merge their individuality in the political organization of the general body. It is in their case, impossible, even if it were desirable, by a stroke of the pen to bring about a complete assimilation of their institutions to those of their neighbours. Lower Canada, too, is jealous, as she is deservedly proud, of their ancestral customs and traditions; she is wedded to her peculiar institutions, and will enter this Union only upon the distinct understanding she retains them.

Chief Justice Dorion, who had taken part, as a member of the legislature, in the Confederation debates, gave the following opinion quoted at page 143 of volume III of La Thémis:

There is no difference between the powers of the local and Dominion legislatures within their own sphere. That is the powers of the local legislature within its own sphere are co-extensive with the powers of the Dominion government within its own sphere. The one is not inferior to the other. I find that the powers of the old legislature of Canada is extended to the local legislatures of the different provinces. We have a government modelled on the British constitution. We have responsible government in all provinces, and these powers are not introduced by legislators, but in conformity with usage. It is founded on the consent and recognition of those principles which guide the British constitution. I do not read that the new constitution was to begin an entirely new form of government, or to deprive the legislature of any of the powers which existed before, but to effect a division of them, some of them are given to the local legislatures, but I find none of them curtailed.

In substituting the new legislation to the old, the new legislature has, in all those things which are special to the province of Quebec, all the rights of the old legislature, and they must continue to remain in the province of Quebec, as they existed under the old constitution.

And Sandborn, J., said:

The *British North America Act* of 1867 was enacted in response to the petition of the provinces of Canada, Nova Scotia and New Brunswick, as stated in the preamble of the Act, to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom. The powers of legislation and representative government upon the principle of the British constitution, or, as it has commonly been called, responsible government, were not new to Canada. They had been

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conceded to Canada and exercised in their largest sense from the time of the Union Act of 1840, and in a somewhat more restricted sense from the Act of 1791 to 1840. The late province of Lower Canada was constituted a separate province by the Act of 1791, with a governor, a legislative council and a legislative assembly, and it has never lost its identity. It had a separate body of laws, both as respects statute and common law, in civil matters no powers that had been conceded were intended to be taken away by the *British North America Act* of 1867, and none, in fact, were taken away, as it is not the wont of the British government to withdraw constitutional franchises once conceded. This Act, according to my understanding of it, distributed powers already existing to be exercised within their prescribed limits, to different legislatures constituting one central legislature and several subordinate ones, all upon the same model, without destroying the autonomy of the provinces, or breaking the continuity of the respective provinces, in a certain sense, the powers of the federal parliament were derived from the provinces, subject, of course, to the whole being a colonial dependency of the British Crown. The provinces of Quebec and Ontario are by the sixth section of the Act, declared to be the same that formerly comprised Upper and Lower Canada. This recognizes their previous existence prior to the Union Act of 1840. All through the Act, these provinces are recognized as having previous existence and a constitutional history upon which the new fabric is based. Their laws remain unchanged, and the constitution is preserved. The offices are the same in name and duties, except as to the office of lieutenant-governor, who is placed in the same relation to the province of Quebec, as that which the governor general sustained to the late province of Canada. I think it would be a great mistake to ignore the past government powers conferred upon and exercised in the province now called Quebec, in determining the nature and privileges of the legislative assembly of this province.

The procedure recommended by the Imperial Conferences in 1926 and 1930 regarding legislation or international agreements by one of the self-governing parts of the Empire which may affect the interests of other self-governing parts, i.e. previous consultation between His Majesty's ministers in the several parts concerned, should be applied by the central and provincial governments specially before ratifying any international agreement—not falling under Section 132 of the B.N.A. Act. The only direct legislative authority expressly given to the Parliament and Government of Canada concerning foreign affairs is found in this section and is limited to the performance of the obligations of Canada or any province thereof arising under treaties between the Empire as a whole and a foreign country. The Imperial Parliament saw to it that Imperial interests would be protected by federal legislation. But to pass legislation—affecting the provinces—to ratify a treaty or agreement by Canada alone—under an evolution which came to pass since Confederation—with a foreign power, previous

consultations between the federal and provincial self-governing parts of our Confederation seem to me logical and the only way to preserve peace, order and good government in Canada and save the very roots of the tree to which our constitution has been compared. In order to grow, if it be a growing instrument, it must keep contact with its native soil—and draw from the constituting provinces new force and efficiency.

The provinces agreed to this principle of Legislative Union and the Imperial Parliament granted it to a central Parliament strictly within the ambit of 91; any legislation by this Parliament attempting to legislate uniformly for the whole of Canada on any subject exclusively retained by the provinces and within the natural and obvious meaning of section 92 must, in my opinion, be *prima facie,* considered as *ultra vires* of the Dominion.

The additions by some decisions to the powers of the Dominion in emergency cases must be applied, if at all, with the greatest caution. In the words of Sir John MacDonald, "the scheme must be considered in the light of a treaty" not to be lightly interfered with by way of commentary and gloss.

If any changes are required to face new situations or to cope with the increased importance of Canada as a nation, they may be secured by an amendment to the Act; but neither this Court nor the Privy Council should be called upon to legislate in the matter by treating the constitution as a growing tree confided to their care. We have nothing to do with the growth or with the making of the law in constitutional matters. The Imperial Parliament alone can change what they enacted—or add to it. New branches to acquire the force of law, must be embodied in the statute, not in judgments or commentaries.

The above considerations may be applied, *mutatis mutandis,* to all the acts referred to us for consideration, but I would add a few words with respect to the three acts based on the so-called Geneva Labour Conventions mentioned in Order in Council 3454, being chapters 14, 44 and 63 of the statutes of 1935.

Such labour conventions binding Canada independently from the rest of the Empire do not fall under 132; they were not even contemplated as feasible in 1867 when the

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B.N.A. Act was passed. Radio and aeronautics are also new matters not existing at that time and had to be dealt with by the Privy Council as outside the enumerated subjects of 91 and 92; and these two decisions must be considered as *arrêts d'espèce* and confined to the subject matters which both had necessarily interprovincial and international aspects.

But the payment of wages for labour, the weekly rest and the rate of wages and length of hours of work were well known subjects in 1867 and they were, by common agreement, reserved by the Imperial Parliament to the Provinces as purely local and private matters of property and civil rights.

Therefore, in the words of section 405 of the treaty of Versailles, Canada as a federal state, has only a "power to enter into convention on labour matters *subject to limitations*" and the draft convention should have been treated as a "recommendation only." Such recommendation is to be submitted to the members for "consideration with a view to effect being given to it by national legislation or otherwise." The Versailles Treaty recognizes that in certain cases, effect can be given to a labour agreement "otherwise" than by national legislation.

In these cases, it does not appear that either the recommendations or the draft conventions were submitted to the provinces, i.e., the "authorities within whose competence the matter lies for the enactment of legislation or other action."

To my mind, this is fatal to the validity of the ratification of these labour conventions by the Federal authorities.

As an internal matter, such changes in the respective constitutional powers of the provinces and of the Central Government cannot be jusified by invoking some clauses of the treaty of Versailles. Respect of their property and civil rights was guaranteed by the British Crown to the inhabitants of the original provinces as far back as the treaty of Paris in 1763; this was confirmed by the constitution of 1867 which cannot be changed in this essential part except by an Imperial statute, as plainly set forth in the Act of Westminster of 1931, sec. 7. It is not admissible that the Parliament and the Government of Canada could appropriate these powers, exclusively reserved to the provinces,

by the simple process of ratifying a labour convention passed at Geneva with representatives of foreign countries. The framers of our constitution, and the Privy Council by their recent judgments in the *Radio* (1) and *Aeronautics* (2) cases never intended to plant in its bosom the seeds of its own destruction. If such interference with provincial rights by way of international agreements is admitted as *intra vires* of the central government, we may as well say that we have in Canada a confederation in name, but a legislative union in fact. Uniformity is not in the spirit of our constitution. We have not a single community in this country. We have nine commonwealths, several different communities. This is the fact embodied in the law. It may be wise or unwise, according to the preferences and predilection of every one, but this is the basis of our constitution. Diversity is the basis of our constitution. The federative system was adopted in order to give to the provinces their autonomy and to secure, specially in Quebec, the rights to their own customs as crystallized in their civil law. No gloss or commentary to be found in judicial pronouncements can alter the constitution of this country. It is a written document which can be amended or added to, only by legislation. No usage or judge made law can be invoked, no practice can be introduced to change the division of powers as set forth in 91 and 92, however desirable or opportune it may seem. If amendments are needed and asked for, they should be granted by the Imperial Parliament.

In 1867, it was found necessary in order to achieve confederation, to give us a federal form of government, more cumbersome and more expensive though it be, on account of the superior liberty it gives to the people.

This cannot be changed by the indirect way of a labour convention, in furtherance of some pious wish of the treaty of Versailles, at a time when its binding authority and wisdom is universally contested; and, albeit, many years after notification to Canada of these particular so-called draft conventions. The King's prerogative has not been used to do away with the statutory rights of His Canadian subjects.

These are not references to an international tribunal; we are not called upon to determine, in the absence of

(1) [1932] A.C. 304. (2) [1932] A.C. 54.

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foreign powers, what effect such a ratification by the Canadian government might have in the international field. But Canada is not an independent sovereign state, and the Parliament of Canada is *not a Parliament of unlimited authority. Every Parliament in Canada—not only the Parliament of the Dominion, but also the legislature in each province—is necessarily of limited authority, because it has not been given and does not possess the wide, the plenary authority over the whole field of legislation which is possessed by the Parliament of Great Britain or of an independent sovereign state.* Upon the union—upon the creation, not of one Parliament for Canada, but of one central Parliament and four provincial legislatures, each of them—the central Parliament just as much as the others—had limits to its jurisdiction, by the necessity of the case. That affords at once a very strong reason why no one of these parliaments should have jurisdiction over the Constitution of any other of them.

In 1867, when the agreement for entering into this Union was under discussion and being arrived at by the provinces, they wanted to create, and they did create by their agreement and by the statute which followed upon their agreement, a Parliament which was to have a limited jurisdiction, and no power to amend its Constitution.

These are some of the reasons why foreign powers, when dealing with Canada, must always keep in mind that neither the Governor General in Council, nor Parliament, can in any way, and specifically by an agreement with a foreign power, change the constitution of Canada or take away from the provinces their competency to deal exclusively with the enumerated subjects of section 92. Before accepting as binding any agreement under section 405 of the treaty of Versailles, foreign powers must take notice that this country's constitution is a federal, not a legislative union.

CROCKET J.—It cannot be doubted that all these statutes, no matter from what point of view they are considered, embody legislation which is directly aimed at the regulation and control of contracts of employment, private as well as public, in every Province of the Dominion, and thus deal in a very real and radical sense with civil rights in all the provinces of Canada alike. The

fundamental question before us, therefore, is: Can any authority be found within the four corners of the B.N.A. Act for the exercise of such legislative power by the Parliament of Canada?

In my opinion none of the draft conventions of the International Labour Organization of the League of Nations, upon the ratification of which by the Government of Canada it has been sought to justify the enactment of all this legislation, fall within the terms of s. 132 of the B.N.A. Act. That section provides:—

> The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada, or of any Province thereof, as part of the British Empire, towards foreign countries arising under treaties between the Empire and such foreign countries.

The powers granted by this section are strictly limited to the performance of obligations towards foreign countries arising under treaties between the Empire and such foreign countries. Unquestionably the section does not embrace obligations arising under any form of convention or agreement entered into by the Government of Canada with the Government of any other country within the Empire, nor does it contemplate or suggest any form of convention or agreement with the Government of any foreign country other than a treaty in the true sense of the term. As Lord Dunedin pointed out in the *Radio* case (1), the idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was unthought of in 1867, when the B.N.A. Act was enacted, and the only class of treaty, which would bind Canada, was thought of as a treaty by Great Britain, that is to say, as I understand the reference, a treaty concluded by the Crown in the exercise of its prerogative as the sovereign of a single indivisible Empire on the advice of its constitutional advisers, the Imperial Government of Great Britain. Only by the exercise of this supreme authority could any treaty obligation be imposed on Canada or any other Dominion or dependency of the British Empire towards foreign nations within the intendment of the B.N.A. Act. The executive government and authority of and over Canada were expressly declared by s. 9 of the B.N.A. Act "to continue and be vested in the Queen," s. 2 having already declared that the

(1) [1932] A.C. 304.

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provisions of the Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland. There can hardly be a doubt that in the minds of the Fathers of Confederation and the framers of the B.N.A. Act the British Empire was visualized only as a single unit and not as a collection or commonwealth of separate nations, each of equal status with the United Kingdom of Great Britain and Ireland, with authority to conclude either treaties, or conventions analogous to treaties, on its own account with any foreign government. For my part I am unable to comprehend how any international convention, to which Canada in its new status, whatever that status may actually be, purports to become a party as a separate government, or any obligation resulting therefrom, can possibly be brought within the terms of s. 132—much less a mere draft convention, such as those of the International Labour Organization of the League of Nations. To my mind there is nothing which the judgment of the Judicial Committee in the *Radio* case (1) has more decisively settled than this: that if the Government of Canada by its own plenipotentiaries enters into an international convention with the Government of any other country, whether British or foreign, s. 132 cannot be relied upon as empowering the Parliament of Canada to enact legislation for the carrying out of any obligation arising under such a convention, and that, if such legislative power exists at all, it must be found, either under the enumerated heads of s. 91 or the introductory words of that section, the so-called residuary clause.

Even if the Treaty of Versailles were a treaty between the British Empire, as an undivided unit, and those foreign states, whose plenipotentiaries signed it, which I do not think it is, and not a treaty purporting to have been entered into by the self-governing Dominions of the Empire as separate governments, it could not, in my judgment, be said that there was any obligation, for the performance of which the Parliament of Canada was empowered within the terms of s. 132 to enact legislation as pertaining to an obligation imposed by that treaty upon Canada or any

(1) [1932] A.C. 304.

province thereof, as part of the British Empire. The obligation arose directly from a so-called international convention, purporting to have been ratified by Canada as a separate and distinct Government—an idea which is wholly incompatible with the conception of the Dominion of Canada as constituted by the B.N.A. Act.

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As regards the residuary clause of s. 91, this empowers the Parliament of Canada

> to make laws for the peace, order and good government of Canada in relation to all matters not coming within the class of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

It will be seen at once that this provision can only be invoked where the real subject-matter of the legislation does not fall within the classes of subjects which are exclusively assigned to the provinces by s. 92. To meet this obvious and formidable difficulty the learned counsel for the Dominion brought forward the much canvassed double aspect principle, by which, as I understand it, a matter, though it relates in one aspect and in some circumstances to a class of subjects, which is exclusively assigned by s. 92 to the legislative jurisdiction of the provinces, may nevertheless in another aspect and in other circumstances assume such nation-wide importance as to completely lose its original and normal identity within the purview of s. 92, and thus become at any time a matter falling within the general residuary clause of s. 91.

It was strongly argued that hours of work and the standard of wages and of living had attained such importance as subjects of legislation in Canada as to affect the body politic of the Dominion as a whole and thus to justify the Parliament of Canada in dealing with them in that aspect as matters demanding the intervention of Dominion legislation "for the peace, order and good government of Canada," notwithstanding that the general authority to make laws so plainly excludes all subject-matters coming within the scope of s. 92.

No doubt there have been pronouncements in the Privy Council which lend much colour to this argument, but I do not think that they can properly be interpreted as going to such a length as is now contended for. The learned Chief Justice has discussed very fully in dealing with the reference on the *Natural Products Marketing Act* (p. 403) the argument which was put forward in behalf of the

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Dominion in this regard and I feel that I can add nothing to what he has said. There is certainly no authoritative decision to the effect that, once it is seen that the real subject-matter of a legislative enactment pertains in all its predominant characteristics to the regulation and control of civil rights in the provinces, it can rightfully be transferred to the legislative jurisdiction of the Parliament of Canada in virtue of the introductory words of s. 91 as a matter of legislation "for the peace, order and good government of Canada" in disregard of the plain and all important proviso that such jurisdiction may be exercised only in relation to matters "not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces." I cannot refrain from reiterating these cogent observations of Lord Watson in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1):

> To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate, to the exclusion of the provincial legislatures.

These observations, it seems to me, present a conclusive answer to the argument which has been so strongly urged upon us in reference to the so-called double aspect principle. They demonstrate at least that the mere fact that Dominion legislation concerning any particular matter may be stated to be for the general advantage of Canada, or that the subject of the legislation has become as much a matter of national as of provincial concern to the several provinces, is not sufficient to remove that subject from the sphere of s. 92, to which in its normal and domestic aspect it primarily belongs, and transfer it to the jurisdiction of the Parliament of Canada under s. 91. It is true that local works and undertakings may be 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, and that, when Parliament makes such a declaration with respect to any such local work or undertaking, it may

(1) [1896] A.C. 348.

lawfully legislate in relation to it, but that is in virtue of the exceptions which are expressly made in enumerated head, no. 10, of s. 92, and the consequent application of enumerated head, no. 29 of s. 91 to such a work or undertaking.

Nor do I think that any authoritative decision can rightly be interpreted as warranting the conclusion that, once it appears that the real purpose and effect of a Dominion enactment is to interfere with private and civil rights in the provinces and that in that aspect it consequently falls within the sphere of legislation which has been exclusively reserved for the provinces, not only by the provisions of s. 92, but by the saving clause in the introduction of s. 91, such an enactment can possibly be justified under the general authority conferred on the Parliament of Canada. If such legislation could be maintained on the ground that it was for the peace, order and good government of Canada, it could only be by ignoring the explicit limitation, which is placed on the so-called general authority by the residuary clause itself with the obvious intention of preventing its application in the very sense now contended for, and thus protecting the provinces in the full enjoyment of their exclusive legislative rights as permanently guaranteed to them by s. 91.

It may be that in the event of the peace, order and good government of Canada as a whole being so menaced by some outstanding national peril as to render the intervention of the Dominion Parliament necessary as the only adequate means of meeting such an emergency, the Courts will not shrink from holding that such an emergency constitutes a subject-matter of legislation which is quite outside the purview of s. 92 and the limitation which the saving clause of s. 91 imposes on the general authority of the Parliament of Canada to make laws for the peace, order and good government of the country as a whole, but, apart from such considerations, I question very much if there has been any really conclusive judicial recognition of the double aspect principle relied upon. If there be any such conclusive authority, to which we are bound to give effect in this case, then, as was suggested by the Attorney General of Ontario, the provinces may as well bid adieu to s. 92, reinforced by the saving limitation in the residuary clause of s. 91, as the unassailable charter of their legislative rights.

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I entirely concur in the opinion of the learned Chief Justice that there is nothing in the judgment in the *Aeronautics* case (1) of 1931 to indicate that the Lords of the Privy Council intended to detract from the judicial authority of decisions in the *Combines* case (2) and *Snider's* case (3), and that we are bound by those decisions, as well as the decision in the *Fort Frances* case (4), to hold that the legislation now in question, considered apart from the question of the performance of obligations arising out of binding international conventions, as distinguished from treaties proper within the meaning of s. 132, cannot be supported as legislation enacted for the peace, order and good government of Canada under the introductory clause of s. 91.

This brings me to a consideration of the further question as to whether the ratification by the Government of Canada of such draft international labour conventions as those of the General Conference of the International Labour Organization of the League of Nations, which themselves imposed no obligation of any kind upon the Government of Canada or any other government represented in that organization to give legislative effect or even to assent to any of them, can itself have the effect of vesting in the Parliament of Canada legislative jurisdiction which otherwise it would not possess under the B.N.A. Act.

It is said that we must now take it as settled by the decisions in the *Aeronautics* (1) and *Radio* (5) cases that international conventions and all obligations arising therefrom are matters which fall within the general authority of Parliament to make laws for the peace, order and good government of Canada in relation to matters not coming within the classes of subjects exclusively assigned to the legislatures of the provinces. If this means that, once the Government of Canada has concluded a convention with the Government of any other country, whether within or without the British Empire, that fact itself operates to exclude the subject-matter of the convention from s. 92, regardless of the fact that that subject-matter admittedly up to the time of the conclusion of the convention came within one or more of the classes of subjects exclusively assigned by that section to the legislative jurisdiction of

(1) [1932] A.C. 54.
(2) [1922] 1 A.C. 191.
(3) [1925] A.C. 396.
(4) [1923] A.C. 695.
(5) [1932] A.C. 304.

the provinces, I do not think that either of these cases, upon which counsel for the Dominion have so much relied, can properly be said to have laid down any such principle.

As to the *Aeronautics* decision (1), the legislation, which the Judicial Committee there considered, was s. 4 of the *Aeronautics Act*, c. 3, Revised Statutes of Canada, which reproduced with an amendment the provisions of the *Air Board Act*, c. 11 of the statutes of Canada (1919). Lord Sankey L.C., who delivered the judgment of the Board, explained that the *Air Board Act* was enacted by the Parliament of Canada in 1919 with a view to performing her obligations as part of the British Empire under a convention relating to the Regulation of Aerial Navigation, which was signed by the representatives of the allied and associated powers in the Great War, including Canada, and was ratified by His Majesty on behalf of the British Empire on June 1, 1922, and at the time of the hearing was in force between the British Empire and seventeen other nations. "By article 1," he said,

> the high contracting parties recognize that every Power (which includes Canada) has complete and exclusive sovereignty over the air space above its territory; by article 40, the British Dominions and India are deemed to be States for the purpose of this Convention.

The Lord Chancellor then stated some of the principal obligations undertaken by Canada as part of the British Empire under the stipulations of the convention. Some of these undoubtedly affected civil rights in the provinces. The real grounds of the decision appear in the following passage, which I reproduce from p. 77 (1):

> To sum up, having regard (*a*) to the terms of s. 132; (*b*) to the terms of the Convention which covers almost every conceivable matter relating to aerial navigation; and (*c*) to the fact that further legislative powers in relation to aerial navigation reside in the Parliament of Canada by virtue of s. 91, items 2, 5 and 7, it would appear that substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion. There may be a small portion of the field which is not by virtue of specific words in the *British North America Act* vested in the Dominion; but neither is it vested by specific words in the Provinces. As to that small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good government of Canada. Further their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.

(1) [1932] A.C. 54.

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As Viscount Dunedin, who sat in the *Aeronautics* case (1), pointed out in delivering the judgment of the Board in the *Radio* case (2) three or four months later, the leading consideration in the judgment of the Board in the earlier case was that the subject fell within the provisions of s. 132 of the B.N.A. Act. Apart from this, however, and the character of the Aerial Navigation Convention, it is clear that

> the fact that further legislative powers in relation to aerial navigation reside in the Parliament of Canada by virtue of s. 91, items 2, 5 and 7 and (that) it would appear that substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion.

and further,

> the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion,

also influenced their Lordships.

Whichever one of the different reasons assigned by the Board for the decision may have been regarded by their Lordships as the predominating reason, it seems to me that the judgment cannot, in any view, be interpreted as definitely laying down the principle that obligations arising out of all conventions between governments, not falling within the terms of s. 132 of the B.N.A. Act, are matters, which, as subjects of legislation, cannot fall within s. 92, regardless of the form and character of the conventions themselves, and regardless also of whether they wholly or predominantly deal with matters which otherwise would unquestionably fall within one or more of the classes of subjects which that section reserves exclusively for the provincial legislatures. That their Lordships did not intend to lay down any uniform rule of such far-reaching consequences is shown by the following passage from the judgment itself:—

> Under our system decided cases effectively construe the words of an Act of Parliament and establish principles and rules whereby its scope and effect may be interpreted. But there is always a danger that in the course of this process *the terms of the statute may come to be unduly extended and attention may be diverted from what has been enacted to what has been judicially said about the enactment.*
>
> To borrow an analogy; there may be a range of sixty colours, each of which is so little different from its neighbour that it is difficult to make any distinction between the two, and yet at the one end of the range the colour may be white, and at the other end of the range black. Great

(1) [1932] A.C. 54. (2) [1932] A.C. 304.

care must therefore be taken to consider each decision in the light of the circumstances of the case in view of which it was pronounced, especially in the interpretation of an Act such as the *British North America Act*, which was a great constitutional charter, and not to allow general phrases to obscure the underlying object of the Act, which was to establish a system of government upon essentially federal principles. *Useful as decided cases are, it is always advisable to get back to the words of the Act itself and to remember the object with which it was passed.*

Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. *The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss. 91 and 92 should impose a new and different contract upon the federating bodies.*

Nor do I think that the *Radio* case (1) goes to the length which has been suggested. On the latter reference the legislation considered was the *Radiotelegraph Act*, R.S.C., 1927, c. 195, and the regulations made thereunder, the validity of which the Dominion sought to support on the ground that it was necessary to make provision for performing the obligations of Canada under the Radiotelegraph convention, as well as upon the ground that it was enacted by reason of the expediency of making provision for the regulation of a service essentially important in itself as touching closely the national life and interest.

This convention was the outcome of a meeting of representatives of about 80 countries, including the Dominion of Canada, held in Washington in November, 1927, to settle international agreements on the subject of radiotelegraph communication. The representatives of Canada had been appointed by the Privy Council of Canada with the approval of the Governor General, and the convention was actually signed by these representatives of Canada with the other signatories as plenipotentiaries of the countries named as the high contracting parties. By article 2 the contracting governments undertook to apply the provisions of the convention in all radio communication stations established or operated by the contracting governments, and open to the international service of public correspondence, and also to adopt or to propose to their respective legislatures the measures

(1) [1932] A.C. 304.

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necessary to impose the observance of the provisions of the convention and the regulations annexed thereto upon individual persons and enterprises authorized to establish and operate radio communication stations and international service, whether or not the stations are open to public correspondence.

The Board, while holding that this convention was not a treaty within the meaning of s. 132 of the B.N.A. Act, did no doubt decide that it was a convention by which Canada must be deemed to have been as firmly bound as if had been entered into as a formal treaty with foreign governments, and that Canada as a whole was amenable to the other signatory powers for the proper carrying out of the convention, for the reason apparently, as Lord Dunedin pointed out in the passage quoted by the learned Chief Justice from the Board's judgment (1) that Canada as a Dominion is one of the signatories to the convention. It is nowhere suggested in the judgment that either the fact of the Government of Canada being a signatory to the convention by its duly accredited plenipotentiaries or the fact of the Government of Canada having afterwards formally ratified the convention, clothed the Parliament of Canada with any legislative authority beyond that which flows from the provisions of the B.N.A. Act.

The point of the reference to the subject of international conventions and the changes in the status of the Government of Canada in relation to the Imperial Government was, as I take it, to show that the idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was unthought of in 1867, when the B.N.A. Act was enacted, and that consequently the subject of international conventions could not be expected to be mentioned explicitly in the Imperial statute in either ss. 91 or 92. "The only class of treaty," said Lord Dunedin,

> which would bind Canada was thought of as a treaty by Great Britain and that was provided for by s. 132. Being, therefore, not mentioned explicitly in either s. 91 or s. 92, such legislation falls within the general words at the opening of s. 91, which assigned to the Government of the Dominion the power to make laws "for the peace, order and good govern-

(1) [1932] A.C. 304, at 312.

ment of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." In fine, though agreeing that the convention was not such a treaty as is defined in s. 132, their Lordships think that it comes to the same thing,

that is to say, as I understand it, that the fact of international conventions not having been specifically named in s. 92 among the classes of subjects in relation to which the Provinces are authorized to exclusively make laws, that subject necessarily falls within the residuary clause of s. 91 as a matter "not coming within" any of the classes of subjects enumerated in s. 92. This no doubt may, as their Lordships suggest, amount to the same thing as if the Radiotelegraph convention were in fact such a treaty as is defined in s. 132 in the sense that from the Dominion standpoint it makes no practical difference whether the Parliament of Canada derives its power to enact legislation for the carrying out of the stipulations of an international convention from the provisions of s. 132 or from the fact that the legislation is treated as a matter which does not come within the classes of subjects specified in s. 92, and must therefore fall within the residuary clause of s. 91. I do not think, however, that their Lordships intended to lay it down as an infallible rule for the interpretation of either s. 92 or of the residuary clause of s. 91 itself that the fact that a matter demanding legislative action is not mentioned explicitly in s. 92 decisively excludes it from such a comprehensive class of subjects as is specified in no. 13 of that section —Property and Civil Rights.

The rest of the judgment shows that in addition to the fact of the Government of Canada being a signatory to the convention the Board considered the scope of its stipulations to see whether in their main features they dealt with a subject matter which in reality fell within any of the classes of subjects specified in s. 92, or whether they did not predominantly relate to classes of subjects set out in the enumerated heads of s. 91. Discussing the argument of the province that the convention did not touch the consideration of interprovincial broadcasting, Lord Dunedin says that much the same might have been said as to aeronautics, as it was quite possible to fly with-

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out going outside the province, yet that was not thought to disturb the general view, and that

> the idea pervading that judgment is that the whole subject of aeronautics is so completely covered by the treaty ratifying the convention between the nations, that there is not enough left to give a separate field to the provinces as regards the subject.

Again, His Lordship says:

> But the question does not end with the consideration of the convention. Their Lordships draw special attention to the provisions of head 10 of s. 92. These provisions, as has been explained in several judgments of the Board, have the effect of reading the excepted matters into the preferential place enjoyed by the enumerated subjects of s. 91.

Their Lordships held that broadcasting fell within the excepted matters as being an undertaking connecting one province with another, and extending beyond the limits of the province and therefore came within enumerated head 29 of s. 91. "Once it is conceded," he went on to say,

> as it must be, keeping in view the duties under the convention, that the transmitting instrument must be, so to speak, under the control of the Dominion, it follows in their Lordships' opinion that the receiving instrument must share its fate. The receiver is indeed useless without a transmitter and can be reduced to a nonentity if the transmitter closes. The system cannot be divided into two parts each independent of the other.

Their Lordships, moreover, held that broadcasting fell within the description of "telegraphs," which subject is excepted from "local works and undertakings," specified in s. 92 (10), and therefore takes its place in 91 (29). In conclusion, Lord Dunedin said:

> As their Lordships' views are based on what may be called the pre-eminent claims of s. 91, it is unnecessary to discuss the question which was raised with great ability by Mr. Tilley—namely, whether, if there had been no pre-eminent claims as such, broadcasting could have been held to fall either within "property and civil rights" or within "matters of a merely local or private nature."

It appears, therefore, to me that, while one of the grounds of the decision in the *Radio* case (1) was the form and nature of the convention itself, the basis of the decision, as put in the judgment itself, was "the pre-eminent claims of s. 91," which, I take it to refer to the fact that the subject matter of that convention fell under one of the enumerated heads of s. 91, viz: no. 29. For that reason the authority of Parliament in relation to the subject matter of the convention and of the legislation would override the legislative authority of the provinces in relation thereto, not

(1) [1932] A.C. 304.

because of the residuary clause in the introduction of that section, but in virtue of the declaration 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

set forth in the 29 enumerated heads of that section, and the closing words of s. 91 as well that,

> Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

This, as I read the judgment, is the fundamental basis of the decision. Read in this light, it may truly be said to get back to the words of the B.N.A. Act itself and the object with which it was passed, and thus to avoid the danger to which the Board itself so pointedly called attention in the *Aeronautics case* (1) a few months earlier, of the provisions of such a great constitutional charter being so extended or whittled down in the process of judicial interpretation as the years go on as to impose a new and different contract upon the federating bodies than that upon which the whole structure of confederation was erected.

While I agree with the learned Chief Justice that the Government of Canada must now be held to be the proper medium for the formal conclusion of international conventions, whether they affect the Dominion as a whole or any of the provinces separately, I do not think that this fact can be relied on as altering in any way the provisions of the B.N.A. Act as regards the distribution of legislative power as between the Dominion Parliament and the provincial legislatures or as necessarily giving to any matter, which may be made the subject of legislation in Canada, any other meaning or aspect than that which it bears in our original constitution. Whether such a matter is one which falls under the terms of either s. 91 or of s. 92 or of s. 132, must depend upon the real intendment of the B.N.A. Act itself, as gathered from the terms of those sections and the Act as a whole. The original division of legislative power as between the two fields, Dominion and provincial, has remained inviolate to this day, so far as the Imperial Parliament is concerned. The Statute of Westminster itself provides by s. 7 (1) that,

(1) [1932] A.C. 54.

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Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the B.N.A. Act (1867 to 1930) or to any order, rule or regulation made thereunder.

And by s.s. (3) thereof that,

The powers conferred by this Act upon the Parliament of Canada or upon the Legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the Legislatures of the Provinces respectively.

Seeing that s. 92 so unequivocally assigns all "matters coming within the classes of subjects" enumerated therein to the exclusive jurisdiction of the provincial legislatures, and that the residuary clause of s. 91 is so unequivocally limited to "matters not coming within the classes of subjects" assigned exclusively to the provincial legislatures, I cannot understand how in a controversy as to which of the two legislative fields any particular matter belongs we can look at it otherwise than in its normal aspect within the intendment of these two sections as a subject of legislation, either for the Parliament of Canada or for the provincial legislatures. In such a controversy the primary duty of the Court is to determine whether the real subject matter of the legislation relates to one or more of the classes of subjects which the Act exclusively assigns to the provincial legislatures.

Surely it was never within the contemplation of the Act that the Courts in determining this question should disregard the normal aspect of any matter in its relation to any of these classes of subjects, or that, because through the instrumentality of the Government of Canada in the exercise of its executive authority and functions, it should become the subject matter of an international convention, it should thereby cease to have any relationship to any of the classes of subjects, which the Act has defined as the exclusive prerogative of the legislatures of the provinces and should henceforth be looked at solely from an international point of view. For my part I find it quite impossible to accept such a proposition. If we are not bound by the *Aeronautics* and *Radio* decisions (1) to hold that legislation, which admittedly is directly aimed at the regulation and control of such matters as contracts of employment in respect of the limitation of the hours of labour and the rates of wages in all the provinces alike,

(1) [1932] A.C. 54 and 304.

is legislation relating to a matter which falls to the Parliament of Canada under the residuary clause of s. 91, simply because it has become a matter of national as well as of provincial concern, I can see no logical reason why we are bound to hold that such legislation exclusively vests in the Dominion simply because it relates to a matter which the federal executive has chosen to make a subject matter of an international convention. Both reasons are in my judgment alike irreconcilable with the clear intendment of s. 92 and the residuary clause of s. 91.

As to the suggestion that the fact that s. 92 makes no explicit mention of international conventions necessarily excludes the subject from the ambit of that section and places it in that of the residuary clause, this also in my opinion is wholly inadmissible as being contrary to the plain wording of both sections. Incontrovertibly the residuary clause itself limits the authority of the Dominion Parliament to make laws for the peace, order and good government of Canada to matters, which do not come within *the classes of subjects* assigned exclusively by the Act to the legislatures of the provinces. No matter, which does come within any of these classes of subjects, can legitimately be brought within the operation of the residuary power. There is but one test for determining its application or non-application to any given subject-matter, viz: Does the matter come within any of the classes of subjects, which the Act has assigned exclusively to the legislatures of the provinces? And for the reasons already discussed the given matter must be looked at in its relationship, not to any outside country, but in its relationship to the classes of subjects definitely marked out as the exclusive legislative field of the provinces. The words of the enactment are "matters not coming within the classes of subjects" assigned exclusively to the provinces—not "matters not explicitly mentioned in s. 92." Manifestly many matters may not be explicitly mentioned in the classes of subjects assigned to the provinces and yet unquestionably come within those classes of subjects, particularly such wide and comprehensive classes of subjects as nos. 13 and 16: Property and Civil Rights and "Generally, all matters of a merely local or private nature."

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It seems to me that nothing could be more surely calculated to undermine the whole structure of the confederation compact as expressed in the B.N.A. Act in relation to the distribution of legislative power between the Dominion and provincial legislatures than the adoption of such a guide as has been suggested for the interpretation of these all important sections, 91 and 92. It would strip the legislative charter of the provinces of every vestige of permanency and stability and leave it at all times subject to the will and pleasure of the federal executive.

The legislation embodied in these three statutes is admittedly legislation which the Parliament of Canada would never have ventured to enact but for the draft conventions of the International Labour Organization of the League of Nations. These conventions are admittedly conventions, to which the Government of Canada was in no manner bound to assent or to formally ratify. They were submitted to the Government of this country as mere draft conventions, and stood as such until 1935, when the Government of Canada chose to approve them, several years after the expiration of the period fixed by article 405 of the Treaty of Versailles for their submission "to the authority or authorities within whose competence the matter lies for the enactment of legislation or other action." It was argued that this provision of article 405 was merely directory. I think its language is clearly mandatory, and that the ratification of the conventions, upon which these three statutes purport to be founded is null and void under the terms of article 405 of the Treaty of Versailles itself. It is, however, to the provisions of the B.N.A. Act, not to terms of the Treaty of Versailles, that we must look for the answers to the questions submitted to us on this reference concerning the constitutionality of these three statutes. In my opinion they are all wholly *ultra vires* of the Parliament of Canada, for the reasons above stated.

LOUIS DEITCHER AND JACOB DEITCHER, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF DEITCHER BROTHERS (DEFENDANTS) ..... APPELLANTS;

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*Apl. 28, 29.
*May 27.

AND

MYER WHITZMAN AND EDWARD WHITZMAN (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC.

Contract—Sale of goods—Contract for sale of scrap steel, accumulated on a certain wharf, to be loaded there on ship—Clause providing that weight of goods be ascertained by checking ship's draft—Subsequent arrangement for transferring goods and loading at different place—Change in circumstances—Conduct of parties—Dispute as to weight of goods loaded—Method of ascertainment—Evidence to prove weight.

Defendants contracted to purchase from plaintiffs certain scrap steel, part of which was on a wharf at Dartmouth and part at Halifax, and which was to be loaded on a steamer chartered by defendants. The contract provided: "Railway weights to govern settlement on all material loaded in Halifax. For material loaded in Dartmouth, weight to be obtained in accordance with ship's draft. [Plaintiffs] have the right to appoint Lloyd's Agents to act on [plaintiffs'] behalf as regards to checking the draft for weight purposes, and [defendants] are appointing ship's chief officer for the same purpose." The intention that the steamer should take on the Dartmouth cargo from said Dartmouth wharf was frustrated by the ship captain's fears that there was not sufficient depth of water for that to be done safely. The parties then made an agreement whereby the Dartmouth scrap was loaded into lighters and transported to the ship's side at a pier in Halifax. It was loaded and stowed in the steamer from these lighters while the Halifax scrap was being put on from the pier. Plaintiffs did nothing as to checking the ship's draft, nor did defendants or the ship's officer notify them that the draft was to be checked for the purpose of ascertaining the weight of the Dartmouth scrap. The main dispute was as to the weight of the scrap brought from Dartmouth, to prove which weight the plaintiffs at the trial adduced evidence of the lightermen and others. The jury's finding of the weight was in plaintiffs' favour, and judgment was given accordingly, which was affirmed on appeal. Defendants appealed to this Court.

Held: In the circumstances the above quoted weight clause respecting the Dartmouth scrap in the original contract could not fairly be held to have been incorporated as an implied term of the new arrangement made for its loading: checking its weight by the displacement method within the true meaning of said weight clause became impossible owing

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to the simultaneous loading (which the clause could not be taken as contemplating) of Halifax and Dartmouth scrap at Halifax; further, the clause contemplated concurrent checking and raised a duty in each party to co-operate with the other in the checking of the draft. It was therefore competent to plaintiffs to prove by the best available testimony the weight of the Dartmouth scrap actually delivered; and the evidence adduced warranted the jury's finding.

Judgment of the Supreme Court of Nova Scotia en banc, [1936] 1 D.L.R. 780, affirmed.

APPEAL by the defendants from the judgment of the Supreme Court of Nova Scotia en banc (1) affirming (Ross J. dissenting) the judgment of Hall J. at trial, on findings of a jury, in favour of the plaintiffs. The action was mainly for the price of goods sold and delivered, and the main question in dispute was the quantity (weight in tons) of scrap steel delivered by plaintiffs to defendants. The material facts of the case and questions in dispute are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

D. McInnes and *S. E. Schwisberg* for the appellants.

J. A. Walker K.C. for the respondents.

DUFF C.J.—The appeal should be dismissed with costs.

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

CROCKET J.—The defendants, a firm of Montreal exporters, entered into a contract in writing with the plaintiffs, junk dealers of Halifax, in May, 1934, for the purchase of approximately 1,500 tons of scrap steel at the price of $8.50 per ton and approximately 100 tons of skeleton scrap at $7.50 and $6.50 per ton, loaded on a steamer (SS. *Lina L.D.*), which the defendants had chartered to load at the ports of Montreal, Quebec and Halifax for a voyage to Japan. Part of the purchased scrap had been accumulated on the French Cable Company's wharf at Dartmouth and part was in Halifax, and the contract stated that the defendants expected the steamer in Halifax about the middle of July. The written contract contained the following provision:

Railway weights to govern settlement on all material loaded in Halifax. For material loaded in Dartmouth, weight to be obtained in

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accordance with ship's draft. You have the right to appoint Lloyd's Agents to act on your behalf as regards to checking the draft for weight purposes, and we are appointing ship's chief officer for the same purpose.

The intention of the parties obviously was that the *Lina L.D.* should dock at the wharf, where the Dartmouth scrap was located, and the scrap loaded and stowed on the steamer directly from the wharf. The steamer arrived in Halifax harbour on July 22, but the intention of the parties that she should take on the Dartmouth cargo from the French Cable wharf was frustrated by reason of the fears of the captain that there was not a sufficient depth of water to enable her safely to do so. The result was that the parties entered into a new agreement regarding the Dartmouth scrap, and the steamer proceeded to Pier No. 3 on the Halifax side of the harbour, where she docked and next day began taking on the scrap, which had been brought there in railway cars. The Dartmouth scrap was loaded into lighters at the French Cable wharf, transported to the ship's side and loaded and stowed in the steamer from these lighters, while the Halifax scrap was being put on from the pier. A dispute arose between the parties as to the weight of the steel scrap which was brought from Dartmouth, the defendants claiming that it weighed only 464 tons, and the plaintiffs that it weighed 867 tons.

The plaintiffs consequently brought this action to recover the balance alleged to be due to them for goods sold and delivered under the written contract and for the cost and expenses of the transportation of the Dartmouth scrap to the steamer's side. The plaintiff Edward Whitzman also claimed $495 in addition for supervising the loading of 1,980 tons of scrap iron at Halifax under a special agreement made with the defendants in June. The total amount claimed by the plaintiffs was $15,364.13, upon which they credited payments to the amount of $6,271.25, leaving a balance claimed of $9,092.88.

The action was tried at Halifax before Mr. Justice Hall and a jury. The jury, in answer to questions submitted by the learned Judge, found that the defendants agreed to pay the plaintiffs the cost of transferring the Dartmouth scrap from the Cable wharf to the ship's side; that the *Lina L.D.* could have loaded 920 tons at the Cable wharf in safety; and that 875 tons of scrap steel were delivered by lighters to the ship's side. The jury also found that

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the cause of the delay in loading the steamer was the transferring of the material in scows from Dartmouth to Halifax. The last mentioned finding bears only on the question of the defendant's counter-claim for demurrage. Upon these answers the learned trial Judge directed a verdict for the plaintiffs for $7,091.04, which was affirmed on appeal to the Supreme Court en banc by Sir Joseph Chisholm, C.J., and Graham and Doull, JJ.; Ross, J., holding that the verdict should be reduced to $4,048.04. All four Appeal Justices held that the jury's finding that the defendants agreed to pay the cost of the transferring of the Dartmouth scrap to the steamer's side at the Halifax pier could not be set aside, though Ross, J., remarked that it was not very strongly supported.

As this finding is one which depends entirely upon the credibility of evidence, I think it must be taken as conclusive upon the question. The finding on the question of delay disposes of the claim for demurrage.

The substantial attack on the trial and appeal judgments centres entirely around the construction and application of the weight clause above quoted, and the evidence upon which the plaintiffs relied to prove the weight of the scrap which was delivered to the steamer in lighters from the French Cable wharf. All this evidence was objected to on the trial as an attempt to vary the terms of the written contract regarding the method of ascertaining the weight of this material, which method, the defendants contended, was still applicable notwithstanding the alleged new agreement for the loading at Halifax from the lighters. If this contention is sustained, the finding of the jury as to the weight of the Dartmouth scrap delivered cannot, of course, stand. If it is not sustained, the jury's finding is fully warranted by the evidence relied on.

I concur entirely in the view of the majority of the Supreme Court en banc as expressed by Mr. Justice Graham, that the weighing clause did not in the circumstances apply to the Dartmouth scrap as loaded. The defendants having loaded their own scrap at Halifax at the same time that the loading of the Dartmouth scrap was proceeding under the new agreement, it became quite impossible to check the weight of the Dartmouth scrap by the displacement method within the true meaning of the

weight clause. Such a thing as the simultaneous loading of the Halifax and Dartmouth material at Halifax was surely never contemplated by either party. The displacement method was prescribed for ascertaining the weight of the Dartmouth scrap separately, and obviously could not be used to determine the weight of a mixed shipment.

I also fully agree with the view stated in the majority judgment on appeal that, even if it should be held that the weight clause was not affected by this complete change of conditions, as written in the original contract, it contemplated concurrent checking and raised a duty on the part of each to co-operate with the other in the checking of the steamer's draft. The checking contemplated was not a mere observation of the draft of the vessel as she lay in the water before and after the loading of the material. The clause says:

> You have the right to appoint Lloyd's Agents to act on your behalf as regards to checking the draft for *weight purposes,* and we are appointing ship's chief officer for the same purpose.

The checking, as is clearly shewn on the record, involves the ascertaining of all fuel and ballast aboard immediately before loading commences and also immediately after its completion and the sounding for this purpose of all tanks, peaks, bilges, etc. The importance of an accurate checking as to all these points is evident from the fact, which was pointed out in the record, that every inch of additional draft in the water represented an addition of 44½ tons of cargo. It is quite true that the plaintiffs did not themselves appoint anyone to act for them in the checking of the draft or request an opportunity of checking it for themselves, but they were never notified by the defendants or by the ship's officer that the draft was to be checked, as provided by the weight clause, for the purpose of ascertaining the weight of the Dartmouth material, and it seems to me in all the circumstances that it cannot fairly be held that the weight clause of the original contract was incorporated as an implied term of the wholly new arrangement which the jury found was entered into between the parties with respect to the loading of the Dartmouth scrap. This clause, in my opinion, is not applicable for the reasons stated, and it was therefore quite competent to the plaintiffs to prove by the best available testimony the weight of the material which they actually delivered to the de-

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fendant's chartered steamer. The evidence of the lightermen and others which they did adduce for this purpose, in my judgment fully warrants the finding which the jury made that at least 875 tons were supplied to the steamer from Dartmouth. For this the defendants should be required to pay.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *L. A. Lovett.*

Solicitor for the respondents: *W. N. Wickwire.*

1936
* June 17.

IN THE MATTER OF THE TRUSTEE ACT (SASKATCHEWAN)

AND

IN THE MATTER OF THE MOOSE JAW ELECTRIC RY. CO.

D. R. STREET.....APPELLANT;

AND

BRITISH AMERICAN OIL CO. LTD. AND OTHERS ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Appeal—Practice—Jurisdiction—Failure to obtain approval of security and allowance of appeal within the sixty days fixed by s. 64 of Supreme Court Act (R.S.C. 1927, c. 35)—Secs. 64, 67, 70 of the Act—Appeal from Registrar's order refusing to approve security and affirm Court's jurisdiction—Procedure—Rules 1, 2, 3, 86, 87, 88 of Rules of Supreme Court of Canada.

To bring an appeal to the Supreme Court of Canada in compliance with s. 67 of the *Supreme Court Act* (R.S.C. 1927, c. 35), it is not sufficient to give notice of appeal and pay $500 into court as security within the 60 days fixed (except as otherwise provided) by s. 64; there must be also, within the said time limited, approval of the security and allowance of the appeal.

