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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

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

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Right Hon. ERNEST LAPOINTE, K.C.
The Hon. Louis St-Laurent, K.C.

38037—1½

NOTICE TO SUBSCRIBERS

Please insert the following slips at the respective pages mentioned.

Page 574, at line 26th in head-note, within the bracket and before "The Municipal Council", the following cited case should be added: *Marquess of Clanricarde* v. *Congested Districts Board for Ireland* (75 J.P. 481).

Page 574, at line 31st, the word "enacting" should be "exacting."

Page 577, at lines 14th to 17th, the sentence beginning "The application of this principle" should read as follows: "The application of this principle is illustrated in the judgments in the House of Lords in *Marquess of Clanricarde* v. *Congested Districts Board for Ireland* (1), in the Judicial Committee in *The Municipal Council of Sydney* v. *Campbell* (2) and in the Court of Appeal for Ontario in *Campbell* v. *Village of Lanark* (3)."

Page 577, at line 21st, the word "enacting" should be "exacting".

Page 577, at line 25th, "(3)" should be "(4)".

Page 577, the footnotes should be as follows:

(1) (1914) 79 J.P. 481.
(2) [1925] A.C. 338.
(3) (1893) 20 O.A.R. 372.
(4) [1933] A.C. 168, at 176.

Page 611, at line 16th, the words "County Court" should be "Supreme Court".

ERRATA

in Volume 1941

Page 99, at the 7th line, "the" should be "and".

Page 262, at the 13th line of the first paragraph of the head-note, "74 (a)" should be "74 (A)".

Page 492, at the 7th line, "latter" should be "vendor".

Page 574, at the 26th line, within the bracket and before "The Municipal Council" the following case should be added "*Marquess of Clanricarde* v. *Congested Districts Board for Ireland* (79 J.P. 481)".

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(4) [1933] A.C. 168, at 176.

Page 601, at the 10th line, "1929" should be "1939".

Page 611, at the 16th line, "County Court" should be "Supreme Court".

NOTICE

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.

Board of Education for the City of Windsor v. *Ford Motor Company of Canada, Limited et al.* [1939] S.C.R. 412. Appeal allowed, 30th July, 1941.

Ganong v. *Belyea.* [1941] S.C.R. 125. Special leave to appeal granted, 27th June, 1941.

Landreville v. *Brown.* [1941] S.C.R. 473. Leave to appeal *in forma pauperis* refused, 12th December, 1941.

Lockhart v. *Canadian Pacific Ry. Co.* [1941] S.C.R. 278. Leave to appeal granted on terms, 1st August, 1941.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

JOSEPH H. RICARD (DEFENDANT)..... APPELLANT;

AND

RAOUL LORD (PLAINTIFF)..... RESPONDENT.

1939
*May 10.
*Oct. 3.

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

Municipal corporation—Municipal law—Contract passed between mayor and municipality prior to his election—Contract still in force during term of office—Bribery or corruption—Benefit or interest in the contract—Penal action—Judicial pronouncement as to nullity of contract—All interested parties not joined in the action—Whether similar offence provided by section 161 of the Criminal Code or by section 123 of the Cities and Towns' Act—Constitutionality of the Municipal Bribery and Corruption Act—Effect of section 227 (11) of the Municipal Code as to contract of sale between member of council and municipality—Whether "mayor" is "member of a municipal council"—Construction of the words "shall include" in statute law—Conditions necessary to enable courts to pronounce nullity of contract—Municipal Bribery and Corruption Act, R.S.Q., 1925, c. 107, ss. 3 and 19—Cities and Towns' Act, R.S.Q., 1925, c. 102, s. 123—B.N.A. Act, section 92, paras. 8 and 15.

The appellant was elected mayor of the town of Grand'Mère, in the province of Quebec, on July 2, 1935. At the time of his election and up to the commencement of this action, the appellant and the municipal corporation were bound by a contract entered between them on May 14, 1928, whereby, following a conveyance (effected on the same date by the appellant to the municipal corporation) of certain lots of land to be used as public streets, the adjoining lots, so long as they had not been sold by the appellant to third parties, were not to be "assessed on the valuation roll of the corporation at more than thirty-five dollars each". It was further agreed that the same conditions would apply to the unimproved lots which the appellant, within two years following the contract, would repossess for non-payment by the buyers of those lots. The respondent, in his capacity of elector, ratepayer and property-owner, instituted proceedings, under section 3 of the *Municipal Bribery and Corruption Act*, R.S.Q., 1925, c. 107, where conclusions were to the effect that the appellant "be declared disqualified for five years from the date of the judgment

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

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from holding any office in or under the council of the town of Grand'Mere". This action was dismissed by the Superior Court, which held that the appellant's relations with the municipality under the above contract were rather those of a creditor of the municipality for prestations for which the latter had made itself responsible and that they did not come within the provisions of the above-mentioned Act, the effect of which was to forbid any member of the municipal council to make a contract during his tenure of office, but not to prohibit his election to the council after such a contract had been in force for some time and the obligations resulting therefrom towards the council had been fully performed; in other words, it was held that the appellant had fully performed his obligations to the municipality prior to his election and that, therefore, the prohibition provided by section 3 of the Act did not disqualify him. This judgment dismissing the respondent's action was reversed by the appellate court, which set aside the construction given to the Act by the trial judge as well as all the other grounds invoked by the appellant.

Held, affirming the judgment of the appellate court (Q.R. 66 K.B. 133), that the appellant has violated the provisions of section 3 of the above-mentioned Act. According to the evidence, he clearly had an interest in a contract with the municipal council to which he had been elected and of which he continued to be a member until the action was commenced; that contract existed throughout his tenure of office and during that time he derived appreciable benefits therefrom, and he cannot reasonably claim that he did not do so knowingly.

As to the ground raised by the appellant, that the offence raised against him, having already been provided for by the provisions of section 161 of the Criminal Code, the latter overrides the provincial Act and makes it inoperative:

Held that a mere comparison of the above-mentioned sections of both Acts shows that the two provisions do not relate to the same thing: the provincial Act prohibits the existence of any contract or employment relationship between a municipal council and a member thereof, while the Criminal Code prohibits any offers, proposals, etc., intended *inter alia* to influence the vote of such a member. The two sections are far from identical and, therefore, the provincial field is not in the present instance occupied by the Dominion field. Moreover, the provincial Act comes within the provisions of paragraphs 8 and 15 of section 92 of the B.N.A. Act and therefore its constitutionality cannot be successfully attacked.

As to the other ground raised by the appellant that the municipal council, at the time of the occurrences forming the basis of the action, was governed by the *Cities and Towns' Act* (R.S.Q., 1925, c. 102), that section 123 of that Act covered the same offence as the one mentioned in section 3 of the *Municipal Bribery and Corruption Act* and that therefore the provision of section 123 of the first Act has the effect of setting aside the application of section 3 of the last Act.

Held that the two Acts do not cover the same case and the provision of one Act does not exclude the provision of the other Act; section 123 of the first Act simply prohibits the nominating or electing to the office of mayor or alderman or the appointing to or holding of any other municipal office, while section 3 of the second Act makes

of either one of these Acts an offence entailing not only disqualification from immediately holding the office to which the municipal elector was elected, but in addition disqualification "from holding any public office in the council or under the council thereof, for five years". The two provisions, far from conflicting, are complementary to each other.

As to the other ground raised by the appellant, that, the contract he entered into with the municipality being a contract of sale and in view of the fact that section 227 (11) of the Municipal Code, which also contains a provision prohibiting the holding of municipal office by a member of the council who has a contract with the corporation, provides that the word "contract" does not include "the sale * * * of land," it would be consistent with the economy of the municipal law of Quebec to rule that such a contract is not covered by the prohibition and offence provided in section 3 of the *Municipal Bribery and Corruption Act*.

Held that such ground is not well founded. First, the parties in the case are not governed by the Municipal Code, but by the *Cities and Towns' Act* which contains no restriction of the kind mentioned in the Municipal Code; and, secondly, the above-mentioned section 3, which applies in this case, makes no distinction, and, therefore, there is no reason why the courts should make such a distinction, at least in the present instance. Moreover, the contract in this case is not a contract of sale, but a contract *sui generis*.