An order of the Registrar, on a motion made returnable after expiry of said period of 60 days, refusing, on above ground, to approve the security and affirm the Court's jurisdiction to hear the appeal, was affirmed by the Court.

The question arising out of the fact that the allowance of the appeal was not obtained within the said period of 60 days, was considered as raising the question of the Court's jurisdiction to hear the appeal (*Ohene Moore* v. *Akesseh Tayee,* [1935] A.C. 72); and hence the appeal from said order of the Registrar was dealt with, not as one governed by rules 86, 87 and 88 of the Rules of the Supreme Court

* PRESENT:—Rinfret, Cannon, Crocket, Kerwin and Hudson JJ.

of Canada, but as one governed by rule 3 thereof, which provides for an appeal from the Registrar's order to the Court, and fixes no delay within which the notice of appeal must be served.

MOTION by the respondents for an order quashing an appeal from an order of the Registrar, as set out below. Also the appellant's appeal from said order of the Registrar was heard on its merits as set out below.

The appellant appealed from the judgment of the Court of Appeal for Saskatchewan, dated November 4, 1935 (1), which held that the interest payable on certain bonds issued by the Moose Jaw Electric Ry. Co. should not be regarded, under certain provisions of *The Saskatchewan Railway Act* (R.S.S. 1930, c. 96), as "working expenses" so as to entitle the claims of the bondholders for such interest to rank *pro rata* with the claims of certain creditors who were referred to as "work creditors," on certain moneys in the hands of the National Trust Co. Ltd. as trustee.

On January 3, 1936 (the last day of the 60 days for bringing the appeal to this Court under s. 64 of the *Supreme Court Act,* R.S.C. 1927, c. 35), the appellant paid into court $500 as security for costs and gave a certain notice of motion, returnable on January 15, 1936, before the Registrar of this Court, for an order approving of the security tendered by the appellant and for an order affirming the jurisdiction of the Court to hear the appeal. The motion was adjourned from time to time and was heard by the Registrar on February 17, 1936. The Registrar refused the motion. He gave reasons as follows:

THE REGISTRAR.—This is a motion, which was made returnable before me on 15th January, 1936, but adjourned from time to time, and finally brought on before me on 17th February, 1936, for an order approving of the security tendered by the appellant, and for an order affirming the jurisdiction. The motion was contested on the ground that the appeal was not brought within sixty days from the signing or entry or pronouncing of the judgment appealed from, and that there was no jurisdiction in this Court to hear the appeal, inasmuch as the amount or value of the matter in controversy in the appeal did not exceed $2,000.

(1) [1935] 3 W.W.R. 419; [1936] 1 D.L.R. 226.

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Re MOOSE JAW ELECTRIC RY. CO.

STREET *v.* BRITISH AMERICAN OIL CO. LTD. ET AL.

Mr. Justice Embury of the Court of King's Bench for the Province of Saskatchewan, by his judgment dated 26th March, 1935, held that interest on certain bonds secured by a mortgage covering the assets of the Moose Jaw Electric Railway Company was properly chargeable as working expenses, under the provision of the *Saskatchewan Railway Act*. The creditors appealed to the Court of Appeal for the Province of Saskatchewan, which Court, by a judgment dated November 4, 1935, reversed Mr. Justice Embury's judgment, holding that the interest on bonds should not be declared to be a working expense or working expenditure within the meaning of the *Saskatchewan Railway Act*.

Section 64 of the *Supreme Court Act* provides:—

> Except as otherwise provided, every appeal shall be brought within sixty days from the signing or entry or pronouncing of the judgment appealed from, but the months of July and August shall be excluded in the computation of the said sixty days.

3rd January, 1936, was thus the last day for bringing the appeal.

Section 67 of the *Supreme Court Act* provides:—

> No writ shall be required or issued for bringing any appeal in any case to or into the Court, but it shall be sufficient that the party desiring so to appeal shall, within the time herein limited in the case [namely, sixty days], have given the security required and obtained the allowance of the appeal.

Section 70 provides that no appeal shall be allowed until the appellant has given proper security, to the extent of $500, to the satisfaction of the court from whose judgment he is about to appeal, or a judge thereof, or to the satisfaction of the Supreme Court, or a judge thereof, that he will effectually prosecute his appeal, etc.

On the 3rd of January, 1936, the appellant paid into court $500 as security for costs and, the respondent's solicitors not having any Ottawa agents, posted up on a board in the Registrar's office a notice of motion, (*a*) for an order approving of the security tendered by the appellant, and (*b*) for an order affirming the jurisdiction of the Supreme Court of Canada to hear the appellant's appeal, returnable on 15th January, and they also sent a copy of the notice of motion, dated 31st December, 1935, to the solicitors for the respondent at Moose Jaw, by registered mail, which was received by them on 8th January, 1936.

In my opinion the statute requires the appellant to bring his appeal by serving a proper notice of appeal, giving the security required and obtaining the allowance of the appeal, within the sixty days. I think it is not sufficient that he should have paid the security into court, posted up a notice of appeal and notice of intention to apply for approval of the security (thus having the appeal allowed), returnable after the sixty days had expired. If the sixty days be too short a time to perfect the security, an application must be made under section 66 of the Act, to the court proposed to be appealed from or any judge thereof, based upon the special circumstances required by that section, to allow the appeal, although the same is not brought within the time prescribed in that behalf, namely, 60 days. The motion to approve the security must be refused, with costs.

In view of the foregoing conclusion, it may be unnecessary to deal with the question of jurisdiction, but, in case it is desired to appeal from my order, I may say that I am satisfied that the amount or value of the matter in controversy in the proposed appeal exceeds the sum of $2,000.

The Registrar's order refusing appellant's said motion was made on the 17th day of February, 1936.

On the 21st day of May, 1936, the solicitors for the appellant gave notice that a motion would be made on behalf of the appellant to the Court on Tuesday, the 6th day of October, 1936, by way of appeal from the order of the Registrar and to reverse that part of the order disallowing the appeal, and for an order allowing the said appeal, upon the ground that the Registrar erred in deciding that the *Supreme Court Act* required the appellant to bring his appeal by a proper notice of appeal, giving the security required, and obtaining the allowance of the appeal, all within sixty days of the decision complained of.

Thereupon the agents of the solicitors for the respondents applied for an order quashing the appeal from the order of the Registrar, on the ground that the said appeal was not launched in time or with due diligence; or, in the alternative, for an order dismissing the said appeal; or, in the further alternative, in case the said appeal was allowed, for an order directing the appellant to proceed with his appeal from the judgment of the Court of Appeal of

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Saskatchewan dated the 4th day of November, 1935, at the sittings of this Court commencing on Tuesday, the 6th day of October, 1936.

R. Quain K.C. for the appellant.

R. S. Smart K.C. for the respondents.

On the hearing of the motion to quash it was urged on behalf of the respondents that the Registrar's order was made in pursuance of his jurisdiction under rules 82 *et seq.* of the Rules of the Supreme Court of Canada, 1929, and accordingly that the notice of appeal therefrom should have been "served within four days after the decision complained of, * * * or served within such other time as may be allowed by a Judge of the said Court or the Registrar" (rule 87); moreover, that the appeal lay to a Judge of the Court, not to the Full Court, and should have been brought on for hearing on the first Monday after the expiry of the delays provided for by rule 87, or so soon thereafter as the same could be heard (rule 88).

On the other hand, it was argued for the appellant that the question whether the appeal from the Court of Appeal for Saskatchewan had been properly launched within the requirements of s. 67 of the *Supreme Court Act* involved the further question whether the Court was competent to hear it, and, therefore, was one of jurisdiction governed by rules 1 *et seq.* of the Court. Under rule 3, the appeal from an order of the Registrar, either affirming or refusing to affirm the jurisdiction of the Court, had to be made to the Court itself upon a notice of such appeal being served; and no delay was provided by the rules within which the party dissatisfied with the order of the Registrar had to serve notice of the motion to the Court.

The Court found that the appeal from the Registrar's order undoubtedly was not launched with due diligence, there having elapsed more than three months between the date of the order and that of the notice of appeal.

But, upon the authority of the judgment of the Privy Council in the case of *Ohene Moore* v. *Akesseh Tayee* (1), the question arising out of the fact that the allowance of

(1) [1935] A.C. 72.

the appeal was not obtained within the sixty days might be considered as raising the question of the jurisdiction to hear the appeal in the premises.

As a result, the appeal from the Registrar's order would not be an appeal governed by rules 87 and 88 of this Court, but an appeal governed by rule 3, wherein no delay is fixed within which to serve the notice of appeal.

The Court, therefore, intimated that, without passing upon the respondents' motion to quash the appeal from the Registrar's order, it would hear the appellant immediately on the merits of the appeal from the Registrar's order, and, after the argument of counsel for the appellant, and without calling upon counsel for the respondents, the Court delivered the following judgment:

RINFRET J.—We shall not require to hear you, Mr. Smart.

Section 67 of the *Supreme Court Act* prescribes the minimum required for bringing an appeal, in any case, into this Court. The appellant, within the time limited by sec. 64 of the Act (viz., sixty days), must "have given the security required and obtained the allowance of the appeal."

In this case, the security was given within the time limit, but it was not approved and the allowance of the appeal was not obtained; and, under the circumstances, the Registrar very properly, we think, refused to approve the security after the time was expired.

There is no hardship in the premises; for the appellant, if he could show special circumstances, could always have secured the allowance of the appeal, although it was not brought within the time prescribed in that behalf, by applying either to "the court proposed to be appealed from, or any judge thereof" (sec. 66 of the *Supreme Court Act*).

The appeal from the order of the Registrar must, therefore, be dismissed with costs.

Appeal from Registrar's order dismissed with costs.

Solicitors for the appellant: *Quain & Wilson.*

Solicitors for the respondents: *Grayson & McTaggart.*

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*Juin 17.

JOSEPH E. FORCIER.....APPLICANT;

AND

DAME ULDERIC CODERRE.....RESPONDENT.

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

Leave to appeal—Rule nisi granted as to costs only—Leave refused—May be granted if rule nisi maintained by judgment below—Liberty of subject at stake—Special reasons for granting of leave to appeal under section 41 of the Supreme Court Act.

Leave to appeal to this Court will not be granted from a judgment of the appellate court upholding a judgment of the Superior Court (which had refused to maintain a rule *nisi* except as to costs), where the appeal from the judgment of the Superior Court involves only a question of costs and that from the appellate court a question of procedure. While, even if leave was granted, it is highly improbable that this Court would interfere with such judgments, it should not be lost sight of the fact that special reasons must be shown why leave should be granted under section 41 of the *Supreme Court Act*.

Semble that, if the rule *nisi* had been granted, the liberty of a subject being at stake, there would be a question of sufficient importance to justify this Court to grant leave to appeal.

MOTION for special leave to appeal to this Court from the judgment of the Court of King's Bench, appeal side, province of Quebec, maintaining the judgment of the Superior Court which had refused to declare a rule *nisi* absolute except as to costs.

G. H. Robichon K.C. for the motion.

C. A. Séguin K.C. contra.

The judgment of the Court was delivered by

RINFRET J.—La Cour est unanimement d'avis que la requête pour permission d'appeler doit être rejetée.

Il s'agit d'une règle *nisi* requise par l'appelant contre l'intimée.

La Cour Supérieure a refusé de déclarer la règle absolue "autrement que pour les frais."

En appel, la Cour du Banc du Roi a déclaré qu'elle n'interviendrait pas, parce que, à son avis, "ce n'est pas par la procédure que l'appelant a adoptée qu'il peut faire décider" le droit qu'il réclame.

Comme résultat du jugement de la Cour Supérieure, il ne s'agirait donc que d'une question de frais; et comme

*PRESENT:—Rinfret, Cannon, Crocket, Kerwin and Hudson JJ.

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résultat du jugement de la Cour du Banc du Roi, il n'y aurait en jeu qu'une simple question de procédure.

Même si l'appelant obtenait la permission d'appeler devant cette Cour sur l'un ou l'autre point, il est extrêmement improbable que cette Cour jugerait à propos d'infirmer les décisions des deux tribunaux qui se sont prononcés jusqu'ici sur les questions en litige. Mais, en plus, il ne saurait y avoir là une raison spéciale pour permettre un appel après que la plus haute cour de la province a refusé d'accorder cette permission. Si la règle *nisi* avait été maintenue, la liberté du sujet serait en jeu, et nous serions probablement d'avis que le litige soulève une question suffisamment importante; mais la règle *nisi* n'a pas été déclarée absolue; et, comme conséquence des jugements, la partie visée n'est pas menacée d'emprisonnement.

En pareil cas, dans une cause semblable qui est venue devant la Cour précisément au présent terme, nous avons été d'avis que l'intérêt de l'appelant n'était pas suffisant pour justifier notre intervention en vertu de l'article 41 de la loi de la Cour Suprême. Cette décision récente est concluante en ce qui concerne la présente requête. En vertu de l'article 41, il s'agit d'une permission spéciale d'appel; et il incombe donc à celui que veut l'obtenir de démontrer qu'il existe pour cela des raisons spéciales.

La requête sera donc rejetée avec dépens.

Motion dismissed with costs.

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* Mar. 10, 11, 12.
* June 17.

THE CROSLEY RADIO CORPORATION (PLAINTIFF) ..... APPELLANT;

AND

CANADIAN GENERAL ELECTRIC CO. LTD. (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Validity—Subject-matter—Invention.

In order validly to support a patent, not only must the art or the improvement therein be new, useful, and not anticipated by prior knowledge or prior user by others within the meaning of the *Patent Act*, but also there must be invention; one does not hold a valid

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

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subject-matter of a patent unless he shews the exercise of inventive ingenuity. Generally speaking, the question whether or not in any particular case there has been invention is one of fact and degree, depending upon practical considerations to a larger extent than upon legal interpretation. (*Riekmann* v. *Thierry*, 14 R.P.C. 105, *Burt Business Forms Ltd.* v. *Autographic Register Systems Ltd.*, [1933] Can. S.C.R. 230, at 237, 238, and other cases, cited).

In the present case, the judgment of Maclean J., President of the Exchequer Court of Canada, [1935] Ex. C.R. 190, holding that the patent in question (for a domestic refrigerator insulated door, recessed on its inner face so as to provide a hollow food space therein with suitable shelving arrangements, and without materially adding to the exterior dimensions of the refrigerator) was invalid for lack of subject-matter, was affirmed.

APPEAL by the plaintiff from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding (in an action by plaintiff for infringement) that its patent in question was invalid for lack of subject-matter. The material facts of the case are sufficiently stated in the judgment of Rinfret J. now reported. The appeal to this Court was dismissed with costs.

O. M. Biggar K.C. and *R. S. Smart K.C.* for the appellant.

W. C. Chipman K.C. and *H. K. Thompson* for the respondent.

DUFF C.J.—I concur with Mr. Justice Rinfret.

The improvement in question had, no doubt, some value in convenience and considerable value in respect of properties calculated to result in commercial success.

Everybody who bears in mind the vast number of people who live in small apartments must recognize the importance of reducing the volume of space occupied by necessary household appliances. Useful augmentation of capacity with virtually no increase of cost and relatively very little increase in the exterior dimensions of refrigerators are matters by no means without importance. The change in the form of the interior by recessing the door provides an opportunity for a very convenient rearrangement of shelves, —a convenience which would constitute a strong attraction, no doubt, to housekeepers and improve saleability. But it does not appear to me that what was done was so far from the track of probable development in refrigerator design

(1) [1935] Ex. C.R. 190.

as to amount to invention in the sense of the patent law. I cannot satisfy myself that the conception of recessing the door and thus providing increased capacity and an opportunity for a more convenient arrangement of shelving involved an apprehension of a desideratum, or a gain of great advantage by very simple means, of the kind which the courts have often recognized as affording satisfactory evidence of invention.

The appeal should be dismissed with costs.

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

RINFRET J.—It is only necessary in this case to consider the question of subject-matter.

The patent in issue relates to improvements in refrigerating units and has to do particularly with cabinet construction in combination with a cooling apparatus of a mechanical refrigerating system for providing additional food space alleged to be maintained at a temperature different from the normal temperature in the main food compartment. In the specification, the object of the alleged invention was stated to consist in replacing

> the standard door with the inwardly extending pan with a door wherein the thickness or insulating part thereof extends outwardly past the flange of the door and the inwardly extending or pan portion is annular in form so as to provide a hollow food space in line with or extending outwardly of the usual breaker strip.

The result of this construction is claimed to be

> the provision of approximately an extra cubic foot of food space without changing the dimensions of the standard refrigerator box. * * * the slight bulge on the door will in no way change the space within the kitchen or other room within which the box is designed to fit, so that any standard refrigerator door can be replaced by the door embodying the present invention without any change in the position of the box.

A feature specially referred to in the patent

> is the location of the food space at a point relative to the cooling unit whereby the temperatures maintained in this extra food space will be at a higher range than the temperature existing in the refrigerator proper.

The original patent (No. 334,900) issued on August 15th, 1933, and contained nine claims; but, on the ground that the patent was "deemed defective in that it failed to claim accurately and fully the invention disclosed" and that the "error arose from inadvertence," the appellant,

(1) [1935] Ex. C.R. 190.

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as assignee of the patentee, Mrs. Constance Lane West, of the city of Detroit, Michigan, petitioned for a reissue of the patent, which was granted on June 5th, 1934, under number 342,173.

By the grant, three new claims were added to the patent and, in addition to claim 9, the new claims are those now sued upon on the ground of their infringement by respondent.

The President of the Exchequer Court, where the trial was conducted, found that the improvement "possessed a new and useful feature * * * not to be found in any of the prior art cited"; that "there was no prior user of it"; that "it is absolutely clear that the defendant's structure infringes the plaintiff's patent"; but "that there is not subject-matter in the patent in suit.

The appellant contended before this Court that the trial judge had misdirected himself by taking an erroneous view of the meaning of the word "invention"; and that is the only point which stands to be examined in this appeal; for if it be decided against the appellant—as we think it ought to be—it is immaterial to discuss the question raised by the respondent that the re-issue was invalid for the reason that it did not meet the essential requirements of the *Patent Act*.

In its factum, the appellant described the improvement as consisting in a special type of door for a domestic refrigerator, the characteristics of which were that the inside face of the door had all around its periphery a projecting flange, as it is called, which co-operates with the edge of the door aperture in the refrigerator box to prevent the leakage of heat around the door, and that, surrounded by this flange, there is in the door a shallow recess which may be equipped with shelves on which articles to be kept cool may be stored.

More than once, in the course of the trial, the respondent admitted that if there was invention in what was described in the patent, then the respondent infringed. For that reason, the appellant abstained from adducing any evidence on the issue of infringement; and, although the respondent attempted to raise that issue before us, we think it must be held to have been abandoned.

On the other hand, while the specification rather emphasizes the importance of the slightly higher temperature in the hollow recess said to be provided by the bulging out of the door, counsel for the appellant clearly indicated at the trial that he was not pressing that particular claim. Indeed, he stated that it was "not of much importance as we find it is difficult to follow the exact course of the air in an experimental fashion, that is, to be of any great advantage," although theoretically he thought it was perfectly easy to explain.

As a consequence, the learned President did not consider that feature of the patent in his judgment; and he stated that there was

> but one substantial point for decision here, and that is whether or not there was invention in the idea of recessing the inner face of an insulated door in a domestic refrigerator so as to provide a hollow food space therein with suitable shelving arrangements, and without materially adding to the exterior dimensions of the refrigerator.

In view of the course of the trial, we do not think it is open to the appellant to pretend that the issue between the parties was not so restricted. And we will proceed to discuss the case accordingly. May it be added, moreover, that, on the evidence, this branch of the patent could hardly be supported.

In the circumstances, counsel for the appellant naturally directed the greatest part of his argument to the question of what constituted invention within the meaning of the Canadian *Patent Act;* and he laid considerable stress on the contention that the true test was that of obviousness. He referred to a number of judgments in the English courts, where the word "Obvious" was used to indicate the dividing line between an improvement held to be an invention in the patentable sense and an advance found to have been a mere workshop improvement and, therefore, not within the patentable class.

Notwithstanding the very ingenious and exhaustive argument of counsel for the appellant, we would hardly think,

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however, he would ask this Court to give a sacro-sanct meaning to the use of the word "obvious" for the purpose of discriminating between the category of improvements which ought to be regarded as being properly inventions in the legal sense and the category of those not so regarded. We would suggest that, in England, the appearance, in later years, of the word "obvious," in judgments dealing with patent matters, probably results from the fact that, under section 25 (subs. *f*) of the English *Patents and Designs Act,* a patent may be revoked upon the ground "that the invention is *obvious* and does not involve any inventive step having regard to what was known or used prior to the date of the patent." But although, perhaps, judgments under Canadian patent law may not have denied patentability to certain improvements upon the express ground that the advance over the prior art should be taken to have been obvious to the persons skilled in the art, the jurisprudence, both in the Canadian courts and in the Judicial Committee of the Privy Council, is not wanting in pronouncements conveying the same idea. It has long been laid down in our courts that, in order validly to support a patent, it was, of course, necessary that the art, or the improvement thereon, should be new, that it must be useful and that it must not have been anticipated by prior knowledge or prior user by others within the meaning of sec. 7 of the *Patent Act,* in force at the time of the issuance of the patent in suit; but that something additional was also required. It was essential that there should be invention and that one did not hold a valid subject-matter of a patent unless he showed the exercise of the inventive faculties (See: Halsbury's Laws of England, *vbis.* Patents and Inventions, no. 288); and that is to say, in the words of Lord Watson (*Thomson* v. *American Braided Wire Company* (1)), "a degree of ingenuity * * * which must have been the result of thought and experiment."

It would be idle to attempt a comprehensive definition. In certain cases, the decision must necessarily be the result of some nicety. It is a question of fact and degree (*Riek-*

(1) (1889) 6 R.P.C. 518 (H.L.)

man v. *Thierry* (1)), depending upon practical considerations to a larger extent than upon legal interpretation. Lord Moulton is quoted by Terrell on Patents (8th ed., p. 78) as stating that, generally speaking, it must be "treated as being a question of fact for the judgment of whatever tribunal has the duty of deciding."

We would refer to the judgments of this Court in: *Durable Electric Appliance Co. Ltd.* v. *Renfrew Electric Products Ltd.* (2); *Mailman* v. *Gillette* (3); *Lightning Fastener Co. Ltd.* v. *Colonial Fastener Co. Ltd.* (4); and more particularly to *Burt Business Forms Ltd.* v. *Autographic Register Systems Ltd.* (5), where the necessity of inventive ingenuity is insisted upon, and reference is made to the leading case of *Harwood* v. *Great Northern Ry. Co.* (6), and to the law as laid down by Lord Halsbury in *Morgan* v. *Windover* (7); by Romer, J., in *Wood* v. *Raphael* (8); and again by the House of Lords in the case already referred to of *Riekmann* v. *Thierry* (9)—where the Court was composed of Lord Halsbury, L.C., Lord Macnaghten, Lord Shand and Lord Davey.

In this case, applying the principle laid down in the judgments referred to and having regard to the general common knowledge of the art, we find it impossible to apply the word "invention," in the patentable sense, to the improvement disclosed in the appellant's specification; and we agree with the trial judge that the patent is invalid for lack of subject-matter. To repeat the words of Lord Tomlin in *Lightning Fastener Co. Ltd.* v. *Colonial Fastener Co. Ltd.* (10), we do not think "the inventive element necesary to constitute subject-matter is made sufficiently evident."

There could be no possible invention in the idea of putting shelves on a door. There were already in existence any number of cabinets, such as medicine cabinets, kitchen cabinets, display cabinets, and the like, including cabinets of the refrigerator class, fitted for the storage of articles.

(1) (1896) 14 R.P.C. 105, at 115 (H.L.).
(2) [1928] Can. S.C.R. 8.
(3) [1932] Can. S.C.R. 724, at 733.
(4) [1933] Can. S.C.R. 371, at 372, 374, 376.
(5) [1933] Can. S.C.R. 230, at 237, 238.
(6) (1865) 11 H.L.C. 654.
(7) (1890) 7 R.P.C. 131, at 134.
(8) (1896) 13 R.P.C. 730, at 735.
(9) (1896) 14 R.P.C. 105.
(10) (1934) 51 R.P.C. 349, at 367.

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Hollow doors with shelves or bulged out doors had already been designed. If a refrigerator manufacturer was not satisfied with his shelving arrangement, it would not require invention on his part to adopt the shelving arrangement of other article-storing cabinets. We fail to see an inventive step, in the sense indicated by the decided cases, in the fact of merely designing a recess door with shelves in the hollowing space, with the consequential result that the door will be bulged out. There was no problem in the idea, nor difficulty in the carrying out of it.

On the evidence, the trial judge expressed no surprise "that the West door did not earlier come into use." He found that mechanical refrigerators for domestic use were comparatively new articles and such structural alterations came at the time when they were likely to be expected. Before then, there was really no incentive to solve the problem, for the real demand had only recently come into existence. The modification suggested by Mrs. West undoubtedly met with some measure of success; but we do not think commercial success is an important factor in the present case, since the growing sales of the appellant's refrigerators were substantially in proportion with the total sales of mechanical refrigerators of all makes in the United States at the material periods of time.

The appellant adduced the evidence of a great number of salesmen and dealers to show the favour with which refrigerators equipped with the West door were received by them. But it is sufficient to make a perusal of that evidence to find that the features of saleability which they emphasize refer merely to the added space, or increased capacity, the easier access to the small articles stored, and the fact that the new name given to the article, "Shelvador," and the attractive ornamentation of the recess door had a distinct appeal to the housewives.

Improvements of that character do not, as a rule, fall within the class of invention. As pointed out by the trial judge, it was perhaps not unnatural that the suggestion came from a woman acting for large furnishing establishments and experienced in the art of interior decoration. The refrigerator in existence long before the West patent at Caulfield's Dairy Limited, in Toronto, may not perhaps show anticipation in the pertinent sense, but it indicates that the idea of shelves in a recess door, such as we have

in the patent in suit, is nothing more than a workshop improvement and did not involve the exercise of the inventive faculty essentially required for the grant of a monopoly.

Under the circumstances, we think the learned President was right in denying validity to the re-issued patent of the appellant, and the appeal should be dismissed with costs.

DAVIS J.—No doubt, if the patent is valid, the defendants have infringed. There is only one issue, subject-matter.

There was no constructional difficulty and the design does not appear to me to lie "so much out of the track of the former use as not naturally to suggest itself to a person turning his mind to the subject," to use the words of Lord Chelmsford, in *Penn* v. *Bibby* (1). Or, to put it in the words of Lord Shaw in *London General Omnibus Company* v. *Bonnard* (2), the design "might well have occurred to an intelligent person without any exercise of that invention which is necessary as the ground of a patent."

There is nothing of substance in the alleged difference of air currents and temperatures within the door as distinct from those in the body of the refrigerator proper. In his opening at the trial, counsel for the appellant, when asked by the trial judge whether the direction of the flow of air had anything to do with the case, said:

> It may come into it but it is not of much importance as we find it is difficult to follow the exact course of the air in an experimental fashion, that is, to be of any great advantage, but theoretically it is perfectly easy to explain.

And during the trial counsel for the appellant said:

> It is very difficult to determine with sufficient scientific accuracy to be useful exactly what the courses of currents in the refrigerator are.

I cannot find in this patent anything more than a design of domestic utility and of commercial advantage. There is not in it that "characteristic or quality the presence of which distinguishes invention from a workshop improvement," to adopt the language of Lord Tomlin (then Tomlin J.) in *Parkes* v. *Cocker* (3).

I therefore concur in the dismissal of the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Smart & Biggar.*

Solicitors for the respondent: *MacFarlane, Thompson & Littlejohn.*

(1) (1866) L.R. 2 Ch. App. 127. 127.

(2) (1920) 38 R.P.C. 1, at 15.

(3) (1929) 46 R.P.C. 241, at 248.

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* Feb. 11.
* June 17.

THE ROYAL BANK OF CANADA (DEFENDANT) ..... APPELLANT;

AND

WORKMEN'S COMPENSATION BOARD OF NOVA SCOTIA (PLAINTIFF) ..... RESPONDENT.

APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA *in banco*.

Priorities—Bank Act, R.S.C. 1927, c. 12—Security under section 88 of the Act—Subsequent lien under section 79 (2) of the Workmen's Compensation Act, R.S.N.S. 1923, c. 129—Whether Dominion and provincial statutes conflict—Direct taxation for provincial purposes—Section 92 (2) B.N.A. Act—Banking—Section 91 (15) B.N.A. Act.

The lien of the Workmen's Compensation Board, under section 79 (2) of the *Workmen's Compensation Act* takes priority over the security under section 88 of the *Bank Act*. Judgment appealed from (8 M.P.R. 482) *aff.*

Per Duff, Rinfret, Crocket and Kerwin JJ.—Although the provisions of section 88 of the *Bank Act* are provisions which strictly relate to Banking and are therefore within the competency of the Dominion Parliament under section 91 (15) of the B.N.A. Act, the Parliament, in enacting them, did not intend to remove any property, which might be assigned to a bank by way of security thereunder, from the operation of any statute by the legislature of the province, in which the property is situated, in the legitimate exercise of its power in relation to direct taxation for provincial purposes under section 92 (2) of the B.N.A. Act.—The assessment authorized by section 57 of the *Workmen's Compensation Act* is a direct tax upon the employers in each of the specified classes of industry, imposed for provincial purposes within the meaning of section 92 (2) of the B.N.A. Act. Cannon J. expressing no opinion as to whether or not such assessment is an indirect tax.

Per Davis J.—On the particular facts of this case, if the assessment and levy of these workmen's compensation dues is taxation, it is direct taxation within the province and competent to the provincial legislature.—The securities under section 88 of the *Bank Act* do not operate to transfer absolutely the ownership in the goods, but such transaction is essentially a mortgage transaction and subject to the general law of mortgages except where the statute has otherwise expressly provided. *Bank of Montreal* v. *Guaranty Silk Dyeing and Finishing Co. Ltd.* ([1934] O.R. 625) ref.

APPEAL from a judgment of the Supreme Court of Nova Scotia *in banco* (1) upon a case stated by consent under the provisions of Order 33 of the *Judicature Act* to determine the question of priority between a security under

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

(1) (1935) 8 M.P.R. 482.

section 88 of the *Bank Act* and a lien created under section 79 (2) of the *Workmen's Compensation Act.*

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

C. B. Smith K.C. for the appellant.

F. P. Varcoe K.C. for the Attorney-General of Canada.

L. A. Lovett K.C. for the respondent.

The judgment of Duff C.J. and Rinfret, Crocket and Kerwin JJ. was delivered by

CROCKET J.—This is an appeal from the judgment of the Supreme Court of Nova Scotia *in banco* on a special case stated by the parties for the opinion of the Court as to whether the respondent had the right to levy on a quantity of hardwood flooring and lumber in the possession of Annapolis Hardwood Company, Limited, in priority to a security held by the appellant thereon under s. 88 of the *Bank Act,* ch. 12, R.S.C., 1927.

The bank's security consists of an assignment, which it obtained from the Hardwood Co. on March 30, 1931. It strictly follows the form of schedule C of the *Bank Act* and purports to assign to the bank all the products of the forest and goods, wares and merchandise then owned and in the possession of the company, in consideration of an advance of $5,327 as security for the payment of a series of demand notes specified in a schedule annexed thereto aggregating the amount of the stated advance. The goods are described as "all the lumber and products thereof and special dimension hardwood," situated at five different places in Nova Scotia and at the company's mill and millyard and wharf at Annapolis Royal, and are stated to be "free from any mortgage, lien or charge thereon (except previous assignments to the bank)."

The Workmen's Compensation Board, having received notice from the Hardwood Co. on March 15, 1931, that it had entered into a logging contract with one A. S. Bent, thereafter, on April 11, 1931, assessed Bent and the company under s. 77 (1) and other relevant sections of the Nova Scotia *Workmen's Compensation Act* in the sum of

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$90 in respect of Bent's payroll for the year 1931, and later made two further assessments against them for additional sums in respect of Bent's payroll for the year 1930 as well as for the year 1931. On October 9, 1931, the Board recovered a judgment in the Supreme Court of Nova Scotia against Bent for $197.53, the amount of the assessments then outstanding against him, and $4.53 for costs, and issued execution thereon directing the sheriff to levy the sum of $206.95. Nothing presumably having been realized from the execution against Bent the Board later, on March 3, 1932, recovered another judgment against the Hardwood Co. for $243.89, the amount of the outstanding assessments against Bent and the company in respect of Bent's payrolls for the years 1930 and 1931 together with penalties and the further sum of $4.55 for costs. Execution was forthwith issued upon this judgment and on March 4, 1932, the sheriff of Annapolis levied on all the hardwood flooring in the company's mill and on all the lumber in its yard at Annapolis Royal. This levy was withdrawn on the undertaking of the bank to pay the amount due under the execution if the court should determine that the Board had the right to levy on the said flooring and lumber in priority to the bank's claim.

The special case after setting forth the facts, the essential features of which I have attempted to summarize, states:

> By section 79 (2) of the *Workmen's Compensation Act* the amount of the assessments above referred to and of the cost, if incurred, of recording a certified copy of such assessment in the registry of deeds and any judgment with respect to same, is declared to be a first lien on all the property, real, personal or mixed, used in or in connection with or produced in or by the industry, with respect to which the employer is assessed, though not owned by the employer, subject only to municipal taxes;

and that the Board under s. 79 (2) and other relevant sections of the *Workmen's Compensation Act* claims a lien in priority to the claims of the bank on the property levied upon on the ground that the said property had been

> produced in or by the industry with respect to which the employer was assessed, though not owned by the employer, subject only to municipal taxes.

The questions submitted to the court were as follows:—

> First: On the facts as hereinbefore stated does the claim of the said Board to the property levied upon take priority to the claim of the said bank?

Second: If the answer to the first question is in the affirmative, is the claim of the said Board limited to so much of the property levied upon as was actually produced by the operations of said Bent in respect of which the said assessments were made or does it extend to all property produced in or by the industry of lumbering and the manufacture of lumber and all work incidental thereto as carried on by the said Annapolis Hardwood Company, Limited?

The majority of the court, Graham, Ross and Hall JJ. answered the first question in the affirmative and held in answer to the second question that the claim of the Board extended to all the goods produced in or by the industry with respect to which the company, the employer, was assessed. Mellish and Carroll JJ. held that the first question should be answered in the negative.

While we have no doubt that the provisions of s. 88 the *Bank Act* are provisions which strictly relate to banking, and are therefore within the competency of the Dominion Parliament under s. 91 (15) B.N.A. Act, we are of opinion that in enacting them Parliament did not intend to remove any property, which might be assigned to a bank by way of security thereunder, from the operation of any statute enacted by the legislature of the province, in which the property is situated, in the legitimate exercise of its power in relation to direct taxation for provincial purposes under s. 92 (2) B.N.A. Act.

In *Canadian Pacific Railway* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1), the Judicial Committee of the Privy Council considered an appeal from a decree of the Court of Queen's Bench of the province of Quebec, which condemned the appellant company to pay a fine of $200 for failure to clean and put in good order a ditch along the right of way of the company. The railway, as all railways extending beyond the limits of the province, came within exception (*a*) of 92 (10) B.N.A. Act regarding local works and undertakings and consequently under enumerated head 29 of s. 91 B.N.A. Act, and it was contended by counsel for the appellant that no provincial legislature was competent to enforce the performance of any Act affecting the physical condition of the railway. The Board held that by the true construction of the B.N.A. Act, s. 91, ss. (29) and s. 92, ss. (10), the Dominion Parliament had the exclusive right to prescribe regulations

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

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for the construction, repair and alteration of the appellant railway, and that the provincial legislature had no power to regulate the structure of a ditch forming part of its authorized works, but that the provisions of the Municipal Code of Quebec, which prescribed the cleaning of the ditch and the removal of an obstruction which had caused inundation on neighbouring land were *intra vires* of the provincial legislature. In delivering the judgment of the Board, Lord Watson said:

> The *British North America Act,* whilst it gives the legislative control of the appellants' railway quâ railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, *inter alia,* reserved to the provincial parliament to impose direct taxation upon those portions of it which are within the province, in order to the raising of a revenue for provincial purposes.

It is admitted by the appellant that the assessment authorized by s. 57 of the *Workmen's Compensation Act,* ch. 129, R.S. of Nova Scotia, is a tax and we have no doubt that it is a direct tax upon the employers in each of the specified classes of industry, imposed for provincial purposes within the meaning of 92 (2) of the B.N.A. Act. S. 79 (2) of the provincial *Workmen's Compensation Act* provides that

> The amount of any assessment and of the cost, if incurred, of recording certified copy of such assessment in the registry of deeds, and any judgment with respect to same shall be a first lien upon all the property real, personal or mixed, used in or in connection with or produced in or by the industry with respect to which the employer is assessed, though not owned by the employer, subject only to municipal taxes, and the amount levied under execution upon any such judgment to the extent of the amount due upon such execution shall forthwith be paid by the sheriff or his deputy to the Workmen's Compensation Board.

We think that this section—79 (2)—must be regarded as an enactment properly made in relation to the direct taxation authorized by s. 57 of the provincial Act under the second enumerated head of s. 92 of the B.N.A. Act.

Section 88 of the *Bank Act* itself creates no lien, though it provides that a bank may lend money to dealers in certain products upon the security of such products in a form set forth in schedule (*c*), and that by virtue of such security the bank shall acquire the same rights and powers in

respect of such products as if it had acquired the same by virtue of a warehouse receipt. No lien results except by agreement between the bank and its customer. Section 79 (2) of the provincial *Workmen's Compensation Act* itself directly creates a lien for a public tax or charge. There is, therefore, no conflict between the federal and provincial statutes on the face of the enactments themselves, and no conflict in their operation, as disclosed in this case, unless it be that s. 88 of the *Bank Act* contemplates that no property assigned to a bank under its provisions shall be subject to provincial taxation under 92 (2) of the B.N.A. Act. We think that such is not the intendment of the federal enactment and that the provincial enactment must therefore prevail.

The appeal should be dismissed with costs.

CANNON J.—The question of the validity of the tax sought to be collected by priority over the appellant's lien was first raised before this Court. The stated case only questioned the respective rank to be given to these two claims. Confining myself strictly to that feature of the case, I would answer both questions in the affirmative and agree to the dismissal of the appeal. I do not wish to commit myself nor decide in the premises whether or not, by the cumulative effect of sections 57, 77 (1) and 79 (2) of the *Workmen's Compensation Act* of Nova Scotia it might be found that the levy or tax is an indirect one and therefore *ultra vires* of the provincial legislature.

DAVIS J.—This appeal raises a difficult question of law upon a contest between the appellant bank and the respondent Workmen's Compensation Board as to priority of their respective claims upon the lumber and products thereof of a lumbering company. The real question is whether or not the bank's security, prior as to time, taken under section 88 of the *Bank Act* (Dominion legislation), can maintain its priority in the face of the statutory lien that subsequently arose (by provincial legislation) in favour of the Workmen's Compensation Board and declared to be "a first lien upon" the property. Counsel admitted that the company was insolvent and unable to pay both claims in full.

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The facts were not in dispute and the parties agreed to refer the question upon a stated case to the Supreme Court of Nova Scotia *in banco,* pursuant to the provisions of Order XXXIII of the Rules of the Supreme Court of Nova Scotia. The majority of that Court (Mellish and Carroll JJ. dissenting) decided in favour of the claim to priority of the Workmen's Compensation Board and from their decision the court gave leave to the bank to appeal to this Court.

The competency of the Dominion Parliament to pass section 88 of the *Bank Act* is not questioned. Nor is the competency of the provincial legislature to pass the *Workmen's Compensation Act* questioned except in so far as the Act may have the effect of impairing the bank's security. It becomes necessary therefore to consider carefully the exact meaning and effect of the legislation involved in the point raised.

Dealing firstly with the position of the bank. It acquired its security (the validity of the security is in no way questioned) on March 30, 1931, under the provisions of section 88 of the *Bank Act.* That was prior in date to the first of the several assessments made by the Workmen's Compensation Board. What was the nature, then, of the security that the bank acquired? The relevant sections of the *Bank Act* are sections 88 (1), 88 (7), 86 (1) and 86 (2*a*). Briefly stated, for they are very familiar sections, they provide that a manufacturer may give security to the bank on his goods, wares and merchandise to secure the repayment of moneys loaned by the bank and "all the right and title" to such goods, wares and merchandise "vest" in the bank from the date of the acquisition thereof, subject to a proviso whereby unpaid wages for three months and unpaid purchase money under certain circumstances are made a prior charge. The legal estate passes to the bank. There is however a penalty against the bank selling until default and there is an express right to the customer, on repayment of the moneys loaned, to regain the title to the goods. This type of security is peculiar, so far as I know, to our *Bank Act* and it may be that in view of the civil law of the province of Quebec, the draftsman of the Act refrained from setting up the

English form of mortgage involving the equitable doctrines (unknown to the Quebec civil law) of redemption and foreclosure. In Quebec, the hypothecary system of the Roman law prevails. The mortgagor merely hypothecates or charges the land in favour of the mortgagee, in effect acknowledging the indebtedness as a personal obligation, but retaining the title in himself; on default, the mortgagee may recover judgment on the obligation and bring the property to sale at the hands of the sheriff and is entitled to be paid the amount of the hypothec as a preferred claim out of the proceeds of the sale.

I had occasion in *Bank of Montreal* v. *Guaranty Silk Dyeing and Finishing Co. Ltd.* (1) to consider this particular form of security and came to the conclusion, contrary to the very able argument of counsel for the bank in that case, that the security did not operate to transfer absolutely the ownership in the goods but that the transaction was essentially a mortgage transaction and subject to the general law of mortgages except where the statute has otherwise expressly provided. No appeal on this branch of that case was taken. Section 88 set up by the *Bank Act* enables manufacturers, who desire to obtain large loans from their bankers in order to carry on their industrial activities, to give to the bank a special and convenient form of security for the bank's protection in the large banking transactions necessary in the carrying on of industry throughout the country. Until the moneys are repaid, the bank is the legal owner of the goods but sale before default is prohibited and provision is made for the manufacturer regaining title upon repayment. To say that Parliament did not use language to expressly provide that the bank shall have a first lien on the goods is beside the mark. The bank acquires ownership in the goods by the statute. In the case with which we have to deal, the bank acquired ownership in the goods before any of the Workmen's Compensation Board's assessments were levied and the bank continued throughout all material times to hold such ownership. The nice question of law is whether or not the provincial legislature has the power, assuming the language of the provincial statute is clear enough to have

(1) [1934] O.R. 625, at 632.

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that effect, to undermine the bank's security by creating a first lien upon the goods in question in favour of the Workmen's Compensation Board. The conflicting views as presented to us may be summarized as follows:

The bank contends that having taken this security, the legal estate vested in it and being competent to the legislative authority of the Parliament of Canada, a province has no right to legislate to cut down the security so acquired by creating liens upon it in favour of a provincial institution. The Board, on the other hand, contends that banks when they come into a province to do business must submit to local provincial laws of a general character affecting all industries alike and that the bank cannot be regarded as exempt from provincial enactments of a general nature. The bank supports its contention upon the principle, well established, that if there is a conflict in the operation of Dominion and provincial legislation the Dominion legislation must prevail. Reliance is put upon the judgment of the Privy Council in *Attorney-General for Canada* v. *Attorney-General for British Columbia* (1), where the proposition laid down in *Grand Trunk Railway* v. *Attorney-General for Canada* (2) was restated in the following language:

> There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail.

The Board, on the other hand, relies upon the language in the *John Deere Plow case* (3), where it was said

> It is enough for present purposes to say that the province cannot legislate so as to deprive a Dominion company of its status and powers. This does not mean that these powers can be exercised in contravention of the laws of the province restricting the rights of the public in the province generally. What it does mean is that the status and powers of a Dominion company as such cannot be destroyed by provincial legislation.

and upon the language in *Bank of Toronto* v. *Lambe* (4),

> They (their Lordships) cannot see how the power of making banks contribute to the public objects of the provinces where they carry on business can interfere at all with the power of making laws on the subject of banking or with the power of incorporating banks.

The question is a difficult one but upon the best consideration that I have been able to give to it I have reached

(1) [1930] A.C. 111.
(2) [1907] A.C. 65.
(3) [1915] A.C. 330, at 341.
(4) (1887) 12 A.C. 575, at 586.

the conclusion that the goods in question, though owned by the bank subject to all the statutory rights and duties attached to the security, were property in the province of Nova Scotia

used in or in connection with or produced in or by the industry with respect to which the employer (was) assessed though not owned by the employer

and became subject to the lien of the provincial statute the same as the goods of other owners become liable to the burden of Workmen's Compensation assessments when the industry in which the goods are used or produced falls within the provisions of the *Workmen's Compensation Act*. It is a provincial measure of general application for the benefit of workmen employed in industry in the province and is not aimed at any impairment of bank securities though its operations may incidentally in certain cases have that effect. In my opinion this is not a case where there is any conflict of legislative authority. If it is possible to do so the different enactments should be construed and applied so as to give an adequate and proper place and function to each of them. When banks in this country take, as is well known they so often do, section 88 security on all the raw materials and goods in process of manufacture of a customer, and thereby accept a qualified ownership in the property used in or produced by the industry of its customer, they cannot expect to hold such property free and clear of those burdens on the industry that are of general application throughout the particular province in which the bank is doing business. Provision for compensation to workmen injured or contracting an industrial disease while engaged in industry has become a well understood public object of the provinces throughout Canada and the fact that a Dominion corporation holds the ownership in the property used or produced by an industry subjected to Workmen's Compensation legislation in the province cannot deprive the province of the right to impose contributions on the industry and to secure the payment of the assessments by a lien on the property used in or produced by the industry.

The word "industry" in sec. 79 (2) is not an apt word but it is plain from a reading of the whole statute that it is not used in the subsection with which we are con-

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cerned in the sense of an industry taken as a whole, i.e., the lumbering industry throughout the province, but in a limited sense applying to the main but particular business in connection with the operations of which the workmen are employed either directly or indirectly, for example, workmen engaged in any operations of the Annapolis Lumber Company, Limited, whether employed directly by the company or indirectly by independent contractors, such as Bent, who carry on certain operations necessarily incidental in the manufacture of the products of the company. The employer is clearly the person in respect of whose payrolls the assessment is made.

The court raised the questions whether these Workmen's Compensation assessments were not taxation and if so were they indirect taxation so far as the facts of this case are concerned? Counsel for the appellant stated that he did not think these questions were really open to him upon the stated case. In any event both counsel indicated that they did not desire this aspect of the matter to be raised, preferring a determination of the issue as to priority on the assumption that the legislation was valid except in so far as it might undermine the bank's security. Assuming, without so deciding, that the imposition of assessments under the *Workmen's Compensation Act* for the creation of a general fund available for distribution throughout the province among workmen who suffer accidents in the course of their employment, is taxation, it is inappropriate that we should dispose of the matter on any hypothetical basis that it is direct taxation, as suggested by counsel, because if the lien created by the provincial legislature to secure payment of the assessments involved in this case was beyond the competence of the provincial legislature as indirect taxation, then the bank's security is not affected by the invalid lien set up against it by the provincial Board. Whether taxation is direct or indirect must be determined in each case upon the particular facts of the case. What the Nova Scotia Act attempts to do in this case, and what is more or less the general scheme of Workmen's Compensation Acts in the different provinces, is that the business, as such, is really looked to for payment of the assessment. Take, for instance, the large pulp and paper companies in this country. Many of them, as is well known, carry on their

woods operations by aid of independent contractors who undertake the cutting and delivery of wood in different sections of the company's limits. Then the subsequent logging operations in getting the wood down to the mills by water is frequently undertaken by independent logging contractors. Hundreds of men are thus engaged in the woods and in logging operations on the rivers and streams who are virtually part and parcel of the business of the company, although strictly they are not employees of the company but of these independent contractors. Now the general scheme of workmen's compensation legislation, and in particular of the Nova Scotia Act with which we are concerned, is to make an assessment in respect of all these workmen and for convenience a woods operator on his return of his employees and a logging contractor on his return of his employees, are charged the appropriate amount for the creation and maintenance of the general fund available for accidents throughout the province. The company itself is in effect required to hold back from the payments that fall due from time to time to these independent contractors the amounts of the assessments from time to time made against them respectively by the Board but if for any reason that is not done then the company itself must pay these assessments. It is a system of collection and recovery of the assessments. The point is that the business of a particular company is regarded as liable for all workmen's compensation assessments whether imposed in respect of those workmen who may strictly be said to be its own employees or with respect to those workmen who are strictly employees of independent contractors but are virtually engaged in the essential operations of the particular company. I cannot regard that as indirect taxation, something incompetent to the legislature as outside the proper meaning to be attributed to the words, "direct taxation within the province." There are cases where upon their special facts the definition of John Stuart Mill as to the distinction between direct and indirect taxation is sufficient to determine the matter. But as a matter of law that statement of economic theory is not to be exclusively and rigidly applied in determining, upon every given state of facts, whether the tax is or is not a direct tax.

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Lord Hobhouse in *Bank of Toronto* v. *Lambe* (1), said at p. 581:

> First, is the tax a direct tax? For the argument of this question the opinions of a great many writers on political economy have been cited, and it is quite proper, or rather necessary, to have careful regard to such opinions, as has been said in previous cases before this Board. But it must not be forgotten that the question is a legal one, viz., what the words mean, as used in this statute; whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words "direct," and "indirect," according as they find that the burden of a tax abides more or less with the person who first pays it. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, the late Mr. Fawcett, who, after giving his tests of direct and indirect taxation, makes remarks to the effect that a tax may be made direct or indirect by the position of the taxpayers or by private bargains about its payment. Doubtless, such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the first payers, and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies.

In *In re A reference under the Government of Ireland Act, 1920, and Section 3 of the Finance Act (Northern Ireland,* 1934) (2), Lord Thankerton, in delivering the judgment of the Privy Council, said that in the opinion of their Lordships,

> it is the essential character of the particular tax charged that is to be regarded, and the nature of the machinery—often complicated—by which the tax is to be assessed is not of assistance except in so far as it may throw light on the general character of the tax.

If the assessment and levy of these workmen's compensation dues is taxation, I am of the opinion that on the particular facts which are before us in this case, it is direct taxation within the province and competent to the provincial legislature.

The appeal should be dismissed, with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *C. B. Smith.*

Solicitor for the respondent: *L. A. Lovett.*

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

(2) [1936] A.C. 352, at 358.

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JAMES RICHARDSON & SONS, LIMITED (PLAINTIFF) ..... APPELLANT;

AND

STANDARD MARINE INSURANCE CO., LIMITED (DEFENDANT) ..... RESPONDENT.

* Mar. 3.
* May 27.

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

Maritime law—Insurance—Wheat cargo—"Loss or damage for any external cause"—Grain deteriorated by moisture and reconditioned—Agreement as to its sale—Liability of insurer—Extent of loss—Method to be followed to determine it—Sue and labour clause—Act, 2535 C.C. —Marine Insurance Act, 1906, (Imp.) 6 Edw. VII, c. 41, s. 71.

The appellant company is a grain dealer and, in the course of its business, shipped grain cargoes from certain ports on the Great Lakes and on the St. Lawrence river to Montreal. The respondent insurance company, by a "lake cargo policy," insured on account of the appellant all shipments of grain on vessels sailing between named dates against the risk of "loss or damage from any external cause" occurring during the transportation of these cargoes. Under the terms of this floating policy, a valued marine certificate was issued on a cargo of no. 3 northern wheat valued at 65 cents per bushel. The grain was shipped at Fort William on board the "Anna C. Minch," and, after being transhipped at Kingston to a barge, was tendered to the Harbour Commissioners elevator at Montreal. After a small quantity had been taken out, the wheat was refused by the elevator authorities, as it was found that it had become "tough" due to excessive moisture and had therefore lost its classification as no. 3 northern wheat. The appellant company directed the Montreal Harbour Commission to turn and dry the grain, a process of reconditioning; and, as a result of the process, nearly all the wheat came back to a moisture content which permitted it to be again classified as no. 3 northern. As provided in the policy, the consignees or holders of the certificates of insurance gave immediate notice of the loss or damage to G.W.P. Ltd. who then reported to the underwriters, the respondent, for adjustments or settlement; and Hays S. & Co. were subsequently called in as cargo surveyors to act on behalf of the respondent. Later, the general manager of the appellant's insurance-brokerage firm, one Oldfin, suggested that bids be obtained for the wheat, and, as found by the trial judge and the majority of this Court, this was agreed to by the president of Hayes S. & Co. As a result of this arrangement, a grain broker, authorized by Oldfin, secured offers for the grain, amongst which was one from the appellant. At a meeting of all parties interested, it was agreed that the appellant's offer of the sum of $44,352.84 should be accepted. Later on, the reconditioned wheat was resold by the appellant company on a favourable market, the actual loss to the latter being $4,448.58, as contended by the respondent. The insured value of the cargo was $63,852.84. The appellant's action for "loss or damage" to the wheat cargo under the insurance policy was maintained in full by the trial judge, the

* PRESENT:—Rinfret, Cannon, Crocket, Davis and Kerwin JJ.

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amount of $18,500 claimed and awarded being the difference between the insured value of the cargo and the amount of the sale of the reconditioned wheat to the appellant. The appellate court found the loss under the policy to be $4,448.58, representing the cost of turning and drying the wheat, warehouse storage charges and loss of bushels of grain that were not retained and dried.

Held, Davis J. dissenting in part, that the amount of the damage suffered by the appellant and for which the respondent is liable under the terms of the policy is $8,544.79; Cannon J. concurring with the judgment of the trial judge and Davis J. with that of the appellate court.

Per Rinfret, Crocket and Kerwin JJ.—The amount of the damage suffered by the appellant is the sum of $18,500 as found by the trial judge; but this is not the amount for which the respondent is liable under the terms of the policy and certificate. The loss to the appellant is a partial loss; and the agreement between the parties as to the sale of the reconditioned wheat did not purport to alter the rule of law in such a case as contained in art. 2535 C.C., the provisions of which are similar to those contained in sec. 71 of the *Marine Insurance Act,* 1906, (Imp.) c. 41. In accordance with these provisions, the amount for which the respondent is liable is ascertained as follows: the insured value of the cargo was $63,852.84; the gross produce of the damaged sales was $44,352.84; the sound value of the grain on the first day of unloading at Montreal was 52½ cents per bushel; the total sound value of the cargo is therefore $51,205.08; the difference between the sound and damaged values is $6,852.24, which is 13·382 per cent of the sound value; and the percentage of the insured value of the total quantity of wheat delivered at Montreal, i.e., $63,852.84, amounts to $8,544.79, which is the loss for which the respondent is liable. Cannon J. *contra.*

Per Rinfret, Crocket and Kerwin JJ.—The "sue and labour" clause contained in the policy, which would have applied otherwise, cannot be invoked by the respondent in view of the agreement arrived at between the representatives of the parties in this case.

Per Cannon J.—Under the terms and ambit of the policy and according to the written documents of record, the findings of the trial judge should not be disturbed; and the latter held that the damage was ascertained by agreement of all interested parties for the purpose of any future litigation and that the amount so determined should be considered as the damage recoverable under the policy. The loss in this case was not, strictly speaking, a partial nor a total loss of the cargo, but rather a deterioration of the whole cargo causing damage for only part of the sum insured; and the course adopted by the parties, the conduct of the case and the proven circumstances make inapplicable the percentage rule of art. 2535 C.C. in order to reduce the sound value of the wheat: the necessary elements are lacking to establish the proportion contemplated by the Code. The "sue and labour" clause would apply only in case of disaster during the voyage or adventure and not after the arrival of the ship at destination.

Per Davis J. (dissenting in part)—The "sue and labour" clause should be applied in this case in order to determine the amount of the "loss or damage" suffered by the appellant company; and, consequently the amount which the appellant is entitled to recover is the actual loss suffered by it amounting to $4,448.58, as held by the unanimous judgment of the appellate court.

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APPEAL and CROSS-APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, modifying the judgment of the Superior Court, Loranger J., and reducing the amount of recovery in an action on a marine policy.

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

W. F. Chipman K.C. and *Russell McKenzie K.C.* for the appellant.

Lucien Beauregard K.C. for the respondent.

The judgment of Rinfret and Kerwin JJ. was delivered by

KERWIN J.—The respondent insurance company, by lake cargo policy no. 120137, insured on account of the appellant all shipments of grain to be made by the appellant on vessels sailing between named dates, against the risk of "loss or damage from any external cause" arising between certain ports on the Great Lakes and on the St. Lawrence river. Under the terms of this floating policy a valued marine certificate was issued on a cargo of no. 3 northern wheat valued at 65 cents per bushel.

The grain was shipped on board the *Anna C. Minch* at the head of the Lakes and after being transhipped at Kingston was tendered to an elevator at Montreal. After a small quantity had been taken into the elevator, it was found that the wheat had become "tough" due to excessive moisture and had therefore lost its classification as no. 3 northern wheat. The appellant (plaintiff) alleged in its declaration that the wheat had been damaged by rain or some other external cause within the meaning of the policy and

during the transhipment of the said wheat at Kingston it rained causing the said wheat to become damp and tough.

These claims were denied by the respondent.

At the trial considerable evidence was heard as to the rainfall at Kingston when the grain was being transferred to the barge *Redhead* but it also appeared that the barge had been involved in an accident causing her to leak, although it was denied that this leak caused any damage to the grain. Certificates were produced which had been

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issued under the provisions of *The Canada Grain Act*, R.S.C. (1927), c. 86, and which stated that the grain shipped from the head of the Lakes was no. 3 northern. By virtue of section 27 of that Act these certificates were *prima facie* evidence of that fact. The appellant also led evidence by officials who had inspected and tested the grain which confirmed the grade stated in the certificates. The efforts of the respondent on this point were directed to showing that the wheat must have been tough when it started on its voyage, and that it was impossible for a sufficient quantity of rain to have damaged the grain in order to account for the difference in moisture contents at the head of the Lakes and at Montreal. On that branch of the case the learned trial judge found that the wheat when loaded was no. 3 northern and that it had been damaged while in transit through "an external cause." The Court of King's Bench (appeal side) agreed with that finding and a careful examination of the evidence leads me to the same conclusion. The respondent's cross-appeal should therefore be dismissed with costs.

At the trial the appellant was successful in obtaining judgment for the full amount of the damages claimed by it, but the Court of King's Bench reduced this amount considerably for reasons shortly to be explained.

The certificate of insurance provided that, in case of loss or damage, the consignees or holders of the certificates should give immediate notice to G. W. Price Limited of Montreal "who will report to the underwriters for adjustments and/or settlement." This was done and Hayes, Stuart & Company Limited were called in as cargo surveyors to act on behalf of the respondent underwriters. Captain Hayes, the president of Hayes, Stuart & Company Limited, called as a witness for the respondent, testified that he was notified by Mr. Barclay of the Price Company that the barge *Redhead* had some damaged cargo. This was on September 3rd, 1931, and from the information he then had, Captain Hayes understood that only a small quantity of grain, which he saw and which he estimated at 125 bushels, was in question. On September 8 or 9, he learned that a claim was being made by the appellant that all the grain had been damaged. He took the position that the loss could not have been caused by any external cause,

and that therefore, his principal, the respondent in this appeal, could not be liable.

The appellant's insurance broker was Commercial Insurance Agency Limited and its general manager, L. J. Oldfin, suggested that bids be obtained for the wheat and the trial judge found that this was agreed to by Captain Hayes. It is true that in giving evidence, Captain Hayes did say, when being examined by counsel for the respondent:

> This cargo was in the hands of James Richardson, the consignee: the cargo as far as I was concerned never left their possession. They were the owners of the cargo. Mr. Oldfin then, in course of time, telephoned that we should call for bids in order to find out what the market value of this grain was. They owned the cargo, they have a perfect right to call for bids for their own property.

However, the next question and answer are important as showing that the position he adopted in the witness box was not the same as that which he indicated to Mr. Oldfin at the time in question.

> Q. What did you say to that?
>
> A. As far as I was concerned and the underwriters I was quite agreeable, without prejudice to the underwriters' interest, and Mr. Oldfin calling for bids.

As a result of this arrangement, Mr. Oldfin authorized a grain broker, Joseph A. Byrne, to endeavour to secure offers for the wheat. After Mr. Byrne had secured offers, among which was one from the appellant, a meeting took place between Oldfin, Bryne and Eric Crocker, an officer or employee of Hayes, Stuart & Company Limited. Mr. Crocker attended as Captain Hayes was not available at the time. At that meeting it was agreed that the appellant's offer should be accepted, and this is borne out by two letters of September 29th, 1931, written by Mr. Oldfin to Hayes, Stuart & Company Limited, and the respondent respectively. These letters are important and are as follows:

EXHIBIT P. 8

Attention Mr. Crocker. Sept. 29, 1931.
Messrs. HAYES, STUART & Co. LIMITED,
Marine Surveyors,
410 St. Nicholas street,
Montreal.

Gentlemen:— *Re* Barge Read Head
Ex Anna C. Minch

We confirm conversation of yesterday in our office with Mr. Joseph Byrne, grain broker, and yourself, regarding the disposition of 98,099 bus. tf. no. 3 northern Manitoba wheat unloaded at Montreal.

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As authorized by you, we notified Messrs. James Richardson & Sons Limited, Winnipeg, that their bid was accepted for account of whom it may concern, without prejudice, on the basis of 46¼ cents per bushel C.I.F. Montreal, as this was the highest tender received by Mr. Byrne. Two other bids were received, one from Messrs. Turgeon Ltd. at 45 cents with a contingent warranty that he would only take delivery of 5,000 or 10,000 bushel lots at the rate of 20,000 bus. weekly; and one other bid from Toronto Elevators Limited, Toronto, which we understand was equal to about 42½ cents per bushel.

You will no doubt recall from Mr. Byrne's conversation, that it was with extreme difficulty that he was able to get any bids whatsoever on this wheat. Exporters stated that no demand was available for this grade of wheat, and from a domestic consumption viewpoint it would have to be carried for some time before it could be finally disposed of, and the carrying charges would probably amount to considerable. We are of the opinion that the tender put forward by Messrs. Richardson & Sons Limited is a very generous one.

Yours very truly,

W. General Manager.

EXHIBIT P. 7

Sept. 29, 1931.

Attention Mr. Owan, loss manager.
STANDARD MARINE INSURANCE CO. LIMITED,
71 William street,
New York City.

Gentlemen:—

Re Barge "Readhead"
Ex. "Anna C. Winch"

James Richardson & Sons Limited.

We confirm our telephone conversation of yesterday, and the writer did not call you back inasmuch as we had been in communication with your surveyor here, Mr. Crocker, representing Messrs. Hayes, Stuart & Co. Ltd., and *he advised us he had received a wire from you asking if he would recommend that Richardsons' bid be accepted, on account of it being the highest tender received.*

We had a meeting in our office, with Mr. Crocker, Mr. Joseph Byrne, grain broker, and the writer, and we are enclosing herewith copy of letter which we have to-day addressed to Messrs. Hayes, Stuart & Co. Ltd. on your behalf, for your records. We feel quite sure that this bid is a very good one, and inasmuch as the grain is sold, we trust to be able to get this claim cleared away as quickly as possible. Captain Hayes is expected back in the city to-morrow, and the writer will follow up with him the whole case, and trust that we will be able to assist him in obtaining the necessary information so he can recommend payment of our clients' claim, which we are of opinion is quite just.

Yours very truly,

W. General Manager.

Encl.

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It appears to me that any question that might arise as to what had occurred is set at rest by Captain Hayes' report to the respondent in which it is stated:

> The consignee requested the underwriters agreement to call for bids on the entire amount of 98,099 bushels to be sold for the benefit of whom it may concern. This was agreed to by underwriters without prejudice.
>
> Most favourable bid received from Messrs. James Richardson & Sons, Limited, Winnipeg, 46¼ cents less ¼ cent brokerage commission per bushel, and acceptance of same agreed to, on behalf of whom it may concern, and without prejudice as to underwriters' liability. Copy of confirmation received from consignee's representative.

It was apparently thought in the Court of King's Bench that the appellant was endeavouring to prove some custom, but a perusal of the evidence has satisfied me that, throughout, the appellant relied upon this definite arrangement, and that the evidence as to any custom was introduced merely to show that what was done here was common practice, although Captain Hayes testified that it was usual only when liability was admitted. I agree with the learned trial judge that the arrangement alleged by the appellant was in fact made with Hayes, Stuart & Company Limited, the respondent's surveyor. And in my opinion, its authority was sufficient for that purpose. It was not suggested by the respondent in its factum or in argument that, if the arrangement had been made, the surveyor had not a mandate, to agree on behalf of the respondent insurance company.

In any event, the letter of September 29/31 from Mr. Oldfin to the respondent (exhibit P-7), and particularly the part italicized shows that the question of accepting the appellant's offer for the damaged grain has been a matter of discussion with the United States head office of the respondent company. Mr. Oldfin testified that this letter and exhibit P-8 were correct reports of what had transpired. To neither letter was any reply ever sent, so that if there could be any doubt as to the antecedent authority of Hayes, Stuart & Company, Limited, the respondent must be taken to have adopted the actions of their surveyor.

It was contended that the appellant could not sell to itself, but whether the transactions could be called a sale or by any other name, it did serve to fix the value of the damaged grain. As a matter of fact, the appellant, by having the elevator company turn and dry the wheat,

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secured a greatly increased price for it when they ultimately sold, and it is urged that as the appellant was bound by the "sue and labour" clause of the policy to do all it could to minimize the damage, it would have to bring into the account the price thus secured. Undoubtedly, the "sue and labour" clause would have applied if it had not been for the agreement between the representatives of the parties, but in view of that agreement, I cannot see how the provisions of that clause may be invoked by the respondent. What would have been the attitude of the respondent in case the highest bidder for the damaged grain had been a third party, or in case the appellant had sold the re-conditioned wheat for very much less than the offer it made and the expense of turning and drying? No doubt under the latter circumstances, the respondent would have objected strenuously to any claim for extra loss after the value of the damaged grain had been fixed in the manner indicated.

The Court of King's Bench, considering that the appellant was alleging a custom under the circumstances to call for bids for the damaged grain, determined that no such custom had been proved. They therefore took into account the amount for which the appellant ultimately sold the re-conditioned grain and found the loss under the policy to be $4,448.58. For the reasons already indicated, I must respectfully disagree.

The amount of the damage, therefore, suffered by the appellant is the sum of $18,500 as found by the trial judge. However, in my opinion, this is not the amount for which the respondent is liable under the terms of the policy and certificate. This was a partial loss and according to article 2535 of the Quebec Civil Code:

> The amount for which the insurer is liable on a partial loss is ascertained by comparing the gross produce of the damaged sales with the gross produce of the sound sales and applying the percentage of difference to the value of the goods as specified in the policy, or established in the manner provided for by the last preceding article.

The agreement did not purport to alter this rule of law.

Article 2535 C.C. is similar to section 71 of the *Marine Insurance Act*, 1906 (Imp.) 6 Edw. VII, c. 41, and in accordance with these provisions the amount for which the respondent is liable is ascertained as follows: The insured value of the cargo was $63,852.84. According to appel-

lant's exhibit, P. 4 (which, for this purpose, is accepted by the respondent in its factum) the gross produce of the damaged sales was $44,352.84. The sound value of the grain on September 1st, 1931, the first day of unloading at Montreal, was 52⅛ cents per bushel. (With this figure the respondent agrees although in its factum it is erroneously stated to be the price on September 2nd). The total sound value of the cargo is therefore $51,205.08. The difference between the sound and damaged values is $6,852.24 which is 13·382% of the sound value. This percentage of the insured value of the total quantity of wheat delivered at Montreal $63,852.84 amounts to $8,544.79 which is the loss for which the respondent is liable.

For the judgment *a quo* I would substitute a declaration that the appellant is entitled to an indemnity of $8,544.79 which is totally compensated for by the sum of $11,938.42, admittedly owing by the appellant to respondent.

As the respondent disputed liability for any amount, the appellant is entitled to costs in the Superior Court. Justice would be done, in my opinion, if the respondent be given the costs of the appeal to the Court of King's Bench, and the appellant the costs of the appeal and, as already indicated, the costs of the cross-appeal, to this Court.

CANNON J.—The plaintiff-appellant have brought before this Court a judgment of the Court of King's Bench for the province of Quebec modifying a judgment of the Superior Court in their favour by reducing the recovery, under a marine insurance policy, from $18,500 to $4,448.58, which latter amount was declared compensated. The trial judgment assessed the damages to a grain cargo as it was determined by the parties on its arrival at Montreal, while the Court of King's Bench took the view that only the ultimate loss to the appellant had to be considered.

Both courts were unanimous in finding that the loss or damage came from an external cause and that the respondents were liable under the terms of the policy. This liability has been strenuously denied throughout; and even before us, in his factum, the respondent has reviewed all the facts in order to show that the grain must have been of inferior grade when first placed on board. This Court took the view, however, that these findings could not be

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challenged any longer; and the only question before us is the following: In point of time, under the terms of the policy, when and how was the damage to this cargo to be ascertained?

The respondent issued an open marine insurance policy by which the appellants' goods were insured on board vessels, boats

at and from ports and places to ports and places on a lawful and regular route and voyage, for the several amounts, and at the rates as hereon indorsed, subject to condition of this policy, or of any contract proposition covered by this policy, according to their true intent and meaning.

Beginning the *adventure* upon the said property from and immediately following the loading thereof at the port or place named in the endorsement, and so *shall continue and endure until the same shall arrive and be safely landed at the port of destination and not to exceed forty-eight hours from the time of arrival.*

Touching the adventures and perils which this company is contented to bear and take upon itself, they are of the lakes, rivers, canals, railroads, fires, jettisons, and all other perils or misfortunes that have or shall come to the hurt, detriment, or damage of the said property or any part thereof, excepting all perils, losses or misfortunes arising from the want of ordinary care and skill in loading and stowing the cargo of, or in navigating the said vessel, from theft, barratry or robbery, or other legally excluded causes. And in case of loss or misfortune, it shall be lawful and necessary to and for the insured or insurer, their agents, factors, servants, and assigns, to sue, labour and travel for, in and about the defense, safeguard and recovery of the said goods and merchandise, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of abandonment nor as affirming or denying any liability under this policy, but such acts shall be considered as done for the benefit of all concerned, without prejudice to the rights of either party; to the charges whereof the said company will contribute in such proportion as the sum herein insured bears to the whole value of the property so insured. Moneys and bullion, promissory notes, and other evidences of debt, books of accounts, written securities, deeds, or other evidences of title to property of any kind, are not covered by this policy unless expressly defined as so insured.

* * *

And in case of loss or damage to the property hereby insured, this company, its agent or representative at or nearest the first port of discharge shall have prompt notice of same, and shall have every opportunity and facility for ascertaining the cause, extent and amount of damage, by personal inspection, appraisal, or sale of the damaged property.

Clause 10 of the schedule attached to the policy is to the effect that:

It is hereby specially understood and agreed that risks on grain while in elevators are in no case to be covered hereunder.

Under clause 12, the policy includes

the risk of winter storage at port of destination after the close of navigation and during the season of navigation, when required * * * such risks to be held covered until discharge at destination.

Clause 14:

14. It is understood and agreed that shipments insured hereunder are held covered *until discharged from vessel* for a period not exceeding eighteen (18) days after arrival. After seventy-two (72) hours an additional premium to be charged *pro rata* of the fifteen (15) day tariff rate as provided for under rate tariff.

Under this policy, the appellant shipped, on or about the 4th day of July, 1931, a cargo of no. 3 northern Manitoba wheat which was transhipped at the port of Kingston and was ultimately tendered to the Harbour Commissioners' elevator at Montreal, who refused it, on the ground that the wheat was out of condition, or had become "tough" after contact with water.

In my opinion, the risk incurred by the respondent was limited to the voyage; and the condition of the cargo had to be ascertained when it arrived at its destination. Was it, or was it not, at that time, in the same condition, or of the same grade, as when it was loaded at Fort William and its value fixed at $0.65 a bushel?

This must be answered in the negative. The parties, therefore, proceeded to determine the extent of the damages to the cargo. The appellants' insurance brokers were instructed to take up the matter; and the appellants eventually placed a valuation, or a bid of 46¼ cents with a grain broker, Mr. J. A. Byrne. The matter of investigating the loss and of assessing this damage has been placed by the insurance company respondent in the hands of Hayes, Stuart & Co. of Montreal. The insurance broker, Mr. Oldfin, states that these people represented the respondent company and he wrote the respondent, under date September 29th, 1931:

Sept. 29th, 1931

STANDARD MARINE INSURANCE CO. LIMITED,
Attention Mr. Owen, loss manager,
71 William street,
New York city.
Gentlemen:—

Re Barge "Readhead"
Ex "Anna C. Minch"
James Richardson & Sons Limited.

We confirm our telephone conversation of yesterday, and the writer did not call you back inasmuch as we had been in communication with your surveyor here, Mr. Crocker, representing Messrs. Hayes, Stuart & Co. Ltd., and he advised us he had received a wire from you asking if

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he would recommend that Richardsons' bid be accepted, on account of it being the highest tender received.

We had a meeting in our office, with Mr. Crocker, Mr. Joseph Byrne, grain broker, and the writer, and we are enclosing herewith copy of letter which we have to-day addressed to Messrs. Hayes, Stuart & Co. Ltd., on your behalf, for your records. We feel quite sure that this bid is a very good one, and inasmuch as the grain is sold, we trust to be able to get this claim cleared away as quickly as possible. Captain Hayes is expected back in the city to-morrow, and the writer will follow up with him the whole case, and trust that we will be able to assist him in obtaining the necessary information so he can recommend payment of our clients' claim, which we are of opinion is quite just.

He also enclosed copy of a letter addressed by him on the same date to Hayes, Stuart & Co. Limited:

Gentlemen:—

Re Barge "Redhead"
Ex "Anna C. Minch"

We confirm conversation of yesterday in our office with Mr. Joseph Byrne, grain broker, and yourself, regarding the disposition of 98,099 bus. Tf. no. 3 northern Manitoba wheat unloaded at Montreal.

As authorized by you, we notified Messrs. James Richardson & Sons Limited, Winnipeg, that their bid was accepted for account of whom it may concern, without prejudice, on the basis of 46¼ cents per bushel c.i.f. Montreal, as this was the highest tender received by Mr. Byrne. Two other bids were received, one from Messrs. Turgeon Ltd. of 45 cents with a contingent warranty that he would only take delivery of 5,000 or 10,000 bushel lots at the rate of 20,000 bus. weekly; and one other bid from Toronto Elevators Limited, Toronto, which we understand was equal to about 42½ cents per bushel.

You will no doubt recall from Mr. Byrne's conversation, that it was with extreme difficulty that he was able to get any bids whatsoever on this wheat; exporters stated that no demand was available for this grade of wheat, and from a domestic consumption viewpoint it would have to be carried for some time before it could be finally disposed of, and the carrying charges would probably amount to considerable. We are of the opinion that the tender put forward by Messrs. Richardson & Sons Limited is a very generous one.

Byrne, the grain broker, says:

A. I was approached by two parties; one was Mr. Crocker and the other representing the underwriters, as I understand, and Mr. Oldfin of the Commercial Insurance Agency. They asked me to canvas the trade and to see what price I could get for the wheat, not to make ready the sale of it, but to give them the figures when I would finally get my last figures in. These figures I obtained after working a few days on it. I don't just remember how many days, but the prices ranged from 43·167 to 45 and ¾ c.i.f., Montreal.

Q. How many bids did you get, and from whom?

A. I had four bids altogether. I had approached nine or ten different buyers. Not every buyer can handle that quantity of wheat and pay for it, so I approached the mills and they would not make a bid of any kind. I went to Mr. Turgeon and he bid, and he bid me 43 cents to be taken at his call, five or ten thousand bushels weekly or semi-monthly, he to pay all the charges until he would take final delivery.

Another firm was the A. N. Brown Grain Company. They offered me 45 and ¾, and I had the Toronto Elevators. They offered me 11 cents under the October option, and the October option at that time was 54. That would make a price of 43 cents. Those were the only three offers I could get out of the market.

Q. What was the best offer you got?

A. The best offer I had in Montreal was 45 and ¾.

Q. From whom did you receive that?

A. The A. N. Brown Grain Company.

Q. Did you accept that offer?

A. No, we did not accept that offer.

Q. What was the offer you accepted?

A. 46 and ¼ cents.

Q. That was the highest bid you received?

A. That was the highest bid I received.

Q. Were you in a position to sell this grain to anybody?

A. I was not in a position to sell it without first communicating with Mr. Crocker and Mr. Oldfin, the underwriters and the insurance agents.

Q. And that was the best offer you obtained?

A. That was the best figure I was able to obtain.

Q. Did you report that back to Mr. Crocker or to the representative of the Hayes Stuart Company?

A. I reported to both of them.

Q. And to Mr. Oldfin?

A. Yes.

William A. Barclay, average adjuster, manager of the claims department of G. U. Price Limited, who had placed this insurance, testifies that when, on September 9th, he was informed that quite a serious damage had been found in the cargo of the barge and that the elevator had refused to accept it as no. 3 northern and that it was held what they called "I.P." (to preserve its identity), he

advised Captain Hayes and called the respondent, in New York, over long distance; told them what I had been advised and told them that Captain Hayes was looking after it.

Q. Captain Hayes would be then acting as surveyor for the Standard Marine Insurance?

A. Yes.

He further states that he got in touch with Captain Hayes with the object "to report to the Standard Marine."

Captain Hayes himself, when examined by the respondent, testifies that his duties as surveyor consisted, on behalf of the underwriters, to look after all sorts of claims in connection with cargoes. He confirms that he was advised by Mr. Barclay, of G. U. Price Limited, that the barge had some damage at its cargo. And here is what he says:

Q. Well, now, was there any discussion between you and Mr. Oldfin in connection with the disposal of this cargo?

A. This cargo was in the hands of James Richardson, the consignee; the cargo as far as I was concerned never left their possession. They were

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the owners of the cargo. Mr. Oldfin then, in course of time, telephoned that we should call for bids in order to find out what the market value of this grain was. They owned the cargo, they have a perfect right to call for bids for their own property.

Q. What did you say to that?

A. As far as I was concerned and the underwriters, I was quite agreeable, without prejudice to the underwriters' interest, and Mr. Oldfin calling for bids.

And he points out clearly that the object of asking for bids was

to ascertain what the market price was for this damaged grain in order that he could then ascertain what the extent of the claim was if the underwriters were liable.

Crocker, who represented Captain Hayes when he went over to Mr. Oldfin's office to meet Mr. Byrne, said that he was agreeable to accept the highest bid of 46¼ cents per bushel, on condition there was no acknowledgment of liability on the part of the underwriters and that he would report to Captain Hayes.

The latter's written report of his survey says that he was acting at the request of the respondent and on its behalf when he attended on board the barge *Red Head* on September 3rd, 1931, in order to ascertain as to the nature and extent of the damage to this cargo of grain.

Hayes also reported that the consignees requested the underwriters' agreement to call for bids on the entire amount of 98,099 bushels to be sold for the benefit of whom it may concern. This was agreed to by underwriters without prejudice; and he enclosed a copy of the above quoted letter of 29th September, 1931, from Mr. Oldfin to the insurance company.

A careful study of the evidence and of the correspondence exchanged justifies the conclusion of the learned trial judge that, in order to assess the damage to the grain at the end of the voyage, all parties interested, under reserve of the determination of the question whether or not the damage had come from an external cause or from an inherent defect in the grain, ascertained what was the best obtainable price for the cargo as it then stood at the end of the voyage or adventure. I do not attach much importance to the technical objection that no sale could take place because the highest bid, which was accepted, came from the appellant. If any of the other three tenders had been accepted coming from outside, a sale would have taken

place. The appellants, by tendering 46¼ cents a bushel in reality figured out the amount of their claim to less than it would have been if they had sold the damaged grain to the other tenderers. When this figure was accepted by their Montreal representative, Captain Hayes, the respondent determined, for the purposes of this case, the quantum of damages suffered during the voyage and covered by the policy. It was never intended that the future fate or condition of the grain, after it was landed, should affect the rights or liability of either party under the policy. If the grain had further deteriorated after landing, the appellant would have had no recourse against the respondent, whose liability was limited to damages by external cause during the voyage.

The "sue and labour" clause relied upon by the Court of King's Bench applies during the existence of the risk, which is strictly limited, and endures until safely landed at the port of destination, and is "not to exceed forty-"eight hours from the time of arrival." After the cargo reached Montreal, nothing useful under the policy could be done for the defence, safeguard or recovery of the goods. The acts of the insured or insurers under that clause are confined to the recovering, saving and preserving the property in case of *disaster* during the voyage or adventure. There is no question of recovery after the arrival and assessment of damages.

With the terms and ambit of the policy, and the written documents of record, I cannot see how we could possibly disturb the findings of the learned trial judge that the damage was ascertained by agreement of all interested parties for the purpose of any future litigation, and that the amount so determined must be considered as the damage recoverable under the policy, if the other conditions thereof are complied with.

The Court of King's Bench gave to plaintiff what they never sued for. The declaration does not mention the disbursements made after the settlement, to recondition the wheat. These are not recoverable as damages but only if and when the "sue and labour" clause is applicable and invoked by the insured to make the insurer contribute to the expense incurred in such recovery—at a time and

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place within the scope of the policy, that inures to the benefit of the insurer. Nothing of the sort was alleged by the appellant.

Now as to the application of article 2535 C.C.

The issue of the certificate by the insurer fixed the value of the cargo at 65 cents per bushel. What was the effect of the issue of this certificate on the policy? Was it valued or unvalued?

According to Halsbury's Laws of England, 2nd ed. vbo. *Marine Insurance.* No. 316.

> A policy may be either valued or unvalued.
>
> A valued policy is one which specifies the agreed value of the subject-matter insured: an unvalued or, as it is frequently called, an open policy is one which does not specify the value of the subject-matter but, subject to the limit of the sum insured, leaves it to be subsequently ascertained.
>
> * * *
>
> The difference in legal effect between the two policies is that in the case of an unvalued policy the value of the subject-matter insured is not admitted but has to be subsequently ascertained, whereas in the case of a valued policy, unless it be voidable on the ground of fraud or for some other reason, the value fixed by the policy is as between the insurer and assured conclusive of the value of the subject intended to be insured.

Dalloz, Répertoire de Législation, vbo. Droit Maritime, says:

> 1722. En principe, l'évaluation des choses assurées est * * * fixée par la police * * *
>
> 1723. L'évaluation de la chose assurée, dans la police, a pour but d'éviter les débats relatifs à la valeur de cette chose. Elle ne produit cependant pas toujours ce résultat. En effet, l'évaluation donnée par la police a une portée, une efficacité plus ou moins grandes, suivant les conditions dans lesquelles elle a été faite. Souvent elle n'a d'effet qu'à l'égard de l'assuré; il en est ainsi, notamment, lorsque l'estimation des objets se présente sous la forme d'une simple indication de valeur et qu'elle émane de l'assuré seul, sans aucune adhésion ou acceptation de l'assureur. En pareil cas, l'évaluation oblige l'assuré en ce qu'elle fixe un maximum que ses prétentions ne peuvent jamais dépasser; mais l'assureur peut toujours exiger de lui qu'il prouve l'exactitude de sa réclamation. La simple déclaration de valeur ne change donc pas les règles sur la charge de la preuve, et les modes indiqués par l'art. 339 doivent toujours être employés (Trib. Marseille, 31 août 1866, Recueil de Marseille, 1866. 1.293; de Valroger, t. 3, no. 1109). Au contraire, lorsque l'estimation est présentée dans la police comme *valeur agréée* ou *valeur convenue,* les parties sont liées réciproquement par la convention synallagmatique, qui résulte de leur accord sur la valeur de la chose assurée; l'assureur, en acceptant cette évaluation, a, par là même, dispensé l'assuré de justifier de son exactitude, et ce serait à lui, s'il prétendait que la valeur a été exagérée, qu'incomberait la preuve de l'exagération. Cette clause *valeur agréée* ou *convenue de gré à gré,* ou toute autre clause équivalente, a donc pour effet de transporter la charge de la preuve de l'assuré à l'assureur.

Il a été jugé, en conséquence, que, lorsque l'estimation portée au contrat d'assurance a été agréée par les assureurs et qu'ensuite ils opposent à la demande en validité du délaissement une prétendue exagération de la valeur, c'est à eux qu'il incombe d'en faire la preuve (Rouen, 2 juin 1870, aff. *Lloyd havrais,* D.P. 71.2.125, et sur pourvoi, Req. 20 fév. 1872, D.P. 72.1.250) et l'estimation des objets assurés, agréée entre les parties et contenue soit dans la police, soit dans un avenant, dispense l'assuré de toute preuve quant à la valeur des marchandises, même dans le cas où une clause imprimée de la police stipulerait que, nonobstant toute valeur agréée, les assureurs peuvent toujours demander la justification des valeurs réelles, et réduire, en cas d'exagération, la somme assurée (Req. 12 juin 1876, Benecke, D.P. 77.1.193). Cette dernière décision rejette ainsi la clause spéciale introduite dans la formule imprimée de la police d'assurance sur facultés, arrêtée en 1873 dans un congrès d'assureurs et connue sous le nom de *police française,* d'après laquelle "nonobstant toute valeur agréée, les assureurs peuvent toujours demander la justification des valeurs réelles, et réduire, en cas d'exagération la somme assurée * * * disposition qui avait pour but évident de laisser le fardeau de la preuve à la charge de l'assuré, malgré la déclaration de *valeur agréée* contenue dans la police. Il y aurait là, on le conçoit, une source de graves difficultés. L'intention évidente des parties en employant ces mots *valeur agréée* est de dispenser l'assuré de prouver la valeur des marchandises. S'il en était autrement, l'expression *valeur agréée* serait synonyme de *valeur déclarée,* ce qui est inadmissible.

The certificate dated Winnipeg, July 6th, 1931, is for $64,215 or on 98,792·20 bushels no. three (3) northern wheat valued as at sum insured of 65 cents per bushel shipped on board the *Anna C. Minch* sailing July 4th, 1931, at and from Fort William and Port Arthur to Montreal via Kingston, Ont., and is signed by the respondent and countersigned by Commercial Insurance Agency Ltd. and adds: "Full lake conditions. Average waived."

This is not, strictly speaking, a partial nor a total loss of the cargo but rather a deterioration of the whole cargo causing damage for only part of the sum insured.

Therefore, there was on board no sound wheat to be sold. There was no possibility, as required by article 2535 C.C., of ascertaining the gross produce of the sound sales to compare them with the gross produce of the damaged sales.

We must, therefore, in view of the peculiar circumstances of the case and the conduct of the parties, find:

1. The parties agreed, by the certificate of insurance, to value the goods at 65 cents to all intents and purposes and they acted on that basis;

2. The open policy, when the certificate issued, became a valued policy—and the parties accepted 0.65 a bushel as the value of the goods to the shipper if it reached destination in sound condition;

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3. The respondent pleaded and tried to prove that the wheat was overvalued because this cargo when loaded was not number three northern wheat; in this he has failed before all the courts. The value set by both parties as being that of sound no. 3 Manitoba wheat therefore, for the purposes of this litigation, is and must remain 0.65 a bushel.

4. Even if we could consider what was the price of sound no. 3 northern Manitoba on the 2nd of September, 1931, on the Montreal market, to satisfy the exigencies of article 2535 C.C., the evidence of record is not satisfactory being based on the telegram D12, which is not definite and states that the price quoted, $51\frac{3}{4}$ cents, might vary in Montreal to some extent. The evidence of Gratton, heard as respondent's witness, shows how complicated is the operation of fixing what was the value of sound no. 3 Manitoba northern when this cargo reached Montreal, and, also proves the wisdom of both the insured and insurer in agreeing to a valuation of this particular grain at a fixed price.

Si la totalité a été frappée d'avaries, on ne peut espérer y trouver un terme de comparaison. Il n'y aura donc d'autre parti à prendre que de faire déclarer par des experts, ce qu'ils pensent que pourraient être vendus les objets assurés, s'ils étaient restés dans l'état constaté par des factures et autres documents. Pardessus. Droit commercial, no. 858.

This, as stated above, has not been done in the premises. Moreover, as Pardessus remarks,

Il faut en revenir au principe sur l'assurance, savoir: que la valeur qu'avaient les choses, à leur départ, ou qui leur a été donnée par la police * * * est la seule mesure d'après laquelle l'indemnité doive être payée par l'assureur. Or, souvent les marchandises, au lieu de leur arrivée, valent beaucoup plus qu'à leur départ; il peut se faire aussi que, par l'effet de circonstances fréquentes dans le commerce, elles valent beaucoup moins. Ces chances ne peuvent influer sur le sort de l'assureur * * * Tout cela est la conséquence du principe qu'entre l'assureur et l'assuré, le règlement des avaries doit toujours avoir pour base le capital évalué dans la police, ou à défaut d'évaluation de ce capital, la valeur réelle au lieu de l'assurance.

This agrees with "Elridge on Marine Policies" (1924), p. 204 to 206, where he comments the 1906 English *Insurance Act*, which lays down certain rules, somewhat similar to our article, which apply, "subject to any express provisions in the policy." He says: "the loss must be estimated quite irrespective of the rise or fall at the port of destination," and he quoted Lord Mansfield in *Lewis* v. *Rucker*. (1)

(1) (1761) 2 Burr. 1167.

The defendant underwriter undertakes the proportion of the difference between sound and damaged at the port of delivery, and pays that proportion upon the value of the goods specified in the policy, and has no regard to the price in money which either the sound or the damaged goods bore in the port of delivery. He says the proportion of the difference is equally the rule, whether the goods come to a rising or a falling market. For instance, suppose the value in the policy 30 (pounds): they are damaged but sell for 40 (pounds): if they were sound they would have sold for 50 (pounds)—the difference is a fifth: the insurer, then, must pay a fifth of the prime cost, or value in the policy—that is, 6 (pounds). *E. converso,* if they come to a losing market and sell for 10 (pounds) being damaged, but would have sold for 20 (pounds) if sound, the difference is one-half: the insurer must pay half the prime cost, or value on the policy—that is, 15 (pounds).

The value of goods adopted as a basis for ascertaining the loss is the valuation in the policy if the policy be a valued one.

In this case, in the absence of sound sales or of the evidence of what sound sales would have fetched on the 28th of September, date of the unsound sale alleged and proven, we must, therefore, take the valuation agreed upon by the parties and deduct therefrom the value of the injured grain delivered. This would confirm, on this particular point of the value of the sound cargo, the view of the trial judge and of all the judges in appeal, who have agreed in taking first the fixed value of the cargo in order to determine the depreciation of goods caused by the damage.

The certificate has the words: "Average waived." Do they refer to a general average or particular average loss? The record does not disclose a sufficient answer. However, it may explain the meaning of a part of Captain Hayes' testimony:

Q. And you established that claim by looking at the value of that policy and subtracting from it the amount of the salvage: is it not what you do?

Witness: It is absolutely wrong.

Q. What do you do?

A. This low grade insurance is settled, it is customary to settle it on a *salvage basis* and not on a P.A. basis. It is customary. I am not saying that it is right.

The course adopted by the parties, the conduct of the case and the proven circumstances seem to make it impossible for us to adopt the subsidiary point raised here by the respondent, pressing for the application of the percentage rule of art. 2535 C.C. in order to reduce the sound value of the wheat. The necessary elements are lacking to establish the proportion contemplated by the code.

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Therefore, I would allow the appeal and restore the judgment of the Superior Court with costs throughout against the respondent, and would dismiss the latter's cross-appeal with costs.

CROCKET J.—I agree with my brothers Cannon and Kerwin that, whether the acceptance of the appellant's bid of 46¼ cents per bushel, c.i.f., Montreal, for the damaged grain constituted a valid sale to it or not, the calling for bids by Byrne, the grain broker, must be treated as having been fully authorized by the respondent as the best means for ascertaining the saleable value of the damaged wheat for adjustment and settlement of the loss or damage under the certificate of insurance, and that the acceptance of that bid must be taken also as having been agreed to with the full knowledge and approval of the respondent. The testimony of Captain Hayes, the president of Hayes, Stuart & Co., Limited, who was called in to act as cargo surveyor in behalf of the respondent, the letters of the general manager of the Commercial Insurance Agency, Limited, to both Hayes, Stuart & Co., Limited, and to the respondent itself, of September 29th, 1931, and Captain Hayes' own report to the respondent, quoted in both my brothers' reasons, are, I think, conclusive, not only upon that question, but upon the question of the perfect *bona fides* of the whole matter of the calling for bids and the acceptance of the tender. It is true that this arrangement, to which the respondent was thus a party, was stated by Captain Hayes in his testimony as well as in the letters and report referred to, to have been made without prejudice to the Underwriters' liability, but this reservation of the right of the company, notwithstanding its acceptance of the appellant's bid, to still dispute the question of its liability on the certificate of insurance, cannot, I think, in the circumstances fairly or justly be relied upon to dispute the genuineness or validity of the method which was adopted to fix the amount of the loss or damage, if any loss or damage did in fact arise from any external cause under the terms of the certificate.

I think also that my brother Kerwin has adopted the correct basis for determining the difference between the sound and damaged values and agree with him that

$8,544.79 represents the real loss for which the respondent is liable under the terms of the certificate and that the judgment of the Court of King's Bench should be altered by substituting for it a declaration to that effect.

I agree entirely with the disposition he has made of both the appeal and the cross-appeal.

DAVIS J. (dissenting in part)—The appellant James Richardson & Sons Limited, shipped by water in July, 1931, a cargo of approximately 100,000 bushels of grain from Port Arthur to Montreal. At the point of shipment the grain was certified by Government officials to be of the quality of no. 3 northern, that is, with a maximum moisture content not in excess of 14·5%. When the grain was unloaded in Montreal on September 1st and 2nd (it having arrived on July 13th but remained in the barge *Redhead* in harbour till the days of its unloading) it was refused by the harbour officials as no. 3 northern because it then had a moisture content in excess of 14·5% and was thereupon classified as a cheaper grade of grain. The excess moisture was attributed by the Richardson Company to a rainfall at Kingston on the day that the grain in transit was at that place transferred from the vessel which had carried it down the Great Lakes to the barge *Redhead* which was used to carry it down the St. Lawrence and through the canals to Montreal. The Richardson Company directed the Montreal Harbour Commission to turn and dry the grain, a process of reconditioning, and as a result of the process the grain came back to a moisture content which permitted it to be again classified as no. 3 northern and during the months of October and November the grain was sold by the Richardson Company on a favourable market and the actual loss suffered amounted to $4,448.58. This represented the cost of turning and drying, warehouse storage charges and the loss of a few bushels that were not retained and dried. The Richardson Company had covered the risk of "loss or damage from any external cause" in shipment by a valued marine certificate under a floating policy of marine insurance issued to it by the respondent, Standard Marine Insurance Company Limited, of Liverpool, England, which carried on business in Montreal. The use of marine insurance certificates in connection

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with floating policies is a comparatively recent development and the history and purpose of such certificates are discussed in a recent number of the Harvard Law Review, Vol. XLIX, 239.