Section 19 of the *Municipal Bribery and Corruption Act* provides that "the term 'member of a municipal council' shall include municipal councillors, aldermen and delegates to the county council," and, therefore, the appellant urged the ground that the Act does not apply to the mayor of a municipality.

Held that the mayor is included in the expression "member of a municipal council" as found in section 3. By its very terms, section 19 is not a definition, but it simply specifies some persons which should be included in the term "member of a municipal council" (*Guibord* v. *Dallaire*, Q.R. 50 K.B. 440 followed); and, moreover, the words "shall include" are not ordinarily construed as implying a complete and exhaustive enumeration. *The Queen* v. *Herman* (L.R. 4 Q.B.D. 284); *Robinson* v. *The Local Board of Barton-Eccles* (8 App. Cas. 798) and *Dyke* v. *Elliott* (L.R. 4 P.C. 184) followed.

Held, also, that the legal position of the appellant would not be improved by the alleged fact, assuming it to be right, that the benefits and privileges which he has derived from the contract throughout his tenure of office would be illegal: it is the effect of the contract that must be considered and the appellant must suffer the consequences thereof. Moreover the courts can not in this case pronounce nullity of the contract or even recognize the existence of that nullity, first, because neither party to the suit have so requested and, above all, for the reason that one of the contracting parties, the corporation of the town of Grand'Mère, has not been made a party to the action.

Held further that, in such a case, it is not necessary that a "conviction" should first be pronounced against the delinquent in a criminal proceeding; and the so-called "conviction" may be prayed for, at the same time as the disqualification, in the conclusions of one and the same penal action instituted under articles 1150 and seq. C.C.P.

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APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Marchand J. (2) and maintaining the respondent's action which prayed that the appellant be declared disqualified for five years from holding any public office in the council of the city of Grand'Mère, in the province of Quebec.

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

Léon Méthot K.C. for the appellant.

Auguste Désilets K.C. for the respondent.

The judgment of the Court was delivered by

RINFRET, J.—L'appelant a été élu maire de la ville de Grand'Mère, dans la province de Québec, le 2 juillet 1935.

Au moment de son élection, et depuis lors jusqu'à l'institution de la présente action, il existait entre lui et la ville un contrat, datant du 14 mai 1928, en vertu duquel, à la suite d'un acte de cession (passé le même jour par l'appelant avec la ville) de divers immeubles pour servir de rues municipales, tant et aussi longtemps que l'appelant n'aurait pas vendu à des tiers les lots avoisinant ceux qui étaient cédés à la ville, ces lots avoisinants ne pourraient pas

être évalués dans le rôle de perception de la Corporation à plus que trente-cinq piastres chacun.

Il a été, en plus, convenu que si, dans les deux années qui suivraient le contrat, l'appelant reprenait, pour défaut de paiement, les lots non bâtis qu'il avait cédés par vente ou promesse de vente,

ces lots non bâtis ainsi repris et appartenant de nouveau à (l'appelant) devraient être évalués seulement à trente-cinq piastres aussi longtemps qu'il en restera propriétaire et qu'il n'y érigera pas de construction.

Il a aussi été

entendu que la Corporation ne pourra pas forcer (l'appelant) à construire des trottoirs sur les dits lots, à moins que sur la rue où ces trottoirs doivent être érigés, la majorité des propriétaires en pieds de front l'exigent.

L'intimé, en sa qualité d'électeur, de contribuable et de propriétaire dans la ville de Grand'Mère, a conclu, par son action, que

(1) (1939) Q.R. 66 K.B. 133. (2) (1938) Q.R. 76 S.C. 382.

le défendeur (fût) déclaré, par le jugement à intervenir, inhabile pendant l'espace de cinq ans à compter de la date du jugement, à remplir une charge dans le Conseil de la Cité de Grand'Mère ou sous le contrôle du dit Conseil.

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L'action s'appuyait sur l'article 3 de la *Loi concernant les manœuvres frauduleuses et la corruption dans les affaires municipales,* ch. 107 de S.R.Q. 1925:

3. Tout membre d'un conseil municipal qui, sciemment, pendant la durée de son mandat, a ou a eu directement ou indirectement, par lui-même ou son associé, quelque part ou intérêt dans un contrat ou un emploi, avec, sous ou pour le conseil, ou qui, sciemment, pendant la durée de son mandat, a, par lui-même ou par son associé ou ses associés, quelque commission ou intérêt, directement ou indirectement, dans un contrat ou relativement à un contrat, ou qui tire quelque avantage d'un contrat avec la corporation ou le conseil dont il fait partie, est, sur jugement obtenu contre lui en vertu des dispositions de la présente section, déclaré inhabile à remplir une charge dans le conseil ou sous le contrôle du conseil pendant l'espace de cinq ans.

L'appelant, pour sa défense, a invoqué un grand nombre de moyens que nous examinerons par la suite.

Il a réussi devant la Cour Supérieure, (1) qui a été d'avis que les relations entre lui et la ville, résultant du contrat en question, étaient plutôt celles d'un créancier de la ville pour les prestations auxquelles elle s'est obligée; et qu'elles ne tombaient pas sous le coup de la loi citée ci-dessus, parce que l'effet de cette loi était de défendre à un membre du conseil municipal de faire un contrat pendant l'exercice de ses fonctions, mais non pas de prohiber son élection comme membre du conseil après qu'un contrat de ce genre avait été conclu depuis un certain temps et que les obligations qui en découlaient pour celui-ci avaient été complètement exécutées. Le juge de la Cour Supérieure était d'avis que, dans le cas actuel, l'appelant avait entièrement rempli sa part d'obligations envers la ville antérieurement à son élection et que, par conséquent, la prohibition prévue à l'article 3 de la loi ne le frappait pas d'incapacité.

Il débouta, en conséquence, l'intimé des fins de son action.

Mais la Cour du Banc du Roi, (2) à l'unanimité, a infirmé ce jugement, a rejeté l'interprétation donnée à la loi par le juge de première instance, ainsi que tous les autres moyens invoqués par l'appelant; et elle a maintenu l'action avec dépens.

(1) (1938) Q.R. 76 S.C. 382.

(2) (1939) Q.R. 66 K.B. 133.

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L'appelant nous a de nouveau soumis tous les points qu'il avait plaidés devant les deux cours de la province.

Il a soulevé d'abord une question constitutionnelle. Il a attiré notre attention sur le fait que le Code criminel contient un article qui se lit comme suit:

> 161. Est coupable d'un acte criminel et passible d'une amende de mille dollars au plus et de cent dollars au moins, et d'un emprisonnement de deux ans au plus et d'un mois au moins, et à défaut du paiement de l'amende, d'un emprisonnement additionnel de six mois au plus, tout individu qui, directement ou indirectement,
>
> (*a*) Fait des offres, propositions, dons, prêts, promesses ou conventions de payer ou de donner une somme d'argent ou quelque autre compensation ou valeur appréciable, à un membre d'un conseil municipal, soit pour son propre avantage, soit pour l'avantage de toute autre personne, dans le but de l'induire à voter ou à s'abstenir de voter à une réunion du conseil dont il fait partie, ou d'un comité de ce conseil, pour ou contre une mesure, motion, résolution ou question soumise au conseil ou au comité; ou
>
> * * *
>
> (*d*) Etant membre ou fonctionnaire d'un conseil municipal, accepte ou consent à accepter quelque offre, proposition, don, prêt, promesse, convention, compensation ou valeur prévus au présent article; ou, pour quelqu'une de ces causes, vote ou s'abstient de voter pour ou contre une mesure, motion, résolution ou question, ou fait ou s'abstient de faire un acte officiel;

Et l'appelant prétend que, comme le Code criminel pourvoit déjà à l'offense qui lui est reprochée dans la présente action, il a pour effet de l'emporter sur la loi provinciale et de rendre cette dernière inopérante.

Mais il suffit de comparer l'article du Code criminel et celui de la *Loi concernant les manœuvres frauduleuses et la corruption dans les affaires municipales* pour voir que les deux articles ne se réfèrent pas au même cas.