There is no dispute between the parties as to the amount of the actual loss. The Richardson Company, however, sued the respondent for the sum of $18,500 on the allegation that it had "sold" the grain, with the knowledge and consent of the respondent, at a price which had resulted in a loss within the meaning of the policy and certificate at that amount. This sale was alleged to have taken place on September 28th, 1931. The learned trial judge found that the respondent had by its agents consented to the sale of the damaged grain without prejudice to its right to dispute its liability and he found it ill became the respondent to complain of this sale since it was made for its own benefit. He therefore found the loss or damage on the basis of this alleged sale at $18,500. Upon appeal the Court of King's Bench unanimously reversed the judgment as in their opinion there had been no such sale as alleged and they fixed the loss or damage at the amount actually sustained, $4,448.58.

That there was no sale as alleged is perfectly plain. The grain was at all times the property of the Richardson Company and it sold and delivered the grain to third parties for the first time during October and November. A grain broker was asked by the adjuster for the Richardson Company to obtain bids toward the end of September on the damaged shipment. Three bids are said to have been obtained either by telephone or in writing but there is very little evidence about these bids because they were really not in issue in the action as framed. The Richardson Company is said to have bid itself the highest price and its own property is treated as having been sold to and bought in by itself. It is absurd to even contend that there was a sale. When the case came to this Court, counsel for the Richardson Company very wisely abandoned the contention that there had been a sale, though its pleading was founded and the judgment at the trial based upon the alleged sale. It was argued that, however ineffective the calling for bids was to establish any actual sale, the calling for bids had been adopted as a

reasonable method of ascertaining at the time the real value of the damaged grain and consequently the amount of the loss or damage. No custom of the trade having been pleaded, counsel for the Richardson Company were forced to treat the fictitious sale as something that had been agreed to by the insurance company for the purpose of arriving at the amount of the loss or damage. This was not the case that had been pleaded or made against the insurance company but in any event the evidence falls short in my view of proof of authority by the insurance company to Hayes, its local adjuster, to do other than investigate and report. A mandate to Hayes to enter into an agreement is now sought to be established by the appellant extracting a few words from one sentence in the respondent's factum—"and respondent in turn had placed the matter in the hands of Hayes, Stuart & Company". No admission of any such mandate can be taken from those words in the factum. Nor can I read the evidence of Hayes and Crocker as substantially saying any more than that liability in any sum under the policy was denied from the moment the merits of the claim had been investigated but that the Richardson Company persisting in its claim was told that so far as the insurance company was concerned, it could do what it liked. Quite apart from the absence of proof of authority to enter into any binding agreement, that is, I think, the real effect of the evidence.

The "sue and labour" clause in the policy before us is substantially the same as in Lloyd's policy (see p. 136, 4th edition, 1932, Chalmer's Insurance Act 1906) except that the policy in this case adds the words "and necessary" after the words "it shall be lawful." The English statute, sec. 78 (4), expressly provides with reference to the sue and labour clause that it is the duty of the insured and his agents in all cases to take such measures as may be reasonable for the purpose of averting or minimizing the loss. Sue and labour clauses in marine insurance have for their object the encouragement of the insurer and the insured to do work to preserve, after an accident, the property covered by the policy and to make the best of a bad state of affairs. Should they do so, the waiver clause provides that their respective rights shall be in no wise prejudiced by any acts done in pursuance of such object

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and that the insured shall be entitled to obtain his expenses consequent on the work from the insurers. Under such a clause it is the duty of the insured to take reasonable measures to avert loss.

Arnould on Marine Insurance, 11th ed., Vol. 2, p. 1131, in discussing the proper effect of the usual sue and labour clause, says that prevention of loss is the very object in view and that the clause contemplates the benefit of the insurers only and the insurers on that account undertake for the expenditure. The illustration of Willes J. in *Kidston* v. *Empire Ins. Co.* (1) is adopted for the purpose of shewing that cases do frequently occur in which the insurers by the operation of this clause are saved from loss and the damage done is thrown upon the assured.

> For instance, under a policy on goods warranted free from average under 5 per cent, the goods, suppose, have been wetted by sea water; the damage to them, unless they are taken out and dried, would go on increasing beyond the 5 per cent, till it threatened the cargo with destruction; but they are dried at an expense of 3, 2 or 1 per cent, and the damage done is less than 5 per cent. The insurers bear the cost of drying, and the assured the loss by sea damage.

The case of *Meyer* v. *Ralli* (2) is discussed in Arnould at p. 1133 as a good illustration of the principles established by the previous decisions. There a cargo of rye was insured by a policy warranted free of particular average. The voyage was necessarily abandoned, owing to perils of the sea; part of the rye was so damaged that it had to be sold at once, the rest could have been profitably reconditioned and forwarded to its destination. This course, however, the captain neglected to take, so that a substantial portion remained in warehouses for more than a year, subject to charges. It was held that the plaintiffs, under the suing and labouring clause, were entitled to recover the expenses of unshipping the whole and conveying it to a warehouse, and of the separation of the comparatively sound part from that which was irreparably damaged, and of the expense of reconditioning the former—all these being expenses necessary in order to avert a total loss. In Halsbury, 2nd edition, Vol. 18, p. 363, note (*b*), it is said:

> It is clear, however, that if the total loss, whether actual or constructive, is before action brought adeemed by the acts of the assured or his servants, the assured cannot recover for a total loss, but is entitled

(1) (1866) L.R. 1 C.P., 535, at 543, 544.

(2) (1876) L.R. 1 C.P.D. 358.

to be recouped, under the suing and labouring clause, the expenses incurred in saving the subject-matter insured,

and the *Kidston* case (1) is cited in support of the statement.

In any event, marine insurance is a contract of indemnity and the actual loss sustained by the appellant is not in dispute and for that amount it has recovered judgment but now seeks in this Court to increase the amount of its recovery from its actual loss of $4,448.58 to the sum of $18,500 on the grounds above outlined. In *Castellain* v. *Preston* (2), Brett, L.J., said:

> The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong.

It may be that notwithstanding the sue and labour clause the insured would have been entitled to have the loss or damage measured at the date of the unloading of the cargo and was not bound to run the risks incidental to reconditioning and holding the grain for a favourable market, if it had dealt with the grain and commenced its action upon that basis and evidence of bona fide sales and real values had been directly put in issue and established. But it is unnecessary in my view to determine that point in this case.

In the result I agree with the amount of the loss fixed by the unanimous judgment of the Court of King's Bench and the appeal of the Richardson Company therefrom in my view should be dismissed with costs.

The respondent the insurance company cross appealed, however, on the question of liability. It contends that the evidence does not establish as a fact that there was any loss or damage caused "from any external cause" within the meaning of the policy and that the action should have been dismissed. The contention is that having regard to the quantity of grain and the amount of the rainfall at

(1) (1866) L.R. 1 C.P. 535. (2) (1883) 11 Q.B.D. 380 at 386

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Kingston the day in question, it was physically impossible for the quantity of water necessary to increase the content of moisture in the grain from that certified at Port Arthur to that found on the arrival of the grain at Montreal to have reached the grain during the rainfall at Kingston and that the Richardson Company having pleaded only the rainfall at Kingston as the cause of the damage, it must be concluded that the grain was not of the moisture content it was certified to have been when it left Port Arthur and that the certificate being only *prima facie* evidence, the weight of the evidence at the trial was sufficient to rebut it. I must confess that a careful reading of the evidence leads me to believe that a strong defence was made out by the respondent on the question of liability but the trial judge and the Court of King's Bench are in agreement that liability was as a matter of fact established and I cannot say that they are so clearly wrong as to entitle us to interfere with that concurrent finding. The cross-appeal of the respondent therefore should also be dismissed with costs.

Appeal allowed in part with costs.
Cross-appeal dismissed with costs.

Solicitors for the appellant and cross-respondent: *Brown, Montgomery and McMichael.*

Solicitors for the respondent and cross-appellant: *Beauregard, Phillimore & St. Germain.*

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* April 30.
* May 1.
* May 27.

SIN MAC LINES LIMITED AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

HARTFORD FIRE INSURANCE COMPANY AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

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

Insurance, fire—Cause of loss—Burning match—Explosion—Clauses in the policy—Liability of insurer.

A fireman on an oil-burning tug, desirous of ascertaining for the information of the captain whether there was enough fuel oil in the boat to enable her to proceed with her journey without reloading, opened a

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

manhole on the boat, lit a match, and held the burning match over the man-hole with a view to seeing the quantity of fuel oil in the tank. Instantly the vapour in the tank caught fire, an explosion occurred and the boat was in the midst of flames. Very substantial loss was sustained by the appellants, the owners of the tug, and they sued the respondents upon a policy of fire insurance for the amount of their entire loss. The respondents contended that they were not liable for the loss attributable to explosion, but only for that part of the loss actually caused by fire. The policy contained the following printed clause: "Unless otherwise provided by agreement in "writing added hereto this company shall not be liable for loss or "damage occurring * * * (*g*) by explosion or lightning, unless fire "ensue, and, in that event, for loss or damage by fire only."

Held that by the terms of the policy recovery by the appellants must be limited to the proportion for fire damage as distinguished from explosion damage. *Hobbs* v. *Guardian Fire & Assurance Co.* (12 Can. S.C.R. 631); *Curtis's & Harvey, Ltd.* v. *North British & Mercantile Ins. Co.* ([1921] 1 A.C. 303); *Stanley* v. *Western Ins. Co.* (L.R. 3 Ex. 71) and *Re Hooley Hill Rubber & Chemical Co.* v. *Royal Ins. Co.* ([1920] 1 K.B. 257) disc.

Per Duff C.J. and Davis and Kerwin JJ.—The language of the printed clause in the policy is not limited to cases where the fire was originated by the explosion but includes cases where the explosion occurs in the course of a fire. By the policy, the respondents insured the appellants against "all direct loss or damage by fire." The printed clause in the policy, however, defined or limited the risk and excluded damage caused immediately by explosion.

Per Rinfret and Cannon JJ.—In this case, the insurers agreed to pay fire damage if the fire was caused by an explosion. In order to carry out the intention of the parties as expressed in the policy and in view of the opinion of both courts below on the evidence and its application to the terms of the policy, the recovery by the appellants must be limited to the loss caused by fire which followed or was concurrent with the explosion. *Robbs* case (*supra*) dist.

APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, McDougall J. and condemning the respondents in the amount of $4,475.94 in an action brought by the appellants in which damages were claimed in the total amount of $38,230.65 under three insurance policies.

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

W. F. Chipman K.C. and *Russell McKenzie K.C.* for the appellants.

J. T. Hackett K.C. and *G. B. Osler K.C.* for the respondents.

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SIN MAC LINES LTD. v. HARTFORD FIRE INS. CO.

The judgment of Duff C.J. and Davis and Kerwin JJ. was delivered by

DAVIS J.—A foolhardy fireman on an oil-burning tug, desirous of ascertaining for the information of the captain whether there was enough fuel oil in the boat to enable her to proceed with her journey without re-loading, opened a manhole on the boat, lit a match and held the burning match over the manhole with a view to seeing the quantity of fuel oil in the tank. Instantly the vapour in the tank caught fire; an explosion occurred and the boat was in the midst of flames. Very substantial loss was sustained by the appellants, the owners of the tug, and they sued the respondent upon a policy of fire insurance for the amount of their entire loss. The policy specifically provided that such explosives as might be necessary in connection with the operations of the appellants might be carried on the vessel without prejudice to the insurance. The respondent contends that under certain exceptions in the policy it is not liable for the loss attributable to explosion but only for that part of the loss actually caused by fire.

In point of strict, literal fact, the burning match was the cause of the explosion. In other words, the explosion was caused by fire, not by concussion or other physical agency as distinguished from fire. On the question whether or not the damage caused by the explosion, that is to say, by the disruptive effect of the explosion, was within the terms of the policy: *Hobbs* v. *Guardian Fire & Life Assurance Co.* (1) would appear to be an authority binding upon us. I am unable, however, to see that it matters in this case whether this view that the explosion was caused by fire or the view that the explosion was not an explosion caused by fire within the meaning of the policy, be accepted. In either case, by the terms of the policy, damage caused by the explosion and not by fire ensuing upon the explosion, or concurrent with the explosion, is excluded from the policy.

Further, it is quite unnecessary to determine whether or not the policy is governed by the provisions of the Quebec *Insurance Act*. That statute was invoked only for the purpose of showing that statutory condition no. 11 was, by

(1) (1886) 12 Can. S.C.R. 631.

force of the statute, imposed upon the policy as a matter of law though not actually printed or written upon the policy, if the policy was one that had been delivered to the insured in Quebec. In this connection, it was contended that certain clauses in the policy could not be treated as variations of the statutory condition because they were not printed or written upon the policy in red ink as required by the Quebec statute. It was held in the *Hobbs* case (1) and affirmed in the *Curtis's & Harvey (Canada) Ltd.* v. *North British and Mercantile Insurance Co. Ltd.* (2) that statutory condition no. 11 relates to an explosion which originates a fire and not to an explosion caused by a fire; and, by that condition, the insurer is responsible for the fire resulting from the explosion. There has been no substantial change in the wording of statutory condition no. 11 in the Quebec statute since the *Curtis's* case (2) but it makes no difference in this case whether or not that condition was part of the policy or was effectively varied by the policy.

The policy in this case contains the following printed clause:

> Unless otherwise provided by agreement in writing added hereto this company shall not be liable for loss or damage occurring
>
> (*g*) by explosion or lightning, unless fire ensue, and, in that event, for loss or damage by fire only.

It will be necessary to return to this printed clause later but for the moment I turn to certain typewritten clauses which were added to the printed form of policy in this particular case. Only one of the specific typewritten clauses was relied upon but before referring to it the following general clause in typewriting appears in the policy:

> These clauses shall be considered to supersede and annul any other clauses to the same or similar effect, printed in or attached to this policy, and that for the purposes of construction these clauses shall be deemed of the nature of written additions thereto.

Now the specific typewritten clause relied upon reads as follows:

> In the event of loss or damage to the subject of insurance by any peril or cause not covered by this policy, followed by fire or with which fire is concurrent, this company shall only be liable for that part of the damage actually caused by fire, whether the loss be partial or total.
> * * *

(1) (1886) 12 Can. S.C.R. 631. (2) [1921] 1 A.C. 303.

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Dealing with this last clause, this stipulation is entitled to be given its full effect but it is to be observed that the event specifically covered by it is "loss or damage to the subject of insurance by any peril or cause not covered by this policy." This stipulation, however, can have no application to the facts of the case before us if we have here a fire followed by an explosion rather than an explosion followed by a fire, because the peril of a fire followed by an explosion is covered by the policy. The specific stipulation points to a peril or cause not covered by the policy and therefore does not come into play upon the facts of this case.

Reverting now to the printed clause, above set out, in the policy before us, which expressly excepts liability for loss or damage "occurring by explosion or lightning, unless fire ensue, and, in that event, for loss or damage by fire only." The object of that clause was clearly to restrict and limit the risk. It was in fact a contractual condition that the risk should be so limited. The first question that arises in considering this clause is whether or not the specific typewritten clause, above set out, by virtue of the general typewritten clause, superseded and annulled this printed clause as being one "to the same or similar effect." The typewritten clauses are expressly agreed to be "deemed of the nature of written additions" to the policy, whereas the printed clause was clearly intended to limit and restrict the risk. The point is one of some difficulty but I incline to the view that the two clauses may stand independently of one another. That being so, the question then arises as to whether or not the printed clause is so general and unlimited in its scope that it may fairly be read as applying "to the whole risks in which the explosion takes part" and not confined to the case where an explosion originates a fire. If so confined, the clause does not apply to the case before us if the case is to be properly treated as a fire followed by an explosion. If, on the other hand, the printed clause is to be given such a general construction as to apply to every case whether an explosion originates or merely takes part in the fire, the clause would apply to

the facts of this case. Now in the *Curtis's* case (1) the Judicial Committee had to consider the scope and extent of the following clause:

> Warranted free of claim for loss or damage caused by explosion of any of the material used on the premises.

The Judicial Committee said that those words were "absolutely general and in no way limited" and "that the more natural construction is to apply the words of exception to the whole risks in which the explosion takes a part."

Stanley v. *Western Insurance Co.* (2) was considered in the *Curtis's* decision (1) as a case which explained an exception. In that policy, which was against fire, the insurer, in terms of the policy, was not to be liable for loss or damage by explosion and the expression was there held to cover all loss by explosion, whether the explosion succeeded to or was caused by a fire, or was prior to and caused a fire. Lord Dunedin pointed out, in the *Curtis's* case (1), that the *Stanley* case (2) was followed by the English Court of Appeal in *In Re Hooley Hill* and *Royal Insurance Co.* (3), and then said:

> These cases are not actually binding on their Lordships but they agree with them. *Stanley's* case (2) was decided by a very strong Court and has stood as the law of England for many years.

We should therefore turn to the specific clauses that were before the courts in the *Stanley* (2) and the *Hooley Hill* (3) cases fo they were interpreted as sufficiently wide and general to cover an explosion whether it succeeded to or was caused by a fire or was prior to and caused a fire. Now the clause in the *Stanley* case (2) was this:

> Neither will the company be responsible for loss or damage by explosion, except for such loss or damage as shall arise from explosion by gas.

The word "gas" in the policy was held to mean ordinary illuminating coal gas but that is immaterial for our purpose. The point is that the clause was held to be an exemption of liability for loss by explosion, not limited to cases where the fire was originated by an explosion but included cases where the explosion occurred in the course of a fire. Reference to the language of the whole clause in that case shows that

> Losses by lightning will be made good by this company, as far as where either the building or the effects insured have been actually set on fire thereby, and burnt in consequence thereof.

(1) [1921] 1 A.C. 303. (2) (1868 L.R. 3 Ex. 71.
(3) [1920] 1 K.B. 257, at 272.

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The plaintiff in that case contended that the company was not to be responsible for any loss arising from explosion, provided the explosion was not occasioned by a fire already in existence upon the premises, but, on the other hand, if there was already a fire upon the premises so that the explosion was incidental to and occasioned by that fire, and then lent itself to further the fire and so to increase the loss, the whole of the damage caused was within the insurance of the policy.

"But to give the instrument this construction," said Kelly, C.B. (1),

would be, in fact, to introduce into it words not found there; while the natural construction of the words gives a probable and easily intelligible sense.

Martin, B., added (2):

There is nothing to qualify the word "explosion," and I apprehend, therefore, that the company bargain, and the insured agrees with them, that they are not to be responsible for any loss or damage by explosion. The clause is exceedingly simple, and we should not be justified in adding words to give it the most artificial meaning which (the plaintiff) contended for.

In the *Hooley Hill* case (3), the words of exception in the policy were:

This policy does not cover loss or damage by explosion nor loss or damage by fire following any explosion unless it be proved that such a fire was not caused directly or indirectly thereby or was not the result thereof.

It was held in that case that the insurers were exempted from liability as to the damage caused by the explosion although the explosion occurred in the course of a fire.

Having regard to the statement of Lord Dunedin in the *Curtis's* case (4) that the Judicial Committee agreed with these two cases, the *Stanley* case (5) and the *Hooley Hill* case (3), although they were not actually binding on their Lordships, and to the decision in the *Curtis's* case (4) itself that the warranty clause there in question applied to the whole risks in which explosion takes a part, we must conclude that the language of the printed clause in the policy before us is not limited to cases where the fire was originated by the explosion but includes cases where the explosion occurs in the course of a fire. By the policy, the respondent insured the appellants against "all direct loss

(1) (1868) L.R. 3 Ex. 71, at 74.
(2) (1868) L.R. 3 Ex. 71, at 75.
(3) [1920] 1 K.B. 257, at 258.
(4) [1921] 1 A.C. 303.
(5) (1868) L.R. 3 Ex. 71.

or damage by fire." The printed clause in the policy, however, defined or limited the risk and excluded damage caused immediately by explosion.

The appeal should be dismissed.

The judgment of Rinfret and Cannon JJ. was delivered by

CANNON J.—On June 16th, 1931, Osborn and Lange, the appellants' insurance brokers and their agents, applied, in New York, to each of the defendants, for insurance on fifty-two vessels owned by the Sin Mac Lines, Limited, including the tug *Rival*. All the applications were for insurance for "fire only," as per form attached thereto. The form thus referred to in the applications was the typewritten form subsequently attached to the policies which are identical.

The tug *Rival* was insured by these three policies for a total amount of $75,000, of which the proportion of the respondent was $37,500 and that of each of the other defendants $18,750.

A printed condition in each policy provides:

> Unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damage occurring * * * by explosion or lightning, unless fire ensue, and in that event, for loss or damage by fire only.

The typewritten form attached to each policy, as it was to the application for insurance, reads as follows:

> Fire on vessels clause:
>
> In the event of loss or damage to the subject of insurance by any peril or cause not covered by this policy, followed by fire or with which fire is concurrent, this company shall only be liable for the part of the damage actually caused by fire, whether the loss be partial or total and, in the event of said vessel being necessarily moved for repairs this company shall in no way be liable for any part of the expense incurred unless the necessity for removal arises wholly or partly from fire, and then only in the proportion that the cost of the fire damage repair bears to the total cost of all repairs necessitating the removal, and then only when the cost of such removal has been approved by the representative of this company.

This typewritten form also provided:

> It is agreed that these clauses shall be considered to supersede and annul any other clauses to the same or similar effect, printed in or attached to this policy, and that for the purpose of construction these clauses shall be deemed of the nature of written additions thereto.

A rate of 1·35% was charged as premium. Through the same brokers, the appellants had secured marine insurance from five different companies against explosions, with a typewritten form making the policies

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free from claim for loss caused by fire or in consequence of fire, whether or not fire ensues as a result of a marine peril.

The charge for these policies which covered the tug *Rival* from August 7th, 1931, to August 7th, 1932, was $8 per $100 of insurance.

The *Rival* was registered at the port of Montreal. On the 10th November, 1931, she was proceeding on a voyage from Port Colborne to Montreal and was tied up for the night in the Welland canal. The captain having made inquiry with regard to the fuel in the tug tanks, one of the firemen, Gendron, to secure the information, removed the manhole cover over the tank on the starboard deck and held a lighted match over this opening for the purpose of illuminating the inside of the tank. Immediately thereafter there was an explosion which caused the conflagration which lasted for about forty minutes, when the tug sank. The appellant sued to recover the sum of $38,230.65, including explosion damages which, the appellant contends, was a direct loss and damage by fire. The respondent denied all liability. The courts below did not allow any explosion damage as recoverable under the policy, but limited the recovery to loss from fire following the explosion: $4,475.94 with interest and costs.

The appellants claim that the unanimous judgment of the six learned judges who have considered this case erred in the following respects:

(*a*) Effective consideration was not given to the fact that fire did actually precede the explosion and that the explosion was an incident thereof and caused thereby;

(*b*) The conditions relied upon by the respondent were illegal and in conflict with the Quebec *Insurance Act;*

(*c*) In the proper interpretation of the policy;

(*d*) In the quantum of damages.

The learned trial judge says:

> After a careful examination of the evidence as to the fact of the accident, as also of the elaborate expert and scientific evidence having to do with the nature, manifestation and characteristics of an explosion, the Court has reached the conclusion that it is practically impossible to dissociate the fire from the explosion. In point of time they were practically simultaneous or concurrent. It is true that the hand, which brought the lighted match to the aperture created by the removal of the manhole cover, introduced a flame (fire) to the gaseous substances contained in the tank, but from that moment the "explosion" entered the first of the three stages described by Professor Stacey in his testimony, ignition, passed at once into the second, or turbulent phase, and then almost imme-

diately into the third or detonation stage. He describes or defines the word "explosion" as including three phases: uniform flame propagation, turbulence, and detonation, without all of which there can be no gas explosion. The eye witnesses of the accident speak of the sequence of events as passing with almost instantaneous rapidity, which is quite consistent with the theory expounded by Professor Stacey. Had the lighted match not been applied to the gaseous explosive mixture in the tank no explosion would have occurred and in this restricted sense only can it be said that fire preceded the explosion. It cannot be said that there was a fire, within the meaning of the policies, which burned for an appreciable period, during the course whereof the explosion occurred as an incident of the fire. The element of simultaneity defeats any such theory. So difficult was it found to dissociate fire from explosion, or to state which preceded the other, that the plaintiff itself, in the first notices of the casualty given to the defendants, through their agents, referred to the incident as "explosion followed by fire." Similarly, plaintiffs' agents notified the explosion underwriters of the nature of the casualty as "explosion followed by fire and sinking in Welland canal."

The learned trial judge then proceeds to determine the exact nature and scope of the risk incurred by the insurers and, in view of the special clauses of the contract above quoted, reached the conclusion that the intention of the parties was to exclude such loss by explosion which would be within the policy under the ruling of this Court in *Hobbs* v. *The Guardian Fire & Life Assurance Co.* (1), but for

(1) (1886) 12 Can. S.C.R. 631.

the exception. The first judge also noted that the premium paid on the policies in question in this case was on the rate for fire insurance only and that the appellants carried separate policies covering explosion damages excluding fire losses. Moreover, the trial judge found that, even if the policies were subject to the statutory conditions contained in the Quebec *Insurance Act,* condition 11 does not conflict with the provisions in the defendant's policies exempting them from liability for explosion damages.

This statutory condition, if applicable to this case, would make them liable "for all loss caused by fire resulting from an explosion," which is practically to the same effect as the printed and typewritten clauses above quoted. If the Act applies to exclude the typewritten fire on vessel clause, then the statutory condition would justify the judgments *a quo.* We have, therefore, in this case a contract against loss by fire containing an exception, as in *Stanley* v. *Western Insurance Company* (1), referred to in the case of *Curtis's and Harvey* v. *North British and Mercantile Insurance Co.* (2) by Lord Dunedin. There, the

(1) (1868) L.R. 3 Ex. 71. (2) [1921] 1 A.C. 303, at 310.

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insurer, in terms of the policy based on the insured's application, was not to be liable for loss or damage by explosion. This expression was held to cover all loss by explosion, whether the explosion succeeded to or was caused by a fire, or was prior to or caused the fire. In our case, the insurer agreed to pay fire damage if the fire was caused by an explosion—but not more. The clause is exceedingly simple and is to be construed according to its natural meaning, and as ordinarily understood by mankind. The Privy Council also agreed with the judgment of the English courts in *In re Hooley Hill Co.* v. *Royal Insurance Co.* (1), where full effect was given to an exception memorandum.

In the same case, the Privy Council uses words which may well apply to the facts of the present case:

> As to the true meaning of the word "explosion," the parties have been content to leave the Court without any means of judging this from the scientific point of view. Their Lordships do not think they are entitled to read in any knowledge which they may as individuals possess on the subject, but are bound to take it that the parties are agreed to take the word in the popular sense, in which sense it has been used in the résumé of the facts given above. But while T.N.T. might burn it might also explode, and it seems to their Lordships impossible to come to any conclusion but that the parties must have contemplated the possibility of an explosion either as an incident or as an originator of fire. It is obvious that if the assurer was content to have this possible risk barred, he would secure an assurance on better terms. When, therefore, he used in his proposal and the insurer accepted in the policy, words which are absolutely general, and in no way limited, their Lordships think that the more natural construction is to apply the words of exception to the whole risks in which explosion takes a part rather than to confine them to the special case provided for by statutory condition 11, to which no reference is made.

As pointed out in *Hobbs* v. *Guardian Fire & Life Assurance Co.* (2):

> It is not so much a question of law as of fact that we are called on to decide.

In the latter case, the parties had agreed that the loss was occasioned by some employee accidentally setting fire to some gun powder stored in the premises insured. In this case, in the opinion of the trial judge, the preponderance of evidence shows that the fire damage was subsequent to the explosion and that 85% of the loss must be ascribed not to the burning of the vessel but to the disruptive force of the explosion. In spite of the very able argument of Mr. Chipman, I cannot see my way clear to reach a firm conclusion that all the judges below were wrong in their

(1) [1920] 1 K.B. 257.

(2) (1886) 12 Can. S.C.R. 631, at 637.

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appreciation of the evidence and their application of it to the terms of the policies. The circumstances of the case make it clearly distinguishable from *Hobbs* v. *Guardian Fire & Life Assurance Co.* (1). The appellant's request for separate policies distinguished the fire risk from the explosion risk and makes it clear to my mind that, in order to carry out the intention of the parties, as expressed in the policies, we must adopt the views of the courts below and limit the recovery to the loss caused by fire which followed or was concurrent with the explosion.

We also agree with the trial judge that the amount of the first survey, $19,839.68, to which must be added the salvage account of $10,000, would represent the total loss and that a proportion of 15% should be paid by the respondents as constituting fire damage distinguished from explosion damage.

The appeal, therefore, must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Brown, Montgomery & McMichael.*

Solicitors for the respondent: *Hackett, Mulvena, Foster, Hackett & Hannen.*

IN THE MATTER OF THE BANKRUPTCY OF T. H. COLLINGS

1936

* Oct. 9.
* Oct. 31.

EX PARTE T. H. COLLINGS

EX PARTE K. MURPHY

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Bankruptcy—Appeal—Application for special leave to appeal to Supreme Court of Canada—Time of notice—Jurisdiction to hear application—Bankruptcy rule 72.

The competency of the Supreme Court of Canada in bankruptcy proceedings is to be looked for exclusively in the *Bankruptcy Act* (R.S.C. 1927, c. 11) and the rules properly made under it; it is not controlled by the sections of the *Supreme Court Act* dealing with the Court's ordinary jurisdiction.

* Rinfret J. in chambers.

(1) (1886) 12 Can. S.C.R. 631.

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In re COLLINGS.

A trustee in bankruptcy applied to a Judge of this Court for leave to appeal from a decision of the Court of Appeal made on June 29, 1936. The court of original jurisdiction in bankruptcy, acting under s. 163 (5) of the *Bankruptcy Act*, on September 8, 1936, extended the time (which otherwise would have expired on July 29) within which to apply for such leave, its order providing that notice of motion for leave be served on or before September 28, and be made returnable on or before October 12. The notice was served on September 26 and made returnable on October 9; so it was not served "at least 14 days before the hearing thereof" as prescribed by bankruptcy rule 72.

Held: The motion could not be heard. A Judge of this Court has no power to excuse a party from compliance with rule 72, nor to abridge the time of notice thereby prescribed. Assuming the court of original jurisdiction in bankruptcy had power to abridge the time of notice, its said order did not do so.

In re Hudson Fashion Shoppe Ltd., [1926] Can. S.C.R. 26; *In re Gilbert*, [1925] Can. S.C.R. 275; *In re North Shore Trading Co.*, [1928] Can. S.C.R. 180, and *Boily* v. *McNulty*, [1927] Can. S.C.R. 275, cited.

The motion was dismissed; but with reservation of any right in the applicant to obtain from the court having jurisdiction to grant it a further extension of time to renew the application.

APPLICATIONS by the Trustee in Bankruptcy for special leave to appeal to this Court from the judgment of the Court of Appeal for Ontario (1) which allowed an appeal from the order of Mr. Justice McEvoy (2) dismissing applications for an order rescinding the receiving order made by the Registrar in Bankruptcy and annulling the adjudication in bankruptcy.

F. K. Ellis for the Trustee.

Lewis Duncan K.C. for T. H. Collings.

R. M. Willes Chitty for K. Murphy.

RINFRET J.—The applications for leave to appeal to the Supreme Court of Canada were made to me by the Trustee in these matters on the 9th day of October, 1936.

The appeals intended to be lodged, if leave therefor was granted, are from a decision of the Appeal Court pronounced on the 29th day of June, 1936, and application for leave to appeal therefrom ought therefore to have been made on or before the 29th day of July, 1936 (Rule 72 under the *Bankruptcy Act*); but the court of original jurisdiction in bankruptcy, acting under subs. 5 of s. 163 of the

(1) 17 C.B.R. 390; [1936] 4 D.L.R. 28; [1936] Ont. W.N. 409.

(2) [1936] O.R. 130; 17 C.B.R. 223; [1936] 2 D.L.R. 47.

Bankruptcy Act, on the 8th day of September, 1936, extended the time within which the application might be made up to the 12th day of October, 1936. The order so made was

that the notice of motion for such special leave, if any, be served upon the parties entitled to notice on or before the 28th day of September, 1936, and that the said notice of motion for such special leave, if any, be made returnable before a Judge of the Supreme Court of Canada on or before the 12th day of October, 1936.

The notice of motion for leave to appeal now before me was served on the 26th day of September. As aforesaid, it was made returnable on the 9th of October. So that the notice was not "served on the other party at least fourteen days before the hearing thereof," as prescribed by Bankruptcy Rule No. 72 (1).

The objection was taken by opposing counsel for the respondents.

I am precluded by the rule from hearing the motion and from entertaining the application. (*In re Hudson Fashion Shoppe Limited* (1).)

Rule 72 is a statutory rule. Moreover, it is not a rule made under the provisions of the *Supreme Court Act* and from the compliance with which the Supreme Court of Canada or a Judge thereof may excuse a party under Rule 109 of this Court. The Rule is a Bankruptcy Rule made by the Governor in Council under the provisions of s. 161 of the *Bankruptcy Act;* and it is not inconsistent with the provisions of the Act. (*In re Gilbert; Boivin* v. *Larue, Trudel & Piché* (2).) It has been held further that a Judge of this Court had no power, under Supreme Court Rule 108, to enlarge or abridge the delay provided by Bankruptcy Rule 72. (*In re Gilbert* (2); *In re North Shore Trading Company* (3).) One reason for this is that the competency of this Court, in bankruptcy matters, is to be looked for exclusively in the *Bankruptcy Act* and the Rules properly made under it; it is not controlled by the sections of the *Supreme Court Act* dealing with the Court's ordinary jurisdiction (*Boily* v. *McNulty*) (4).

In the present instance, Rule 72 was clearly not followed. Under it, the notice must be served "at least" fourteen days before hearing. The use of the words "at least"

(1) [1926] Can. S.C.R. 26.
(2) [1925] Can. S.C.R. 275.
(3) [1928] Can. S.C.R. 180.
(4) [1927] Can. S.C.R. 275.

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means that "both the day of service or of giving notice and the day on which [the application was to be heard] shall be excluded from the computation." (Bankruptcy Rule 170).

Assuming the court of original jurisdiction in bankruptcy had the power to abridge the prescribed delay, such delay was not abridged by the order extending the time for applying for leave. The order prescribed an extreme date within which the notice should be served and another date within which the motion should be made returnable. Between the 8th of September (the date of the order) and the 12th of October (the date on or before which the motion was ordered to be made returnable) ample time was provided for complying both with the order and with Rule 72.

In the particular instance, counsel for the applicant complained that the 12th day of October happened to fall on a non-juridical day (Thanksgiving day) and that the previous day, the 11th of October, was a Sunday. But, far from operating to the prejudice of the applicant, these events really gave him additional time within which to comply with the order and with the Rule, for in such case he could have made his motion returnable on the 13th day of September and his proceedings would necessarily have been "considered as done or taken in due time" (*Bankruptcy Act*, s. 184; Rule 172).

I must, therefore, dismiss the motions and the applications with costs; but, as I am not passing on the merits of the applications, I will reserve any right which the applicant may have to obtain from the court having jurisdiction to grant it a further extension of time to renew the applications for special leave to appeal herein made.

Applications dismissed with costs (with reservation as stated).

Solicitors for the Trustee (applicant): *Ellis & Ellis.*

Solicitor for T. H. Collings: *Lewis Duncan.*

Solicitors for K. Murphy: *Joy & Chitty.*

IN THE MATTER OF THE BANKRUPTCY OF T. H. COLLINGS

1936
*Dec. 16.
1937
*Jan. 4.

EX PARTE T. H. COLLINGS

EX PARTE K. MURPHY

(NO. 2)

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Costs—Bankruptcy—Costs on dismissal of application of trustee in bankruptcy for special leave to appeal to Supreme Court of Canada—Settlement of minutes of judgment—Costs against trustee as trustee, not against him personally—Tariff applicable—Costs given to trustee in other proceedings in the bankruptcy not to be embraced in the order so as to allow for set-off.

Upon application for settlement of the minutes of the judgment delivered on application by the trustee in bankruptcy for special leave to appeal to this Court, and reported *ante*, p. 609:

Held (1) The trustee appeared (on said application for leave) in his capacity as trustee and the dismissal of his application with costs could affect him only as trustee and not personally; costs were payable by him out of the funds in his hands.

(2) Upon appeals to this Court in bankruptcy matters the tariff which applies is that provided for in the Rules (91 *et seq.*) of this Court, and contained in Form I set out in the schedule thereto; and the costs of said application for leave should be taxed according to that tariff, and not according to the tariff prevailing in the bankruptcy courts. The judge hearing said application was not empowered to adjudicate otherwise.

(3) Certain taxable costs given the trustee in other proceedings in the course of the bankruptcy should not be embraced in the order now in question so as to give right to a set-off.

Moreover, contentions to the effect that the costs should be adjudicated against the trustee personally, that they should be taxed according to the tariff prevailing in the bankruptcy courts, and request that a set-off be provided for as aforesaid, could not now be raised for the first time on settlement of the minutes—they were contrary to the intention of the said judgment, and were equivalent to asking amendment thereof; which there was no reason to grant. (*Paper Machinery Ltd.* v. *J. O. Ross Engineering Corpn.*, [1934] Can. S.C.R. 186, referred to).

APPLICATION for settlement of the minutes of the judgment rendered by Rinfret J. (1) dismissing with costs applications by the Trustee in Bankruptcy for special leave to appeal to this Court. The questions had to do with costs of said applications and are sufficiently set out in the judgment now reported and are indicated in the above headnote.

*Rinfret J. in chambers.

(1) *Ante* p. 609.

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In re COLLINGS.

J. T. Wilson for T. H. Collings and K. Murphy.

D. K MacTavish for the Trustee.

RINFRET J.—Upon application for settlement of the minutes of the judgments rendered by me in these matters on the 31st day of October, 1936, I have come to the conclusion that:

(1) Edward Wilkins was before me in these matters in his capacity of Trustee. In fact, it was objected at the argument that he had no *locus standi* precisely because he was making the applications in his capacity of Trustee. The argument in respect of the absence of *locus standi* would have been without any foundation whatever if he had appeared in his personal capacity.

It follows that, on the applications on which I gave decisions, on the 31st day of October, 1936, the dismissal with costs could affect him only as Trustee and could not affect him personally.

(2) Although these are bankruptcy matters and the Supreme Court of Canada is given jurisdiction to hear appeals therein by the *Bankruptcy Act* (with the aid of the enabling section 44 of the *Supreme Court Act*), these appeals are nevertheless made to the same Supreme Court of Canada as is organized under the provisions of sections 3 *et seq.* of the *Supreme Court Act* and as is given an appellate jurisdiction within and throughout Canada under section 35 thereof.

Accordingly, upon appeals in bankruptcy matters, the tariff which applies is that provided for in Rules 91 *et seq.* of the Court and contained in Form I set out in the schedule to these rules. A Judge of this Court is not empowered to adjudicate otherwise.

(3) I may say, moreover, that the points now raised by counsel on behalf of the respondents Katherine Murphy and Thomas H. Collings (to the effect that the costs should be adjudicated against the Trustee personally and that they should be taxed according to the tariff prevailing in the bankruptcy courts) were not even mentioned in the course of the argument made before me on the applications for special leave to appeal. I consider that they cannot be raised at this stage, where the only question to be decided upon is the settlement of the minutes of the judgments I

have delivered on the 31st of October, 1936. When delivering those judgments, I did not intend that the costs should be adjudicated against Mr. Edward Wilkins personally, nor that they should be taxed by the Registrar of the Bankruptcy Court under the tariff prevailing in that court.

To ask me now to settle the minutes so as to give such a meaning to my judgments is equivalent to a demand that I should amend my judgments; and I can see no reason for doing so (*Paper Machinery Ltd. et al.* v. *J. O. Ross Engineering Corpn. et al.* (1)).

I, therefore, order that the judgments be settled so that the costs be payable by the Trustee out of the funds in his hands; and I shall fix the fees upon his applications, if and when counsel will come before me for that purpose.

As for the further request that certain taxable costs given the Trustee against the debtor Collings, which remain unpaid, should be embraced in the order, so as to entitle Collings to a set-off, it should not be entertained:

(*a*) because the matter was not submitted to me in the course of the argument on the application and, therefore, the same reasons apply as given above to refuse to modify my judgment in other respects;

(*b*) I do not think costs incurred upon other matters and other proceedings in the course of the bankruptcy should be set off against the costs on the present applications.

Solicitor for T. H. Collings: *Lewis Duncan.*

Solicitors for K. Murphy: *Joy & Chitty.*

Solicitors for the Trustee: *Ellis & Ellis.*

(1) [1934] Can. S.C.R. 186.

1936

*Oct. 21.
*Nov. 9.

IN THE MATTER OF THE INCOME TAX ACT (MANITOBA) AND AMENDMENTS

THOS. JACKSON & SONS, LTD.....APPELLANT;

AND

THE MUNICIPAL COMMISSIONER....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Assessment and taxation—Income tax—Income Tax Act, Man. (C.A. 1924, c. 91) as amended in 1930, c. 22—Ss. 8 (4), 4 (p)—Exemption of profits of a company "accumulated prior to and undistributed at" December 31, 1929 (s. 4 (p))—Exemption not available to company in respect of dividends received by it in 1934 from another company out of latter's profits accumulated prior to and undistributed at December 31, 1929—Construction of statutes.

S. 8 (4) (enacted in 1930, c. 22) of the *Income Tax Act*, Man. (C.A. 1924, c. 91) provided that every joint stock company (other than a personal corporation) pay a tax upon the amount of its income within the province during the preceding year; that this tax be paid on April 30, 1931, and annually thereafter. S. 4 (*p*) (enacted in 1930, c. 22) provided that "profits of a * * * joint stock company * * * accumulated prior to and undistributed at" December 31, 1929, be not liable to taxation under s. 8 (4).

In 1935 appellant company was assessed for income tax in respect of moneys received by it in 1934 as dividends from N. Co., which moneys were part of profits of N. Co. accumulated by N. Co. prior to and undistributed at December 31, 1929.

Held: Appellant company was properly so assessed. Read literally, s. 4 (*p*) applied only to profits in the hands of the accumulating company, and would not exempt appellant company from the liability created by s. 8 (4). The mere fact that, reading s. 4 (*p*) literally and giving full effect to s. 8 (4), the result might be that s. 4 (*p*) would be wholly unnecessary, was not sufficient to overcome the language of the statute.

Judgment of the Court of Appeal for Manitoba (44 Man. L.R. 228) affirmed in the result.

APPEAL by Thos. Jackson & Sons Ltd. from the judgment of the Court of Appeal for Manitoba (1) dismissing its appeal from the judgment of Dysart J. (2) dismissing its appeal from the Municipal Commissioner of the Province of Manitoba affirming an assessment of the appellant under the *Income Tax Act* of Manitoba (C.A. 1924, c. 91, and amendments) in respect of the sum of $73,016.08 received by the appellant during the year 1934 as and by way of dividends from Nelson River Construction Ltd.

(1) 44 Man. L.R. 228; [1936] 2 W.W.R. 535.

(2) 44 Man. L.R. 228; [1936] 1 W.W.R. 717.

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

That sum was part of the profits of Nelson River Construction Ltd. which were accumulated by it prior to, and were undistributed at, December 31, 1929. The appellant and Nelson River Construction Ltd. are joint stock companies and neither of them is a personal corporation within said Act.

Sec. 8 (4) (enacted in 1930, c. 22) of said Act provides (as amended in 1932, c. 49, in respects not here material):

> Save as herein otherwise provided, every corporation and joint stock company, other than a personal corporation, no matter how created or organized, carrying on business within the Province shall pay a tax of five per centum upon the amount of its income within the Province during the preceding year.
>
> The tax imposed by this subsection shall be paid in the manner provided by this Act on the thirtieth day of April, 1931, and annually thereafter.

Sec. 4 (*p*) (enacted in 1930, c. 22) provides:

> Profits of a corporation or joint stock company other than a personal corporation accumulated prior to and undistributed at the 31st day of December, 1929, shall not be liable to taxation under subsection (4) of section 8 of "The Income Tax Act."

The appellant contended that as the said sum of $73,016.08 was part of the profits of Nelson River Construction Ltd. accumulated by the latter prior to and undistributed at December 31, 1929, the appellant was not liable for income tax under said Act in respect thereof.

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

G. L. Cousley for the respondent.

The judgment of the court was delivered by

HUDSON J.—In the year 1935 the Manitoba Administrator of Income Tax assessed the appellant, Thos. Jackson and Sons, Limited, for income tax in respect of moneys received by them in the year 1934 from the Nelson River Construction Company, Limited. The moneys so paid were dividends out of profits accumulated by the Nelson Company prior to the 31st December, 1929.

From the decision of the Administrator the appellants appealed unsuccessfully to the Municipal Commissioner, to Mr. Justice Dysart in the Court of King's Bench of Manitoba and from there to the Court of Appeal in Manitoba where its appeal was unanimously dismissed. It is from that Court that this appeal is now brought to us. The Manitoba income tax law originally applied only to individuals but in 1930 it was amended to apply to com-

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In re THE INCOME TAX ACT (MAN.)

THOS. JACKSON & SONS LTD. *v.* THE MUNICIPAL COMMISSIONER.

Hudson J.

panies as well. The material charging section in the amendment then passed, and still in force, is 8 (4) reading as follows:

> 8 (4). Save as herein otherwise provided, every corporation and joint stock company, other than a personal corporation, no matter how created or organized, carrying on business within the Province shall pay a tax of five per centum upon the amount of its income within the Province during the preceding year.
>
> The tax imposed by this subsection shall be paid in the manner provided by this Act on the thirtieth day of April, 1931, and annually thereafter.

This section taken by itself is clearly sufficient to authorize the assessment of the appellants.

There was also inserted in the amendments of that year a section, 4 (*p*), reading as follows:

> 4. The following shall not be liable to taxation hereunder:—
>
> * * *
>
> (*p*) profits of a corporation or joint stock company other than a personal corporation accumulated prior to and undistributed at the 31st day of December, 1929, shall not be liable to taxation under subsection (4) of section 8 of "The Income Tax Act."

This section read by itself clearly would not exempt the appellants from the liability created by 8 (4). Read literally it applies only to profits in the hands of the accumulating company and would not relieve the beneficiaries on any distribution.

But it is argued, and with some force, that if section 4 (*p*) is read literally and section 8 (4) given its full effect, the result would be that 4 (*p*) would be wholly unnecessary, and the real intention of the Legislature must have been to relieve corporate shareholders from the tax which they would otherwise be liable for under 8 (4), and that effect should be given to this intention.

However, in the absence of some more definite expression of intention by the Legislature, in my opinion we cannot hold that a clear and specific charging section is limited by an exempting section which, read literally, does not impose such a limitation. The mere fact that the effect might be to render the exempting section altogether ineffective is not sufficient to overcome the language of the statute.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Johnston, Major, Finlayson & Fraser.*

Solicitor for the respondent: *John Allan.*

IN THE MATTER OF THE ESTATE OF JAMES OUDERKIRK, DECEASED

1936

* March 16.
* March 31.

ELLEN JANE OUDERKIRK AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

BERNICE GRANT OUDERKIRK AND WATSON OUDERKIRK (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Will—Testamentary capacity—Insane delusions.

In deciding whether or not a testator at the time of making his will was influenced by insane delusions to which it is shown he had been subject, all the circumstances of the case must be considered. In the present case it was *held* (reversing the judgment of the Court of Appeal for Ontario and restoring the judgment of the Surrogate Court Judge at trial), on the evidence, that, at the time of the making of the will, the delusions, which were as to the character and conduct of the testator's wife, were present and affected the testator's mind so that he could not rationally take into consideration the interest of his wife; and therefore he lacked the capacity to make a will and the will should not be admitted to probate.

The law on the subject discussed; *Banks* v. *Goodfellow*, L.R. 5 Q.B. 549, *Boughton* v. *Knight*, 3 P. & D. 64, and other cases, referred to.

APPEAL from the judgment of the Court of Appeal for Ontario which reversed the judgment of His Honour F. T. Costello, Esquire, Judge of the Surrogate Court of the United Counties of Dundas, Stormont and Glengarry, who found that at the time of the execution of the will in question the testator was labouring under delusions as to the character and conduct of his wife; that such delusions were fantastic and preposterous and would affect the making of the will; that therefore the testator was not of sound and disposing mind at the time the will was made; and ordered that the will be not admitted to probate. On appeal the Court of Appeal (without written reasons) allowed the appeal and directed that probate be granted.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal to this Court was allowed and the judgment of the Surrogate Court Judge restored.

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

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R. Danis K.C. for the appellants.

R. P. Milligan for the respondent Bernice Grant Ouderkirk.

J. M. Baird K.C. for the Official Guardian (representing infant defendants).

The judgment of the court was delivered by

KERWIN J.—The learned Surrogate Court judge directed that the will in question be not admitted to probate for the following reasons:—

> I find that before, at the time, and after the execution of the will, the deceased was labouring under delusions. These delusions were to the effect that his wife was an immoral character, and that she was entertaining men for immoral purposes. His wife, Ellen Jane Ouderkirk, was at the time about seventy years of age. She had borne him eleven children, the youngest of whom was over twenty-one, and the evidence was that she had lived a moral and respectable life.
>
> His ideas produced such delusions as were fantastic and preposterous. These delusions would affect the making of the will, and although some provision was made for his wife's maintenance, I consider that the provisions of the will show that he was influenced by such insane delusions.
>
> I find, therefore, that the deceased was not of sound and disposing mind at the time the will was made, and I therefore order that the will be not admitted to probate.

The one plaintiff executor who was actively concerned in propounding the will, appealed to the Court of Appeal for Ontario, and we were informed that that Court at the conclusion of the argument allowed the appeal, but we have not the benefit of the reasons for that judgment. We, therefore, found it necessary to examine the evidence at the trial critically.

The will in question was executed October 18th, 1932. The evidence is overwhelming that the testator did have delusions as to his wife from some time in the year 1928. Dr. Gormley, the family physician, states definitely that he observed them on April 28th of that year, and the evidence indicates that it was because some members of the family noticed these manifestations somewhat earlier, that the doctor was consulted. At that time he was prepared to certify that the man should be sent to an asylum but that was not done as the family decided not to remove him from his home.

The more difficult question that arises is whether these delusions "*were of such a character that they could not reasonably be supposed to affect the disposition of his*

property." The leading case on the subject is *Banks* v. *Goodfellow* (1). There are two subsequent cases which are of interest as they contain the relevant parts of charges to juries by the President of the Probate Division, Sir James Hannen, who had been a member of the very strong Court that heard the appeal in the Queen's Bench in *Banks* v. *Goodfellow* (1). The words italicized are taken from his charge to the jury in *Smee* v. *Smee* (2), and the other case to which I have referred is *Boughton* v. *Knight* (3). On page 74 of this latter report, the President quotes and applies the following passage in the judgment of Lord Chief Justice Cockburn in *Banks* v. *Goodfellow* (1):

> It is essential to the exercise of such a power (of making a will) that a testator shall understand the nature of the act, and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect, and with a view to the latter object that no disorder of the mind shall poison the affections, pervert his sense of right, or prevent the exercise of his natural faculties, that no insane delusion shall influence his will in disposing of his property, and bring about a disposal of it, which, if the mind had been sound, would not have been made. Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease, if insane suspicion or aversion take the place of natural affection, if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence, in such a case it is obvious that the condition of testamentary power fails, and that a will made under such circumstances ought not to stand.

At page 75, after dealing with the evidence in the case before him he charges the jury:—

> It is for you to say whether the accumulation of this evidence (for the defendants) has not this effect on your minds that it leads you to the conclusion that, whatever fluctuation there may have been in the condition of Mr. Knight's mind, for some years before he made this will he had been subject to delusions, especially in reference to the character, the intention, and the motives of his son's acts; and if you so find, then I must impress upon you that it becomes the duty of the plaintiffs to satisfy you that at the time the testator made the will he was free from those delusions, or free from their influence.

The law on this subject is well understood, but difficulties may arise in applying it, as is indicated by the vigorous dissenting judgment of Mr. Justice Sedgewick in *Skinner* v. *Farquharson* (4). There the majority of the members of the Court, who had heard the re-argument, and who

(1) (1870) L.R. 5 Q.B. 549.
(2) (1879) 5 Pro. D. 84.
(3) (1873) 3 P. & D. 64.
(4) (1902) 32 Can. S.C.R. 58.

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were living at the time judgment was given, reversed the decision of the Supreme Court of Nova Scotia and restored the judgment of the trial judge. The testator in that case had by an earlier will provided for his wife and son. Prior to the execution of the later will which was in question, he, to quote the head-note, "had frequently accused his wife and son of an abominable crime, for which there was no foundation, had banished the son from his house and treated his wife with violence." By the later will he reduced the provision for his wife and it was held, again quoting the head-note, "that the provision made by the will for testator's wife and son, and the appointment of the former as executrix and guardian, were inconsistent with the belief that when it was executed the testator was influenced by the insane delusion that they were guilty of the crime he had imputed to them and the will was therefore valid."

All the circumstances of each case must be considered, and in the present appeal we have come to the conclusion that the delusions were present on October 18th, 1932, the date of the making of the will, and that they did affect the testator's mind so that he could not rationally take into consideration the interest of his wife.

The solicitor who drew the will and who had known the testator for some years testified that he noticed nothing abnormal about the man, but he had never heard of the suggestion in 1928 that the testator be sent to the asylum nor had he heard of the delusions from which the man suffered since that time. It is true that the solicitor's recollection was that the testator mentioned some family trouble but the reference must have been of a fleeting character since it left no impression upon the mind or memory of the solicitor. The reference which, according to the solicitor, the testator made to his wife's age, and "that he wanted to provide a home for her where she would be taken care of in her old days, and he seemed to have it in his own mind that he was making a better provision for her now than he had formerly made for her" does not affect the matter, as that involves a comparison of the testator's mental condition at the time the previous will was executed and at the date of execution of the will in question; and at the trial the question of the probating

of the earlier will in these proceedings was abandoned. The testator was examined by a doctor on October 18th, 1932, but merely for some physical ailment, and while that doctor did not consider that Ouderkirk was incompetent to do business, he did not have present to his mind the question now under investigation. Similarly with Dr. McLeod, who saw Ouderkirk in March and April of 1932. It is true there is evidence called by the propounding executor that several merchants saw him from time to time and considered that he was quite capable of doing business and others called by the executor considered that the man was normal. This negative evidence, however, cannot prevail against the evidence of Dr. Gormley and Eliza McLeod, a daughter of the testator.

Dr. Gormley did not see Ouderkirk the day the will was made and had not seen him possibly for several weeks, but he was quite definite in his opinion as to the permanency of the delusions, and his evidence is not weakened, in our view, by his statement that when Ouderkirk was to undergo an operation the witness suggested that he arrange his affairs; as the doctor admitted, that implied the making of a will, but he stated that he should not have said that to the patient under the circumstances.

Eliza McLeod saw her father at her home in Cornwall on the day in question both before and after the will was executed, and on each occasion her father by his language showed that he was still labouring under the delusions with reference to his wife. It is not remarkable that he did not mention these to the solicitor since he went to the latter's office with notes for a will prepared by another witness. This witness, Hutt, called by the plaintiff, did not notice anything about the testator different from any other time he had seen him, but did consider strange the provision which the testator desired to be inserted in his will as to the burial of his wife, and also the provision of $5 a year for her. According to the evidence of the widow, the testator had a family plot in the cemetery and no one is buried there except himself, but despite this, the will provides for the burial of the body of the wife in a separate burial plot. This manifestation of the man's delusion as to his wife is on a par with what is indicated by the evidence of Eliza McLeod and Roy Casselman to the effect that some

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years before (Casselman fixes it about 1930), Ouderkirk told these two witnesses that after his death his picture in the house was to be taken down so as not to be near the picture of his wife whom he at that time described in terms similar to those used by him on other occasions.

We are clearly of opinion that these delusions did affect the mind of the testator to such an extent, and at the relevant time, that he was unable to make the will, and the appeal will, therefore, be allowed and the judgment of the Surrogate Court judge restored. The respondent Bernice Grant Ouderkirk must pay the costs of the appeal to this Court, but we do not interfere with the disposition made by the Court of Appeal for Ontario of the costs of the appeal to that Court.

Appeal allowed with costs.

Solicitors for the appellants: *Danis & Danis.*

Solicitor for the respondents: *J. C. Milligan.*

Solicitor for infant defendants: *McGregor Young (Official Guardian).*

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* Feb. 25, 26, 27, 28.
* June 17.

CAPTAIN W. F. WAKE-WALKER, OFFICER COMMANDING H.M.S. "DRAGON" (DEFENDANT) ..... APPELLANT;

AND

STEAMER COLIN W. LIMITED AND ST. LAWRENCE TANKERS LIMITED (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA (QUEBEC ADMIRALTY DISTRICT)

Maritime law—Collision—Evidence of negligence—Damage—Liability—vessel sunk when moored at wharf—Damage—Onus—Findings of trial judge—Assessors—Care and nautical skill.

The British cruiser H.M.S. *Dragon,* in command of the appellant, shortly before 9 o'clock in the morning and in fair weather, when about to enter Victoria Basin in the harbour of the city of Montreal to take up her allotted berth at the cross-wall at the inner end of the basin, collided with and sank the respondents' oil bunkering steamer *Maplebranch* which was lying at the time securely moored alongside the steamer *New Northland* which was docked at the wharf in a section

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

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just outside the entrance to the basin, on the north side of the harbour. The oil tanker *Maplebranch* had received orders to deliver a quantity of oil to the *New Northland* on the morning of the collision and she proceeded, without previously notifying the Harbour Master's office in conformity with certain regulations of the Montreal Harbour, to dock the section where the *New Northland* was moored and tied up alongside it about fifteen minutes before the collision occurred. According to the evidence, the appellant observed the *Maplebranch* cross over from the entrance to the basin and go alongside the *New Northland* when he was at a distance estimated by him at about a mile away though at that time he was not able to identify the vessel or to judge the distance of it from the entrance to the basin. It is also common ground that a strong cross current runs diagonally across the entrance of the basin toward the north shore at a speed of from five to six knots. The evidence shows further that a motor vessel, the *Saguenay Trader,* had arrived in the basin the previous afternoon and docked on the south side, bow towards the west; and, just as the *Dragon* was approaching the entrance to the basin, the *Saguenay Trader* was being turned about at her berth by her crew, her stern lines being fast to the pier and she merely drifting round with the wind; and the appellant alleged that, when he observed this motor vessel apparently swinging out across his course, he believed that she was going to get into his way and that he had to stop and reverse the *Dragon's* engines and that the cross-current then carried the *Dragon* over against the *Maplebranch* with no fault on his part. The action was brought by the respondents, Steamer Colin W. Limited, as registered owner of the steamer *Maplebranch,* and St. Lawrence Tankers Limited, as beneficial and managing owner or operator of the steamer *Maplebranch,* and as owner also of the cargo on board her, jointly claiming $100,000 against the appellant as officer commanding H.M.S. *Dragon* for damages by collision alleged to have been caused solely by the improper and negligent navigation and mismanagement of the *Dragon* by the appellant.

Held, Rinfret and Crocket JJ. dissenting, that the appellant should be held liable. The appellant, having collided with the *Maplebranch* at her moorings in broad daylight, the onus rested upon him to satisfy the Court that there was no fault upon him which directly caused the collision, and the trial judge has affirmatively found that there was such fault; and where the trial judge, as here, is not only an experienced local judge in Admiralty, but had the assistance of two assessors to advise him upon matters requiring nautical or other professional knowledge and arrived at a conclusion of fact upon conflicting testimony, it would need a very clear case of error for this Court, without the assistance of any assessors, to reverse such a finding. —The position of the *Maplebranch* has no bearing on the question of the appellant's liability, for, even if there were some technical breach of one of the Harbour regulations in bunkering the *New Northland* without first notifying the Harbour Master, that would have no legal consequence because of the fact that the appellant had a full view of the *Maplebranch* in ample time to avoid a collision with her. There is no place in this case for the application of the doctrine of contributory negligence to the *Maplebranch:* if there was any negligence, it was remote and antecedent and was not a proximate cause of the collision.—Also, assuming that there was some fault on the part of the vessel *Saguenay Trader,* if there was fault as well on the

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part of the appellant, the respondents not being guilty of any contributory negligence would be entitled as a matter of law to recover the whole of their loss from either of the ships that was in fault; and therefore the vital question before the Court was whether there was absence of negligence on the part of the appellant.

Per Rinfret and Crocket JJ. dissenting.—

In the case of a collision in broad daylight between a ship under way and one securely moored and an action brought against the moving ship for the recovery of damages resulting therefrom the defendant is not obliged, in order to absolve himself from liability or blame, to prove that the collision could not have been avoided in any possible way, but only to prove that it could not have been avoided by the exercise of ordinary skill and care on his part or on the part of the officers and men, for whose conduct he was responsible, in the particular circumstances in which they were placed. If he clearly proves that the collision was the necessary consequence of the intervention of a third ship in his course and that he and his officers and men were not at fault in the creation of that emergency he fully discharges the onus the law imposes upon him for running into a ship at anchor or securely moored and the defence of inevitable accident is thereby established. The finding of the trial judge that the defendant had not satisfied him that the collision was an inevitable accident was apparently based upon the assumption that the defendant should have foreseen that a vessel at or near the basin the defendant ship was entering might move and that it was his duty to have "his ship in hand to meet any eventuality." In this he prescribed a higher standard of duty for the defendant than the law warrants. The defendant's duty was, not to foresee and have his ship in hand to meet and guard against any and every eventuality which might possibly happen, but merely to exercise that degree of care and nautical skill, which is generally looked for in a competent seaman, to avoid such risks as might in the proved circumstances reasonably have been anticipated by him. There is no finding or suggestion, in the trial judgment, of any evidence pointing to any possible negligence on the part of the *Dragon* other than in following the course it did in approaching the basin, of any failure to keep a sufficient look-out before the *Saguenay Trader* was first observed across her course within the basin and of any lack of nautical skill respecting the orders to stop her engines and reverse. When these orders were given the evidence clearly shews that the *Dragon* was face to face with an imminent peril. Unless, therefore, she herself had been guilty of some negligence which contributed to bring that peril about, her commanding and navigating officers, being then in the agony of an imminent collision, could not properly be held to be accountable for any failure to exercise even ordinary care or nautical skill. There was no evidence upon which it could properly be found that there was any prior negligence upon their part which contributed to bring about the emergency. In these circumstances the *Dragon* should have been held blameless.

The City of Peking Case (6 Asp. 396) disc.

APPEAL from the Exchequer Court of Canada, Quebec Admiralty District, P. Demers J., maintaining an action brought by the respondents jointly claiming the sum of

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$100,000 against the appellant as officer commanding H.M.S. *Dragon* for damage by collision, the appellant being condemned to pay the damages sustained by the respondents, the same to be assessed upon a reference to the registrar of the Exchequer Court of Canada assisted by merchants.

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

Geo. A. Campbell K.C., John Kerry K.C. and *R. C. Harvey-Jellie* for the appellant.

R. C. Holden K.C. and *A. D. P. Heeney* for the respondents.

The judgment of Duff C.J. and Cannon and Davis JJ. was delivered by

DAVIS J.—In broad daylight and in fair weather the British cruiser H.M.S. *Dragon* in command of the appellant, when about to enter what is known as the Market (or Victoria) Basin in the harbour of the city of Montreal to take up her allotted berth at the cross-wall at the inner end of the basin, collided with and sank the respondents' oil bunkering steamer *Maplebranch* which was lying at the time securely moored alongside the steamer *New Northland* which was docked at the wharf in section 23 just outside the entrance to the basin. The *Dragon* had a length of 470 feet and a beam of 41 feet and at the time of the collision was inbound from the city of Quebec. It seems unfortunate that the Master of the Montreal Harbour should have allotted to the British cruiser such an inconvenient berth to be reached through a comparatively narrow entrance, and while the Harbour Commission is not a party to this action and has not been called upon to justify the designation of the particular berth, it is a little difficult to refrain from comment upon what appears to have been a most inappropriate location for the *Dragon*. Just at the entrance to the basin, the *Dragon's* starboard side, at a point about 100 feet from her stern, struck the starboard side of the *Maplebranch* and the *Dragon's* starboard propeller cut into the *Maplebranch* and she sank. The *Maplebranch* had a length of approximately 232 feet and a beam of 35·5 feet.

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This action by the owners of the *Maplebranch* (respondents) is to recover from the Officer Commanding the *Dragon* (appellant) the damages sustained by them and under the circumstances it plainly rested upon the appellant to satisfy the Court that there was no negligence on his part. In the *City of Peking* case (1), the Judicial Committee laid down the rule very definitely that the fact of a vessel under steam colliding with a ship at her moorings in daylight is *prima facie* evidence of fault and her owners cannot escape liability except by proving that a competent officer could not have averted the collision by the exercise of ordinary care and skill.

Counsel for the appellant, in endeavouring to support the plea of inevitable accident, complained of the conduct of the *Maplebranch* itself and also of the conduct of a motor schooner, the *Saguenay Trader,* which was at the time of the accident in course of being turned about at her berth within the harbour.

Dealing firstly then with the charges against the *Maplebranch.* It is contended that under certain regulations of the Montreal Harbour she was not entitled to be lying alongside the *New Northland* and that her presence there was an impediment to the *Dragon* entering the basin to take her allotted berth. But the evidence is clear that the appellant observed the *Maplebranch* cross over from the entrance to the basin and go alongside the *New Northland* when he was at a distance estimated by him at about a mile away though at that time he was not able to identify the vessel or to judge the distance of it from the entrance to the basin. The appellant admits that when he was about 200 or 300 yards below the *Maplebranch* he was able to estimate her position and if he had thought then that there was any danger to the *Maplebranch* he could have stopped earlier than he did. He went on, thinking he could go in successfully with the *Maplebranch* where she was. The Navigating Officer of the *Dragon* was asked how the *Maplebranch* bore at the time the engines of the *Dragon* were stopped.

Q. You were not worrying at all about the *Maplebranch* at that stage?

A. Not at that stage.

(1) (1888) 6 Asp. 396.

Q. But for this schooner (i.e., the *Saguenay Trader*) you think the *Maplebranch* would not have interfered with your entry?

A. I am quite certain of it.

The position of the *Maplebranch* has no bearing on the question of the appellant's liability for even if there were some technical breach of one the Harbour regulations in bunkering the *New Northland* without first notifying the Harbour Master, that would have no legal consequence because of the fact that the appellant had a full view of the *Maplebranch* in ample time to avoid a collision with her. In *Cayzer, Irvine & Co.* v. *Carron Company* (1), the House of Lords had to consider an action brought in the Admiralty Division in respect of a collision off Blackwall Point. The appellants' steamship, the *Clan Sinclair,* had come out of the South West India Dock on the north shore of the Thames nearly opposite the curve of Blackwall Point about 1.30 p.m. on the 9th of March, 1883, and proceeded down river against the tide under her own steam and with a tug attached, at about three to four knots through the water. The respondents' vessel, the *Margaret,* was at the same time steaming up the river with the tide at from five to six knots over the ground. The Court of Appeal had held that upon the true construction of Rule 23 of the Thames Rules the *Clan Sinclair* had broken the rule in not easing so as to prevent herself from proceeding lower down the river than was necessary, when she first ought to have seen the *Margaret,* and held that both vessels were to blame. The House of Lords reversed the order of the Court of Appeal on the ground that even assuming, but without deciding, that the construction put by the Court of Appeal on Rule 23 was correct and that the *Clan Sinclair* had transgressed that rule, yet such transgression was not the cause of the collision; that ordinary care on the part of the *Margaret* would have enabled her to avoid the collision, and that she alone was to blame. I quote the words of Lord Blackburn at p. 883:

Then it is said that the collision was owing to the *Clan Sinclair* being where it was. Undoubtedly in one sense that is so. If the *Clan Sinclair* had been some hundred yards higher up the river, the fact which made it a matter of rashness for the *Margaret* to run where it did run would not have existed. But that is not a sufficient ground for saying that the fact of the *Clan Sinclair* being there was the cause of the accident. The *Clan Sinclair* would not have been there at the time when it was there if it

(1) (1884) 9 App. Cas. 873.

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had not been that the vessel did not ease and wait so soon perhaps as it ought to have done; but that was not the cause of the accident, but that the *Margaret,* knowing where the *Clan Sinclair* was, attempted to pass between it and the *Zephyr* where there was not sufficient room. Undoubtedly the *Maplebranch* would not have been sunk had she not been where she was but whether she was rightly or wrongly there, having regard to the local regulations of the Montreal Harbour, the appellant had full view of her in broad daylight and there is no place in this case for the application of the doctrine of contributory negligence to the *Maplebranch.* If there was any negligence, it was remote and antecedent and was not a proximate cause of the collision.

Turning now to the charges against the motor schooner, the *Saguenay Trader,* the owners of which are not parties to the action, but whose conduct, the appellant contends, was the direct and sole cause of the unfortunate occurrence. The *Saguenay Trader* was a small motor schooner 103 feet long. At all material times she was tied at her regular allotted berth within the basin, at the Victoria Pier (which forms the south side of the basin), starting at a point about 75 feet from the end of the pier. As the *Dragon* was approaching the entrance to the basin this schooner was being turned about at her berth by her crew; her stern lines were fast to the pier and she merely drifted round with the wind, the turning operation taking about ten or twelve minutes. The defence of the appellant is that to avoid striking the schooner it became suddenly necessary for him to stop and reverse the *Dragon's* engines and that a cross current then carried the *Dragon* over against the *Maplebranch* and that there was no fault on his part; in other words, that it was an inevitable accident. The trial judge said,

> There is no question that if the *Saguenay Trader* had not started to turn when the *Dragon* was approaching the basin there would have been no accident to anybody.

Counsel for the appellant very naturally seized upon that sentence in the reasons for judgment of the learned trial judge and sought to put the entire blame upon the *Saguenay Trader.* It may be that if the *Saguenay Trader* had not been turning round at her berth at the time the *Dragon* was about to enter the basin, it would not have been necessary for the appellant to stop and reverse the engines of the *Dragon* when he did, but that observation does not

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carry us any distance in determining what was the proximate cause of the damage to the *Maplebranch*. I cannot find that the *Saguenay Trader* was committing any wrongful act in turning round at her berth or that she in any way contravened Regulation 28 of the Harbour regulations which provides that

> The master or person in charge of any vessel wishing to move from one berth to another in the harbour must first obtain permission from the Harbour Master.

The *Saguenay Trader* was not moving from one berth to another. The Harbour Master had given no orders or directions to the *Saguenay Trader* or to any of the other boats that were lying in the harbour with respect to the arrival of the *Dragon*. The *Saguenay Trader* had been allowed to come in and go out and to turn on arrival or departure without permission each time from the Harbour Master and so far as the appellant knew (he had received no assurance that none of the boats in or around the basin would be moving about) the *Saguenay Trader* might have been merely departing on a voyage. But assuming that there was some fault on the part of the *Saguenay Trader*, though I cannot find any, if there was fault as well on the part of the appellant as on the part of the *Saguenay Trader*, the respondents, not being guilty of any contributary negligence, would be entitled as a matter of law to recover the whole of their loss from either of the ships that was in fault. *The Devonshire* (1). The vital question before us therefore is whether there was absence of negligence on the part of the appellant. It cannot properly be said, it seems to me upon the evidence in this case, that the appellant was suddenly put in the agony of a collision. The movement of any one of the several boats that were in or about the entrance to the basin was something to be reasonably anticipated by the appellant and with respect to which, having regard to the neck of the bottle as it were through which he had to pass, he should have had his ship under control to meet.

Within the basin beside the *Saguenay Trader* were the motor schooner *Zénon C.* (85 feet long), lying just west of the *Saguenay Trader* on the south side, and, on the north side, the *Tadoussac* (350 feet long) and the *Richelieu*, another large steamer. Just outside the basin, in section 23

(1) [1912] A.C. 634.

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of the wharf, stood the *New Northland* (287 feet long with a 47-foot beam) and alongside her the *Maplebranch*. Somewhat farther down the wharf was H.M.S. *Dundee*. The trial judge specifically found that the movement of the *Saguenay Trader* was "something unexpected by the *Dragon*, but in the opinion of the Court it was one of those eventualities a mariner should guard himself against."

Having collided with the *Maplebranch* in broad daylight it rested upon the appellant to satisfy the Court that there was no fault on his part which, either alone or in common with some fault on the part of the *Saguenay Trader*, directly caused the collision. It is said that under all the circumstances it is a hardship to hold the appellant liable but it would be an equal hardship to the owners of the *Maplebranch* and her cargo if sympathy for the appellant were to enter into the determination of the action. The question is whether or not the appellant has discharged the onus that lay upon him to establish that he was not guilty of what the law regards as negligence. The learned trial judge has had much experience as the local Judge in Admiralty at Montreal and he had the advantage of two assessors appointed under the provisions of Rule 112 of the General Rules and Orders regulating the practice and procedure in admiralty cases in the Exchequer Court of Canada. It is plain that the trial judge decided the matter, as he was bound to do, in accordance with his own opinion as to the law and the merits, though he adopted, as he was entitled to adopt, the advice of the assessors upon those phases of the action which required nautical knowledge and practical seamanship. Such a judgment ought to be given great weight by an appellate court and we ought not to interfere with it unless upon our own examination of the evidence, unassisted as we are by assessors, we are led to an irresistible conclusion that there is manifest error in the judgment. Counsel for the appellant in their very able and exhaustive argument before us have failed to satisfy me that there was no fault directly causing the damage, on the part of the appellant. The trial judge went farther and found affirmatively that there was fault on the part of the appellant. We may conveniently examine now the evidence upon which the learned trial judge undoubtedly rested his finding of fault.

West, the Navigating Officer of the *Dragon*, made a black line on exhibit D-1 to indicate the course which according to him the *Dragon* followed from the time she went under Harbour Bridge up to the time her engines were stopped. If this course was followed, the *Dragon* did not alter to starboard until she had reached a point about opposite the *Maplebranch* and at least three or four hundred feet out in the river from the north shore. On the same chart, exhibit D-1, Captain Lacouture of the *Maplebranch* indicated in blue pencil the course which the *Dragon* appeared to him to have taken. Captain Lacouture said that when he first noticed the *Dragon* altering her course she was about 1,000 feet below the entrance to the basin; he was standing on the bridge of the *Maplebranch* watching the *Dragon* approaching. He said that he only saw the *Dragon* broadside, indicating that the *Dragon* had altered her course at that time to starboard, and that when the bow of the *Dragon* passed the bridge of the *Maplebranch* the distance between the *Maplebranch* and the bow of the *Dragon* was only about 60 to 65 feet. At that time the *Dragon* was about parallel to the *Maplebranch*. Symons, the Harbour Master of Montreal, when asked from his knowledge of the current, if the *Dragon* coming in followed "anything like the course" marked with the blue pencil could she expect to get safely into the basin, said that it all depended on the speed she was travelling, that it is not the usual course for a long ship, it might do for a small vessel 100 or 150 feet long, but that a long vessel should be farther out as she passed the wharf where the *New Northland* was moored and that if a long ship got as close to the shore as indicated by the blue pencil he would expect her to have a lot of difficulty getting in, unless she could move very fast, and in any event the current would be very much inclined to swing her down on the moored ships. The *Dragon's* records and the evidence of the appellant and of West, the Navigating Officer, indicate that the alteration to starboard was made by the *Dragon* at 0842. The entry in the Navigating Officer's note-book reads.—

0842

Altered course to starboard, 30 degrees.

West stated that while he thought he used only 10 degrees of starboard helm, the ship actually turned 30 degrees. The appellant himself, at the trial, said

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I had to use 30 degrees of wheel to get a swing quickly because the current was on my starboard bow. She hung rather, and I started with 15, and told the Navigating Officer to give her more, and he gave her 30 degrees of wheel to bring her around.

And he said that it was about 1,000 to 1,200 feet, from the end of the pier, when he altered the course to starboard, and West had testified that they starboarded about 1,200 feet below the pier. But when the *Dragon* altered her course to port at 0839 to steer on buoy 201-M she was almost 1,000 feet below the Harbour Bridge, as shown by chart exhibit D-9. She was making 11½ knots through the water and continued on this course for only three minutes, until 0842, when she altered the 30 degrees to starboard and continued on this new course for a similar period of three minutes until 0845 when her engines were reversed and the helm put hard aport.

The respondents' contention at the trial was that the alteration to starboard was a good deal farther down the river than the course plotted on chart exhibit D-9 indicates and that the *Dragon* turned in at a point down the river which brought her in close to the shore too soon. There was considerable evidence at the trial by eye-witnesses to the accident that the *Dragon* was too close to the shore and was already in a dangerous position while she was still considerably below the *Maplebranch*. Captain Hatfield was standing on the port side of the *New Northland,* at the rail, and in his judgment the *Dragon* swung "a little bit too sharply." He did not particularly notice the *Dragon* until her bow was half her length astern the *New Northland.* Now the *New Northland* was between 450 and 475 feet below the Victoria Pier and the length of the *New Northland* herself was 287 feet and half the *Dragon's* length was 235 feet, making in all about 1,000 feet that the bow of the *Dragon* was below the pier at the time Captain Hatfield says he first saw her. O'Hearn, 3rd Officer of the *New Northland,* was near her stern where he had gone to dip the colours. He testified that when the *Dragon* was about half her length below the stern of the *New Northland* she was only 80 or 90 feet outside that ship. He had never seen a ship so close to the north side when trying to enter the basin and he testified that the *Dragon* was never out in the position shown on the sketch filed by the appellant as exhibit D-2. Bouchard, 2nd Officer of the *New Northland,* testified that he thought there was danger when

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he first saw the *Dragon* about 300 feet below the *New Northland* and that the *Dragon* was in opposite the basin and was not in the position shown on the appellant's sketch, exhibit D-2. Le Calvez, a waiter on the *Tadoussac*, testified that when passing the *Dundee* (which was moored below the *New Northland*) the *Dragon* was only 40 or 50 feet out from her and that when about three of her own lengths below the Clock Tower at the end of the pier, the *Dragon* "took an inward course into the basin." While the witness may not be exact in his estimate of the distances, he placed the *Dragon* dangerously close to the north shore and not out in the river as indicated by the course marked by West on the chart exhibit D-1. Sioui, another waiter on the *Tadoussac*, testified that when the *Dragon* was at least a length below the *Maplebranch* he realized that there might be a collision and that as the *Dragon* came on, her bow was between 50 and 60 feet from the *Maplebranch* and that she was never out opposite the pier as indicated on the appellant's sketch, exhibit D-2. Murphy, who was on the top deck of the *New Northland*, saw the *Dragon* when she was around shed 24, just below the *Dundee*, and he estimated that she was then probably 150 or 200 feet from the *Dundee* coming toward the basin. Captain Gagnon from the deck of the *Saguenay Trader* saw the *Dragon* when she was a little below the *New Northland*. He said she was coming fast and was heading for about the middle of the basin, and he could see only her port side. The effect of Gagnon's evidence is that the *Dragon* was up opposite the entrance to the basin while still below the *New Northland* and was never out opposite the end of Victoria Pier and close to it, as the appellant contends. There was substantial evidence that when the *Dragon* stopped and reversed her engines she was already near the north shore and practically on top of the *Maplebranch*. Against all this evidence, the appellant and his Navigating Officer West said that the *Dragon* took the outer course as indicated generally by the black line on sketch exhibit D-1.

Upon this conflicting testimony the trial judge came to the conclusion that the course "at first" followed by the *Dragon* was more as indicated by the black line than by the blue line on exhibit D-1 but that she did not follow that course throughout and "turned too early, or, if you prefer,

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too sharply." The language is unfortunately somewhat loose but I think indicates plainly that in the judgment of the Court the proper course to have taken was the course indicated throughout by the black line and that in point of fact the appellant did not keep to that course and that his failure to do so led him into difficulty when confronted with the movement of the *Saguenay Trader* and directly caused the collision of the *Dragon* with the *Maplebranch*. It is common ground that there is calm water in the basin but that a strong current runs diagonally across the entrance of the basin toward the north shore at a speed of from five to six knots. "For this reason," as counsel for the appellant very frankly state in their factum, "vessels approaching the basin must steer well to port and far out from the north shore." Counsel for the appellant further state in their factum that "The earlier a vessel turns in, the sooner will the navigator be able to perceive anything in his course; but to turn too early means that the current will carry the ship to the north shore before it can safely cross it." There is really no difficulty in appreciating the trial judge's finding that the *Dragon* "turned too early, or, if you prefer, too sharply."

While I think the onus lay throughout the case upon the appellant to satisfy the Court that there was no fault upon him which directly caused the collision, the learned judge has affirmatively found that there was such fault; and where the trial judge, as here, is not only an experienced local Judge in Admiralty but had the assistance of two assessors to advise him upon matters requiring nautical or other professional knowledge and arrived at a conclusion of fact upon conflicting testimony, it would need a very clear case of error for this Court, without the assistance of any assessors, to reverse such a finding.

In my opinion the appeal should be dismissed with costs. The question of liability for the cargo is open on the reference directed to be had but if there is any doubt on that point, as suggested during the argument, the order of this Court may make it plain. One of the respondents, the steamer Colin W. Limited, was the registered owner of the *Maplebranch* but its co-plaintiff, St. Lawrence Tankers Limited, was the beneficial owner as well as the owner of the cargo laden on board her. The former company may have been a necessary and proper party to

the action but the recovery of judgment should have been limited to the latter company, and the judgment at the trial may be corrected if counsel for the appellant think it necessary.

The judgment of Rinfret and Crocket JJ. (dissenting) was delivered by

CROCKET J.—This appeal comes to us directly from a decision of the Local Judge in Admiralty for the district of Quebec (Mr. Justice P. Demers) in an action brought by the respondents, Steamer Colin W. Limited, as registered owner of the Str. *Maplebranch,* and St. Lawrence Tankers Limited, as beneficial and managing owner or operator of said Str. *Maplebranch,* and as owner also of the cargo laden on board her, jointly claiming $100,000 against the defendant as Officer Commanding H.M.S. *Dragon,* for damage by collision alleged to have been caused solely by the improper and negligent navigation and mismanagement of the *Dragon* by the defendant.

The collision occurred in the Harbour of Montreal on Monday, August 13, 1934, shortly before 9 o'clock a.m., while the *Maplebranch* was lying tied up alongside the Str. *New Northland* on the north side of the harbour and while the *Dragon,* upbound from Quebec, was about entering Market Basin to dock at its western wall, where her Commanding Officer had been notified by the Harbour Master she was to dock. The *Maplebranch* sank soon afterwards as a result of the collision.

The Harbour Master's office had been informed by wireless through H.M.S. *Dundee,* which was docked below the *New Northland,* on Saturday afternoon that the H.M.S *Dragon* would arrive at 9 o'clock on Monday morning, but this information was not communicated to any of the vessels moored in or about the basin, though steps were taken to see that the west wall was clear to receive the warship on her arrival.

The *Maplebranch* was a twin screw oil tanker of 1,649 registered tonnage, 238 feet long, with a beam of 35 feet 6 inches. Having received orders to deliver a quantity of oil to the *New Northland* on the morning of August 13, she proceeded without previously notifying the Harbour Master's office from the Racine wharf to dock section 23,

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where the *New Northland* was moored, and tied up alongside the last named steamer only ten or fifteen minutes before the collision occurred. The beams of the two vessels thus lying side by side extended 82·8 feet into the harbour from the wall of the dock and this at a point only a few hundred feet below the entrance to the basin.

It appears that the Commanding Officer of the H.M.S. *Dragon*, when at a distance he estimated to be about a mile east of the Market Basin, had observed the *Maplebranch* cross over from the entrance to the basin and come alongside the *New Northland*, though he was not then able to identify either vessel or in a position to judge the distance of the two vessels from the entrance of the basin, according to her case. Just before the *Dragon* got to the Harbour Bridge she altered her course to port, steering on gas buoy 201, on the south side of the ship channel, and continued in that direction until she reached a position at a distance variously estimated as from 1,000 to 1,500 feet from the east end of Victoria Pier, the inside northerly wall of which forms the southerly side wall of Market Basin. At this point, her case was, the defendant altered her course to starboard and steered for the end of Victoria Pier. It should here be explained that a cross current sweeps across the basin entrance in a northeasterly direction upon dock sections 23 and 24. Having been advised by the pilot, who had been assigned to the ship at Quebec for the Montreal trip, that this current was a six-knot current, the defendant in approaching the basin increased his speed from 87 to 100 revolutions which, it seems, means 11½ knots through the water and about 8 to 8½ over the ground. When the *Dragon* got within 500 or 600 feet of the line of the entrance to the basin or about half way from the point at which she had altered her course to starboard the current began to swing the vessel sideways towards the entrance of the basin, which measures 312 feet, as the defendant had anticipated it would, and then, when the bow of the warship was pointing towards the northeasterly corner of Victoria Pier, the defendant, according to his case, for the first time saw over that point of the pier a vessel moving within the basin not far from the entrance. As the *Dragon* approached the entrance of the basin, the defendant, who was in command of the ship and on the

bridge with his navigating officer, another Lieutenant-Commander, a number of signalmen and the pilot—the latter on the port side of the platform—was heading his ship, on account of the cross current, outside the basin, and could not see any of the vessels—it seems there were three of them—which were moored on the south side of the basin, these being hidden from his view by the clock tower and sheds on the pier. He was steering to port to allow for the set of the current. He could see, however, the vessels which were moored along the north side of the basin. One of these was the *Tadoussac,* 350 feet long with a beam of about 70 feet, a passenger steamer of the Canada Steamships Line, which, it seems, had docked earlier in the morning, partly within and partly without the entrance to the basin, the stern of the latter being about 65 feet west of the bow of the *New Northland.* Some distance west the *Richelieu,* another passenger of the Canada Steamships Line, lay along the nort wall of the basin. The vessel, which the defendant saw over the pier moving in the basin from the position indicated, turned out to be the *Saguenay Trader,* a motor vessel, 103 feet long. It had arrived in the basin the previous afternoon and docked on the south side, bow towards the west, in a space of 175 feet, which had been marked off and allotted by the Harbour Master for the Verrault Shipping Co., commencing at a point about 75 feet from the eastern end of the pier.

It seems that when the *Dragon* altered her course to starboard at 8.42 a.m. while south and east of Victoria Pier the *Saguenay Trader* was turning around at her berth for the purpose of more conveniently discharging some cargo on the dock. This movement was made without giving any notification to the Harbour Master or the Harbour Master's office and in violation, as both the Harbour Master and the Dock Master alleged, of the regulations governing the movement of ships in the harbour.

The result was that when the *Dragon* got closer to the basin entrance with the cross current gradually swinging her into a position paralleling or nearly paralleling the north wall of the basin the defendant observed this motor vessel swinging out across his course and believed that she was going to get into his way. The Chief Yeoman of the *Dragon* said that when he first saw the motor vessel it was about at an angle of 45 degrees from the wharf and swinging out

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very quickly as the *Dragon* was approaching. Confronted with this emergency when, as he estimated, the *Dragon* was at a point approximately 150 to 200 yards from the end of Victoria Pier the defendant stopped his engines and immediately afterwards—the navigating officer says 12 or 15 seconds later—ordered full speed astern, and then hard aport. The warship moved on towards the basin at a reduced speed. Her bows passed into the still water of the basin but her stern, still in the cross current, was swung over while the ship was still moving forward slowly, so that her starboard propeller, which was situated about 100 feet forward of the extreme end of the stern, caught the *Maplebranch* and ripped some of the plates off her hull. "Owing to the fact," the officer commanding explained, "that I had to pull the ship up while she was still in the current instead of in the still water in the basin the current caught my stern and swung it over so that it hit the *Maplebranch.*"

The *Dragon,* after hitting the *Maplebranch,* continued to move forward in the basin and passed the *Saguenay Trader* by about 15 or 20 feet. In executing her turning movement the *Saguenay Trader* did not use its own power but relied entirely upon the force of the wind from the west to turn her round while lines from her stern held her to the wharf, so that in turning she must at one time have had her stem projected into the basin at least 103 feet. The *Dragon* herself was 470 feet long with a beam of 41 feet.

By consent of counsel all evidence made at the formal investigation of the collision before the Wreck Commissioner in August, 1934, was made part of the trial record in the Admiralty Court subject to the right of the parties to recall the same witnesses or to call new witnesses in their discretion. In pursuance of this agreement the Commanding Officer and the Navigating Officer of the *Dragon* were recalled and gave evidence in the Admiralty Court before the learned trial judge and his assessors, supplementing in some particulars that which they had previously given before the Wreck Commissioner. Only two other witnesses gave evidence in the presence of the trial judge, one of whom, a photographer, merely identified a photograph which had been produced at the Enquete. The other (Sioui) was a waiter on the *Tadousac,* who gave an account of what he had seen from the stern of the main deck of that ship. So that the trial was one in which the learned

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judge with the exceptions just indicated had not the advantage of seeing the witnesses as they gave the evidence upon which he decided the case, which I think in a case of such importance as this was unfortunate.

His Lordship held that the principal issue was as to whether the defendant had proved that the collision was an inevitable accident, and that the defendant had not satisfied him that it was. He therefore ordered judgment for the plaintiffs and referred the case to the Registrar, assisted by merchants, for the assessment of damages.

I have already summarized the essential facts as they appear from the evidence of the defendant, his navigating officer and other witnesses, which I have thought it well to do at the outset in order to get a clear picture of the collision as explained from the defendant's standpoint.

On the part of the plaintiffs it was sought to shew that the *Dragon,* after passing under the Harbour Bridge, which, it seems, is 3,300 feet below the easterly line of Victoria Pier, altered her course to the north in the middle of the ship channel and then gradually drew in towards the *Dundee* and the *Maplebranch* until she got in a position less than 100 feet out from these vessels; one witness put it as low as 40 feet out from the side of the *Maplebranch.* It is clear from the learned trial judge's reasons that he did not accept this evidence, for he expressly held that the evidence shewed that the line at first followed by the *Dragon* was more as indicated by the defendant and his witnesses, though stating that the court was of the opinion, as were also the assessors, "that the *Dragon* turned too early, or if you prefer, too sharply."

It was sought also by the plaintiffs to prove that the *Saguenay Trader* had completed her turning movement in the basin and was lying alongside the wharf again at the time the *Dragon* altered her course to starboard. This evidence the learned trial judge seems to have rejected also, for he states that there was

> no question that if the *Saguenay Trader* had not started to turn when the *Dragon* was approaching the basin there would have been no accident to anybody.

There is no doubt there is a well recognized rule in the Admiralty Courts of Great Britain as well as of Canada that the fact of a ship under way running in broad daylight into a ship at anchor or securely moored, as the learned

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trial judge found the *Maplebranch* was here, creates a presumption that the collision was caused by the negligence of the moving ship. This presumption is, of course, not absolute, but is one which can only be effectually rebutted by clear proof that the collision was not wholly or in part so caused, that is to say, by clear proof that there was no negligence on the part of the moving ship, which caused or materially contributed to cause the collision sued for, or in other words, that the collision could not possibly have been avoided by the exercise of ordinary care and ordinary nautical skill on the part of the moving ship. If it could not have been so avoided it is, so far as the moving ship is concerned, " an inevitable accident " within the true meaning of that expression so often used in maritime law. If it could have been so avoided, the defence fails. That, I apprehend, is the clear result of the authorities on the question of the proof of inevitable accident, as now generally recognized. See *The Batavier* (1); *The Marpesia* (2); *The Sisters* (3); *The Annot Lyle* (4); *The Merchant Prince* (5); *The Schwan and The Albans* (6); *The Steel Scientist* (7); *The Clarissa Radcliffe* (8).

The law as it affects the adequacy of proof of inevitable accident is perhaps most concisely summed up in the following passage from the judgment of Dr. Lushington in *The Thomas Powell* v. *The Cuba* (9).

> To constitute an inevitable accident it was necessary that the occurrence should have taken place in such a manner as not to have been capable of being prevented by ordinary skill and ordinary diligence. We were not to expect extraordinary skill or extraordinary diligence, but that degree of skill and that degree of diligence which is generally to be found in persons who discharge their duty.

Whether the person sued exercised such skill and care manifestly can only be determined on a full consideration of all the conditions and circumstances in which he found himself, as in any action based on negligence. It must be borne in mind in all cases, whether the defendant be charged with negligence causing a collision with a ship at anchor or a collision with a ship under way, that he is not

(1) (1845) 2 W. Rob. 407.
(2) (1872) L.R. 4 P.C. 212.
(3) (1876) 1 P., 117.
(4) (1886) 11 P.D. 114.
(5) (1892) P. 17.
(6) (1892) P. 419.
(7) (1926) 25 Lloyd's List, L.R. 325.
(8) (1930) 36 Lloyd's List, L.R. 298.
(9) (1866) 14 L.T., at 603.

obliged, in order to absolve himself from liability or blame, to prove that the collision could not have been avoided in any possible way, but only to prove that it could not have been avoided by the exercise of ordinary skill and care on his part or on the part of the officers and men, for whose conduct he was responsible, in the particular circumstances in which they were placed. If a defendant clearly proves that the collision sued for was the necessary consequence of the intervention of a third ship in his course and that he was not at fault in the creation of that emergency he fully discharges the onus the law imposes upon him for running into a ship at anchor. Proof by a preponderance of evidence, as in all civil actions, is all that is necessary to establish the defence of inevitable accident in such a case.

With all respect it seems to me from my study of the trial judgment and of the evidence that the learned judge prescribed for the defendant a higher standard of duty than the law warrants. I have already quoted two of His Lordship's findings, viz.: "that the *Dragon* turned too early or, if you prefer, too sharply," and that "if the *Saguenay Trader* had not started to turn when the *Dragon* was approaching the basin there would have been no accident to anybody."

As to the first of these findings its meaning is not clear in itself, but His Lordship explains it in the two following paragraphs:

> I am told by my assessor that the proper way of entering that basin on account of a current running from Victoria Pier towards section 23 of the wharf is to keep a course well southwest of the extremity of Victoria wharf,—at a certain moment, a few hundred feet off this point, to proceed slowly in the current until she is in proper position to enter the basin. This permits the ship to thus attain safely the dead water of the basin. Of course, if you turn too sharply, on acount of the current you must maintain the speed otherwise you are carried by the current against the wharf, but the entrance to be safely executed must be as I have said, and diagonal.
>
> If the manoeuvre had been as I have said, the defendant would have got his ship in hand to meet any eventuality. By taking the other course, there was the risk of an intervening ship in the basin.

These two paragraphs no doubt shew that His Lordship adopted the opinion of his assessor (the record states there were two assessors and doubtless His Lordship meant both of them) as the proper course to enter the basin, but that does not mean that there was any negligence on the part of the *Dragon* in following the course it actually did follow

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in approaching the basin, or that, if there were any failure to exercise ordinary skill in not following the suggested course, such failure was the direct cause of her hitting the *Maplebranch*.

It is unfortunate that there is no record of the precise questions which were submitted to the assessors for their advice and no other record of their advice than that contained in the paragraph of the judgment above quoted, for, as it is there stated, it is not of a very clear or definite character. Whether it was intended to indicate the proper way for a vessel of the *Dragon's* length and navigating characteristics to approach and enter the basin or the proper way for all vessels, regardless of their size, to approach and enter, it is difficult to say, but if it was intended to lay down a course for all vessels alike, and in all conditions of wind and weather, it is clear from the evidence that it is not the course which has been usually followed. As to keeping a course well southwest of Victoria Pier, that is precisely what the evidence shews the *Dragon* did until she was within a distance, according to the defendant, of 1,000 or 1,200 feet. Nothing is said about a vessel changing her course from well southwest of the extremity of Victoria Pier, but at a certain moment, a few hundred feet off this point, it is said she is to proceed slowly in the current until she is in a proper position to enter the basin. There must, however, obviously be some turning to starboard from such a course, if a vessel is to enter a basin on the north shore of the river before she can proceed slowly in such a cross current as has been described.