La loi provinciale prohibe l'existence d'un contrat ou d'un emploi entre le membre du conseil municipal et le conseil de la corporation dont il fait partie. La loi criminelle prohibe des offres ou propositions, etc., dans le but d'induire un membre d'un conseil municipal à voter ou à s'abstenir de voter à une réunion du conseil ou d'un comité de ce conseil, ainsi que l'acceptation de, ou le consentement à accepter, ces offres ou ces propositions, etc., par le membre ou le fonctionnaire du conseil municipal. Dans ce dernier cas, la loi fédérale punit à la fois celui qui a fait les offres et le membre du conseil qui les a acceptées.

Les deux articles sont loin d'être identiques; et, par conséquent, suivant l'expression employée en pareil cas, en matière de droit constitutionnel, le champ provincial n'est pas occupé ici par le champ fédéral.

D'autre part, il est indiscutable que la loi provinciale invoquée par l'intimée tombe sous le paragraphe 8 de l'article 92 de l'*Acte de l'Amérique Britannique du Nord,* qui a trait aux "*institutions municipales dans la province*"; et elle tombe, en outre, sous le paragraphe 15 du même article 92, qui permet aux provinces d'imposer, à titre de sanction, des amendes, des pénalités ou l'emprisonnement pour assurer l'exécution des lois provinciales adoptées à l'égard de toute matière comprise dans l'une quelconque des catégories de sujets énumérés dans cet article 92. Par conséquent, la constitutionnalité de la loi provinciale dont il s'agit ne saurait présenter aucun doute.

Mais l'appelant soumet en plus que la *Loi concernant les manœuvres frauduleuses et la corruption dans les affaires municipales* ne s'applique pas aux membres du conseil municipal de la ville de Grand'Mère parce que cette dernière, à l'époque des événements dont l'action se plaint, était régie par la *Loi concernant les cités et les villes* (c. 102 des statuts refondus de Québec, 1925) et que cette loi contiendrait, elle aussi, un article qui pourvoit à la même offense que celle qui est prévue par l'article 3 du chapitre 107. Ce serait l'article 123, dont le texte, en autant qu'il concerne l'appelant, se lit comme suit:

> 123. Ne peuvent être mis en nomination pour les charges de maire ou d'échevin, ni être élus à ces charges, ni être nommés aux autres charges municipales, ni les occuper:
>
> * * *
>
> 9o. Quiconque a, directement ou indirectement, par lui-même ou par son associé, un contrat avec la municipalité.

L'appelant soumet que cette disposition particulière à la *Loi des cités et villes* a pour effet d'écarter l'application de l'article 3 du chapitre 107.

Nous ne le croyons pas. En premier lieu, les deux lois ne couvrent pas le même événement. L'article 123 du chapitre 102 se contente d'empêcher la mise en nomination ou l'élection aux charges de maire ou d'échevin, ou la nomination à ou l'occupation des charges municipales.

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L'article 3 du chapitre 107, en plus, fait de l'un de ces actes une offense qui comporte non seulement l'inhabilité à occuper immédiatement la charge à laquelle le conseiller municipal aurait été élu, mais, en plus, l'inhabilité

à remplir une charge dans le conseil ou sous le contrôle du conseil pendant l'espace de cinq ans.

A la prohibition d'occuper la charge pour laquelle l'élection a eu lieu, le chapitre 107 ajoute donc, sous forme de pénalité, l'inhabilité

à remplir une charge dans le conseil ou sous le contrôle du conseil pendant l'espace de cinq ans.

Et les deux lois, loin d'être en conflit, se complètent, au contraire, l'une par l'autre. A la procédure par voie de *quo warranto,* le chapitre 107 ajoute la procédure par voie d'action pénale. Non seulement elle empêche le membre élu d'entrer en fonctions, mais elle le punit d'incapacité pour cinq ans parce qu'il a enfreint la loi. Les deux lois ne sont pas du même ordre et l'une n'exclut pas l'application de l'autre.

Il faut donc se demander maintenant si l'appelant a vraiment enfreint les dispositions de l'article 3 du chapitre 107.

Sur ce point, nous sommes absolument d'accord avec le jugement unanime de la Cour du Banc du Roi.

L'appelant avait évidemment un intérêt dans un contrat avec le conseil de la corporation municipale auquel il a été élu et dont il a continué de faire partie jusqu'au moment où l'action a été instituée. Ce contrat a existé pendant la durée de son mandat. Pendant toute cette période de temps, il en a tiré des avantages appréciables. Il ne peut raisonnablement prétendre qu'il ne l'a pas fait sciemment. Il avait signé son contrat; il a dû donner son consentement écrit à son élection; il a été subséquemment assermenté comme maire. Il a siégé comme tel et en a exercé toutes les prérogatives pendant au delà de deux ans avant que l'action ne fût intentée. En plus, la preuve démontre que, chaque fois que les estimateurs de la ville de Grand'Mère ont préparé le rôle d'évaluation annuel, il a eu des conférences avec les estimateurs et le secrétaire-trésorier qui les accompagnait, pour faire valoir les avantages qui lui résultaient du contrat qu'on lui reproche maintenant; et que, dans chaque cas, les estimateurs ont fixé le chiffre de son

évaluation en vertu du contrat, et non pas d'après la valeur réelle de ses biens imposables, ainsi que l'exigeait la loi (art. 485). Il n'y a donc aucun doute à la fois sur l'existence du contrat prohibé et sur les avantages que l'appelant en a tirés.

Mais l'appelant nous réfère au Code municipal (art. 227, par. 11), qui contient également une disposition défendant l'exercice des charges municipales par un membre du conseil qui a un contrat avec la corporation, et qui stipule que le mot " contrat " dans ce cas

ne s'étend pas au bail, ni à la vente ou à l'achat de terrains, ni à une convention se rapportant à l'un de ces actes.

Il dit que le contrat qu'il a passé le 14 mai 1928 avec la ville de Grand'Mère est un contrat de vente et qu'il serait conforme à l'économie de la loi municipale de la province de Québec de décider qu'un pareil contrat n'est pas visé par la prohibition et l'offense prévues à l'article 3 du chapitre 107.

Cette objection ne vaut pas, pour au moins deux raisons:

Tout d'abord, les parties ne sont pas régies par le Code municipal mais par la loi des villes, laquelle ne contient aucune restriction du genre de celle que l'on trouve dans le Code municipal. Mais, en plus, l'article 3 du chapitre 107, qui est celui qui s'applique à l'espèce, ne fait aucune distinction; et il n'y a pas lieu pour les tribunaux d'en introduire une, au moins dans le cas actuel, lorsque la loi elle-même n'en fait pas.

L'appelant invoque encore l'article 19 de la *Loi concernant les manœuvres frauduleuses et la corruption dans les affaires municipales.* Cet article déclare que l'expression " membre d'un conseil municipal " comprend les conseillers municipaux, les échevins et les délégués de comté. En langue anglaise, l'expression est: " shall include municipal councillors, aldermen and delegates to the county council."

Dans ses termes mêmes l'article 19 n'est pas une définition. Il ne fait que préciser que les conseillers municipaux, les échevins et les délégués de comté sont compris dans l'expression " membre d'un conseil municipal." Il est plus que probable que cet article se trouve au chapitre 107 pour écarter tout doute sur l'inclusion, entre autres, des délégués de comté, vu que le bureau des délégués n'est pas un conseil municipal.

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Mais, en plus, le mot "comprend" ou les mots "shall include" ne sont pas d'ordinaire interprétés comme supposant une énumération complète et exclusive.

Sur le point particulier qui nous occupe, il suffit de référer à l'article 47 de la loi des villes, qui est à l'effet que "le conseil municipal est composé d'un maire et du nombre d'échevins déterminé par la charte, élus en la manière ci-après prescrite." En vertu de cet article, le maire d'une ville est donc indiscutablement un des membres de son conseil municipal. Et il serait inadmissible que l'on interprétât l'article 19 du chapitre 107 comme excluant le maire de l'opération de la loi, spécialement de l'opération de l'article 3 de cette loi, lorsque l'on songe que le maire est, en général, le membre le plus important du conseil municipal, et que l'interprétation que nous soumet l'appelant aurait pour conséquence de le soustraire aux pénalités pour manœuvres frauduleuses ou corruption dans les affaires municipales, alors que les conseillers municipaux en seraient passibles. Cette simple constatation, qui conduirait à l'absurdité, est suffisante pour écarter une pareille interprétation.