I confess I cannot understand just what is meant by the finding in the preceding paragraph that the *Dragon* "turned too early or, if you prefer, too sharply," for it seems to me that the farther west she proceeded on her course southwest of Victoria Pier, the more sharply she would have to starboard into the cross current, while the farther east she was, i.e. the sooner she turned to approach the entrance to the basin, the less sharp would be her turning angle. Be this as it may, we are told, presumably on the advice of the assessors: "Of course, if you turn too sharply, on account of the current you must maintain the speed, otherwise you are carried by the current against the wharf, but the entrance to be safely executed must be, as I have said, and diagonal." I take this to mean that if a vessel does not

follow the course first suggested and proceed slowly in the current until she is in a proper position to enter the basin, but instead turns more sharply into the cross current she must maintain her speed to avoid being carried against the wharf, and enter the basin diagonally, heading towards the northwest. My greatest difficulty with the assessors' opinion is to understand how a vessel, which simply proceeds slowly in the current from a course well southwest of Victoria Pier, is less likely to be carried by the cross current against the wharf or a ship moored there than if she turns sharply into the cross current and maintains her speed.

Whatever the suggestion may be, however, it cannot well be held that the failure to precisely follow one course in preference to the other even points to the possibility of negligence causing the collision with the *Maplebranch,* when the trial judge has expressly found that had it not been for the action of the *Saguenay Trader* there would have been no accident to anybody. This last mentioned finding can mean nothing else than that, had it not been for the intervention of the third ship, the *Dragon* would have passed safely into the basin on the course she was following, and no other conclusion in that regard is in my opinion reasonably possible on the evidence. In any event there is nothing in connection with the finding regarding the too early or too sharp turning of the *Dragon* to shew that any consideration was given either by the assessors or the learned trial judge to her unusual length or her navigating characteristics, with which her navigating officers were so familiar, or to any other facts or circumstances, which might affect the question as to whether ordinary care and skill were exercised in adopting the course she did.

It was strongly urged in behalf of the defendant that the finding as to the too sharp turning should in any case be disregarded for the reason that it was not even suggested on the trial and that the defendant accordingly had no opportunity of answering it. It is true that paragraphs 15 and 16 of the statement of claim allege that the defendant altered his course to starboard too soon and that he directed his ship too much to starboard and attempted to bring her up the harbour too close to the north shore, but this claim had reference, I think, clearly to the plaintiff's attempt to prove that she turned to starboard at a point

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indicated by the captain of the *Maplebranch* on exhibit D-1 and followed the course marked by him in blue. The bulk of the evidence of the plaintiff's witnesses was directed to this feature of the case, but was rejected by the trial judge, and, so far as I can discover, attention was not anywhere called to any specific negligence in turning either too soon or too sharply from the course the *Dragon* was following well southwest of the extremity of Victoria Pier at the point where the evidence shews he did turn to starboard to make his entrance to the basin. This fact itself, it seems to me, affords a perfectly sound basis of objection to the learned trial judge's finding upon that point, even if there were no other. See *Dominion Bridge Co.* v. *Str. Philip J. Dodge.* (1)

It is quite apparent to me, however, from the judgment itself that the true explanation of His Lordship's essential finding that the defendant had not satisfied him that the collision was an inevitable accident, lies in the fact that the learned judge assumed that the defendant should have foreseen "that a vessel at or near that basin might move" and that it was his duty to get "his ship in hand to meet *any* eventuality." "By taking the other course" (i.e., I assume, the first one suggested by the assessors) His Lordship says "there was the risk of an intervening ship in the basin," and later he adds:

> Of course, this movement of the *Saguenay Trader* was something unexpected by the *Dragon* but in the opinion of the Court it was one of those eventualities a mariner should guard himself against.

It is especially in respect of these last mentioned findings that I think His Lordship misdirected himself as to the extent of the defendant's duty. The defendant's duty, as I conceive it under the law, was, not to foresee and have his ship in hand to meet and guard against any and every eventuality which might possibly happen, but merely to exercise that degree of care and nautical skill, which is generally looked for in a competent seaman, to avoid such risks as might in the proved circumstances reasonably have been anticipated by him.

We have before us unquestioned proof that the Harbour authorities had notified the defendant that the west wall of the basin would be reserved for the docking of the *Dragon* on her arrival and that the defendant had notified them of the precise hour his ship would arrive. Indeed the learned

(1) [1936] 1 W.W.R. 94.

trial judge not only points this out at the outset of his judgment, but deprecates the omission of the Harbour authorities to notify the ships at or near the basin that the *Dragon* was to arrive at 9 o'clock, and plainly states that this omission "explains this unfortunate collision." He says:

> The defendant evidently expected that, as a matter of courtesy, the wharf authorities would have given such a notification and would have paid attention to stop all movements of the ships but he had not been told so, and in the opinion of the Court, he should have foreseen that a vessel at or near that basin might move. The fact is that before he reached Jacques Cartier bridge, he saw the movements of the *Maplebranch*.

It seems to me that the mere fact that the defendant had not been told that the Harbour authorities had actually done what it so obviously was their duty to do, cannot well be held to make it negligence for the defendant to assume that the Harbour authorities had performed their duty and that as a consequence no ships would be allowed to move in or about the entrance to the basin that might foul or obstruct the course of so long a ship in entering to dock at the berth which had been assigned to her.

As to the *Maplebranch* herself, the suing ship, it is conclusively shewn that in taking up her position alongside the *New Northland* without permission from the Harbour Master's office and in violation, as both the Harbour Master and the Dock Master affirmed, of the by-law governing the movement of ships in the harbour, increased the difficulties of any vessel which might have to enter the basin. This fact, while perhaps not affording in itself proof that she contributed to bring about the collision, is nevertheless a fact which must be taken into account in determining whether the *Dragon* herself was guilty of any lack of ordinary care and nautical skill which caused or materially contributed to cause the collision, and I am not at all sure that under the authorities the fact of her doing an act so manifestly wrong would not preclude her from fastening the whole burden of the collision upon the *Dragon*, even had the officers of the warship been guilty of any negligence which contributed to bring about the collision.

There is no finding or suggestion in the trial judgment of any evidence pointing to any possible negligence on the part of the *Dragon* other than in the particulars I have mentioned, no failure to keep a sufficient lookout before the *Saguenay Trader* was first observed across her course

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within the basin, and no lack of nautical skill respecting the orders to stop her engines and reverse, though many questions were put on the investigation and trial directed to this end. The undoubted fact is that when these orders were given the *Dragon* was face to face with an imminent peril and that, unless she herself had then been guilty of some negligence which contributed to bring that peril about, the warship's Commanding and Navigating Officers, being then in the agony of an imminent collision with the *Saguenay Trader*, could not properly be held to be accountable for any failure to exercise even ordinary care or nautical skill. Unless, therefore, there was some prior negligence upon their part which contributed to bring about the emergency she must be held blameless.

I have already shewn, as I respectfully think, that the only findings of the learned Judge in Admiralty which could point to the possibility of any negligence on the part of the defendant's ship before she encountered the *Saguenay Trader* in a situation of danger were not justified in law or by the evidence.

In my opinion it has been clearly proved by a marked preponderance of evidence, not only that the *Dragon* would never have hit the *Maplebranch* had it not been for the action of the *Saguenay Trader* in starting to turn around in the basin when she did, as the learned trial judge himself has expressly found, but that the collision sued for would never have occurred had not the *Maplebranch* herself been in the position which she took up wrongfully and without permission, and that there is no evidence upon which it can reasonably be found that the officers of the *Dragon* failed to exercise that degree of care and nautical skill which the law requires in order to entitle the plaintiffs to succeed. The defendant has fully discharged the whole onus which the law placed upon it.

I would therefore allow the appeal and dismiss the action with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Campbell, McMaster, Couture, Kerry & Bruneau.*

Solicitors for the respondents: *Meredith, Holden, Heward & Holden.*

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NORTHERN ELECTRIC COMPANY, LTD., AND WESTERN ELECTRIC COMPANY, INC. (PLAINTIFFS)..... APPELLANTS;

AND

PHOTO SOUND CORPORATION AND GEORGE PERKINS (DEFENDANTS) RESPONDENTS.

* Mar. 17, 18, 19.
* Nov. 9.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Re-issue patent—Conditions necessary for grant of—Patent Act, R.S.C. 1906, c. 69, s. 24—Interpretation—Conditions that original patent be deemed "defective" by reason of "insufficient description or specification" arising from "inadvertence, accident or mistake," within the statute—Action for infringement of re-issue patent—Validity of amendments in re-issue patent—Proper limits of expert testimony.

The issue of a new patent (a re-issue patent) in accordance with an amended description and specification, under s. 24 of the *Patent Act*, R.S.C. 1906, c. 69, is not justified if the invention described in the amended description or specification and protected by the new patent is not the same invention as that to which the original patent related. The relief authorized by said s. 24 in respect of "insufficient description or specification" is limited to correcting insufficiency (arising "from inadvertence, accident or mistake") in describing or specifying in the original patent the invention in respect of which the applicant therefor intended to ask protection. The statute did not contemplate a case in which an inventor has failed to claim protection in respect of something he has invented but failed to describe or specify adequately because he did not know or believe that what he had done constituted invention in the sense of the patent law and, consequently, had no intention of describing or specifying or claiming it in his original patent. The original patent cannot be "deemed defective" within s. 24 in a case where it obviously completely fulfilled the applicant's intention—where the invention in respect of which he intended to obtain protection is quite certainly and sufficiently described and specified.

On appeal from the judgment of Maclean J., President of the Exchequer Court of Canada ([1936] Ex. C.R. 75), dismissing the plaintiffs' action for alleged infringement of a re-issue patent (for an alleged new and useful improvement in radio communications):

Held: The appeal should be dismissed. The grant of the re-issue patent was unauthorized, as the conditions necessary for its grant under s. 24 (as above interpreted) were absent. The proper conclusion from the documents was that there was no defect in the statutory sense in the original patent (there was no suggestion that it could be deemed "inoperative")—no reasonable ground for apprehending that it was defective in failing sufficiently to describe the inventions in respect of which the applicant for it was intending to claim invention; no "inadvertence, accident or mistake" of the applicant in respect of the description or specification of the invention that the applicant

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

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had in mind. The pertinent documents conclusively negatived any intention on the part of the applicant for the original patent to describe or to specify any of the inventions, so-called, embraced within the amendments in the re-issue patent in so far as they were material to the present appeal. Also, in view of the evidence as to the state of the art at the time of the application for the original patent, and at the time when the applicant therefor was alleged to have conceived and perfected the inventions embraced within the amendments in respect of which relief was now claimed, it was highly improbable that he believed he was entitled to obtain protection in respect thereof; and the balance of probability supported the conclusion that he was not so entitled.

A large part of the expert evidence given in the case (on both sides) was the subject of adverse comment by this Court, which held that much of it was not legal evidence and could not properly be taken into consideration. With reference to specified examples thereof, it was *held*, that any inference to be drawn from the applicant's specification in the original patent, as to whether or not the devices and arrangements in question in these proceedings were inventions of said applicant (to establish the affirmative of which was a substantive part of plaintiffs' case), was matter of fact for the court and not a matter upon which it was competent to any expert witness to pronounce; also (with reference to a witness being shown said original patent and being asked broadly to explain what said applicant was trying to do), that the issue touching the identity of the invention to which said original patent related, was a substantive issue in the action, and upon that issue no expert witness should have been permitted to express an opinion. Comments upon the proper limits of expert testimony in *British Celanese Ld.* v. *Courtaulds Ld.*, 52 R.P.C. 171, at 196-8, quoted.

APPEAL by the plaintiffs from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing their action, which was brought for a declaration that as between the parties certain letters patent alleged to be owned by the plaintiffs were valid and had been infringed by the defendants, and for an injunction and damages.

One patent in question was a re-issue of a patent for an alleged new and useful improvement in radio communications. As to this patent in question, Maclean J. dismissed the action on the ground of lack of invention and on the ground that there was no statutory authority for the granting of the re-issue patent, as it embraced more than the invention described and claimed or intended to be described and claimed in the original patent (and the claim in the action being for infringement of features claimed as invention which appear in the re-issue only); and the

(1) [1936] Ex. C.R. 75.

appeal to this Court was (by the judgment now reported) dismissed on grounds similar to the latter ground mentioned.

The other patent in question was a re-issue of a patent for an alleged new and useful improvement in electrical receiving or repeating apparatus. As to this patent in question, Maclean J. dismissed the action on the ground that there was no infringement by the defendants; and the appeal to this Court was (by the judgment now reported) dismissed on the same ground.

O. M. Biggar K.C. and *R. S. Smart K.C.* for the appellants.

H. N. Chauvin K.C. and *F. B. Chauvin* for the respondents.

The judgment of the court was delivered by

DUFF C.J.—It will be convenient at the outset to quote the section of the statute of 1906 (R.S.C. 1906, c. 69, s. 24) from which the authority to grant the re-issue patent must be derived if such authority exists:

24. Whenever any patent is deemed defective or inoperative by reason of insufficient description or specification, or by reason of the patentee claiming more than he had a right to claim as new, but at the same time it appears that the error arose from inadvertence, accident or mistake, without any fraudulent or deceptive intention, the Commissioner may, upon the surrender of such patent and the payment of the further fee hereinafter provided, cause a new patent, in accordance with an amended description and specification made by such patentee, to be issued to him for the same invention, for any part or for the whole of the then unexpired residue of the term for which the original patent was, or might have been granted.

2. In the event of the death of the original patentee or of his having assigned the patent, a like right shall vest in his assignee or his legal representative.

3. Such new patent, and the amended description and specification, shall have the same effect in law, on the trial of any action thereafter commenced for any cause subsequently accruing, as if the same had been originally filed in such corrected form before the issue of the original patent.

4. The Commissioner may entertain separate applications, and cause patents to be issued for distinct and separate parts of the invention patented, upon payment of the fee for a re-issue for each of such re-issue patents.

First of all, the invention described in the amended description or specification and protected by the new patent must be the same invention as that to which the original patent related.

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Second, it is plain that the authority to issue a new patent in accordance with the amended description or specification is an authority by the exercise of which it is intended that the original patentee, or those claiming under him, shall have relief in respect of certain strictly specified things. These things, for our present purpose, are insufficient description or insufficient specification,—obviously, insufficient description or insufficient specification of the invention to which the original patent related.

Thirdly, such insufficiency of description or specification in respect of which relief is authorized under this section must have arisen from inadvertence, accident or mistake.

These conditions necessarily imply that the inadvertence, accident or mistake must be inadvertence, accident or mistake affecting the sufficiency of the description or specification in the original patent, and it is only in respect of such inadvertence, accident or mistake that the statute contemplates relief.

The statute does not contemplate a case in which an inventor has failed to claim protection in respect of something he has invented but failed to describe or specify adequately because he did not know or believe that what he had done constituted invention in the sense of the patent law and, consequently, had no intention of describing or specifying or claiming it in his original patent. The tenor of the section decisively negatives any intention to make provision for relief in such a case.

In this connection it is to be observed that, while the section provides for relief where the patentee claims too much, there is no provision for relief where the patentee fails to claim something to which he may be entitled. In this last mentioned case, he can only obtain relief if he can bring himself within the condition relating to insufficiency of description or specification arising from inadvertence, accident or mistake affecting the sufficiency of the description or specification.

It is to be noted that the section is retroactive in an important respect. The amendment speaks from the date of the original patent as regards causes of action arising after the date of the new patent. Even on the strictest construction, a serious injustice may arise from the operation of this provision where people have made arrange-

ments and expended money on the faith of the specification in the patent between the date of the original patent and of the re-issue patent,—a period which in this case extended to five years. It is our duty, I think, in the circumstances, not to extend the language of the section beyond cases clearly within its intendment.

It will be unnecessary to discuss at length the introductory words, "Whenever any patent is deemed defective or inoperative by reason * * *," but one observation naturally arises out of the circumstances of the present appeal. There is no suggestion that the original patent was inoperative or could be deemed inoperative. It is essential, therefore, to enable the appellants to invoke the section, that the original patent should have been deemed defective by reason of insufficiency of description or specification arising from inadvertence, accident or mistake.

It is immaterial to my present purpose whether the word "deemed" contemplates the view of the Commissioner or the view of the Court before whom the question of the validity of the re-issue patent comes for decision, or the view of the parties concerned. At the lowest, the statute must contemplate some kind of reasonable ground for apprehension on the part of the original patentee that the patent is defective in the sense of the section It would, in my opinion, be an abuse of this language to apply it to a case in which it is obvious that a patent completely fulfils the intention of the applicant, where there is plainly neither insufficiency of description nor specification, for the purpose which the applicant had in view; where, in other words, the invention in respect of which the patentee intended to obtain protection is quite certainly and sufficiently described and specified. In such a case, the patent is not in any proper sense of the phrase defective.

There is another view of the statute advanced by the appellants which I shall discuss later; but, in the view just expressed, the appellants necessarily fail; first, because the pertinent documents, the original application for the United States patent, the specification and claims in the original Canadian patent, conclusively negative any intention on the part of the applicant Arnold to describe or to specify any of the inventions, so-called, embraced within the amendments in so far as they are material to the present

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appeal; second, because, having regard to the evidence properly before us as to the state of the art at the time of the application for the Canadian patent, and at the time when Arnold is alleged to have conceived and perfected the inventions in respect of which relief is claimed by the appellants, it is highly improbable that Arnold believed he was entitled to obtain the protection of the law in respect of these so-called inventions; and that the balance of probability supports the concluson that Arnold was not entitled to the protection of the patent law for these improvements, in respect of which protection is claimed.

In giving my reasons for these conclusions, I shall first consider the documents themselves; which constitute most weighty evidence. The two documents, the importance of which I shall emphasize, do not differ from one another in any material respect; they are Arnold's application for his United States patent, and the specification and claims in the original Canadian patent. Both these documents are signed by Arnold. There is, of course, a presumption, which is a presumption of law, that Arnold, in signing these documents, knew the nature of their contents. This presumption of law is fortified by a very powerful presumption of fact. There is quite sufficient evidence in the record to show, what nobody disputes, that Arnold was an accomplished physicist, a most competent radio engineer and master of the radio art and an experienced inventor. The documents before us, which include a number of specifications signed by him, make it quite clear that he was skilled in the art of scientific exposition, and that, also, nobody disputes.

At the material times, Arnold was associated with Richards, to whom reference will be made later, as assistant of Dr. Colpitts in the laboratory of the Western Electric Company, and with his staff was engaged in investigating radio communication and the practical and theoretical problems connected with it. It would hardly be disputed that few people were better fitted than he to appreciate the value of a given improvement or to form a just judgment upon the merit of it. He was an inventor accustomed to framing specifications and we may assume that he was little likely to be misled upon the point whether a given improvement gave evidence only of the application by a skilled engineer

of principles and methods well known among skilled radio engineers, or of something exceptional involving invention.

We must proceed upon the view, in the absence of some evidence to the contrary, that Arnold knew the contents of the documents I am now about to discuss and that he knew the effect of them in accordance with their proper construction.

On the 31st of August, 1915, Arnold signed his application for the original U.S. patent. The meaning of the application in its relevant aspects is not doubtful. The first two paragraphs are as follows:

> Be it known that I, Harold DeForest Arnold, a citizen of the United States, residing at East Orange, in the County of Essex and State of New Jersey, have invented certain new and useful improvements in radio communication, of which the following is a full, clear, concise and exact description.
>
> This invention relates to receiving systems for radio communication, particularly to devices for limiting the electrical power which may be transmitted to a receiving instrument in such a system, and more particularly to devices in which such limiting action is obtained by employing electric currents in an evacuated vessel.

The next paragraph states the object of the invention: which is to provide means by which a definite upper limit is set upon the amount of power that may be communicated to a receiving circuit or apparatus. Then, in the next paragraph, the desirability of such a limitation is explained, and the explanation given is that "foreign disturbances" which are often "of large magnitude compared with that of the normally received signals" may thereby be reduced to a value not exceeding that of such signals. Then it is stated that this object is attained by an arrangement of audions described, which will be conveniently referred to hereafter as the push-pull arrangement, and by causing the thermionic currents in audions so arranged to flow

> by impressing upon their limiting electrodes, in multiple, an electromotive force operating through a high impedance, said high impedance being essential to the operation of the device for the purpose specified, * * *

such purpose being to put a definite upper limit upon the amount of power communicated to the receiving apparatus.

Then there is an explanation of the accompanying drawing which is said to represent a "receiving system" embodying the invention.

It will be observed that, up to this point, the invention is specifically stated to consist in a method for limiting the

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"electrical power" which may be transmitted to a receiving instrument in a system for radio communication. A drawing is attached to the application for the purpose of communicating a fuller understanding of the nature of the invention and for that purpose alone; and represents a receiving system for radio communication in which the invention, the power limiting device, operates in the final stage of amplification and restricts the amount of power transmitted therefrom to the ultimate receiving apparatus. The inventor declares:

> The nature of this invention will be more fully understood by reference to the drawing, which represents a receiving system for radio communication embodying this invention, * * *

The specification then proceeds to trace the construction of the network by reference to the numbered parts of the drawing with explanations in some instances of the functions of those parts; and, the explanation having arrived at "amplifier 38," proceeds:

> The output circuit of amplifier 38 is supplied by battery 34 and contains choke coil 42, condenser 40 and coil 41, whose functions are the same as those of the corresponding elements in the previous amplifier. It also contains condenser 43 and coil 44.

Then we are told:

> The apparatus to the right of 44 comprises the power-limiting device and the receiving circuit.

Referring now to the first and second paragraphs, it is self evident that it is in the apparatus to the right of 44 that are to be found the devices limiting the amount of power which may be communicated to the final receiving circuit or apparatus; and in the conception and design of which resides the invention. It is in respect of these devices that the inventor declares he has produced an invention, and only in respect of these devices. A description of the apparatus to the right of 44 follows.

In explaining the operation of the system it is summarily stated that power received by the antenna is transferred to the circuit 5, 6, is augmented by the amplifier 7, is then communicated to the circuit 19, 20, is then transformed into low frequency form by rectification in element 21, is then augmented by amplifiers 31 and 38; and after this summary reference to the anterior parts of the drawing, the inventor states that the power is finally

> passed to the receiving instrument through the power limiting device whose operation will now be explained.

Then follow three paragraphs in which the operation of the power limiting device comprised in the apparatus to the right of 44 is explained. Here again it is self evident that it is the power limiting device whose operation he is explaining.

Once again, the claims are explicitly limited to this power limiting device, with the exception of claim 1, which appears to be a combination claim for a combination of the power limiting device with the enumerated antecedent elements of a receiving system: an antenna, a tuned receiving circuit, and so on.

As I have already said, the inventor has left no room for doubt as to the meaning and effect of his application. He has invented, he says in his introductory paragraph, certain new and useful improvements in radio communication; and in what follows, he declares in emphatic words, he has given a full, clear and exact description of the new and useful improvements he has invented and for which in his claims he claims protection. This invention he sets forth as constituting an improvement both new and useful in a receiving circuit for radio communication. There is no other invention described. There is no suggestion that he has invented any other new and useful improvement or any other improvement, or that he has made any other invention of any description.

It would be an abuse of language to aver, for any purpose relevant to any controversy on this appeal, that this application describes or relates to any other invention.

The drawing, as I have said, was produced solely with the object of enabling the reader to comprehend the invention; that is to say, the invention with which the application is concerned. The drawing cannot be legitimately construed in any other way.

The parts of the drawing to the left of 44 are obviously, as matter of construction, there for the purpose of enabling the reader to realize the kind of network in which the invented devices operate and thereby the better to comprehend their purpose and mode of operation. To read the drawing in the other way is to read it as contradicting, not as illustrating, the text.

The application, therefore, with the appended drawing, construed in the only way in which it can properly be con-

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strued, negatives (as within the contemplation of the application) any claim by the inventor to having invented any improvement for which he is entitled to the protection of the law, in respect of any part of the apparatus disclosed by the drawing which is not involved in the invention explicitly claimed and set forth.

It is, therefore, of no relevancy in determining the invention to which this application relates that, by Arnold's instructions, sets of a "receiving system" of which the drawing, so far as it goes, would be a correct delineation, were or had been constructed; the existence of such physical objects is of no relevancy because the application has plainly no relation to any such particular physical things or contemplated physical things. There is not a syllable in the application, there is nothing in its detail, there is nothing in its general scope, there is nothing in the drawing, which can afford a foundation for the proposition that the application relates to some actually existing physical "receiving system." Indeed, it obviously could not be so. An actually existing physical system in operation, or capable of being put into operation, would be of fixed dimensions, of determined physical quantities. The windings of the transformers primary and secondary, for example, would be capable of exact mathematical description. So as to audions,—when actually existing in operation, or ready for operation, they must have certain physical constants, in an amplifier, an amplification factor, and so on. So also as to the condensers. There is no conceivable means by which any engineer could, from this drawing, construct any such actually existing physical system. Obviously, such a particular physical system as a whole, in all its various parts, was an invention not contemplated by this application. These physically existing sets, therefore, can be of no value in assisting us in determining what is the invention to which the application relates; they add nothing to the drawing.

They could not properly be resorted to for the purpose of explaining or for the purpose of limiting the scope of the invention expressly claimed. You could not properly, for example, restrict Arnold's claim in respect of his power limiting device to a claim for a power limiting device employing audions of the precise dimensions and physical

constants of the audions found in these receiving sets. Nor can you find anything in the documents as they stand which justifies the introduction of the elements of these physical receiving sets as elements to be considered in the determination of the meaning of the document. The drawing is there and may be used as illustrating the text, throwing light upon the meaning of it, but only for that purpose. I shall come later to the contention already mentioned that, for the purpose of applying the statute, these receiving sets serve as a link establishing the identity of the invention to which the original patent relates and the invention to which the amendments refer. For the present, I am concerned with applying the statute according to the interpretation above mentioned which limits admissible amendments to such as may be necessary to correct any insufficiency of description or specification arising from the error of the patentee in failing adequately to describe or specify an invention in respect of which he intended to apply for protection and arising from inadvertence, accident or mistake. These observations apply equally to the specification in the surrendered Canadian patent.

Now, I have no hesitation in drawing the inference that Arnold fully understood the scope and effect of the application of May 22nd, 1916, and of the specification in the original Canadian patent. He understood, that is to say, that he was excluding from the invention specified and claimed by him those devices and arrangements which are described and specified and claimed in the amendments in so far as we are presently concerned with such amendments. It is also very clear on the material before us that in the proceedings before the Commissioner leading up to the grant of the reissue patent no evidence was adduced to show that the specifications, the description or the claims of the original patent were insufficient to give effect to the intention of Arnold. Still less was there any evidence adduced to show that Arnold had failed to describe or to specify sufficiently the invention in respect of which he was claiming protection by reason of inadvertence, accident or mistake. Nor, indeed, is there any allegation to that effect. Again, no evidence was adduced at the trial directly bearing upon either of these points.

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I have examined the proceedings before the Commissioner and I cannot find there any statement made by Arnold personally that there was any such insufficiency of description or specification or any such inadvertence, accident or mistake. Indeed, there is not, I think, among these documents any statement by Arnold personally that he was the inventor of the alleged improvements to which the amendments relate. There is no reference in any of these documents to the receiving systems physically constructed upon which the appellants so much rely; still less any suggestion anywhere that the invention in respect of which the reissue patent is prayed for is to be found embodied in these existing physical things.

There is a letter signed in Arnold's name by R. R. Adams, attorney, which contains an argument, an ingenious argument, that the amendments contain nothing but permissible explanations of the drawings and the summary expressions in the text of the specification of the surrendered patent. The first paragraph is in these words:

> It should be noted that in the re-issue application no change has been made in the drawing except to add three reference characters to the second vacuum tube, counting from the left, and that there is nothing, either in the specification or claims that is not illustrated in the drawing. The changes in the specification have been for the purpose of more clearly describing the parts of the device and are in the nature of insertions, amplifying somewhat the brief references in the original specification.

Then, the statement concludes:

> It is felt that all of the claims are properly included in the re-issue application and come well within the scope of the original patent as defined by the statement of inventions repeated in lines 20 to 25 of page 2 of the original specification and the fourteen original claims. However, on review it has been thought several claims can be cancelled without substantial loss of protection to applicant's invention and that some changes should be made in the other claims.

The ground upon which the application for the reissue patent is based is that everything in the amendments is to be found by implication in the specification of the original patent when read with the drawings. I have pointed out that, on the true construction of the specification, this is a wholly inadmissible proposition. What is material for my present purpose is that this letter contains no allegation that, in point of fact, it was Arnold's intention to claim or to describe or to specify the alleged invention with which the proposed amendments are concerned; or that, by reason of inadvertence, accident or mistake, he was led into some

insufficiency of description or specification. Still less is there any reference to any material adduced as evidence in support of an allegation of inadvertence, accident or mistake. I shall have a word later to say with regard to these proceedings.

It seems perfectly plain that the reissue patent ought not to have been granted and that, unless we are at liberty to empty the provisions of the enactment under which the conditions for the grant of a reissue patent are laid down, of all substance, we are inevitably forced to the conclusion that the grant of the reissue was an unauthorized and unwarranted act. For the present, however, I am concerned only with this: the proper conclusion from the documents, including the proceedings on the application for the reissue patent, is that there was no defect in the original patent in the statutory sense, no reasonable ground for apprehending that the patent was defective in failing sufficiently to describe the inventions in respect of which Arnold was intending to claim invention; no mistake on Arnold's part in respect of the description or the specification of the invention to which his application related. Accident is not suggested nor is inadvertence in the pertinent sense; that is to say, no inadvertence in respect of any insufficiency of description or specification of the invention that the applicant had in mind. The statutable conditions governing the exercise of the authority to grant the reissue patent are all absent. This, in itself, is, of course, sufficient to dispose of the appeal.

But it is necessary to examine the validity of the reissue patent from a point of view which stands upon a view of the statute different from that which I have expressed and which I am satisfied is the true view. The appellants say that a number of "receiving systems," to employ Arnold's own expression, all of them answering the description to be found in the specification in the surrendered Canadian patents (including the drawing), had actually been constructed and set up and put in operation before the date of Arnold's application for the original Canadian patent. Invoking the interpretation clause of the *Patent Act*, each one of these receiving systems, it is said, embodied the devices and arrangements claimed in the amendments in the reissue patent and in question in this litigation. These

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physically existing things were, it is argued, inventions within the definition in the interpretation clause of the *Patent Act*. The original patent, it is argued, was a patent in relation *inter alia* to these things and so was the reissue patent. Identity of invention, it is said, is established and we are asked to say that, consequently, the authority under the statute was exercisable.

This argument is not convincing.

First of all, the case of the appellants at the trial was that the inventive idea in respect of which Arnold was entitled to claim protection was not the condensers, the resistances, the coils, as physical things, but the use for which Arnold employed them. That is hardly consistent with the view that these physical things in themselves constituted the invention in respect of which the surrendered Canadian patent was granted.

On the argument before us, counsel for the appellants said, "What the patent was directed to was a physical object." The case at the trial was not that the patent was directed to a physical object, but to certain physical objects employed in a certain way and for a certain purpose, and that it was in this employment that the merit of the inventive idea lay.

The argument involves, of course, the proposition that it is sufficient, in order to obtain relief under the statute, to show that the drawing in the original patent exhibits a device in respect of which the patentee might have claimed protection if he had asked for it and sufficiently disclosed the nature of the invention. This, of course, is to discard the parts of the statute that I have been emphasizing, which make it very plain that the design of the statute is to afford relief only in respect of an invention clearly conceived as such, for which the original patentee intended to claim protection, but in respect of which, through the causes defined by the statute, there is insufficient description or specification. Identity of invention is only one of the conditions of the statute.

Then, as I have already pointed out, there is nothing in the original patent or in the specification of the original patent or the specification of the re-issue patent, or in the material before the Commissioner on the petition for the granting of the re-issue patent, dealing with these physical

instruments. I have already given my reasons, and I will not repeat them, for the conclusion that it would not be sufficient to show that the devices in these physical instruments constituted improvements in respect of which Arnold might have obtained protection if he had asked for it but had no intention of asking for it, either because he was deliberately abandoning them to the public, or because he was satisfied they were not inventions in respect of which he could properly claim protection, or because he overlooked the merit of them from the point of view of invention. That is not sufficient because the inadvertence, accident or mistake in respect of the sufficiency of description or specification must constitute a defect in the patent in the sense that it fails adequately to give effect to the intention of the applicant; I repeat, these physical sets add nothing to the drawing.

As I have already indicated, the weight of evidence appears to me to support the conclusion that the devices and arrangements in question in this litigation were not regarded by Arnold as inventions in respect of which he was entitled to a patent, and that this conclusion is that which best accords with the balance of probability arising from all the circumstances.

I shall deal specifically with the alleged patentable features of the alleged inventions which are described in the pertinent parts of the amended specification and claims in the re-issue patent. Before doing so, it is convenient to sketch some facts in the development of the instrument known as the audion. The audion, as invented by DeForest about the year 1906 or 1907, was a valve having three electrodes. The record contains the specifications in several patents granted to him in respect of improvements in the audion and circuits in which the audion was a part. A fact which it is useful to keep in mind in considering the evidence before us, and the arguments presented to us, is that the audion, as conceived and devised by DeForest, operated by a current of electricity passed through a gaseous medium. I do not wish to be misunderstood. In modern vacuum tubes a very high degree of evacuation has been achieved and the pure electron stream which passes from the cathode to the anode is not in any way dependent upon the conductivity of the small amount of residual atmospheric air

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or gas that may remain within the tube. But the audion, as conceived by DeForest, was an instrument in which the conductivity of a gaseous content was made use of purposely, and the term "audion," which was applied by DeForest to his instrument, continued, at all events, down to the end of the period with which we are concerned in this appeal, to be applied to that type of instrument; although for the last twenty years or so it may have been used to describe a vacuum tube having the general features of the audion as invented by DeForest but evacuated as completely as the pumps and other means at the command of engineers and manufacturers make possible.

There is some oral evidence with regard to these matters which is not very satisfactory and I have been obliged to resort to the documents in the record to obtain information upon them. Specifications of United States patents applied for by DeForest on the 14th February, 1906, 27th August, 1906, and 25th October, 1906, and 29th January, 1907, are in evidence. The first paragraph of the claim in the first of these is thus expressed:

> An oscillation-detector comprising two electrodes separated by a heated gaseous medium, one of said electrodes consisting of mercury.

In the second, the description of the invention contains this sentence:

> D represents an evacuated vessel of glass or other suitable material having two separated electrodes F and F' between which intervenes the gaseous medium which, when sufficiently heated or otherwise made highly conducting, forms the sensitive element of my oscillation detector.

In the third, there is described a three-electrode device, in other words, an audion, in which the first claim is expressed as follows:

> In a device for amplifying electrical currents, an evacuated vessel inclosing a sensitive conducting gaseous medium maintained in a condition of molecular activity, * * *

In the last of them, the objects of the invention are thus stated:

> * * * to increase the sensitiveness of oscillation detectors comprising in their construction a gaseous medium by means of the structural features and circuit arrangements which are hereinafter more fully described.

This specification describes a particular type of audion which is referred to later in a specification of a patent issued to Arnold upon an application of the 28th May, 1914.

The invention, the specification states, is for "new and useful improvements in gaseous repeaters in circuits of low impedance." The specification proceeds to state that, of

these improvements, the " following is a full, clear, concise and exact description ":

> Still more particularly, [the invention] relates to the use of thermionic repeaters for securing amplification of current in circuits of low impedance. By a thermionic current is meant current discharge from a hot cathode. Examples of *thermionic repeaters* are the DeForest *audion* disclosed in Patent No. 879,532, dated February 18, 1914, and others, the Von Lieben & Riesz repeater disclosed in Patent No. 1,038,910, dated September 17, 1912, etc. By vacuum discharge is meant current discharge between electrodes in space from which nearly all atmosphere is exhausted. The expression vacuum discharge repeaters is intended to include repeaters of the thermionic types and also those in which current flows between electrodes in space maintained in a conductive state by the arc or otherwise. The mercury arc repeater of an earlier application of this applicant, Serial No. 709,445, filed July 13, 1912, is an example of the class of vacuum discharge repeaters but it is not of the thermionic type.

February 18, 1914, ought to be February 18, 1908, as appears from the serial number 841,568.

It will be observed that the specification describes improvements in "gaseous repeaters." The DeForest audion and the Von Lieben repeater, both of which make use of the conductivity of the gaseous content, are given as typical examples of thermionic repeaters of the type to which the specification relates. Entire exhaustion of the atmosphere is not contemplated.

Now this specification shows in the plainest way that such gaseous repeaters were, in the mind of Arnold, properly designated by the term "audion." Indeed, in his description of his invention he invariably selects the "audion" as the gaseous repeater which exemplifies it, although he does not exclude other types—the repeaters are " preferably audions." In explaining the drawings the repeaters are always described as " audions." Claims 1, 2, 3, 4, 6 and 7 use the term " thermionic repeaters," of which, as already mentioned, the typical examples given are the DeForest audion and the Von Lieben repeater; while in claim 5, the term " vacuum discharge repeaters " is employed which, as already mentioned, contemplates a repeater from which the atmosphere is not entirely exhausted. This, let it be noted, is Arnold's conception of the term " audion," as appears from a patent dated the 2nd March, 1915, granted on an application dated the 22nd March, 1914.

In the application for Arnold's U.S. patent in respect of the invention which is now in question, dated the 31st August, 1915, the repeaters which are employed in the power limiting device, that is to say, in the apparatus

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immediately to the right of number 44 in the diagram of the network attached to the application, are described in the claims as "thermionic repeaters" and "thermionic elements." In the body of the specifications these structures are said to be "of the audion type"; and in the claims in the surrendered Canadian patent they are (in claims 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14) described as "audions"; while in claim 1 they are referred to as "thermionic elements" and in claim 3 as "thermionic repeaters." There is not a suggestion in either the specification or the claim that the term "audion" in these documents does not designate repeaters of the type described as audions in Arnold's patent of the 2nd March, 1915, and his application of the 28th May, 1914. Indeed, the specification contains a reference which is definitely at variance with any such suggestion.

In describing the power limiting device and the means for securing uni-lateral conductivity, he distinguishes his own device from that invented by E. H. Colpitts and described in U.S. patent 1,128,292, by the circumstance that in Arnold's own device the electromotive force employed for driving the plate current operates through a high impedance and by that circumstance alone.

Now, turning to Colpitts' patent which was applied for on the 3rd of January, 1914, and granted on the 16th of February, 1915. We have a careful description of Colpitts' push-pull arrangement; the arrangement which Arnold adopts subject to the alteration mentioned. "This invention," Colpitts says,

> relates to electric wave repeating apparatus and particularly to the use of vacuum discharge repeaters as exemplified by the so-called "audion" for repeating and amplifying in an output circuit waves of electric energy received in an input circuit.

He adds:

> The principal parts of an audion element or structure are a heated filament or other source of ionization, an anode usually called a "plate," and an intermediate electrode usually called a "grid." These are preferably inclosed in an evacuated glass vessel. Characteristic features of the audion are that current can flow in one direction only in the ionized stream, and that the strength of current in the stream flowing from its source to the plate is modified by electrostatic rather than by electromagnetic force as in some other types of "gaseous" repeaters.

Colpitts would appear to have been an experienced and competent engineer, and it will be observed that he mentions as a characteristic feature of the audion that the

current can flow in one direction only in "the ionized stream" and that the function which he ascribes to the heated filament is that it is "a source of ionization."

Turning now to the claims,—in the first claim the repeating apparatus is said to comprise a

* * * divided input and divided output circuits, means for producing two ionized streams, said streams being oppositely included in said output circuit, and two electrodes for controlling said ionized streams respectively and oppositely connected in said input circuit.

In claim 7, the combination of the two repeating elements is said to comprise "a common source of ionization." This document appears to have been signed by Colpitts on the last day of December, 1913. The patent, issued on the 16th of February, 1915, as I have already observed, must have been present to Arnold's mind when he signed his application for the United States patent on the 31st August, 1915.

There is another patent of Colpitts for which application was made on the 18th May, 1914, the patent being granted on the 27th April, 1915, five days before the grant of Arnold's patent for improvements in audions which, as already pointed out, he gives as the preferable type of "gaseous repeaters" for his purposes. Colpitts' repeaters are described by him as audions. The space within the audion between the plate and filament is described as "the ionized space." The claims comprise "means for producing a state of ionization in the evacuated vessel."

In a patent applied for on the 24th of June, 1913, and granted to DeForest in 1921, the repeaters are described as audions, and the electrodes within the evacuated vessel as being surrounded by a gaseous conducting space.

The specification in a patent granted to Richards on the 14th of July, 1914, on an application of the 8th of February, 1913, relates to devices intended for use in connection with relays of the "gaseous type, such, for instance, as disclosed in letters patent [of] January 15th, 1907, and February 18th, 1908, granted to Lee DeForest." "This device," it is stated,

is well known in the art and termed an "audion" and because of the grid shaped element is sometimes known as the "grid-audion."

The objects of the invention, it is stated,

are obtained in this invention by the provision of an alternative or shunt path for the energy normally passing through this gaseous conductor.

"It is obvious," it is said,

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that the improvement disclosed herein may be applied to any of the various types of audions and similar gaseous relays without the exercise of invention.

It seems to follow from these documents, which would appear to be the most reliable evidence of contemporary usage, that, at the time of Arnold's application for his Canadian patent in 1916, the term "audion" was known among engineers and specialists in radio engineering as a term originally applied by DeForest to a repeater employing a conducting gaseous content and normally designating a repeater of that character; although there may be room for conjecture that shortly afterwards it came to be loosely used also as applying to any three-electrode repeater.

Light is thrown upon the use of the term by another set of contemporary documents. Reference will first be made to a patent granted to Langmuir on the 23rd of July, 1918, upon an application of the 29th of December, 1913. "The electron discharge tube" is described in these words:

> In carrying my invention into practice I make use of an energy storing device arranged in co-operative relation with electron discharge tubes. By the term "electron discharge tube" I mean to imply the use of a highly exhausted envelop containing at least two electrodes one of which is provided with means for causing it to emit electrons. A device of this nature when connected to a source of current operates selectively in such a manner as to allow current to flow between the electrodes in only one direction; that is, there will be a flow of negative electricity from the electron emitting electrode to the other electrode or electrodes, but no flow in the opposite direction. In order that this result may be obtained when a potential of more than 20 or 30 volts is applied it is necessary to have the highest possible exhaustion of the envelop. Otherwise there will be a heavy ionization of the gas present and this will render the device useless for my purpose. By improved methods of exhausting the envelop, however, such a high vacuum may be secured that for any voltage which is applied there is no appreciable gas ionization but the flow of current is the result of a pure electron discharge and is entirely independent of any gas conductivity.

That is the way in which a scientist and an engineer familiar with radio engineering and its terms of art describes, at the relevant period, an instrument which operates without appreciable gas ionization and whose current is the result of a pure electron discharge independently of any gas conductivity. "The electron discharge tube" had evidently been described in applications filed on the 16th October, 1913, and it is explained with similar explicitness in the specification under a patent granted 24th April, 1917, and applied for July 15th, 1914.

This device is also described in the specification of a patent granted to Alexanderson on the 22nd of February, 1916, for which application was made on the 29th of October, 1913. The invention was for a selective tuning system. The system as described includes Langmuir's "electron discharge tube" but it is said that the invention is not confined to a relaying device operating with a pure electron discharge. In other words, the invention was not confined to a device operating independently of gas conductivity.

It results from all this that, according to the usage of the time, the claims in Arnold's Canadian patent embrace audions in the proper sense of the term, audions as described by DeForest, by Colpitts, by Richards and by Arnold himself, as is shown in his specification for improvements in "gaseous repeaters." His invention is stated in his application for his U.S. patent and in his surrendered Canadian patent to be a "power limiting device" and relates to appliances to be found to the right of the figure 44 in his sketch. The power limiting device included audions arranged in push-pull relation after the manner, subject to the qualification mentioned, explained in Colpitts' patent, and there is nowhere the slightest suggestion, or the slightest ground for a suggestion, that "the thermionic repeaters" which form a part of the network are repeaters of the character described by Langmuir and Alexanderson as "electron discharge devices" operating with a pure electron stream through a medium exhausted in the manner described by Langmuir.

It will be convenient now to quote from the appellants' factum a very concise description of the features of Arnold's 1915 receiving system to which it is alleged that the claims sued upon in the re-issue patent relate:

(1) the arrangement whereby a single audion is used for one stage of amplification and two audions in what is known as push-pull relation are used in the next stage (claims 33, 34, 36 and 37),

(2) the interposition of a resistance or impedance in shunt to the coil of a transformer between two stages of amplification (claims 53 to 55) with provision for the adjustability of this resistance (claims 61 to 70 inclusive) and its use in combination with a negative bias on the grid (claims 56 to 60), and

(3) the provision of condensers and choke coils in order to allow the audions in the successive stages of amplification to be energized from a single common battery (claims 77, 78, 85 and 86).

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As to the first of these alleged patentable features of Arnold's "receiving system," three things are admitted,—(1) that Colpitts, in the patent already referred to, had patented a push-pull arrangement which Arnold, with the modification mentioned in his specification, was virtually adopting. It is plain enough from the explanations of Colpitts that this arrangement was intended as one stage in a system of amplification. (2) It is admitted that a system by which a series of audions were so arranged that each one successively amplified the output of the last was well known. And (3) the system was well understood under which one push-pull arrangement immediately succeeded another push-pull arrangement.

These things being given, I find it difficult to perceive the invention involved in Arnold's arrangement; I do not doubt that Arnold regarded it as an arrangement well within the range of competent engineering skill.

It was argued that Arnold for the first time perceived that distortion is reduced when the electric energy fed into the incoming circuit of an audion is "well within the capacity," according to the phrase used, of the audion. Now, there is not a word in the specification of the surrendered Canadian patent, nor is there a suggestion in the drawings, to indicate such a limitation of the power fed from audion 38 into the push-pull arrangement. Nor, indeed, is this condition of the effectiveness of the arrangement set forth in the re-issue patent. If such was the condition of the practical working of this combination and invention was involved in the appreciation of it, then it should have been clearly and plainly stated and, in the absence of such a statement, the disclosure is, in my judgment, insufficient. However, the conclusive answer to this contention is that it was well known that with the audion of that period the amplifying circuit worked satisfactorily only on limited amounts of incoming energy. That is stated by Richards in the specification in his patent, to which reference has already been made, for which he applied on the 8th of February, 1913, and which was granted on the 14th of July, 1914. Richards explains that the relays of the type to which his invention relates, and to which this observation applies, which he describes as relays of the gaseous type, are relays such as those disclosed

in the patents to DeForest already referred to which are dated January 15, 1907, and February 18, 1908. Such devices, he says, are known in the art and are termed "audions."

I shall have to refer to Richards' actual invention on the point next discussed and, in that connection, to a note of Richards dated the 21st of November, 1912.

Richards and Arnold had been associated and Arnold signs Richards' note as a witness. It is quite plain that Richards in his specification is referring to a condition well understood and that his invention aims at providing a remedy. It was very freely suggested in the course of the trial and on the argument that Richards was dealing with a type of instrument that went out of vogue before Arnold's invention was complete. Richards, it was argued, was directing his attention to totally different conditions. I shall point out why this view is inadmissible.