Le raisonnement qui précède s'appuie, en outre, sur l'interprétation constante par la jurisprudence du sens qu'il faut donner aux mots "shall include". La loi concernant les manœuvres frauduleuses et la corruption dans les affaires municipales est de droit public ou administratif. Elle s'inspire des statuts édictés en pareille matière en Angleterre, où ces mots ("shall include") ont subi une interprétation extensive plutôt que limitative. Et c'est ainsi que Lord Coleridge, dans *The Queen* v. *Herman*, (1) dit:

> The words "shall include" are not identical with or put for "shall mean". The definition does not purport to be complete or exhaustive. By no means, does it exclude any interpretation which the sections of the Act would otherwise have. It merely provides that certain specified cases shall be included.

La Chambre des Lords, dans la cause de *Robinson* v. *The Local Board of Barton-Eccles* (2) avait à appliquer, dans *The Public Health Act*, un statut qui contenait une clause d'interprétation à l'effet que "'Street' shall apply to and include * * *". Lord Selborne y déclara ce qui suit:

> An interpretation clause of this kind is not meant to prevent the word receiving its ordinary popular and natural sense whenever that would be

(1) (1879) L.R. 4 Q.B.D. 284, at 288. (2) (1883) 8 App. Cas. 798.

properly applicable, but to enable the word as used in the Act, when there is nothing in the context or the subject matter to the contrary, to be applied to some things to which it would not ordinarily be applicable (pp. 800 et suiv.).

A son tour, dans *Dyke* v. *Elliott* (1), le Conseil Privé s'exprime comme suit:

It was contended in the Court below, but without success, that the words in the prohibitory clause were to be restricted by the words in the definition clauses, and that contention has been repeated here. In the Court below that argument was used in support of a contention that "steam-tug" was not within the definition. Here, in support of the contention that the uses are limited to the uses specifically mentioned in definition. The words, however (as was pointed out by the learned Judge), are not "shall mean" but "shall include". In some of the clauses in the same part of the Act the other words "shall mean" are used, and in the other clauses in which the words "shall include" are used, the most absurd consequences would follow if the words "shall include" were construed as equivalent to "shall mean", e.g., the clause as to what shall be included under the words "United Kingdom". Indeed, as to this particular clause itself, consequences no less absurd would follow if the things included were to be considered as an exhaustive enumeration, and so as to be the only things comprised. Their Lordships have, therefore, no hesitation in concurring with the learned judge that the words in the definition can have no effect in restricting the meaning to be put on the words of the prohibitory section. And the whole question is really what is the meaning of the words in that section "naval service".

Nous devons donc décider que le maire d'une ville est bien compris dans l'expression "membre d'un conseil municipal", telle qu'elle se trouve à l'article 3 du chapitre 107; et que, par suite, il est passible des pénalités qui y sont édictées, s'il se rend coupable de l'infraction qui y est prévue.

C'est d'ailleurs dans ce sens que la Cour du Banc du Roi en la présente cause l'a unanimement interprétée, suivant en cela un arrêt rendu par la même cour dans la cause de *Guibord* v. *Dallaire,* (2) qui est au même effet; et auquel on peut ajouter la définition contenue dans le paragraphe 5 de l'article 4 de la Loi concernant les cités et les villes:

5o. Les mots "membre du conseil" désignent et comprennent le maire et tout échevin de la cité ou de la ville.

Quant à la prétention de l'appelant qu'il s'agirait ici d'un contrat de vente, et qu'il devrait bénéficier de la tolérance du Code municipal, nous avons déjà fait allusion à l'objection qui s'oppose à l'application du Code municipal en l'espèce, parce que l'offense de l'appelant n'en relève pas

(1) (1872) L.R. 4 P.C. 184, at 191. (2) (1930) Q.R. 50 K.B. 440.

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et parce que nous sommes ici dans le cas d'une ville et d'un membre de son conseil municipal qui tombent sous le coup du chapitre 107 des statuts refondus de Québec. Il convient d'ajouter que le contrat que nous avons à étudier dans cette cause n'est pas un contrat de vente. C'est un contrat *sui generis* en vertu duquel l'appelant a cédé certains immeubles pour que la municipalité les transforme en rues; et il a été convenu en retour qu'il bénéficierait de certains avantages sous forme de limite d'évaluation municipale pour ses autres propriétés; et, comme nous l'avons vu, d'une stipulation spéciale concernant la construction des trottoirs.

Et précisément l'appelant se charge lui-même de démontrer qu'il ne s'agit pas ici d'une vente, puisqu'il prétend que la convention intervenue entre lui et la ville en est une qui est prohibée par la loi, en ce sens qu'une corporation municipale de ville n'a pas le droit de convenir que l'évaluation municipale ne sera pas faite suivant la valeur réelle des immeubles, mais qu'elle comportera une évaluation fixe qui demeurera stable pendant une période indéfinie d'années, c'est-à-dire: tant que l'appelant demeurera propriétaire des autres lots mentionnés dans le contrat.

Pour le besoin de l'argument, nous pouvons prendre pour acquis que cette convention est illégale. Il n'est pas, en effet, nécessaire de nous prononcer sur ce point. Mais, comme le fait valoir l'intimé, la position juridique de l'appelant n'est pas meilleure du fait que les avantages et privilèges qu'il retire et qu'il a retirés de ce contrat durant l'existence de son mandat sont illégaux. Même si le contrat est illégal, c'est l'effet réalisé qui compte; et l'appelant doit en subir les conséquences.

L'appelant ne peut empêcher que le contrat ait été passé entre lui et la ville. Surtout il ne peut pas se soustraire au fait que ce contrat a été mis en vigueur et respecté de part et d'autre et que l'appelant en a invoqué les stipulations et retiré les bénéfices pendant la durée de son mandat de maire. En ce sens, au moins, le contrat a été et est demeuré une réalité. Les tribunaux ne peuvent en ignorer les conventions jusqu'à ce qu'il ait été mis de côté par eux-mêmes. Et même quand il aura été mis de côté, on ne pourra empêcher qu'il ait existé et qu'il ait produit des effets dont

chaque partie a tiré les bénéfices, bénéfices que ni l'un ni l'autre n'a jusqu'ici manifesté l'intention de remettre à son co-contractant.

Dans ces conditions et au point de vue pratique, les actes qualifiés d'inexistants ne se distinguent pas des actes nuls de droit. Chez les uns et chez les autres, la nullité a besoin d'être reconnue par les tribunaux. Le contrat a eu lieu en fait et il a été matériellement accompli. Il faut que les tribunaux se prononcent, "même dans le cas où la nullité opère de plein droit." (Dalloz, Répertoire pratique vbo *Nullité,* N^{os} 4 et 5; Planiol, *Traité Elémentaire de Droit Civil,* 6e éd. tome 1, n° 330; Planiol & Ripert, *Traité Pratique de Droit Civil Français,* vol. 6, n° 297; Colin & Capitant, *Cours Elémentaire de Droit Civil Français,* 3e éd. vol. 1, pp. 77 et 81; Solon, *Théorie sur la nullité,* vol. 1, n° 16).

Et en plus de tout ce que nous venons de dire au sujet de la nullité de son contrat, que l'appelant invoque lui-même dans le but de se soustraire à la loi C. 107, il reste que, dans le cas actuel, il serait impossible aux tribunaux de prononcer la nullité ou même de reconnaître l'existence de cette nullité, parce que ni l'une ni l'autre des parties en cause ne la demande (Code de procédure civile, art. 113); que, comme le fait remarquer le juge de première instance, le contrat.

semble encore donner aux parties sinon les droits mêmes qu'il comporte, du moins d'autres recours possibles;

et que, par dessus tout, la ville de Grand'Mère, l'une des parties contractantes, n'a pas été mise en cause (*Lachapelle* v. *Viger* (1); *Burland* v. *Moffatt* (2); *Corporation de la paroisse de St-Gervais* v. *Goulet* (3)).