As regards the second feature, the employment of a resistance for the purpose of improving the operation of, or the fidelity of reproduction by the audion is the substance of the patent of Richards to which I have just referred; and it is now necessary to examine the evidence adduced bearing upon the employment of this device by Arnold. Arnold and Richards, let me repeat, were associated as the assistants of Colpitts. Arnold witnessed the note that I am just about to quote. The circumstances all point to the conclusion that Arnold was familiar with Richards' idea of employing the resistance and that he did not in any way regard it as an invention of his own.

On the 21st of November, 1912, Richards made a note in the following words, which note was signed by Richards, his signature being witnessed by Arnold:

> Try shunting grid and plate of audion to prevent excessive talking current from knocking down the efficiency of the repeater circuit. Advise work with a 5-K coil and ·88 megohm connected in series. Mr. Mills constructed a new circuit and used this shunt with success.

The note seems to show that the condition restricting the usefulness of audions was well recognized, viz., that signals in which the current is excessive impair the efficiency of the repeater circuit; and the proposal is that the grid and plate of the audion shall be shunted for the purpose of correcting this. He appears to suggest an inductive and a non-inductive resistance in series for that purpose. Then he

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adds that, in a circuit newly constructed, this shunt has been employed with success.

The conception of Arnold's invention, it seems to be suggested, was complete in March, 1914, and was embodied in circuits which were constructed in the summer of 1914. Now, there are two notes of Arnold, one on the 10th of March, 1914, and one on the 4th of March, 1914, as follows:

> Arrived to put in standard B audions, with higher B current, negative cells in C circuit, high fixed resistance across high side of input transformer, adjusting gain by tapping off across part of this for the grid. Checked high resistance coils—all about 50,000w each.
>
> * * *
>
> Note the advantages of using a high negative C voltage in audion in improving the uniformity of magnification over ranges of output, and also in improving exactness of reproduction.

The first thing to be observed about these notes is that they all refer to "audions" and, as already pointed out, the contemporary documents show plainly that the term "audion" at that time was used as designating a gaseous conductor. As to the notes of the year 1912, there can be no manner of doubt that Richards and Arnold were dealing with the same type of repeater,—the audion of DeForest described by Arnold, Richards and Colpitts as a "gaseous repeater." Kendall, it is true, says the standard B audion was the standard "high space current audion." There is no explanation of that term. Its natural meaning is an audion having space current of high value. That is, I presume, a high plate filament current. There is nothing in that to suggest an instrument of the character of the "electron discharge repeater" described by Langmuir and exhausted as explained by Langmuir with precision. There is no reason for thinking that Arnold in 1912 when he used the term "audion" had in his mind a repeater different in character from the gaseous repeater well known, as Richards says, in the art as the "audion," invented by DeForest and referred to by Arnold himself in the specification in his patent of the 2nd of March, 1915, as the audion of the usual type. There is, to be sure, a statement by the appellants' witness Johnson in rebuttal that when gas did appear in the DeForest tubes it was an abnormal condition. It is, of course, perfectly plain from what has already been said that at the relevant times the presence of gas in a DeForest tube was the normal condition.

But the consideration which is entirely conclusive upon this point is the fact that in his Canadian specification, Arnold, as has been pointed out, uses the term "audion" to describe the type of repeaters which his invention contemplates. In October, 1913, Langmuir had applied for patents in respect of his "electron discharge tube" and in February, 1916, a year and a half before Arnold's Canadian patent was granted, Alexanderson had received a patent in which he described the "electron discharge" tube as a device having a vacuum so high that gas ionization by collision is substantially absent. It was stated categorically by the witness Johnson that Arnold was the first to use in 1913 a tube which he spoke of as the high vacuum tube. He was obliged to admit that he was speaking from hearsay, and then finally said such tubes were known in 1913. If Arnold, in his note of 1912 and his notes of 1914, had in mind a repeater of this description and not the type of repeater which he and Richards and Colpitts had been in the habit of describing as an audion, it seems extraordinary that something was not said about it, and still more extraordinary that something was not said about it in the specification for the Canadian patent which issued in October, 1917.

It is impossible to maintain the contention that Arnold's resistance is something different from Richards' resistance on the ground that Arnold was dealing with one type of repeater and Richards with another.

Then it is sought to get rid of the Richards patent by labelling his patent a "blue glow preventer." It is abundantly plain from the documentary evidence before us that the blue glow was merely evidence of a condition of instability which, unless prevented, paralyzed the operation of the repeater. No doubt the high evacuation of the tube achieved by Langmuir greatly aided this prevention, and, perhaps, completely accomplished it, but, I repeat, we are not concerned with Langmuir's "electron discharge" device, we are concerned with the "audion."

Much the same considerations apply to the negative bias on the grid. As far back as April, 1912, Lowenstein had applied for a patent of a means for coping with the distortion arising from the unequal magnification of weak and strong signals and high and low frequencies in which he

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employed the negative grid bias. It is perfectly true that his patent contemplated the presence of some gaseous content in the repeater as DeForest's previous patent did, and Arnold's and Colpitts' subsequent patents did. But the problem is stated and the solution is given.

In May, 1914, Colpitts applied for a patent which was granted in April, 1915, a patent which has already been referred to. There appears in the drawings the combination of the negative bias on the grid and the resistance in shunt to the input electrode. And again, in an application made by Van der Bijl on the 21st of August, 1915, there is an association of resistances in shunt, grid bias and potentiometer shown in the drawings. Although this association is plainly disclosed, there is, by Colpitts, not even a reference to any of these devices in his specification, and none that I can discover in Van der Bijl.

These facts are important as showing that such an association was something well understood and this may properly be regarded as throwing light upon the fact that in Arnold's application for his U.S. patent, which is dated the 31st of August, 1915,—one year later than Colpitts' application and some months later than Colpitts' patent, and a week later than Van der Bijl's application—he passes over this association in the same way without comment.

Having regard to all these circumstances, it seems improbable that the employment by Arnold in 1914 of the negative bias and variable high resistance in combination was regarded by him as involving any advance not well within the scope of the skill of a trained specialist in these matters having a knowledge of what was generally known among such specialists; that is, on all the facts, the most natural explanation of the fact that he did not claim protection for this arrangement as an invention.

As to the third feature in respect of which protection is claimed, I would simply say that I see no satisfactory evidence of invention.

The form of Arnold's specification in the surrendered patent is, therefore, in my opinion, capable of the very simple explanation I have mentioned: that in respect of these matters in controversy in this appeal, he did not regard them as new or as inventions of his.

The appellants complain that the learned trial judge did not act upon the evidence of their experts. I regret to say that a large part of the evidence given by experts on both sides consists of material which ought not to be present in the record, for the plain reason that it is not legal evidence and cannot properly be taken into consideration by this Court, which, it hardly seems necessary to state, is a court of law. Some of the evidence given by the experts bearing upon the state of the art, what for brevity I have called the radio art, at a time when they were practitioners in that art, and are, therefore, competent to speak about it, is not only admissible but of weight and value. Some of it, although, perhaps, technically admissible, given by the witnesses in relation to the state of the art at a time when they had not much more than entered upon their studies as engineering students, is of no value. Some of it ought never to have been given. It is contradicted by the documents in the case and is obviously wrong. On the other hand, as I have said, there is a great mass of it which could not be properly taken into account by this Court, but the presence of which in the record substantially increases the labour of the Court, which is obliged to separate the legal from the irrelevant evidence. I mention two examples only—

The witness Johnson, who left the University of North Dakota in 1913-14 and entered Yale in the following year, professed to give evidence as to the problems with which Arnold was confronted from 1912-14 when he was perfecting his alleged invention, and, after descanting at great length about what Arnold had in his mind and was trying to do, was compelled to admit on cross-examination that he had never met Arnold before 1916, and that everything he said was an inference drawn by him from the specifications in the original patent and in the re-issue patent. In point of fact, it is quite obvious from perusal of his evidence that he is mainly speaking from the re-issue patent.

Now, it was a part of the case advanced by the appellants, a substantive part of their case, to establish that the devices and arrangements in question in these proceedings were inventions of Arnold, and any inference with regard to that to be drawn from Arnold's specification signed by him in 1915, if any such inference could be drawn, was matter of fact for the Court and not a matter upon which

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it was competent to any expert witness to pronounce. The opinions of such persons on such matters are entirely without legal relevancy and cannot be considered in this Court.

Again, the respondent's witness Kelley had put in his hands Arnold's original patent and was asked broadly to explain what Arnold was trying to do. The issue touching the identity of the invention to which Arnold's original patent related was a substantive issue in the action and upon that issue no expert witness should have been permitted to express an opinion.

The proper limits of expert testimony are well understood; the subject has, however, recently been the subject of comment by Lord Tomlin, and I think it is desirable to reproduce in full what Lord Tomlin said upon it (*British Celanese, Ld.* v. *Courtaulds, Ld.* (1)):

> The area of the territory in which in cases of this kind an expert witness may legitimately move is not doubtful. He is entitled to give evidence as to the state of the art at any given time. He is entitled to explain the meaning of any technical terms used in the art. He is entitled to say whether in his opinion that which is described in the specification on a given hypothesis as to its meaning is capable of being carried into effect by a skilled worker. He is entitled to say what at a given time to him as skilled in the art a given piece of apparatus or a given sentence on any given hypothesis as to its meaning would have taught or suggested to him. He is entitled to say whether in his opinion a particular operation in connection with the art could be carried out and generally to give any explanation required as to facts of a scientific kind.
>
> He is not entitled to say nor is counsel entitled to ask him what the specification means, nor does the question become any more admissible if it takes the form of asking him what it means to him as an engineer or as a chemist. Nor is he entitled to say whether any given step or alteration is obvious, that being a question for the court.
>
> In the present case much time was occupied and substantial parts of the shorthand notes have been filled with questions and answers which in my opinion were not admissible.
>
> To illustrate what I mean I will venture to call your Lordships' attention to a few examples taken at haphazard.
>
> Evidence, Vol. 1, p. 16. Q. 150. Now there are in the alleged anticipations cases for the spinning of nitro silk where downward spinning is proposed?—Yes.
>
> Q. 151. I ask you quite generally—I am going to take them later—do you find in any of those any assistance in reaching the process the subject of this first patent?—No.
>
> P. 19, Q. 184. Do you find in this (i.e., *Clark's* Specification) although there is downward spinning, any suggestion of outside winding?—No.
>
> P. 20, Q. 187. * * * Is that language consistent with what you inferred from the statement about the chamber being steam tight?—Yes. * * *

(1) (1935) 52 R.P.C. 171, at 196-8.

P. 23, Q. 224. Now turn to *Boullier,* No. 15015 of 1908. First of all you might tell my Lord what you understand *Boullier* to describe?—*Boullier* has got some idea of heating the filaments by radiation. * * *

P. 210, Q. 1807. * * * I suggest that means by the capacity of the apparatus to squirt?—Yes.

Q. 1809. So that we have here downward spinning and outside winding?—Yes, but which end of the filament do you imagine he takes hold of?

Q. 1810. Not the one in the jet, at all events?—I do not think it means "continuous" at all. What I read here is that he squirts until he has a tangle of his filament on the bottom of his apparatus.

P. 211, Q. 1815. It does not say anything about waiting on the bottom?—I think it does.

Evidence, Vol. II, p, 867, Q. 9537. Then it continues: "but is usually only very short so that the filaments can be spun at a high speed and need only travel a relatively short distance in the casing." Does that passage there convey to your mind the necessity or desirability of a long casing?—No. Rather the reverse.

Q. 9538. Then just going on from line 50: "By way of example we have found that in most cases the volatile liquids are sufficiently evaporated and the filaments sufficiently solidified by a travel of one to two seconds exposed to a warm air current of about 30 deg. to 50 deg. C. in the casing." Just bearing in mind that with the Provisional there are no drawings, does that passage enable you to gather anything as regards the speed of spinning?—No.

Q. 9542. I just want to ask one question on that paragraph. You see at line 115 it is dealing with guides, and I just want you to explain to his Lordship what you understand by this paragraph: "The said guide or guides may be located in the aperture or apertures through which the filaments leave the casing, or when the associated filaments pass round or over more than one guide in the casing, the last of each series of these may be placed in the issue apertures." What does that convey to your mind?—The possibility of carrying the filaments in a zig-zag path to and fro inside the casing, in order to get the requisite length of travel, without needlessly extending the length of the casing. Of course, it also includes a case in which the filaments pass direct to an outlet, and over a single guide.

P. 887, Q. 9681. Then at line 21: "Under the conditions above described, the matter is expelled in the form of a continuous thread whose length is only limited by the capacity of the apparatus." What does that convey to your mind?—It conveyed to my mind the limit as to the amount of material he can expel by his piston from his containing vessel. He has spoken of expelling the thread by means of a piston at page 2, line 15, and I assume he was speaking of a sort of charge which he could put in such a cylinder and expel by the piston.

Q. 9682. He goes on: "The thread or filament coagulated as above described after traversing the coagulating medium is drawn out by its extremity and wound on a roller or reel whence it is rewound on bobbins or into balls or skeins or by any suitable means, which it is unnecessary to describe." Does that convey anything to your mind as regards the position of the winding or the time when it takes place after the coagulation?—Yes; it does suggest that after traversing the coagulating medium the thread is drawn out by its extremity. That suggests to my mind that it is drawn out of the apparatus and conveyed direct to a roller or reel on which it is wound.

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Duff C.J.

P. 893, Q. 9762. Do you find in *Boullier's* Specification any direction as to whether there would be a casing or an enclosed space or not?—Yes. He suggests that at any rate the back and sides should be closed in and that there should be a front put on where you want to limit the loss of heat by radiation.

P. 986, Q. 9797. Just look at the last lines in *Suvern*. "By this arrangement, the recovery of the solvent is also facilitated, since the same evaporates in comparatively only narrow chambers"?—Yes, that I think is quite obvious.

Q. 9798. So that you have narrow chambers—

Sir Arthur Colefax: Please do not lead here because it is absolutely in conflict with what this discloses.

Sir Stafford Cripps: I did not appreciate that there was any conflict upon this at all.

Q. 9799. Do you therefore find that *Suvern* tells you as an engineer that narrow chambers were used?—Yes.

P. 902, Q. 9868. What does that convey to your mind?—The film is formed by evaporation, or elimination of solvent and coagulation or coming together of the particles of viscose to make a relatively solid film, much as milk will coagulate on a heated liquid. The surface then will consist of a more coagulated body, substantially solid, but still containing a good deal of liquid.

P. 904, Q. 9875. I am coming back afterwards to ask you a question on page 250, but I want to deal with the viscose point first, if I may. I have read you the middle of page 250, except the last two lines, where he says: "However, provision has then to be made for hardening them"—that is the filaments—"as rapidly as possible, so that they may be reeled up. While viscose coagulates by itself in the air, too much time would in the case in question be required for the purpose." When it speaks of coagulating by itself in the air, bearing in mind the paragraph we have been looking at on page 132, where he tells you how that happens, what do you imagine he means there?—He means that if you tried to form a filament by allowing the viscose to coagulate in air at an ordinary temperature, the process would be altogether too slow to enable you to carry out that process and make a filament.

Q. 9878. I will just read to the end of the paragraph: "and the viscose threads after having been stretched to a certain length must be further treated according to this principle"; what do you understand "this principle" to mean?—Continued heating, probably after the threads have been formed and wound up, sufficient to convert the solidified viscose into viscoid.

P. 905, Q. 9886. Now: "For the purpose of converting the fluid viscose thread into the solid viscoid thread a current of hot air ascends in the shaft through which the thread sinks down"?—Yes.

Q. 9887. Would that be what is called counter current?—Yes, but he would not get it converted in such a shaft during its formation into a true viscoid. I think the word is used loosely there.

The disadvantages of these methods are two-fold.

In the first place time is wasted and money spent on what is not legitimate. In the second place there accumulates a mass of material which so far from assisting the Judge renders his task the more difficult, because he has to sift the grain from an unnecessary amount of chaff.

It is advisable, I think, to repeat, for the purpose of emphasizing it, what I have said about the proceedings lead-

ing to the grant of the reissue patent. There can be little doubt that, as already observed, in granting the reissue patent, the conditions laid down by the statute were entirely disregarded. One is struck with amazement when one observes the utter absence of any attempt on the part of the applicants to offer evidence to establish the existence of the statutory conditions. As I have said, the fact upon which the appellants mainly rely in this appeal, viz., the existence in operation of certain "receiving systems" answering the description provided by the drawing in the original patent, is not mentioned in the application. There was produced literally no evidence of inadvertence or accident or mistake. It is too plain that the grant was quite destitute of legal authority.

As to Kendall's patent, I am satisfied there was no infringement.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Smart & Biggar.*

Solicitors for the respondents: *Chauvin, Walker, Stewart & Martineau.*

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ASSESSMENT AND TAXATION— *Continued*

City of Saint John (supra) cannot be regarded as binding in the present case, owing to changes in conditions, and is distinguishable in regard to the nature of the tax there in question. *Caron* v. *The* King, 64 Can. S.C.R. 255, [1924] A.C. 999, is distinguishable, having regard to the nature of the position of the person there objecting to the tax. Moreover, it is at least doubtful if the pay and allowances to a soldier of the permanent force of the active militia of Canada are "wages" within the meaning of the Act in question, and in construing it (a taxing Act) the subject should be given the benefit of that doubt. Moreover, Part I of the Act attempts to strike first directly at the source of wages, before they reach the employee, expecting direct payment from the employer, and through him to reach the employee indirectly; such legislation is *ultra vires;* and, having regard to the design of the Act, the part so *ultra vires* cannot be severed from the provision in s. 7 for payment by the employee, so as to save the latter provision from invalidity (*Attorney-General for Manitoba* v. *Attorney-General for Canada,* [1925] A.C. 561, at 568). *Per* Crocket J. (dissenting)—The primary purpose and effect of Part I of the Act is to impose the tax, not upon the employee or upon the income from wages received by him, but upon the earned and accruing wages of the employee in the hands of the employer before they are paid to the employee; and so far as its provisions seek to tax federal salaries or other pay or allowances in the hands of the Government of Canada they are entirely void and inoperative. The provisions of s. 7 purporting to impose upon the employee the liability to pay the tax only in the event of its not having been deducted from his wages and paid by the employer, cannot reasonably be severed, in an action brought against an employee of the Dominion Government, from the provisions of the previous sections, which in their application to the salaries, pay and allowances of civil and other employees of the Dominion Government are *ultra vires* of the legislature, the liability for payment of the tax having been primarily placed upon the employer, and only secondarily or conditionally on the employee. The secondary liability of the employee cannot fairly be held, in a taxing statute, to stand alone if the primary liability out of which it arises or for which it is substituted is unconstitutional and void. WORTHINGTON *v.* ATTORNEY-GENERAL OF MANITOBA.—FORBES *v.* ATTORNEY-GENERAL OF MANITOBA. 40

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2——*Business assessment — Clause (cc) (added in 1933, c. 2, s. 2) of s. 9 (1) of Assessment Act, R.S.O. 1927, c. 238— "Distribution premises" for goods supplied to a chain of retail stores—Submission of questions under s. 84 of said Act.*] Clause (*cc*) (added in 1933, c. 2, s. 2) of s. 9 (1) of the *Assessment Act,* R.S.O. 1927, c. 238, imposes upon "every person carrying on the business of selling or distributing goods * * * to a chain of more than five retail stores or shops in Ontario" a business assessment for a sum equal to 75 per cent of the assessed value of the land occupied or used "in such business for a distribution premises, storage or warehouse" for such goods, or for an office used in connection with the business. Appellant company owned a chain of retail grocery stores and had in Toronto, Ontario, a large warehouse building in which it had its general administrative offices, and in which it stored goods until required by its stores, and from which it distributed goods by trucks to its stores. In respect of this building (and the land on which it stood) appellant was assessed under said clause (*cc*); this assessment was not in dispute. In 1934 appellant acquired land and built thereon, across a street from the said older building (and not connected with it except by a small pipe tunnel under the street for housing pipes and wires for conveying steam heat, water, electricity and gas to the new building), a building used, (1) for a garage for housing appellant's trucks, (2) as a repair shop for its trucks, and for servicing its cars used by its store supervisors in making inspections, and (3) as a carpenter, paint and repair shop for repairing shelving and other fixtures in the retail stores and doing repairs to said stores. In respect of this building also (and the land on which it stood), and as a parcel in itself, appellant was assessed by the City of Toronto under said clause (*cc*); and the question in dispute, on a case stated by a County Court Judge under s. 84 of said *Assessment Act,* was whether appellant was (in respect of the latter building and land) properly so assessed. *Held:* Appellant was not assessable under said clause (*cc*) in respect of the building and land secondly above described. It could not be said that the land was occupied or used by appellant in its business for distributive purposes in the sense that the two buildings taken together were occupied and used in its business for the storage and distribution of its goods. The occupation or use of the particular land assessed must be looked at; and the new building could not be said to come plainly within the

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and depositing other shares as collateral security — Company failing to carry shares for customer and thereby, and by use of customer's shares, and by buying in on falling market for delivery to customer, making profit for itself—Claim by customer against directors of company—Customer's retention of shares delivered to him, as election precluding claim for conversion—Basis of claim, form of action and essentials for right to recover.] Defendants S. and M., who had as partners conducted a brokerage business, turned it over, on May 31, 1928, to a Dominion company, which they had organized and of which they were officers and almost the sole shareholders. That company, on November 30, 1928, transferred the Ontario portion of the business to an Ontario company which S. and M. had organized and of which they were high officials and directors. The Dominion company owned practically all the shares of the Ontario company. On October 16, 1929, plaintiff employed the Ontario company (hereinafter called the company) as his agent and broker to buy 7,000 shares of a certain stock on the Toronto Stock Exchange at market prices on margin, and deposited, at varying intervals, in all, 14,000 shares of the same stock (hereinafter called the collateral) as security to maintain the margin. This Court found, or accepted findings of, the following facts: The company, while it did go upon the Exchange and buy 7,000 shares, virtually nullified that purchase by selling shares on its own account, the effect of this, under the Stock Exchange practice, being that the company took delivery of few, if any, of the shares so bought, and it did not get or carry shares from which it could make delivery to plaintiff if and when required. Though any asserted marginal requirement was always met by plaintiff promptly, the collateral was disposed of, in most instances, immediately it was deposited; in all, 11,800 of said 14,000 shares were disposed of for about $65,320. On January 13, 1930, plaintiff called for delivery of the 7,000 shares. The company bought upon the market (which had fallen) 7,000 shares for about $25,000 and delivered them to plaintiff as and for the shares which he had ordered in October. Plaintiff accepted the shares and paid the amount demanded ($50,334.92 for price, brokerage and interest), believing that the shares were those which he had ordered in October. The company also repurchased upon the market 11,800 shares for about $32,000, and these, along with the 2,200 shares which it had not sold, it delivered to

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plaintiff as the collateral, retaining the secret profit of about $33,320 which it had made on the sale and repurchase. The company's conduct, both as to the 7,000 shares and the collateral, was in pursuance of a general system, which had been inaugurated by S. and M. when partners as aforesaid, and which had been carried on continuously since by the successive owners and operators of the business. S. and M. controlled and directed all the business and practices of the company. A judgment against the company and S. and M. (for the difference betwen what the company charged plaintiff for the 7,000 shares and what it acquired them for when delivery was requested, and for the difference between what the company received and paid for the collateral; with adjustment for interest and brokerage) was, as to S. and M. reversed by the Court of Appeal for Ontario, which dismissed the plaintiff's action as against S. and M. Plaintiff appealed to this Court. *Held:* (1) As to the 7,000 shares: Under the terms of the accepted order to buy and the representations regarding its execution, there was a legal duty on the company to get delivery of the shares bought and to carry always a sufficient number of shares available for delivery to plaintiff when demanded (*Conmee* v. *Securities Holding Co.*, 38 Can. S.C.R. 601; *Solloway* v. *Blumberger*, [1933] Can. S.C.R. 163, at 167); which duty was not fulfilled. The October order to buy was never fully executed and so came to naught. This relieved plaintiff of any contractual obligation to take any shares at any price. He was not obliged to take or retain the shares bought in January, but he had by his conduct after discovering the facts elected to retain the shares, thereby adopting the company's action in buying the shares as his agent, and defeating his claim, which he might otherwise have had, for conversion (his retention of the shares being a denial that they had passed to anyone else, and, further, the retention after election amounting in law to waiver of the conversion, not only against the converting company, but against all who participated—the waiver extending to the entire cause of action, absolving all the joint tort-feasors—*Buckland* v. *Johnson*, 15 C.B. 145). Plaintiff's remedy was for a strict accounting as agent. On the pleadings (and rejecting any claim for conversion) plaintiff's claim must be taken as based on agency, the purchase adopted as that of January, and the claim as being for the overcharge against him for the shares then bought by the company. This claim plaintiff was en-

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titled to recover from the company, and was now merged in his judgment against it. Although that judgment stood unchallenged, it could not be regarded as the measure of the directors' liability in respect of the frauds (*Solloway* v. *Johnson,* [1934] A.C. 193, at 206). Before a director can be held liable for the acts of his company there must be established, (1) fraud of the company, and (2) loss or damage to the customer attributable to that fraud, or benefit accruing to the director from the fraud (*Solloway* v. *Johnson, supra,* at 207-8). In the present case, both fraud of the company and loss or damage (consisting in the excess or overcharge paid by plaintiff as aforesaid, the return of which he had been unable to secure) were established. Plaintiff should have judgment against S. and M. (and the company) to the extent of the moneys paid by him to the company for the 7,000 shares in excess of the actual market price as paid by the company for them on January 13, 1930, and the proper brokerage charges based on that price; and interest on that excess from January 13, 1930. (2) As to the collateral: Plaintiff's claim for damages for conversion was defeated by his retention of the shares delivered to him as return of the collateral. As to a claim based on agency: Judgment, obtained against the company, for the profits, could be obtained against the directors only on proof of the two elements aforesaid, fraud and loss, "loss" including benefit accruing to the directors attributable to the fraud. By retaining the shares plaintiff had elected to treat them as being the very shares that he deposited as collateral. Securing their return had not cost him anything. The withholding of the profits from him was not in itself a loss to him, because any right he might have to recover them was based, not upon a theory that they belonged to him or that he had lost what the agent had gained, but rather upon the broader doctrine of morality,—that good faith and honest dealing forbid an agent to make secret profits and require him to account for any made. (*Parker* v. *McKenna,* L.R. 10 Ch. App. 96, at 118; *Hutchinson* v. *Fleming,* 40 Can. S.C.R. 134). Therefore plaintiff could not be said to have suffered "loss or damage" in respect of the collateral. His claim for the secret profits (necessarily, for reasons aforesaid, based on assumption of agency, and precluding all ground partaking of the nature of tort) could only be allowed against the directors on proof that they had either received the profits or derived some benefit

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attributable to the fraud. They could not have made profit directly, because they were not, the company alone being, the plaintiff's agent. While plaintiff had a right to sue them for profit (as inferentially appears from *Solloway* v. *Johnson, supra,* at 207), yet no foundation was laid, either in the pleadings or evidence, upon which a conclusion could be based that they secured profits, or any benefit to themselves attributable to fraud. On this branch, therefore, plaintiff's appeal failed. Judgment of the Court of Appeal for Ontario, [1934] O.R. 464, reversed in part. McLAUGHLIN *v.* SOLLOWAY ET AL... **127**

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COMPETITION FOR SCHOLARSHIP—*Encouragement of music—Special jury—Examination of competitors—Verdict—Subsequent discovery of errors and partiality—Right of official body to revise verdict—Whether jury is functus officio—An Act for the Encouragement of Music, R.S.Q., 1925, c. 139—Art. 50 C.C.P.*] The Academy of Music, in virtue of "An Act for the Eucouragement of Music" (R.S.Q., 1928, c. 139), was receiving a yearly grant of $5,000, so that a scholarship called "Prix d'Europe" could be awarded, upon the verdict of a special jury of five members appointed by the Academy, to the competitor who would obtain the highest number of marks. In the year 1932, a competition was held; and, after the examination had been completed and all the judges had handed over to the secretary of the jury the ballots on which each of them had inscribed the

COMPETITION FOR SCHOLARSHIP—*Continued*

respective number of marks allowed to each candidate, on each subject, and the number of marks for each candidate had been added up and arranged, it was found that the mis-en-cause Piché ranked first with 81·9 marks and the respondent, Payment, with 81·1 marks. Thereupon, one of the examiners, Morin, expressed the opinion that respondent's marks should be increased so that the scholarship be awarded to him because in his opinion he deserved it; and another examiner, Bernier, in order to obtain such result, got back his ballot from the secretary and granted five marks more to respondent. The latter was accordingly declared the winner of the scholarship. A few days after the examination, another competitor, one Bélanger, wrote to the vice-president of the Academy that he had not been awarded for his musical dictation the marks he thought he was entitled to. The officers of the Academy ascertained the fact that an obvious error had occurred in Bélanger's case and thought that it would be expedient that the whole examination should be reviewed. The president of the Academy then called a meeting of the members of the jury and of the officials of the Academy, which took place on July 21, 1932. At that meeting, mistakes and errors in the allocation of marks to the respondent and Piché were admitted by the members of the jury, a rectification was made accordingly, and, as a result, the mis-en-cause Piché, having obtained 84·8 marks, while the respondent had only 76·9, was awarded the scholarship. The respondent, under art. 550 C.C.P., then took an action against the Academy of Music and the members of the jury for a declaration that he had won the scholarship and, claimed all the advantages deriving therefrom, and, also, for $5,000 damages. The trial judge dismissed the action, holding that the respondent had not won the scholarship, that the Academy of Music rightly refused to award it to him and that the Academy of Music could not be held liable for fraud committed by some of the examiners, and mistake by the others. The Court of King's Bench reversed this judgment, holding that the examiners were arbitrators, that they had become *functi officio* the moment they had signed their first report; that court annulled the decision of the jury rendered on July 21, 1932, and condemned the appellant to pay $1,000 damages to the respondent. *Held*, reversing the judgment appealed from (Q.R. 59 K.B. 121) Cannon J. dissenting, that under the circumstances of this case, the respondent was not

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entitled to claim the scholarship and that the appellant was right in refusing to award it to him. Even admitting that the decision reached at the meeting of July 21, 1932, (which, according to the facts, cannot be considered as a second verdict, but as a rectification of the first verdict), was illegal and null, this Court had still the right and the duty to decide, what the court appealed from has failed to do, whether the first verdict was valid and legal, as such verdict had been contested by the appellant in its plea. It was not only the right, but also the duty, of the appellant, as mandatory of the legislature in the distribution of public moneys, to investigate the proceedings of the jury and, after having found evident errors and illegalities, which were admitted by the members of the jury at the meeting of July 21, 1932, and have been held as proven by the trial judge, to award the scholarship to the competitor who had obtained "the highest number of marks" according to the statute. *Per* Cannon J. (dissenting).—The only regular competition for the scholarship of 1932 and the only official examination of the competitors had taken place on June 16 and 17, 1932. The respondent is entitled to claim the benefit of the unanimous decision of the jury rendered on June 17 and of the official document, bearing the seal of the Academy, which stated that he was the winner of the scholarship. The jury, after having rendered its verdict, had no more powers to act as such (*functus officio*). The proceedings subsequent to the first verdict as well as the second verdict were illegal, as the statute incorporating the Academy does not provide for any appeal from the decision of the jury to the executive committee of the Academy or to the members of the jury individually or collectively. If the officials of the Academy were of the opinion that there had been fraud, partiality or errors in the conduct of the competition, they should have proceeded by way of action under art. 50 C.P.P. to annul the verdict of the jury.—L'ACADEMIE DE MUSIQUE DE QUÉBEC *v.* PAYMENT **323**

CONSTITUTIONAL LAW—*Assessment and taxation—The Special Income Tax Act, Man., 1933, c. 44 (Part 1: Taxation of Wages)—Constitutionality—Direct or indirect taxation — Whether tax imposed on employee or upon wages in employer's hand—Application, effect, and validity of the Act as to pay, allowance, or wages, received by an officer of the permanent force of the active militia of Canada, or by a civil servant of the*

Dominion Government—B.N.A. Act, ss. 92 (2), 91 (7) (8).] The imposition of the tax on wages by Part I of *The Special Income Tax Act* of Manitoba, 1933, c. 44, is direct taxation, and is *intra vires*. The tax is imposed upon the employee; it is not in substance a tax on the employer's pay roll. Secs. 4, 5, 6 and the second part of s. 7 of the Act do not attempt to impose the tax as such upon the employer but merely provide for the collection and recovery of the tax. The appellants, both resident within the province, one an officer of the permanent force of the active militia of Canada, the other a civil servant of the Dominion Government, were each held to be liable for the said tax in respect of the pay, allowance or wages received by him from the Government of Canada. *Abbott* v. *City of Saint John*, 40 Can. S.C.R. 597, cited and applied. Judgments of the Court of Appeal for Manitoba, 42 Man. L.R. 540, 569, affirmed. Cannon and Crocket JJ. dissented. *Per* Duff C.J.: (1) Even assuming everything in said ss. 4, 5, 6 and second part of s. 7 which imposes any duty or liability upon the employer to be struck from the Act as *ultra vires*, there would still stand enactments valid and complete for the purpose of making the taxes in question exigible from the taxpayer. (2) Said ss. 4, etc., read by the light of well settled and well known canons of construction, do not extend to the Crown or to the officers of the Crown in the right of the Dominion or of any province, other, at all events, than Manitoba, or to the revenues of the Crown in these respective rights; and further, even if this were not so, the form and character of the legislation is such that the enactments, in so far as they relate to such governments and such revenues, must be treated as severable, and the enactments would still have their full operation as regards other employers and other revenues. (3) Sec. 11 of *The Manitoba Interpretation Act*, R.S.M. 1913, c. 105, precludes the extension of said ss. 4, etc., at least to the Crown in right of the Dominion or in right of any province other than Manitoba. *Per* Cannon J. (dissenting): A provincial government cannot by a tax such as that in question affect the salary or wages paid, or the pay or allowance made, by the Government of Canada to a Dominion civil servant or a soldier of the permanent force. To do so would impair the status and essential rights of such civil servant or soldier, which are under exclusive Dominion authority. *Abbott* v. *City of Saint John* *(supra)* cannot be regarded as binding in the present case, owing to changes in conditions, and is distinguishable in regard to the nature of the tax there in question. *Caron* v. *The King*, 64 Can. S.C.R. 255, [1924] A.C. 999, is distinguishable, having regard to the nature of the position of the person there objecting to the tax. Moreover, it is at least doubtful if the pay and allowances to a soldier of the permanent force of the active militia of Canada are "wages" within the meaning of the Act in question, and in construing it (a taxing Act) the subject should be given the benefit of that doubt. Moreover, Part I of the Act attempts to strike first directly at the source of wages, before they reach the employee, expecting direct payment from the employer, and through him to reach the employee indirectly; such legislation is *ultra vires;* and, having regard to the design of the Act, the part so *ultra vires* cannot be severed from the provision in s. 7 for payment by the employee, so as to save the latter provision from invalidity. (*Attorney-General for Manitoba* v. *Attorney-General for Canada*, [1925] A.C. 561, at 568). *Per* Crocket J. (dissenting)—The primary purpose and effect of Part I of the Act is to impose the tax, not upon the employee or upon the income from wages received by him, but upon the earned and accruing wages of the employee in the hands of the employer before they are paid to the employee; and so far as its provisions seek to tax federal salaries or other pay or allowances in the hands of the Government of Canada they are entirely void and inoperative. The provisions of s. 7 purporting to impose upon the employee the liability to pay the tax only in the event of its not having been deducted from his wages and paid by the employer, cannot reasonably be severed, in an action brought against an employee of the Dominion Government, from the provisions of the previous sections, which in their application to the salaries, pay and allowances of civil and other employees of the Dominion Government are *ultra vires* of the legislature, the liability for payment of the tax having been primarily placed upon the employer and only secondarily or conditionally upon the employee. The secondary liability of the employee cannot fairly be held, in a taxing statute, to stand alone if the primary liability out of which it arises or for which it is substituted is unconstitutional and void. WORTHINGTON *v.* ATTORNEY-GENERAL OF MANITOBA—FORBES *v.* ATTORNEY-GENERAL OF MANITOBA **40**

statutes enumerated in section 2 (*h*) as may be competent. IN THE MATTER OF A REFERENCE AS TO WHETHER THE PARLIAMENT OF CANADA HAD LEGISLATIVE JURISDICTION TO ENACT THE DOMINION TRADE AND INDUSTRY COMMISSION ACT, 1935, BEING 25-26 GEO. V, C. 59 **379**

4——*The Farmers' Creditors Arrangement Act — Constitutional validity — Bankruptcy and insolvency—B.N.A. Act, 1867, s. 91, ss. 21.*] *The Farmers' Creditors Arrangement Act,* which is entitled "An Act to Facilitate Compromises and Arrangements between Farmers and their Creditors," provides by its enactments a procedure whereby a farmer may make a proposal for a composition, extension of time or a scheme of arrangement, to his creditors. If the proposal is accepted by the ordinary creditors and the secured creditors whose rights are affected concur, it is submitted to the Court for approval. If it is not accepted by the ordinary creditors or if a secured creditor whose rights are affected by it does not concur, the matter is referred to a Board of Review to formulate a proposal. If the proposal is accepted by the creditors and approved by the Court, or if it is formulated by the Board of Review and is approved by the creditors and the debtor, or if, though not so approved, it is confirmed by the Board of Review, it shall be binding upon all the creditors and the debtor. *Held,* Cannon J. dissenting, that the Act is *intra vires* of the Parliament of Canada. The power of the Parliament to enact this statute is derived from subdivision 21 of section 91 of the B.N.A. Act, in virtue of which the exclusive legislative authority of the Parliament of Canada extends to the subject of Bankruptcy and Insolvency. The provisions of the statute affect farmers who are in such a situation that they are unable to pay their debts as they fall due; and it is competent to Parliament, possessing plenary authority in respect of bankruptcy and insolvency, to treat this condition of affairs as a state of insolvency. *Per* Cannon J. dissenting:— In view of the accepted aims and past history of the bankruptcy and insolvency legislation, the Parliament of Canada, in enacting the Act, has exceeded the domain of bankruptcy and insolvency to which its jurisdiction is limited. More particularly, the Act does not provide, as in the case of an insolvent person, for the rateable distribution of the assets of the debtor among his creditors nor for the discharge of the debt. Section 17 of the Act, which fixes the rate of interest, is *intra vires* of the Parliament of Canada under ss.

19 of section 91 of the B.N.A. Act. IN THE MATTER OF A REFERENCE AS TO WHETHER THE PARLIAMENT OF CANADA HAD LEGISLATIVE JURISDICTION TO ENACT THE FARMERS' CREDITORS ARRANGEMENT ACT, 1934, 24-25 GEO. V, C. 53, AS AMENDED BY THE FARMERS' CREDITORS ARRANGEMENT ACT AMENDMENT ACT, 1935, 25-26 GEO. V, C. 20..... **384**

5——*The Natural Products Marketing Act, 1934, 24-25 Geo. V, c. 57, as amended in 1935 by 25-26 Geo. V, c. 64— Constitutional validity — Regulation of trade.*] *The Natural Products Marketing Act,* 1934, and *The Natural Products Marketing Act Amendment Act,* 1935, are *ultra vires* of the Parliament of Canada. In effect, these statutes attempt and, indeed, profess, to regulate in the provinces of Canada, by the instrumentality of a commission, or commissions appointed under the authority of the statute, trade in individual commodities and classes of commodities. The powers of regulation vested in the commissions extend to external trade and matters connected therewith and to trade in matters of interprovincial concern; but also to trade which is entirely local and of purely local concern. Regulation of individual trades, or trades in individual commodities in this sweeping fashion, is not competent to the Parliament of Canada and such a scheme of regulation is not practicable "in view of the distribution of legislative powers enacted by the Constitution Act, without the co-operation of the provincial legislatures" (*Board of Commerce* case, [1922] 1 A.C. 191, at 201). The legislation is not valid as an exercise of the general authority of the Parliament of Canada under the introductory words of section 91, B.N.A. Act, to make laws "for the peace, order and good government of Canada." IN THE MATTER OF A REFERENCE AS TO WHETHER THE PARLIAMENT OF CANADA HAD LEGISLATIVE JURISDICTION TO ENACT THE NATURAL PRODUCTS MARKETING ACT, 1934, BEING CHAPTER 57 OF THE STATUTES OF CANADA, 1934, AND ITS AMENDING ACT, THE NATURAL PRODUCTS MARKETING ACT AMENDMENT ACT, 1935, BEING CHAPTER 64 OF THE STATUTES OF CANADA, 1935. ..... **398**

6——*The Employment and Social Insurance Act, 25-26 Geo. V, c. 38—Constitutional validity—Taxation—Property and civil rights.*] The *Employment and Social Insurance Act* provides (Part I, sections 4 to 9 inclusive) for the administration of the Act by a Commission consisting of three members to be called the Employment and Social In-

CONSTITUTIONAL LAW—*Continued*

surance Commission, whose duties are defined in these sections. Part II (sections 10 to 14 inclusive) of the Act provides for the organization and administration by the Commission of an employment service for the Dominion of Canada with regional divisions and a central employment office and employment offices within each division. Part III (sections 15 to 38 inclusive) of the Act provides for the establishment of an Unemployment Insurance Fund out of which unemployment insurance benefits would be payable to all persons of the age of sixteen years and upwards who are engaged in any of the insurable employments specified in the Act. Such fund is to be derived partly from moneys provided by Parliament and partly from compulsory contributions by employers and workers. The statutory conditions governing the eligibility and ineligibility of insured contributors for the receipt of benefits are defined in the Act. Penalties are provided for fraudulently obtaining benefits or evading payment and for other violations of the Act or the regulations under it. Part IV (sections 39 to 41 inclusive) of the Act, under the heading "National Health," charges the Commission with the duty of collecting information concerning any scheme, actual or proposed, for providing medical, dental, surgical and hospital care, and compensation for loss of earnings due to ill-health or accident. (Further particulars of the Act are contained in the judgments reported.) *Held,* per Rinfret, Cannon, Crocket and Kerwin JJ., that the Act is *ultra vires* of the Parliament of Canada; Duff C.J. and Davis J. holding that the Act is *intra vires*. *Per* Rinfret, Cannon, Crocket and Kerwin JJ.—The validity of the legislation cannot be supported either as an exercise of the residuary power to make laws for the peace, order and good government of Canada, or as an exercise of the power to regulate trade and commerce. The proposition that the Act could be supported in virtue of the power of the Dominion Parliament concerning statistics or criminal law need not retain our attention. The legislation is not based on the Treaty of Peace (1919) and, therefore, no reliance for its validity can be made on section 132 of the B.N.A. Act. Nor can it be supported under "the power to raise money by any mode or system of taxation," or "the power to appropriate public money for any public purpose." The statute, in its substance, is not an exercise of those powers. It clearly indicates that the Parliament of Canada intended primarily to legislate with regard to employment service, to

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unemployment insurance and to health matters. It is not concerned either with public debt and property or with the raising of money by taxation. Its provisions for levying contributions for the creation of the Unemployment Insurance Fund are nothing more than provisions to enable the carrying out of the true and only purpose of the legislation. These contributions (or taxes, if they are to be so called) are mere incidents of the attempted regulation of employment service and unemployment insurance. It being well understood, and in fact conceded, that the subject-matters of the Act fall within the legislative authority of the provinces, the Dominion Parliament may not, under pretext of the exercise of the power to deal with its property or to raise money by taxation, indirectly accomplish the ends sought for in this legislation. The effect of the Act under submission is "to attach statutory terms to contracts of employment" (Lord Haldane in *Workmen's Compensation Board* v. *Canadian Pacific Railway,* [1920] A.C. 184); and its immediate result is to create civil rights as between employers and employees. The Dominion Parliament cannot use its power of taxation to compel the insertion of conditions of that character in ordinary employment contracts. *Per* Duff C.J. and Davis J. dissenting.—The aims stated in the preamble of the Act are legitimate, provided, of course, that the enactments themselves are within the ambit of the legislative powers possessed by Parliament. Reading subdivision 1 of section 91 and subdivision 3 of the B.N.A. Act together, the proper conclusion is that Parliament has exclusive authority to raise money by any mode or system of taxation for disposition by Parliament for any purpose for which it is competent to Parliament to apply the assets of the Dominion in virtue of subdivision 1. In effect, subdivision 1 endows the High Court of Parliament with full discretionary authority to dispose of the public assets of the Dominion, and no other court is invested with jurisdiction to examine any purported exercise of that authority with a view to pronouncing upon its validity, subject only to the rule that the courts are always entitled to determine whether, in truth, any given enactment of Parliament professing to be an exercise of a given authority is not really an enactment of that character; but one relating to a subject over which Parliament has no jurisdiction. The provisions requiring compulsory contributions by employers and employed possess the essential elements of legislation respecting taxation.