Sans doute, l'appelant, dans un argument alternatif qui est plutôt la contradiction du précédent, prétend-il que, nonobstant le contrat, ses lots, au moins pendant la période de temps où il a occupé ses fonctions de maire, ont été évalués strictement suivant leur "valeur réelle". Mais il n'a pas réussi à en convaincre le juge de première instance qui, sur ce point, s'est contenté d'exprimer un doute; et il a contre lui de ce chef l'opinion unanime de la Cour du Banc du Roi qui est clairement d'avis que l'estimation figurant

(1) (1906) Q.R. 15 K.B. 257. (2) (1885) 11 Can. S.C.R. 76, at 88, 89.
(3) [1931] S.C.R. 437.

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au rôle d'évaluation s'est simplement conformée aux stipulations du contrat, sans que les estimateurs aient, en aucune façon, cherché à inscrire les lots de l'appelant au rôle d'évaluation suivant leur valeur réelle, contrairement au devoir à eux imposé par l'article 485, et sans tenir aucun compte de leur réelle valeur.

Il reste donc le motif qui, en Cour Supérieure, a fait pencher la balance en faveur de l'appelant, mais qui a été repoussé par tous les juges de la Cour du Banc du Roi. Ce motif serait qu'en vertu du contrat, au moment de son élection et par la suite, l'appelant n'était plus que le créancier de la corporation, vu que, quant à ce qui le concernait, l'appelant avait rempli toutes ses obligations, lorsqu'il a cédé les immeubles à la ville. Nous partageons l'avis de la Cour du Banc du Roi que ce motif ne saurait être admis, soit en fait, soit en droit. La manœuvre que vise l'article 3 du chapitre 107, c'est d'empêcher l'existence de relations contractuelles entre le membre d'un conseil et la corporation municipale pendant la durée du mandat du membre du conseil. Or, il paraît évident que le contrat consenti par l'appelant avait ici une continuité qui a maintenu l'existence des relations contractuelles bien au delà de l'époque où l'appelant a été élu maire. Après avoir cédé le terrain nécessaire aux rues, l'appelant a continué de tirer des avantages de son contrat. Les lots dont il est resté propriétaire ont continué d'être évalués conformément au contrat et l'appelant a continué d'en réclamer le bénéfice. Il est impossible à l'appelant de prétendre que ce contrat n'existe plus en autant qu'il est concerné, pendant que les effets en persistent. La limitation du montant des taxes à payer a opéré d'année en année et a continué d'opérer pendant que l'appelant exerçait ses fonctions de maire et au moment même où s'instruisait la cause actuelle.

Si même l'article 3 du chapitre 107 faisait, sous ce rapport, une distinction entre le débiteur et ce que le juge de première instance appelle le " créancier ", en vertu du contrat que cet article prohibe—distinction qui ne paraît pas pouvoir être faite au moins en l'espèce (*O'Carroll* v. *Hastings,* (1)—il resterait qu'il ne s'agit pas ici d'un contractant pour un ouvrage à l'entreprise, qui a terminé ses travaux mais à qui il reste dû un solde sur le prix, comme c'était le cas dans *Therrien* v. *Deschambault,* (2) mais d'une personne

(1) [1905] 2 Ir. Rep. 590. (2) (1911) Q.R. 40 S.C. 263, at 267.

dont les relations contractuelles persistent et ont persisté pendant toute la durée du mandat de l'appelant jusqu'à ce que l'intimé fût venu s'en plaindre par l'action qu'il a intentée. Il est tout à fait inexact de dire que ce contrat avait été complètement exécuté avant que l'appelant ne fût élu maire, même si l'on n'envisage que les obligations de ce dernier. Mais cela devient encore davantage évident si l'on songe à la prétention de l'appelant que ce contrat doit être maintenant considéré comme *ultra vires* et nul, sous prétexte que la ville de Grand'Mère n'avait pas le pouvoir nécessaire pour le consentir. Il en résultera toutes sortes de conséquences dont il suffit de mentionner la plus importante: c'est-à-dire que les parties devraient être remises dans le même état où elles étaient avant que le contrat fût consenti; et, par conséquent, que la ville devrait remettre à l'appelant les immeubles que, depuis, elle a convertis en rues, et où il est probable qu'elle a construit des trottoirs et des égouts; et que, de son côté, l'appelant devra subir une nouvelle estimation de ses immeubles sur les rôles d'évaluation successifs et payer à la ville le surplus de taxes que cette nouvelle évaluation pourra comporter. Il suffit de se rappeler ces choses pour envisager jusqu'à quel point la position de maire, que l'appelant a prétendu avoir le droit de continuer d'occuper, mettait ses devoirs de membre du conseil en conflit inévitable avec ses intérêts particuliers. Et c'est là précisément ce que l'article 3 du chapitre 107 a voulu prévenir et éviter; c'est l'offense qu'il a voulu punir au moyen des prescriptions qui y sont édictées.

Il ne reste plus qu'à mentionner un point qui a été soulevé pour la première fois au cours de l'argumentation devant nous. Il a été suggéré à raison du texte de la version anglaise plutôt que de celui de la version française du statut.

La version française dit que l'inhabilité du membre du conseil pour une période de cinq ans peut être déclarée

> sur jugement obtenu contre lui en vertu des dispositions de la présente section;

mais la version anglaise traduit les mots que nous venons de mettre entre guillemets par les suivants: "if legally convicted thereof under this division". L'emploi du mot "convicted" a d'abord fait penser à cette Cour que la

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déqualification devrait être précédée d'une condamnation préalable devant un tribunal de juridiction criminelle. Un examen plus attentif du texte de la loi fait voir qu'il ne s'agit, en somme, que d'une condamnation " under this division ", pour employer la version anglaise, et surtout

d'un jugement obtenu contre lui en vertu des dispositions de la présente loi,

pour employer la version française, qui est probablement plus claire.

Or, pour obtenir un jugement en vertu des dispositions de la présente section, ainsi que le dit la version française, et c'est-à-dire en vertu même de la Loi concernant les manœuvres frauduleuses et la corruption dans les affaires municipales (c. 107), la poursuite, suivant l'article 17 de la loi, est prise

par action pénale intentée conformément aux dispositions des articles 1150 et suivants du Code de procédure civile.

Cet article indique clairement que l'intention de la loi est que la demande en déqualification du membre du conseil municipal délinquant soit intentée devant les tribunaux civils et qu'elle y sera instruite suivant la procédure en matières sommaires.

Il convient d'ajouter que, dans le cas actuel, l'intimé a procédé conformément à la pratique dans la province de Québec, en vertu de laquelle la condamnation du membre du conseil pour l'infraction à l'article 3 du chapitre 107 et la déqualification qui s'ensuit ont toujours été demandées par une seule et même action. Et c'est probablement la raison pour laquelle ce moyen n'a pas été soulevé devant les tribunaux de la province de Québec, soit par les procureurs intéressés, soit par les juges qui ont entendu la cause.

L'appelant a donc failli sur tous les points invoqués par lui; et son appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Solicitor for the Appellant: *Léon Méthot.*

Solicitors for the Respondent: *Désilets & Deshaies.*

GORDON C. SMYTHE .....APPELLANT; 1940

* Oct. 28.
* Nov. 4

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Trial—Murder—Plea of insanity—Charge to jury—Evidence—"Beyond all reasonable doubt" or "to the reasonable satisfaction of the jury."

On a trial for murder, where a plea of insanity is advanced, the law does not require the accused, in order to succeed upon that issue, to satisfy the jury that insanity has been proved beyond all reasonable doubt; it is sufficient in point of law if insanity is proved to the reasonable satisfaction of the jury.

Clark v. *The King* (61 Can. S.C.R. 608) approved.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the conviction of the appellant on an indictment for murder.

The appellant, being put on trial, pleaded that he was insane when the crime was committed. Subject to this defence, the crime was proved.

The trial judge, in charging the jury, instructed them in the following terms: "* * * The whole burden of proving insanity rests upon the defence, just as the whole "burden of proving guilt rests upon the Crown. Every "man is presumed to be sane and responsible for his acts "until he, in defence of himself, proves the contrary."