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On their true construction, they have that character because, first, it would not be competent to a provincial legislature to enact them in the context in which they stand, which demonstrates that the contributions are exacted for the purpose of raising moneys for exclusive disposition by Parliament; and, second, there is no adequate ground for holding that they are, either in purpose or in immediate effect, outside the ambit of the powers under subdivision 3. So also as regards the enactments concerning the disposition of the proceeds of the levies upon employers and employed and of the contribution from the Dominion treasury. They are not enactments in respect of property and civil rights in any one province or in all of the provinces They would not be competent as enactments by any or all of the provincial legislatures and there is no adequate ground for affirming that these enactments are not legislation in relation to the subjects within the scope of subdivision 1. Parliament can in the legitimate exercise of its exclusive authority under subdivisions 1 and 3 of section 91 of the B.N.A. Act, levy taxes for the purpose of raising money to constitute a fund to be expended, in conformity with the directions of Parliament, in unemployment benefits, and provide for a contribution to that fund from the Dominion treasury, and in executing these exclusive powers. Parliament is not subject to any control by the courts as to the form of the taxation or the incidence of it or as touching the manner or conditions of the payment of benefits. Complete discretionary authority respecting the form and incidence of taxation under subdivision 3, and respecting the disposal of all public assets under subdivision 1, are essential to enable Parliament to discharge the responsibilities entrusted to it. Legislation for raising money for disposition by Parliament under subdivision 3 of section 91, and directing the disposition of it under subdivision 1, is necessarily excluded from the jurisdiction of the provinces by the concluding words of section 91; and there is no sufficient ground for affirming that, in the enactments of this statute, Parliament is not exercising its powers under these subdivisions, or, in other words, that under the guise of doing so it is invading a provincial field from which it is excluded, for the purpose of attaining a result which it has full power to attain by legislating within fields in which it has exclusive authority. IN THE MATTER OF A REFERENCE AS TO WHETHER THE PARLIAMENT OF CANADA HAD LEGISLATIVE

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7—The Weekly Rest in Industrial Undertakings Act, 25-26 Geo. V, c. 14—The Minimum Wages Act, 25-26, Geo. V, c. 44—The Limitation of Hours of Work Act, 25-26 Geo. V, c. 63—Constitutional validity—Treaty of Peace of Versailles, 1919—Art. 405 of the Treaty—League of Nations—Draft Conventions of the International Labour Conference—Approval of Treaty by Dominion Parliament—B.N.A. Act, s. 132—Property and civil rights—B.N.A. Act, s. 92.] The *Weekly Rest in Industrial Undertakings Act*, which gave effect to the Draft Convention of the International Labour Conference on that subject, applies to industrial undertakings as defined in art. 1 of the Draft Convention, and requires employers to grant a rest period of at least twenty-four consecutive hours in every seven days to all employees, with the exception of persons who hold positions of supervision or management or who are employed in a confidential capacity. The rest period is, wherever possible, to be granted to the whole staff simultaneously, and to coincide with the Lord's Day as defined by the Lord's Day Act, R.S.C. 1927, c. 123. *The Minimum Wages Act* is designed to give effect to the provisions of the Draft Convention concerning the creation of minimum wage-fixing machinery adopted by the International Labour Conference in 1928. By s. 4 (1), the Governor in Council, on the recommendation of the Minister of Labour, may create and by regulation provide for the operation, by or under the Minister, of machinery whereby minimum rates of wages can be fixed for workers in specified rateable trades. Employers and workers concerned are to be associated in the operation of such machinery in such manner as the Governor in Council may by regulation determine, but in any case in equal numbers and on equal terms. "Rateable trades" are defined in accordance with the terms of the Convention as "those trades or parts of trades (in particular, homeworking trades) in which no arrangements exist for the effective regulation of wages by collective agreement or otherwise and wages are exceptionally low." "Trade" includes manufacture and commerce and "worker" includes any employed person not under 16 years of age. By s. 4 (2), Minimum wages so fixed are to be binding on employers and workers concerned so as not to be subject to

abatement by means of individual agreement, or, except with the general or particular authorization of the Minister, by collective agreement. *The Limitation of Hours of Work Act* gives effect to the Draft Convention of the International Labour Conference adopted in 1919, limiting hours of work in industrial undertakings as defined in article 1 of the Convention. *Held, per* Duff C.J. and Davis and Kerwin JJ., that these Acts are *intra vires* of the Parliament of Canada; *per* Rinfret, Cannon and Crocket JJ., that they are *ultra vires*. *Per* Duff C.J. and Davis and Kerwin JJ.—From two main considerations, the conclusion follows that legislative authority in respect of international agreements is, as regards Canada, vested exclusively in the Parliament of Canada. First, by virtue of section 132 of the *British North America Act*, jurisdiction, legislative and executive, for the purpose of giving effect to any treaty obligation imposed upon Canada, or any one of the provinces of Canada, by force of a treaty between the British Empire and a foreign country, is committed to the Parliament and Government of Canada. This jurisdiction of the Dominion the Privy Council held, in the *Aeronautics* case and in the *Radio case* ([1932] A.C. 54 and 304) is exclusive; and consequently, under the *British North America Act*, the provinces have no power and never had power to legislate for the purpose of giving effect to an international agreement: that, as a subject of legislation, is excluded from the jurisdiction envisaged by section 92. Second, as a result of the constitutional development of the last thirty years (and more particularly of the last twenty years) Canada has acquired the status of an international unit, that is to say, she has been recognized by His Majesty the King, by the other nations of the British Commonwealth of Nations, and by the nations of the world, as possessing a status enabling her to enter into, on her own behalf, international arrangements, and to incur obligation under such arrangements. These arrangements may take various forms. They may take the form of treaties, in the strict sense, between heads of states, to which His Majesty the King is formally a party. They may take, *inter alia*, the form of agreements between governments, in which His Majesty does not formally appear, Canada being represented by the Governor General in Council or by a delegate or delegates authorized directly by him. Whatever the form of the agreement, it is now settled that, as regards Canada, it is the Canadian Government acting on its own responsibility to the Parliament of Canada which deals with the matter. If the international contract is in the form of a treaty between heads of states, His Majesty acts, as regards Canada, on the advice of His Canadian Government. Necessarily, in virtue of the fundamental principles of our constitution, the Canadian Government in exercising these functions is under the control of Parliament. Parliament has full power by legislation to determine the conditions under which international agreements may be entered into and to provide for giving effect to them. That this authority is exclusive would seem to follow inevitably from the circumstances that the Lieutenant-Governors of the provinces do not in any manner represent His Majesty in external affairs, and that the provincial governments are not concerned with such affairs; the effect of the two decisions above referred to is that in all these matters the authority of Parliament is not merely paramount, but exclusive. The first of the two cardinal questions raised by the contentions of the provinces has two branches, and may be stated thus: Has Parliament authority to legislate for carrying out a treaty or convention or agreement with a foreign country containing stipulations to which effect can only be given by domestic legislation changing the law of the provinces (*a*) in matters committed by the *British North America Act* (in the absence of any such international agreement) to the legislatures of the provinces exclusively, and (*b*) in relation to such matters where they are *ex facie* of domestic concern only and not of international concern, such, for example, as the matters dealt with by the conventions to which effect is given by the statutes now before the Court: the regulation of wages and of hours of labour. The view that the exclusive authority of Parliament extends to international treaties and agreements relating to such subjects rests on the grounds now outlined. (1) As touching the view advanced that the subject-matters of the stipulations in the international agreements in question are of exclusively domestic and not at all of international concern: the language of section 132 B.N.A. Act is unqualified and that section would appear *prima facie* to extend to any treaty with a foreign country in relation to any subject-matter which in contemplation of the rules of constitutional law respecting the royal prerogative concerning treaties would be a legitimate subject-matter for a treaty; and there would appear to be no authority for the proposition that

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treaties in relation to subjects, such as the subject-matter of the status in question are not within the scope of that prerogative. Legislative authority to give effect to treaties within section 132 remained, of course, after the B.N.A. Act, down to the enactment of the Statute of Westminster in the Imperial Parliament, although by section 132, it also became and is vested in the Parliament of Canada; but, since the Statute of Westminster, no Act of the Imperial Parliament can have effect in Canada without the consent of Canada. The practice of modern times and, in particular, the provisions of the Covenant of the League of Nations embodied in the Treaty of Versailles would appear to demonstrate that by common consent of the nations of the world, such matters are regarded as of high international as well as of domestic concern and proper subjects for treaty stipulation. (2) As touching the view that the legislative authority committed to the Parliament and Government of Canada by section 132 (and by the introductory clause of section 91 in relation to international matters) does not extend to matters which would fall exclusively within the legislative jurisdiction of the provinces, in the absence of any international obligation respecting them, it is to be observed: First, section 132 relates *inter alia* to obligations imposed upon any province of Canada by any treaty between the British Empire and a foreign country. Section 132 obviously contemplates the possibility of such an obligation arising as a diplomatic obligation under such a treaty, even although legislation might be necessary in order to attach to it the force of law. In such case, the Parliament and Government of Canada appear to be endowed with the necessary legislative and executive powers. This provision with regard to the obligations of the provinces taken together with the generality of the language employed in section 132 would seem to point rather definitely to the conclusion that the view under consideration is not tenable. Secondly, the established practice of the Parliament of Canada and the decisions of the Courts in relation to that practice do not accord with this view. Statutes giving effect to the International Waterways Treaty (1911) with the United States, and the Treaty with Japan (1913) are instances in which treaties dealing with matters of civil right within the provinces and the management of the public property of the provinces were given the force of law by Dominion statutes. The legislation concerning the Japanese Treaty was held to be valid and to nullify a

statute of the province inconsistent with it by the Judicial Committee of the Privy Council in *Attorney-General for British Columbia* v. *Attorney-General for Canada*, ([1924] A.C. 203). The jurisdiction of Parliament to enforce international obligations under agreements which are not strictly "treaties" within section 132 is co-ordinate with the jurisdiction under this last named section. It is contended by the provinces that the Dominoin cannot, by reason merely of the existence of an international agreement (within section 132 or within the residuary clause) possess legislative authority enabling the Parliament of Canada to legislate in derogation of certain fundamental terms which, it is said, were the basis of the Union of 1867, and are expressly or impliedly embodied in the B.N.A. Act. For the purposes of the present reference, it is unnecessary to make any observation upon this contention further than what has already been said, viz., that the exclusive authority of the Dominion to give the force of law to an international agreement is not affected by the circumstances alone that, in the absence of such an agreement, the exclusive legislative authority of the provinces would extend to the subject-matter of it. The second of the cardinal questions requiring determination concerns the construction and effect of article 405 of the Treaty of Versailles. The draft conventions now in question were brought before the House of Commons and the Senate, received the assent of both Houses in the form of resolutions, which resolutions approved the ratification of them, and the statutes in question were passed for the purpose of giving legislative effect to their stipulations, the operative clauses of the statute being in each case preceded by a preamble in which it is recited that the draft conventions have been ratified by Canada. The procedure followed, if we put aside the provisions of article 405, was the usual and proper procedure for engaging in and giving effect to agreements with foreign governments. The propriety of this procedure is questioned on the ground that under the special provisions of article 405, and especially those of paragraphs 5 and 7 of the article, it was an essential condition of the jurisdiction of Parliament to legislate for the enforcement of the conventions that the conventions should have been submitted to, and should have received the assent of, the provincial legislatures before the enactment of such legislation by Parliament. Paragraphs 5 and 7 must be read together and, reading them together, it would appear that the "competence"

postulated is the "competence" to enact legislation or to take other "action" contemplated by the article. The obligations upon consent of the competent authority or authorities to ratify and, upon like consent after ratification, "to make effective the provisions of the convention" are both treaty obligations; and the authority or authorities competent to take legislative action where legislative action may be necessary to make the provisions of the convention effective would appear plainly to be included within the authority or authorities before whom it is provided that the draft conventions shall be brought. It follows from what has been said that this treaty obligation is an obligation within section 132 and, consequently, that the authority to make the convention effective exclusively rests in the Parliament and Government of Canada and, therefore, that the Parliament of Canada is, at least, one of the authorities before which the convention must be brought under the terms of article 405. The provincial legislatures may also be competent authorities within the contemplation of paragraph 5 of that article, but it is unnecessary to decide that question for the purposes of this reference. The Governor General in Council is designated by the *Treaties of Peace Act*, 1919, enacted under the authority of section 132, to take all such measures as may seem to him to be necessary for the purpose of carrying out the Treaties of Peace and for giving effect to the terms of such treaties. He it was, therefore, upon whom devolved the duty of performing the obligation of Canada under art. 405 to bring the draft convention before the authority or authorities possessing "competence" under the Constitution of Canada. He it was also on whom devolved the duty to communicate to the League of Nations the ratification by Canada upon the assent of the competent authority or authorities. Moreover, the Parliament of Canada, possessing exclusive jurisdiction in relation to international agreements, the creation as well as the enforcement of them, declared, by the statutes now under examination, that the conventions in question were ratified by Canada. The executive authority, therefore, charged with the duty of acting for Canada in performing the treaty obligations, of submitting the conventions to the proper constitutional authorities and of communicating ratification to the League of Nations upon the assent of those authorities, and His Majesty the King in Parliament have, in effect, combined in declaring that the ratification was assented to by the proper

constitutional authorities of Canada in conformity with the stipulations of art. 405. That would appear to be sufficient to constitute a diplomatic obligation binding upon Canada to observe the provisions of the conventions. *Per* Rinfret J.—Apart from any consideration resulting from their aspect as laws intended to carry out the obligations of Canada under Draft Conventions agreed upon at general conferences of the International Labour Conference of the League of Nations, the subject-matter of these Acts is undoubtedly one in relation to which, under the Constitution of our country, the legislature in each province may exclusively make laws. It follows that, in order to support the validity of the Acts, the Attorney-General of Canada has the burden of demonstrating that, in the premises, the subject-matter of the disputed legislation has, for some special reason, been transferred to the jurisdiction of the Parliament of Canada. The Acts cannot be supported as an exercise of the legislative powers of the Dominion either to make laws for the peace, order and good government of Canada, or for the regulation of trade and commerce, or in relation to the criminal law. These conventions are not treaties within the meaning of section 132 of the B.N.A. Act, such as was the case in the *Aeronautics* Reference to the Privy Council ([1932] A.C. 54); nor are they conventions belonging to that class of conventions submitted to the Privy Council in the *Radio* Reference ([1932] A.C. 304). So that the judgments of the Privy Council in those two References do not constitute authorities in support of the Dominion Government's or the Dominion Parliament's power to act alone in the performance of the obligations deriving from conventions of the present character. Besides that, both in the *Aeronautics* and in the *Radio* references, the Privy Council, at the same time as it declared that the validity of the legislation in respect thereto could be supported as an exercise of the power derived from section 132, B.N.A. Act, or from the residuary power to make laws for the peace, order and good government of the country, also came to the conclusion that the subject of aeronautics and the subject of radio came under one or more of the enumerated heads of section 91 of the B.N.A. Act, which is not the case here. But the critical point in the present reference is whether the Draft Conventions were competently ratified—a point which was not raised nor decided in the *Aeronautics* or *Radio* references. A very great distinction must be made between the

power to create an international obligation and the power to perform it when once it has been created. Under the distribution of legislative powers, the subject-matters of the three Acts now submitted are assigned to the exclusive jurisdiction of the legislature in each province under the head "Property and Civil Rights in the Province," of section 92, B.N.A. Act. A civil right does not change its nature just because it becomes the subject-matter of a convention with a foreign state. It is always the same civil right. It is not within the spirit of the Constitution that the Dominion Parliament might acquire exclusive jurisdiction over such matters merely as a consequence of the fact that the Dominion Government, in regard to them, decides to enter into a convention with a foreign power. It would be directly against the intendment of the B.N.A. Act that the King or the Governor General of Canada should enter into an international agreement dealing with matters exclusively assigned to the jurisdiction of the provinces solely upon the advice of the Federal Ministers who, either by themselves or through the instrumentality of the Dominion Parliament, are prohibited by the Constitution from assuming jurisdiction over these matters. Moreover, article 405 of the Treaty of Versailles must be interpreted as requiring, in Canada, the consent and approval of the provinces before Draft Conventions of the nature of those now submitted can be properly and competently ratified by Canada as a member of the League of Nations. In this Court, the question as to where lies the power to create an international obligation dealing with matters within the exclusive jurisdiction of the provinces is concluded by our decision on the reference *Re: Legislative Jurisdiction over Hours of Labour* ([1925] S.C.R. 505). It follows that the Draft Conventions not having received the consent and the approval of the legislatures of the provinces, nor even of the provincial governments, were not properly and competently ratified; and the Acts adopted in relation to these Draft Conventions and allegedly for the purpose of performing the obligations arising under them are *ultra vires* of the Parliament of Canada. *Per* Cannon J.—When an Act of Parliament is challenged before this Court as unconstitutional, the article of the Constitution which is invoked should be laid beside the statute which is challenged in order to decide whether the latter squares with the former. The only power of this Court is to announce its judgment upon the question. This Court neither approves nor condemns any legislative policy. Its office is to ascertain and declare whether the legislation is in accordance with or in contravention of the provisions of the Constitution. The question is not what power the Federal Government ought to have, but what powers, in fact, have been given to it by the B.N.A. Act. There is in this country a dual form of government, and in every province there are two governments. Our country differs from nations where all legislative power, without restriction, is vested in a parliament, or other legislative body, subject to no restriction. If any changes are required to face new situations or to cope with the increased importance of Canada as a nation, they may be secured by an amendment to the B.N.A. Act; but neither this Court nor the Privy Council should be called upon to legislate outside of its provisions. The labour draft conventions in this case, binding Canada independently from the rest of the Empire, do not fall under section 132, B.N.A. Act; they were not even contemplated as feasible in 1867 when that Act was passed. Radio and aeronautics are also new matters not existing at that time and had to be dealt with by the Privy Council as outside the enumerated subjects of 91 and 92 B.N.A. Act; and these two decisions must be considered as *arrêts d'espèce* and confined to the subject-matters which both had necessarily interprovincial and international aspects. But the payment of wages for labour, the weekly rest and the rate of wages and length of hours of work were well known subjects in 1867 and they were, by common agreement, reserved by the Imperial Parliament to the provinces as purely local and private matters of property and civil rights. Therefore, in the words of section 405 of the Treaty of Versailles, Canada as a federal state has only a "power to enter into convention on labour matters *subject to limitation*" and the draft conventions should have been treated as "recommendation only." Such recommendation is to be submitted to the members for "consideration with a view to effect being given to it by national legislation or otherwise." The Versailles Treaty recognizes that in certain cases, effect can be given to a labour agreement "otherwise" than by national legislation. In these cases, it does not appear that either the recommendations or the draft conventions were submitted to the provinces, i.e., the "authorities within whose competence the matter lies for the enactment of legislation or other action"; and this is fatal to the validity of the ratification

of these labour conventions by the Federal authorities. As an internal matter, such changes in the respective constitutional powers of the provinces and of the Central Government cannot be justified by invoking some clauses of the Treaty of Versailles. Respect of their property and civil rights was guaranteed by the British Crown to the inhabitants of the original provinces as far back as the Treaty of Paris in 1763; this was confirmed by the constitution of 1867 which cannot be changed in this essential part except by an Imperial statute, as plainly set forth in the Act of Westminster of 1931, section 7. Therefore the Parliament and the Government of Canada cannot appropriate those powers, exclusively reserved to the provinces, by the simple process of ratifying a labour convention passed at Geneva with representatives of foreign countries. Neither the Governor General in Council, nor Parliament, can in any way, and specifically by an agreement with a foreign power, change the constitution of Canada or take away from the provinces their competency to deal exclusively with the enumerated subjects of section 92, B.N.A. Act. Before accepting as binding any agreement under section 405 of the Treaty of Versailles, foreign powers must take notice that this country's constitution is a federal, not a legislative union. *Per* Crocket J.—The Acts passed by the Dominion Parliament embody legislation which is directly aimed at the regulation and control of contracts of employment, private as well as public, in every province of the Dominion, and thus deal in a very real and radical sense with civil rights in all the provinces of Canada alike; and the fundamental question before this Court is whether there is any authority within the B.N.A. Act for the exercise of such legislative power by the Parliament of Canada. None of the draft conventions of the International Labour Conference of the League of Nations, upon the ratification of which by the Government of Canada it has been sought to justify the enactment of this legislation, fall within the terms of section 132 of the B.N.A. Act. Even if the Treaty of Versailles were a treaty between the British Empire, as an undivided unit, and those foreign states, whose plenipotentiaries signed it, and not a treaty purporting to have been entered into by the self-governing Dominions of the Empire as separate governments, it could not be said that there was any obligation for the performance of which the Parliament of Canada was empowered within the terms of section 132

to enact legislation as pertaining to an obligation imposed by that treaty upon Canada or any province thereof, as part of the British Empire. As regards the residuary clause of section 91, this provision can only be invoked where the real subject-matter of the legislation does not fall within the classes of subjects which are exclusively assigned to the provinces by section 92; once it appears that the real purpose and effect of a Dominion enactment is to interfere with private and civil rights in the provinces and that in that aspect it consequently falls within the sphere of legislation which has been exclusively reserved for the provinces, not only by the provisions of section 92, but by the saving clause in the introduction of section 91, such an enactment cannot be justified under the general authority conferred on the Parliament of Canada. If such legislation could be maintained on the ground that it was for the peace, order and good government of Canada, it could only be by ignoring the explicit limitation which is placed on the so-called general authority by the residuary clause itself with the obvious intention of preventing its application in the very sense now contended for, and thus protesting the provinces in the full enjoyment of their exclusive legislative rights as permanently guaranteed to them by section 91. Although the Government of Canada must now be held to be the proper medium for the formal conclusion of international conventions, whether they affect the Dominion as a whole or any of the provinces separately, this fact cannot be relied on as altering in any way the provisions of the B.N.A. Act as regards the distribution of legislative power as between the Dominion Parliament and the provincial legislatures or as necessarily giving to any matter, which may be made the subject of legislation in Canada, any other meaning or aspect than that which it bears in our original constitution. Whether such a matter is one which falls under the terms of either section 91 or of section 92 or of section 132, must depend upon the real intendment of the B.N.A. Act itself, as gathered from the terms of those sections and the Act as a whole. The legislation embodied in these three statutes is legislation which the Parliament of Canada has enacted to give effect to the draft conventions of the International Labour Conference of the League of Nations. These conventions are admittedly conventions, to which the Government of Canada were in no manner bound to assent or to formally ratify. They were submitted to the Government of this

to enquiry by the city in September, 1931, as to completion, the company replied that reorganization was being effected, and, shortly after, a new company, the plaintiff, took over the company's assets, but did nothing to complete the elevator. On enquiry by the city in February, 1932, plaintiff replied to the effect that it was making efforts to interest new capital. In September, 1932, plaintiff wrote asking for an extension of two years, and in this letter mentioned that the city had not conveyed the lands. Later plaintiff sued, claiming (*inter alia*) return of the bonds. *Held:* Plaintiff was entitled to return of the bonds. Under the terms of the "deposit agreement," even in the light of the other documents and all the circumstances, the city's right to retain them was dependent upon it conveying said "lands shown in black." There was in evidence no conduct of the company which could be considered as a waiver of its right to return of the bonds, or as an estoppel against it. The mere fact that the company itself was in default did not prevent its insisting upon such return (*Mayson* v. *Clouet*, [1924] A.C. 980). *Per* Duff C.J., Rinfret and Davis JJ.: The proviso that the city should convey the lands to the company was a condition precedent to the city's right to retain the bonds; the intention of the parties in this respect being clearly shown by the nature of the subject-matter; it was the very basis or essence of the contract whereby the company undertook to deposit the bonds with the city, that the city should convey to it the lands, which were essential in the elevator scheme. CANADIAN TERMINAL SYSTEM LTD. *v.* THE CORPORATION OF THE CITY OF KINGSTON **106**

2——*Sale of land—Objection to title—Purchaser terminating contract—Vendor claiming specific performance—Extent of title agreed to be conveyed—Vendor claiming rectification of formal contract—Alternative claim for specific performance of formal contract, with reference as to title.*] Plaintiff sued for specific performance of an agreement of sale of land and land covered with water from him to defendant. Shortly after the agreement, the Crown in the right of the Dominion of Canada had asserted a claim to a part of the land as having passed to it at Confederation, under s. 108 of the *B.N.A. Act*, as part of a public harbour, and, on plaintiff's refusal to remove this objection to title, defendant had purported to terminate the agreement. The trial judge found (sustaining plaintiff's claim) that, under the agreement, plaintiff was selling only

such title as he had in the lands, and granted specific performance. This judgment was reversed by the Court of Appeal for Ontario, which found that plaintiff had agreed to convey a good and sufficient title to the lands, and dismissed his action. Plaintiff appealed to this Court. *Held:* Appeal dismissed. A certain executed formal document, under which plaintiff was bound to convey a good and sufficient title to the lands, constituted the only binding agreement, and plaintiff had established no adequate case for reformation in the sense claimed. The trial judge apparently failed to appreciate the evidentiary weight which must be ascribed to the fact of execution of that document and the legal consequences of that fact. As to defendant's objection to title because of said claim of the Crown—the evidence tended to show that part at least of the westerly portion of the lands was used as a public harbour before Confederation, and warranted the court in refusing to force such a doubtful title on defendant. The court refused to plaintiff a decree of specific performance of the agreement as it stood, with a reference as to title, because, (1) when plaintiff took the stand that defendant was bound to accept such title as he had, he was virtually repudiating his obligations under the formal agreement, and defendant, in view of the situation created by the Crown's claim, had just and solid grounds for his action in terminating the agreement, which thereupon ceased to have any virtue as a foundation for any claim by plaintiff; (2) no such claim or offer to accept such a decree (alternatively to rectification of the formal agreement) had been made by plaintiff until argument at trial after completion of the evidence, and, in view of plaintiff's persistent attitude up to that time, such claim should not be allowed in the appellate courts. RODD *v.* CRONIN. **142**

3——*Sale of goods—Contract for sale of scrap steel, accumulated on a certain wharf, to be loaded there on ship—Clause providing that weight of goods be ascertained by checking ship's draft—Subsequent arrangement for transferring goods and loading at different place—Change in circumstances—Conduct of parties—Dispute as to weight of goods loaded—Method of ascertainment—Evidence to prove weight.*] Defendants contracted to purchase from plaintiffs certain scrap steel, part of which was on a wharf at Dartmouth and part at Halifax, and which was to be loaded on a steamer chartered by defendants. The contract provided: "Railway weights to govern settlement on all material loaded

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arises from another's negligence, can avail to relieve that other from the consequences of his own negligence, unless the child's act be such as could not reasonably have been foreseen. The child's act in going upon the grassy strip and following the horses, so likely to attract him, should have been anticipated as a likely consequence of keeping them on the grassy strip after seeing the children running towards them. *Per* Kerwin J. (dissenting): As the pony was lame, the junior defendant acted prudently and properly in travelling on the grassy strip, but having seen the children he was bound to proceed in a reasonable manner and so as not to endanger them. There was no *scienter;* the colt was under proper control and defendant had no reason to expect that the boy would run after the colt or that the colt would kick. It could not be said, on the facts appearing from the evidence, that defendants were responsible in law for the injury. RICKARD *v.* RAMSAY **302**

2——*Master and servant — Plaintiff, operating defendants' bulk station plant for handling gasoline and oil, injured by explosion—Construction of plant—Volenti non fit injuria — Contributary negligence — Liability of both defendants, having regard to acts, position, and occupancy, of each.*] Defendant R.O. Co. refined and manufactured petroleum products, and engaged plaintiff, in February, 1929, to operate a bulk station plant, to be constructed at Beiseker, Alberta. R.O. Co. obtained a lease of land on April 29, 1929, on which it immediately had the plant constructed, and plaintiff, in April or early in May, 1929, began operating it. It contained platform scales and pumps for the handling of gasoline and oil, and, in a small room adjoining the main room and entered by a door from the platform and with no window, a gasoline engine to provide power to operate the pumps, and connected with them by a shaft running through a hole in the wall between the engine room and the warehouse proper, the hole having an unobstructed space of about 60 square inches through which fumes from the warehouse could pass into the engine room. The exhaust pipe of the engine was not extended out of the engine room. There were two storage tanks. On June 1, 1929, the defendant R.D. Co. took over the marketing facilities of R.O. Co. and later wrote to plaintiff that the refining and marketing were operated under different company names, that operations with which plaintiff was connected were to be under the

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name of R.D. Co., and that he should in future communications use that name. The said lease to R.O. Co. was never assigned to R.D. Co. prior to the accident in question. On Aug. 22, 1932, while tractor fuel was being pumped from a truck into a storage tank, plaintiff, as the pump seemed not working satisfactorily, placed a drum on the scales and made adjustments so that the rest of the fuel in the truck should go into drums. When a number of drums had been filled, and the fuel was coming irregularly and slowly, plaintiff left his position beside the drum to go to a point where he could exchange signals with a man on the truck and, receiving what appeared to be a signal that the truck was empty, he returned to close off the valves, but before that was done fuel overflowed from the drum. Plaintiff then went to the engine room to shut off the engine and while attending to this he saw a flame come from the exhaust, an explosion occurred, and he was injured. He sued for damages. The trial judge charged the jury that the determining factors were three issues of fact: (1) the charge against defendants of negligence in construction; (2) defendants' reply that in any case plaintiff accepted any hazards that were incident to the operation of the plant; and (3) defendants' contention that the accident was chargeable to plaintiff's own negligence in regard to the operation of filling the last drum immediately prior to the accident. The jury found a verdict for plaintiff for damages and judgment was given accordingly, which was affirmed on appeal. Defendants appealed to this Court. *Held:* The appeal should be dismissed. *Per* Duff C.J. and Davis and Kerwin JJ.: The doctrine of *Rylands* v. *Fletcher,* L.R. 3 H.L. 330, could have no application to this case (*Toronto Power Co.* v. *Raynor,* 51 Can. S.C.R. 490, at 503, 505). An employer, though he does not warrant the safety of the plant and property used in the business in which the servant is employed, is under an obligation, arising out of the relation of master and servant, to take reasonable care to see that such plant and property is safe. (The question whether or not, by the common law, he can fulfil his obligation by delegating the performance of it to employees whose competence he has taken reasonable care to ensure, discussed, and *Toronto Power Co.* v. *Paskwan,* [1915] A.C. 734, *Ainslie Mining & Rly. Co.* v. *McDougall,* 42 Can. S.C.R. 420, *Brooks, etc., Co.* v. *Fakkema,* 44 Can. S.C.R. 412, *Bergklint* v. *Western Canada Power Co.,* 50 Can. S.C.R. 39, 54 Can. S.C.R.

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285, and *Fanton* v. *Denville,* [1932] 2 K.B. 309, referred to. Where defendant relies upon delegation, the onus is upon him to establish it: *Canadian Northern Ry. Co.* v. *Anderson,* 45 Can. S.C.R. 355). There is no longer an independent rule that, for an employee to recover for injuries sustained from defects in the plant, there must be ignorance in himself and knowledge in the master of those defects (*Jury* v. *Commissioner for Railways,* 53 Comm. L.R. 273, at 282). As to the defence of *volenti fit injuria,* the question is, did the employee agree that if injury befell him the risk would be his and not his master's? (*Smith* v. *Baker* [1891] A.C. 325; *McPhee* v. *Esquimalt & Nanaimo Ry. Co.* 49 Can. S.C.R. 43). The issue of *volens* in this case was one for the jury. As to contributory negligence—plaintiff was obviously much concerned about the manner in which the apparatus emptying the truck was working; the overflowing of the drum was not the consequence of any want of zeal on his part; and the jury might, without acting arbitrarily and unreasonably, have thought any slip, any miscalculation or error of judgment excusable, and not incompatible with the absence of negligence. In the view taken as aforesaid, the responsibility of R.D. Co. was not disputed; there would also appear to be a *prima facie* case against R.O. Co. *Per* Rinfret, Cannon and Kerwin JJ.: On the evidence the jury could reasonably find in plaintiff's favour on the said three issues of fact submitted to them. For a defence on the ground of *volenti non fit injuria,* it must be found as a fact that plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, expressly or impliedly agreed to incur it (*Letang* v. *Ottawa Electric Ry. Co.,* [1926] A.C. 725); it was not sufficient in this case that plaintiff knew it was a common thing for the engine to backfire, that any fault in construction of the building existed from the time he took over the plant, that he knew that the tractor fuel was a highly inflammable product and the vapour from it highly inflammable and dangerous, that he apprehended the danger of a spark exploding such vapour, that he would not light a match there, and that he never complained; the jury had to be satisfied that not only did plaintiff know, but he accepted voluntarily to run, the risk (*Baade* v. *Hill,* [1934] 4 D.L.R. 385, referred to). Both defendants were liable—R.O. Co., which made the agreement with plaintiff, brought into the plant the dangerous substances for storage; it was, under its

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lease, the occupant of the land; R.D. Co., which in fact was only a continuing incorporated department of R.O. Co., also occupied the land either as tenant or employee of R.O. Co.; it was in charge of the premises at the time of the accident and had control over plaintiff; (*Rainham Chemical Works Ltd. v. Belvedere Fish Guano Co. Ltd.,* [1921] 2 A.C. 465). REGAL OIL & REFINING CO. LTD. *v.* CAMPBELL **309**

3——*Passenger injured through slipping on roadway when alighting from defendants' bus—Condition of place where bus stopped—Bus not drawn up to sidewalk—Findings by jury of negligence of defendant and against contributory negligence of passenger—Evidence—Defendant's duty and liability in law.*] WINNIPEG ELECTRIC CO. *v.* ROADHOUSE... **147**

4.——*Railways—Highways.*
See RAILWAYS 1.

PATENT—*Alleged infringement—Validity of patent—Means and methods of underpinning buildings—Lack of patentable improvement—Sufficiency of disclosure—Appeal—Presentation of matter after argument.*] Plaintiff appealed from the judgment of the Court of Appeal for Manitoba, 43 Man. R. 245, affirming judgment of Adamson J. (*ibid*) dismissing his action for alleged infringement of patent of invention relating to means and methods of underpinning buildings. *Held:* Appeal dismissed. Having regard to the state of the art at date of the patent, the methods and devices in respect of which protection was claimed involved no patentable improvement. Remarks, but no decision, on respondent's contention that, since, admittedly, the patentee's procedure would only be operable in soil of suitable consistency and condition, and since there was nothing in the patent defining, either by reference to soil composition or to locality, the places in which it would be operable, the patent was void for want of sufficient disclosure. A communication advancing suggestions on a point, and in effect requesting reargument thereon, addressed to the Court after conclusion of the argument, without special leave given at the argument or subsequent to it, cannot properly be considered by the Court. BALDRY *v.* MCBAIN ET AL.. **120**

2——*Validity — Subject-matter — Invention.*] In order validly to support a patent, not only must the art or the improvement therein be new, useful, and not anticipated by prior knowledge or prior use, by others within the meaning of the *Patent Act,* but also there must be invention; one does not hold a

valid subject-matter of a patent unless he shews the exercise of inventive ingenuity. Generally speaking, the question whether or not in any particular case there has been invention is one of fact and degree, depending upon practical considerations to a larger extent than upon legal interpretation. (*Riekmann* v. *Thierry,* 14 R.P.C. 105, *Burt Business Forms Ltd.* v. *Autographic Register Systems Ltd.,* [1933] Can. S.C.R. 230, at 237, 238, and other cases, cited). In the present case, the judgment of Maclean J., President of the Exchequer Court of Canada, [1935] Ex. C.R. 190, holding that the patent in question (for a domestic refrigerator insulated door, recessed on its inner face so as to provide a hollow food space therein with suitable shelving arrangements, and without materially adding to the exterior dimensions of the refrigerator) was invalid for lack of subject-matter, was affirmed. CROSLEY RADIO CORPN. *v.* CANADIAN GENERAL ELECTRIC CO. **551**

3—*Re-issue patent—Conditions necessary for grant of—Patent Act, R.S.C. 1906, c. 69, s. 24—Interpretation—Conditions that original patent be deemed "defective" by reason of "insufficient description or specification" arising from "inadvertence, accident or mistake," within the statute—Action for infringement of re-issue patent—Validity of amendments in re-issue patent—Proper limits of expert testimony.*] The issue of a new patent (a re-issue patent) in accordance with an amended description and specification, under s. 24 of the *Patent Act,* R.S.C. 1906, c. 69, is not justified if the invention described in the amended description or specification and protected by the new patent is not the same invention as that to which the original patent related. The relief authorized by said s. 24 in respect of "insufficient description or specification" is limited to correcting insufficiency (arising "from inadvertence, accident or mistake") in describing or specifying in the original patent the invention in respect of which the applicant therefor intended to ask protection. The statute did not contemplate a case in which an inventor has failed to claim protection in respect of something he has invented but failed to describe or specify adequately because he did not know or believe that what he had done constituted invention in the sense of the patent law and, consequently, had no intention of describing or specifying or claiming it in his original patent. The original patent cannot be "deemed defective" within s. 24 in a case where it obviously completely fulfilled the applicant's intention—where the invention in respect of which he intended to obtain protection is quite certainly and sufficiently described and specified. On appeal from the judgment of Maclean J., President of the Exchequer Court of Canada, ([1936] Ex. C.R. 75), dismissing the plaintiffs' action for alleged infringement of a re-issue patent (for an alleged new and useful improvement in radio communications): *Held:* The appeal should be dismissed. The grant of the re-issue patent was unauthorized, as the conditions necessary for its grant under s. 24 (as above interpreted) were absent. The proper conclusion from the documents was that there was no defect in the statutory sense in the original patent (there was no suggestion that it could be deemed "inoperative")—no reasonable ground for apprehending that it was defective in failing sufficiently to describe the inventions in respect of which the applicant for it was intending to claim invention; no "inadvertence, accident or mistake" of the applicant in respect of the description or specification of the invention that the applicant had in mand. The pertinent documents conclusively negatived any intention on the part of the applicant for the original patent to describe or to specify any of the inventions, so-called, embraced within the amendments in the re-issue patent in so far as they were material to the present appeal. Also, in view of the evidence as to the state of the art at the time of the application for the original patent, and at the time when the applicant therefor was alleged to have conceived and perfected the inventions embraced within the amendments in respect of which relief was now claimed, it was highly improbable that he believed he was entitled to obtain protection in respect thereof; and the balance of probability supported the conclusion that he was not so entitled. A large part of the expert evidence given in the case (on both sides) was the subject of adverse comment by this Court, which held that much of it was not legal evidence and could not properly be taken into consideration. With reference to specified examples thereof, it was *held,* that any inference to be drawn from the applicant's specification in the original patent, as to whether or not the devices and arrangements in question in these proceedings were inventions of said applicant (to establish the affirmative of which was a substantive part of plaintiff's case), was matter of fact for the court and not a matter upon which it was competent to any expert witness to

the signature of the person to whom the certificate relates put upon it. The Crown relied on a comparison of the handwriting of this signature with that of the signature to the said declaration of ownership, along with the identity of names, to prove identity. *Held:* Such a comparison of handwriting was inadmissible. The authenticated copy of the naturalization certificate was good evidence of the contents of the original document; and the proper inference was that the signature "Manuel Purdy" appearing on the certificate was that of the person to whom the certificate was granted. But the rules by which, at common law or by statute, a record may be proved by exemplification or by the certificate of the person having the custody of the record, where in the nature of things the original cannot be produced, do not contemplate the use of such document for the purpose of establishing the character of the handwriting on the original document. The court cannot receive for the purpose of comparison of handwriting a copy, photographic or other, of alleged specimens of handwriting upon proof by official certificate alone. The court could not examine the photostatic copy of the certificate of naturalization in question for any other purpose than that of ascertaining the contents of the original. It was not shewn, therefore, that the Manuel Purdy who in 1926 was admitted a citizen of the United States was the same person who in 1933 made the said declaration of ownership and became registered as owner of the ship. Identity of names alone was not satisfactory evidence upon which to decree a forfeiture (which postulates an offence) under s. 67 (2). The contention that, as the above particular objection to the comparison of handwriting to shew identity was not taken when the evidence was offered and received, effect should not be given to it now, was rejected (*Jacker* v. *International Cable Co.*, 5 T.L.R. 13). Nothing occurred at the trial (such as did occur, e.g., in *Bradshaw* v. *Widdrington;* see 86 L.T. 726, at 732) which precluded insistence on the objection now. Also, the document being admissible to establish a necessary part of the Crown's case, and having been admitted, it was not so much a question of the admissibility of a piece of evidence as of the manner in which evidence admissible and admitted could properly be applied. The denial of admissibility of such comparison was a proposition of law to which the court could not refuse to give effect on this appeal; because the Crown by this appeal was asking the court to declare a

forfeiture, and the court must consider whether there was a proper foundation in the evidence for such a declaration. Judgment of Martin, D.J.Adm., [1936] Ex. C.R. 92, in favour of an unregistered transferee of a registered mortgage of the ship, as against the Crown, affirmed in the result. THE KING *v.* THE SHIP EMMA K. **256**

2——*Maritime law—Insurance — Wheat cargo—"Loss or damage from any external cause" — Grain deteriorated by moisture and reconditioned—Agreement as to its sale—Liability of insurer—Extent of loss—Method to be followed to determine it—Sue and labour clause—Act, 2535 C.C.—Marine Insurance Act, 1906, (Imp.) 6 Edw. VII, c. 41, s. 71.*] The appellant company is a grain dealer and, in the course of its business, shipped grain cargoes from certain ports on the Great Lakes and on the St. Lawrence river to Montreal. The respondent insurance company, by a "lake cargo policy," insured on account of the appellant all shipments of grain on vessels sailing between named dates against the risk of "loss or damage from any external cause" occurring during the transportation of these cargoes. Under the terms of this floating policy, a valued marine certificate was issued on a cargo of no. 3 northern wheat valued at 65 cents per bushel. The grain was shipped at Fort William on board the *Anna C. Minch.* and, after being transhipped at Kingston to a barge, was tendered to the Harbour Commissioners elevator at Montreal. After a small quantity had been taken out, the wheat was refused by the elevator authorities, as it was found that it had become "tough" due to excessive moisture and had therefore lost its classification as no. 3 northern wheat. The appellant company directed the Montreal Harbour Commission to turn and dry the grain, a process of reconditioning; and, as a result of the process, nearly all the wheat came back to a moisture content which permitted it to be again classified as no. 3 northern. As provided in the policy, the consignees or holders of the certificates of insurance gave immediate notice of the loss or damage to G.W.P. Ltd. who then reported to the underwriters, the respondent, for adjustment or settlement; and Hays S. & Co. were subsequently called in as cargo surveyors to act on behalf of the respondent. Later, the general manager of the appellant's insurance-brokerage firm, one Oldfin, suggested that bids be obtained for the wheat, and, as found by the trial judge and the majority of this Court, this was agreed to by the president of

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Hayes S. & Co. As a result of this arrangement, a grain broker, authorized by Oldfin, secured offers for the grain, amongst which was one from the appellant. At a meeting of all parties interested, it was agreed that the appellant's offer of the sum of $44,352.84 should be accepted. Later on, the reconditioned wheat was resold by the appellant company on a favourable market, the actual loss to the latter being $4,448.58, as contended by the respondent. The insured value of the cargo was $63,852.84. The appellant's action for "loss or damage" to the wheat cargo under the insurance policy was maintained in full by the trial judge, the amount of $18,500 claimed and awarded being the difference between the insured value of the cargo and the amount of the sale of the reconditioned wheat to the appellant. The appellate court found the loss under the policy to be $4,448.58, representing the cost of turning and drying the wheat, warehouse storage charges and loss of bushels of grain that were not retained and dried. *Held,* Davis J. dissenting in part, that the amount of the damage suffered by the appellant and for which the respondent is liable under the terms of the policy is $8,544.79; Cannon J. concurring with the judgment of the trial judge and Davis J. with that of the appellate court. *Per* Rinfret, Crocket and Kerwin JJ.—The amount of the damage suffered by the appellant is the sum of $18,500 as found by the trial judge; but this is not the amount for which the respondent is liable under the terms of the policy and certificate. The loss to the appellant is a partial loss; and the agreement between the parties as to the sale of the reconditioned wheat did not purport to alter the rule of law in such a case as contained in art. 2535 C.C., the provisions of which are similar to those contained in sec. 71 of the *Marine Insurance Act,* 1906, (Imp.) c. 41. In accordance with these provisions, the amount for which the respondent is liable is ascertained as follows: the insured value of the cargo was $63,852.84; the gross produce of the damaged sales was $44,352.84; the sound value of the grain on the first day of unloading at Montreal was 52⅛ cents per bushel; the total sound value of the cargo is therefore $51,205.08; the difference between the sound and damaged values is $6,852.24, which is 13·382 per cent of the sound value; and the percentage of the insured value of the total quantity of wheat delivered at Montreal, i.e., $63,852.84, amounts to $8,544.79, which is the loss for which the respondent is liable. Cannon J. *contra.* *Per* Rinfret, Crocket and Kerwin JJ.—The "sue and labour" clause contained in the policy, which would have applied otherwise, cannot be invoked by the respondent in view of the agreement arrived at between the representatives of the parties in this case. *Per* Cannon J.—Under the terms and ambit of the policy and according to the written documents of record, the findings of the trial judge should not be disturbed; and the latter held that the damage was ascertained by agreement of all interested parties for the purpose of any future litigation and that the amount so determined should be considered as the damage recoverable under the policy. The loss in this case was not, strictly speaking, a partial nor a total loss of the cargo, but rather a deterioration of the whole cargo causing damage for only part of the sum insured; and the course adopted by the parties, the conduct of the case and the proven circumstances make inapplicable the percentage rule of art. 2535 C.C. in order to reduce the sound value of the wheat: the necessary elements are lacking to establish the proportion contemplated by the Code. The "sue and labour" clause would apply only in case of disaster during the voyage or adventure and not after the arrival of the ship at destination. *Per* Davis J. (dissenting in part)—The "sue and labour" clause should be applied in this case in order to determine the amount of the "loss or damage" suffered by the appellant company; and, consequently the amount which the appellant is entitled to recover is the actual loss suffered by it amounting to $4,448,58, as held by the unanimous judgment of the appellate court. RICHARDSON (JAMES) & SONS LTD. *v.* STANDARD MARINE INS. CO. LTD. **573**

3——*Maritime law—Collision—Evidence of negligence — Damage — Liability — Vessel sunk when moored at wharf — Damage — Onus — Findings of trial judge — Assessors — Care and nautical skill.*] The British cruiser H.M.S. *Dragon,* in command of the appellant, shortly before 9 o'clock in the morning and in fair weather, when about to enter Victoria Basin in the harbour of the city of Montreal to take up her allotted berth at the cross-wall at the inner end of the basin, collided with and sank the respondents' oil bunkering steamer *Maplebranch* which was lying at the time securely moored alongside the steamer *New Northland* which was docked at the wharf in a section just outside the entrance to the basin, on the north side of the harbour. The oil tanker *Maplebranch* had received orders

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to deliver a quantity of oil to the *New Northland* on the morning of the collision and she proceeded, without previously notifying the Harbour Master's office in conformity with certain regulations of the Montreal Harbour, to dock the section where the *New Northland* was moored and tied up alongside it about fifteen minutes before the collision occurred. According to the evidence, the appellant observed the *Maplebranch* cross over from the entrance to the basin and go alongside the *New Northland* when he was at a distance estimated by him at about a mile away though at that time he was not able to identify the vessel or to judge the distance of it from the entrance to the basin. It is also common ground that a strong cross current runs diagonally across the entrance of the basin toward the north shore at a speed of from five to six knots. The evidence shows further that a motor vessel, the *Saguenay Trader,* had arrived in the basin the previous afternoon and docked on the south side, bow towards the west; and, just as the *Dragon* was approaching the entrance to the basin, the *Saguenay Trader* was being turned about at her berth by her crew, her stern lines being fast to the pier and she merely drifting round with the wind; and the appellant alleged that, when he observed this motor vessel apparently swinging out across his course, he believed that she was going to get into his way and that he had to stop and reverse the *Dragon's* engines and that the cross-current then carried the *Dragon* over against the *Maplebranch* with no fault on his part. The action was brought by the respondents, Steamer Colin W. Limited, as registered owner of the steamer *Maplebranch,* and St. Lawrence Tankers Limited, as beneficial and managing owner or operator of the steamer *Maplebranch,* and as owner also of the cargo on board her, jointly claiming $100,000 against the appellant as officer commanding H.M.S. *Dragon* for damages by collision alleged to have been caused solely by the improper and negligent navigation and mismanagement of the *Dragon* by the appellant. *Held,* Rinfret and Crocket JJ. dissenting, that the appellant should be held liable. The appellant, having collided with the *Maplebranch* at her moorings in broad daylight, the onus rested upon him to satisfy the Court that there was no fault upon him which directly caused the collision, and the trial judge has affirmatively found that there was such fault; and where the trial judge, as here, is not only an experienced local judge in Admiralty, but had the assistance of two assessors to advise him upon matters requiring nautical or other professional knowledge and arrived at a conclusion of fact upon conflicting testimony, it would need a very clear case of error for this Court, without the assistance of any assessors, to reverse such a finding.—The position of the *Maplebranch* has no bearing on the question of the appellant's liability, for, even if there were some technical breach of one of the Harbour regulations in bunkering the *New Northland* without first notifying the Harbour Master, that would have no legal consequence because of the fact that the appellant had a full view of the *Maplebranch* in ample time to avoid a collision with her. There is no place in this case for the application of the doctrine of contributory negligence to the *Maplebranch:* if there was any negligence, it was remote and antecedent and was not a proximate cause of the collision.—Also, assuming that there was some fault on the part of the vessel *Saguenay Trader,* if there was fault as well on the part of the appellant, the respondents not being guilty of any contributory negligence would be entitled as a matter of law to recover the whole of their loss from either of the ships that was in fault; and therefore the vital question before the Court was whether there was absence of negligence on the part of the appellant. *Per* Rinfret and Crocket JJ. dissenting.—In the case of a collision in broad daylight between a ship under way and one securely moored and an action brought against the moving ship for the recovery of damages resulting therefrom the defendant is not obliged, in order to absolve himself from liability or blame, to prove that the collision could not have been avoided in any possible way, but only to prove that it could not have been avoided by the exercise of ordinary skill and care on his part or on the part of the officers and men, for whose conduct he was responsible, in the particular circumstances in which they were placed. If he clearly proves that the collision was the necessary consequence of the intervention of a third ship in his course and that he and his officers and men were not at fault in the creation of that emergency he fully discharges the onus the law imposes upon him for running into a ship at anchor or securely moored and the defence of inevitable accident is thereby established. The finding of the trial judge that the defendant had not satisfied him that the collision was an inevitable accident was apparently based upon the assumption that the defendant should have foreseen that a