D. Gillmor K.C. for the appellant.

J. W. Long K.C. for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—It was settled by the decision of this Court in *Clark* v. *The King* (1), that where a plea of insanity is advanced on a trial for murder the law does not require the accused, in order to succeed upon that issue, to satisfy the jury that insanity has been proved beyond

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

(1) (1921) 61 Can. S.C.R. 608.

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all reasonable doubt; it is sufficient in point of law if insanity is proved to the reasonable satisfaction of the jury.

The law, for reasons of policy which are well understood, draws a distinction as to the sufficiency of the evidence required to establish the affirmative of the issue of guilt or innocence in criminal proceedings, and that which is generally required as the basis of decision in civil cases. Mr. Best in his instructive work (as it is described by Willes J., in *Cooper* v. *Slade* (1), 12th ed.) says at p. 82:—

> There is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former, a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision; but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. The serious consequences of an erroneous condemnation, both to the accused and society, the immeasurably greater evils which flow from it than from an erroneous acquittal, have induced the laws of every wise and civilized nation to lay down the principle, though often lost sight of in practice, that the persuasion of guilt ought to amount to a moral certainty; or as an eminent judge (Parke, B.) expressed it, "Such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt."

It is the rule that prevails generally in civil cases, as this Court decided in the case above mentioned, which governs the jury in determining the issue raised by a plea of insanity.

The learned trial judge in charging the jury used language which, with the greatest possible respect, I think was calculated to confuse them as to this important point of the sufficiency of evidence in relation to the issue of insanity. They may very well have got the impression that the existence of insanity must be demonstrated in the sense in which the guilt of an accused must be established beyond reasonable doubt.

Such being the case, the verdict ought not to be permitted to stand and there should be a new trial.

Appeal allowed and a new trial ordered.

(1) (1857) 6 H.L.C. 746, at 772.

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

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* May 27, 28.
* Nov. 18.

AND

THE DOMINION NATURAL GAS COMPANY LIMITED ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Computation of taxable income—Claim for deduction for legal expenses incurred in defending franchise to supply natural gas—Income War Tax Act, R.S.C., 1927, c. 97, s. 6 (a) (b)—"Expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income"—"Payment on account of capital."

Respondent company supplied natural gas to inhabitants in parts of the city of Hamilton. Its right to do so was attacked in an action in which there were claimed against it a declaration that it was wrongfully maintaining its mains in the streets, etc., in said city and wrongfully supplying gas to the inhabitants, an injunction against its continuing to do so, a mandatory order for removal of its mains, and damages. Respondent defended the action and was successful, at trial and on appeals. Its legal expenses of the litigation were $48,560.94 (after crediting all sums recovered against the other party as taxed costs). The question now in dispute was whether that sum, which respondent paid in 1934, should be allowed as a deduction in computing respondent's taxable income for that year under the *Income War Tax Act*, R.S.C., 1927, c. 97.

Held: The sum was not deductible in computing respondent's taxable income. (Judgment of Maclean J., [1940] Ex. C.R. 9, reversed).

Per the Chief Justice and Davis J.: In order to fall within the category "disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" (s. 6 (*a*) of said Act), expenses must be working expenses; that is to say, expenses incurred in the process of earning "the income"; and the expenditure in question did not meet that requirement. *Lothian Chemical Co. Ltd.* v. *Rogers,* 11 Tax Cases 508, at 521; *Robert Addie & Sons' Collieries Ltd.* v. *Inland Revenue Commissioners,* 1924 S.C. 231, at 235; *Tata Hydro-Electric Agencies* v. *Income Tax Commissioner,* [1937] A.C. 685, at 695-6; *Ward & Co. Ltd.* v. *Commissioner of Taxes,* [1923] A.C. 145, at 149). Further, the expenditure in question was a capital expenditure. It was incurred "once and for all" and was incurred for the purpose and with the effect of procuring for respondent "the advantage of an enduring benefit" within the sense of Lord Cave's language in the criterion laid down in *British Insulated* v. *Atherton,* [1926] A.C. 205, at 213. (*Van den Berghs Ld.* v. *Clark,* [1935] A.C. 431, at 440; *Moore* v. *Hare,* 1914-1915 S.C. 91, also cited). Though in the ordinary course legal expenses are simply current expenditure and deductible as such, yet that is not necessarily so (as example, reference to *Thomson* v. *Batty,* 1919, S.C. 289).

Per Crocket J.: The expenditure in question cannot be said to have been wholly and exclusively made by respondent "as part of the process

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

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of profit earning" according to the test formulated (on statutory provisions not distinguishable in effect, as regards the present case, from those now in question) in the *Addie* case (*supra*), 1924 S.C. 231, at 235, which test was expressly adopted and applied by the Judicial Committee of the Privy Council in the *Tata* case (*supra*), [1937] A.C. 685, at 696, and therefore is binding on this Court.

Per Kerwin and Hudson JJ.: The test stated in the *Addie* case (*supra*), 1924 S.C. 231, at 235, and approved in the *Tata* case (*supra*), is applicable to the case at bar, and the expenditure in question was not one "laid out as part of the process of profit earning" within the requirement of that test. It was a "payment on account of capital," as it was made "with a view of preserving an asset or advantage for the enduring benefit of a trade" (*British Insulated* v *Atherton*, [1926] A.C. 205, at 213).

APPEAL by the Minister of National Revenue from the judgment of Maclean J., President of the Exchequer Court of Canada (1), allowing the present respondent's appeal from the decision of the Minister of National Revenue affirming the disallowance of the sum of $48,560.94, paid by the respondent in the year 1934 for certain legal expenses, as a deduction in computing the respondent's taxable income for that year under the *Income War Tax Act*, R.S.C., 1927, c. 97. The material facts of the case are sufficiently stated in the reasons for judgment in this Court now reported. The appeal to this Court was allowed, and the assessment of respondent (with said deduction disallowed) restored, with costs throughout.

F. P. Varcoe K.C. and *A. A. McGrory* for the appellant.

R. C. H. Cassels K.C. for the respondent.

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

THE CHIEF JUSTICE—The point in issue in this appeal is whether certain legal costs incurred in the litigation about to be mentioned and paid in the year 1934 are deductible from the profits, or gains, of the respondent company for the purpose of assessing such profits, or gains, as income under the *Income War Tax Act* for that year.

The respondent company since 1904 had continuously supplied the Township of Barton and its inhabitants with natural gas under a by-law of that township granting perpetual rights for that purpose, and before and after that

(1) [1940] Ex. C.R. 9; [1940] 2 D.L.R. 357.

date has been developing gas fields and supplying gas to the inhabitants of other municipalities. Since 1904 parts of the township have been at different times annexed to the City of Hamilton. The respondent company has continued to supply the annexed territory with natural gas as before annexation. The United Company had since the year 1904 been supplying the City of Hamilton, as it was before the annexations, and its inhabitants with manufactured gas under authority granted to it by by-laws of the City. About the year 1930 the United Company advanced a claim under these by-laws that it had the exclusive right to sell gas in the City of Hamilton including the annexed districts, and that the respondent company had no competing rights.

Pursuant to authority conferred by an agreement made between the City of Hamilton and the United Company dated March 24th, 1931, which agreement was confirmed by Statute of the Province of Ontario (21 Geo. V, Chap. 100), the United Company in the year 1931 took action in its own name as well as in the name of the City of Hamilton, in the Supreme Court of Ontario, against the respondent claiming:—

(*a*) a declaration that the respondent was wrongfully maintaining its mains in the streets, public squares, lanes and public places in the City of Hamilton, and wrongfully supplying gas to the inhabitants of the said City;

(*b*) an injunction restraining the respondent from continuing to so use the said streets, public squares, lanes and public places, and from continuing to supply gas to the inhabitants of the City of Hamton;

(*c*) a mandatory order requiring the respondent to remove its mains and other property from the streets, public squares, lanes and other places of the City of Hamilton;

(*d*) damages;

(*e*) further and other relief.

The respondent company defended this action and in due course it came on for trial and was dismissed (1). An appeal was then taken by the United Company from the

(1) [1932] O.R. 559.

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judgment of the trial Judge to the Court of Appeal for Ontario, which appeal was dismissed (1). The United Company then appealed to His Majesty in Council, which appeal was also dismissed (2). The costs of this litigation paid by the respondent company in the year 1934 amounted to $48,560.94 after crediting all sums recovered against the United Company as taxed costs.

In its Income Tax return for 1934 the respondent company deducted from its taxable income this sum of $48,560.94, returning a taxable income of $202,326.86. This deduction was disallowed and the respondent company's assessment was increased accordingly. The respondent appealed to the Minister of National Revenue who dismissed the appeal, and thereupon appealed to the Exchequer Court of Canada and this appeal was allowed (3). The Minister now appeals from that judgment.

The relevant statutory provisions are:—

Deductions not allowed.	6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of:—
Expenses not laid out to earn income.	(*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;
Capital outlays or losses, etc.	(*b*) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence, except as otherwise provided in this Act.

There are two broad grounds upon which I think the Minister is entitled to succeed. First, in order to fall within the category "disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income," expenses must, I think, be working expenses; that is to say, expenses incurred in the process of earning "the income." The judgment of Lord Clyde in *Lothian Chemical Co. Ltd.* v. *Rogers* (4) seems to point to the material distinction. The passage is pertinent, because the words Lord Clyde is applying are more comprehensive than those of sec. 6 (*a*). He says:

> The question, and the only question it seems to me that arises in the present case, is this. Was the expenditure of the original £4,000 an expenditure which was part of the working expenses of the business carried on by this Company, that is to say, expenditure laid out in the

(1) [1933] O.R. 369.
(2) [1934] A.C. 435.
(3) [1940] Ex. C.R. 9; [1940] 2 D.L.R. 357.
(4) (1926) 11 Tax Cases 508, at 521.

process of manufacture and of sale by which the Company expected to make profit from year to year? Or, on the other hand, was this expenditure which was necessary to acquire the disposal of property, buildings or plant, the use of which was necessary for conducting the processes of the manufacture and sale of the Company, so long as those processes were carried on? My Lords, if those two alternative questions fairly state the question here, there can be no doubt whatever upon which side the expenditure in question falls. It was not part of the working expenses of the Company, and it cannot be so represented. It was expenditure which was made for the purpose of acquiring the disposal of property or plant which was to be used in the business of the Company, namely, the manufacture of some chemical products and, in this case, of one chemical product in particular, and which was to be so used, not for the purpose of making profit in any particular year, but for the purpose of such manufacture so long as that manufacture might be carried on.

Similar language is used by Lord Clyde in *Addie's* case (1) and was approved and applied by Lord Macmillan in delivering the judgment of the Judicial Committee in *Tata* v. *Income Tax Commissioner* (2). Under s. 10, sub-s. 2, of the Indian Income-tax Act the profits or gains of any business carried on by the assessee are to be computed after making allowance for " (ix) any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains." Lord Macmillan said at pp. 695-696:—

Their Lordships recognize, and the decided cases show, how difficult it is to discriminate between expenditure which is, and expenditure which is not, incurred solely for the purpose of earning profits or gains. * * * In short, the obligation to make these payments was undertaken by the appellants in consideration of their acquisition of the right and opportunity to earn profits, that is, of the right to conduct the business, and not for the purpose of producing profits in the conduct of the business. * * * * * In the case of *Robert Addie & Sons' Collieries, Ld.* v. *Commissioners of Inland Revenue* (1), the Lord President (Clyde), dealing with corresponding words in the British Income-tax Act, says: " What is 'money wholly and exclusively laid out for the purposes of the trade' is a question which must be determined upon the principles of ordinary commercial trading. It is necessary, accordingly, to attend to the true nature of the expenditure, and to ask oneself the question, Is it a part of the Company's working expenses; is it expenditure laid out as part of the process of profit earning?" Adopting this test, their Lordships are of opinion that the deduction claimed by the appellants is inadmissible as not being expenditure incurred solely for the purpose of earning the profits or gains of the business carried on by the appellants.

The distinction is also explained in the judgment of the Court of Appeal for New Zealand in a passage approved by the Judicial Committee in *Ward & Co. Ltd.* v. *Commissioner of Taxes* (3).

(1) *Robert Addie & Sons' Collieries Ltd.* v. *Inland Revenue Commissioners*, 1924 S.C. 231, at 235.
(2) [1937] A.C. 685.
(3) [1923] A.C. 145, at 149.

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"We find it quite impossible to hold that the expenditure was incurred exclusively, or at all, in the production of the assessable income. It was incurred not for the production of income, but for the purpose of preventing the extinction of the business from which the income was derived, which is quite a different thing. It was contended by the Company that it was illogical that while legitimate expenses incurred in the production of the income are deductible, similar expenses incurred for the much more important purpose of keeping the profit-making business alive are not deductible, and, further, that it was inequitable that the Legislature should, on the one hand, force a certain class of traders into a struggle for their very existence, and, on the other hand, treat the reasonable expenses incurred in connection with such struggle as part of the profits assessable to income tax. These aspects of the matter are clearly and forcibly set out in the contentions of the Company as embodied in the correspondence with the Commissioner contained in the case, but they raise questions which can only be dealt with appropriately by the Legislature. This Court, however, cannot be influenced by such considerations, being concerned only with the interpretation and application of the law as it stands."

Their Lordships agree with this reasoning. * * * The expense may have been wisely undertaken, and may properly find a place, either in the balance sheet or in the profit-and-loss account of the appellants; but this is not enough to take it out of the prohibition in s. 86, subs. 1 (*a*), of the Act.

Again, in my view, the expenditure is a capital expenditure. It satisfies, I think, the criterion laid down by Lord Cave in *British Insulated* v. *Atherton* (1). The expenditure was incurred "once and for all" and it was incurred for the purpose and with the effect of procuring for the company "the advantage of an enduring benefit." The settlement of the issue raised by the proceedings attacking the rights of the respondents with the object of excluding them from carrying on their undertaking within the limits of the City of Hamilton was, I think, an enduring benefit within the sense of Lord Cave's language. As Lord Macmillan points out in *Van den Berghs Ld.* v. *Clark* (2):

Lord Atkinson indicated that the word "asset" ought not to be confined to "something material" and, in further elucidation of the principle, Romer L.J. has added that the advantage paid for need not be "of a positive character" and may consist in the getting rid of an item of fixed capital that is of an onerous character: *Anglo-Persian Oil Co.* v. *Dale* (3).

The character of the expenditure is for our present purposes, I think, analogous to that of the expenditure in question in *Moore* v. *Hare* (4), where promotion expenses incurred by coalmasters in connection with two parlia-

(1) [1926] A.C. 205 at 213.
(2) [1935] A.C. 431, at 440. (3) [1932] 1 K.B. 146.
(4) 1914-1915 S.C. 91.

mentary bills giving authority to construct a line to serve the coalfield were held to be capital expenditures. Lord Skerrington at p. 99 says:—

> One can figure a case where a firm of coalmasters in the position of the appellants might incur Parliamentary or other preliminary expenses with a view to constructing a railway which was to be the private property of the firm, and which when constructed would be useful and would in fact be used wholly and exclusively for the purposes of their trade as coalmasters. Such expenditure would be of the same legal character as the actual cost of building the railway. It would be capital employed in the firm's trade as coalmasters, and therefore would not be a legitimate deduction from profits.

I do not perceive any distinction between expenditures incurred in procuring the company's by-laws authorizing the undertaking and the expenses incurred in their litigation with the City of Hamilton.

In the ordinary course, it is true, legal expenses are simply current expenditure and deductible as such; but that is not necessarily so. The legal expenses incurred, for example, in procuring authority for reduction of capital were held by the Court of Sessions not to be deductible in *Thomson* v. *Batty* (1).

The appeal should be allowed and the assessment restored with costs throughout.

CROCKET J.—In 1931 the United Gas and Fuel Company of Hamilton, Limited, and the City of Hamilton brought an action in the Supreme Court of Ontario to restrain the respondent from continuing to supply natural gas to the inhabitants of those portions of the City of Hamilton, which prior to the year 1904 formed part of the Township of Barton and subsequently became part of that city. The United Company claimed that by its franchise it had the exclusive right to supply gas in the City of Hamilton, including the annexed districts, and that the by-law of Barton Township granting the respondent a perpetual franchise to supply its inhabitants with natural gas, as it had been doing since 1904, gave it no right to supply gas to the annexed districts or their inhabitants subsequent to their incorporation in the city. The respondent defended the action, which was dismissed by the trial judge. The United Company appealed to the Court of Appeal for Ontario, which confirmed the trial judgment. A further

(1) *Archibald Thomson, Black & Co., Ltd.* v. *Batty*, 1919 S.C. 289.

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appeal to the Judicial Committee of the Privy Council was dismissed in 1934, and in that year the respondent expended the sum of $48,560.94 as costs and expenses in connection with this litigation.

In its income tax return for 1934 the respondent computed its taxable income at $202,326.80 after deducting the said legal expenses. The taxing authorities disallowed this deduction. The respondent appealed to the Minister of National Revenue, who affirmed the disallowance, and then to the Exchequer Court from the Minister's decision, with the result that the appeal was allowed (1).

The respondent contended before the learned President, who heard the appeal in the Exchequer Court, that the amount in question was wholly, exclusively and necessarily expended for the purpose of earning its income, and was not an outlay, loss or replacement of capital or any payment on account of capital, and therefore did not fall within either the prohibition (*a*) or (*b*) of s. 6. The learned President sustained this contention, and the Minister now appeals from that decision.

If we were free to decide this appeal on considerations of practical business sense and equity, or to deduce from decided cases the governing rule, which should be applied in determining whether the respondent was or was not entitled, under the formula prescribed by s. 6 of the Canadian *Income War Tax Act,* to the deduction claimed in computing its assessable profits or gains for the year 1934, I should have no hesitation in adopting the conclusion at which the learned President of the Exchequer Court arrived and the reasons he has given therefor. We are confronted, however, with a recent judgment of the Judicial Committee of the Privy Council in the case of the appeal of *Tata Hydro-Electric Agencies, Ltd., Bombay,* v. *Commissioner of Income Tax, Bombay Presidency and Aden* (2), in which a test, formulated in 1924 by Lord President Clyde of the Scottish Court of Session in the case of *Robert Addie & Sons' Collieries, Ltd.* v. *Commissioners of Inland Revenue* (3), for determining whether a deduction is allowable under practically identical provisions of the English *Income Tax Act, 1918,* is expressly adopted and applied. The English Act of 1918, ch. 40, 8 & 9 Geo. V,

(1) [1940] Ex. C.R. 9; [1940] 2 D.L.R. 357.

(2) [1937] A.C. 685.

(3) 1924 S.C. 231.

by rule 3 of Schedule "D," prohibits deductions in respect of "any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation," or in respect of "any capital withdrawn from, or any sum employed or intended to be employed as capital in such trade," etc., as well as other specified capital expenditures for improvements and the like, the effect of which, as regards this case, it seems to be impossible to distinguish from the prohibitions (*a*) and (*b*) of s. 6 of the Canadian Act. I apprehend, therefore, that the test so distinctly adopted by the Judicial Committee in the *Tata* case (1) is binding upon us. In delivering judgment in the *Addie* case (2), the Lord President of the Court of Sessions said:—

> What is "money wholly and exclusively laid out for the purposes of the trade" is a question which must be determined upon the principles of ordinary commercial trading. It is necessary, accordingly, to attend to the true nature of the expenditure, and to ask oneself the question, Is it a part of the Company's working expenses; is it expenditure laid out as part of the process of profit earning?

Lord Macmillan in delivering the judgment of the Judicial Committee in the *Tata* case (3) quoted this passage and immediately added:

> Adopting this test, their Lordships are of opinion that the deduction claimed by the appellants is inadmissible as not being expenditure incurred solely for the purpose of earning the profits or gains of the business carried on by the appellants.

It should perhaps here be pointed out that in the *Tata* case (4) the deduction claimed was for an amount equal to 25% of the commission earned and received by the appellants as managing agents of the Tata Power Co. Ltd. and of three other electric power companies in India, which proportion of the commission they were required to pay to certain parties under the terms of the agreement by which they had acquired the agency from their predecessors.

The attention of the learned President of the Exchequer Court does not seem to have been called to this case. He did not refer to it in his printed reasons. No mention of it is made either in the appellant's nor in the respondent's factum, though Mr. Varcoe cited it in his argument before us. The learned President discussed the New Zealand case

(1) [1937] A.C. 685.
(2) 1924 S.C. 231, at 235.
(3) [1937] A.C. 685, at 696.
(4) [1937] A.C. 685.

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of *Ward* v. *Commissioner of Taxes* (1), and other cases, on which the appellant had relied in the hearing before him. He quoted extensively from the judgment of Romer, L.J., in *Anglo-Persian Oil Co.* v. *Dale* (2), and seems to have based his judgment that the expenditure in question was deductible under s. 6 of the Canadian Act as a proper charge against revenue rather than against capital upon the law as laid down by Romer, L.J., in the Appeal Court in that case and by Lord Loreburn, L.C., and Lords Macnaghten and Atkinson in *Strong & Co. Ltd.* v. *Woodifield* in the House of Lords (3). In the last named case the House of Lords held that a payment by a brewery company to satisfy a judgment recovered against it for damages and costs for personal injury sustained by a customer sleeping in an inn, owned by the brewery company, owing to the negligence of the company's servants, could not be deducted in computing the company's profits for the purpose of income tax, the loss not being connected with or arising out of the trade and the moneys not having been wholly and exclusively laid out and expended for the purposes of the trade. Lord Loreburn in his speech in support of this judgment used the following language at p. 452 of the report:—

> In my opinion, however, it does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction; for it may be only remotely connected with the trade, or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can be deducted as are connected with in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader. The nature of the trade is to be considered. * * * In the present case I think that the loss sustained by the appellants was not really incidental to their trade as inn-keepers, and fell upon them in their character, not of traders, but of householders.

Lord Macnaghten and Lord Atkinson concurred in the Lord Chancellor's opinion as thus expressed, which, as I read it, lays down the rule that the test as to whether an expenditure is allowable under the English *Income Tax Act* (which was then of the same import as now) is, not whether it was made "as part of the process of profit earning," but whether it was "really incidental to the

(1) [1923] A.C. 145. (2) [1932] 1 K.B. 124.
(3) [1906] A.C. 448.

trade." Lord Davey in his speech in the same case, however, laid down the principle that:—

> It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits.

Singularly enough, it was apparently upon this dictum of Lord Davey, and not that of the Lord Chancellor, concurred in by Lords Macnaghten and Atkinson, that Lord President Clyde of the Court of Session in the *Addie* case (1) formulated the test, which the Judicial Committee adopted 13 years later in the *Tata* case (2). See Lord Clyde's judgment in the Court of Session, Session Cases (1924), at the bottom of p. 235.

In any event, we must now recognize the rule as expressly affirmed by the Judicial Committee of the Privy Council, and determine whether the expenditure in question in this appeal was wholly and exclusively made by the respondent as part of the process of profit earning. Being unable to convince myself that the expenditure falls within this strict formula, I have reluctantly concluded that the appeal must be allowed.

The judgment of Kerwin and Hudson JJ. was delivered by

KERWIN J.—This is an appeal from a judgment of the Exchequer Court (3) allowing an appeal by the Dominion Natural Gas Company Limited from a decision of the Minister of National Revenue whereby the latter disallowed the sum of $48,560.94 claimed by the company as a proper deduction from its income. This sum represents the company's solicitor and client costs in connection with an unsuccessful action brought against it by the United Gas and Fuel Company of Hamilton, Limited. As to that action, it is sufficient to state that the Dominion Company had been supplying gas to the inhabitants of the City of Hamilton for some years and the United Company attacked its right to continue so to do. If the claim had succeeded, the Dominion Company would have lost the franchise it had enjoyed and would have been prevented from earning any income from that part of its assets.

(1) 1924 S.C. 231. (2) [1937] A.C. 685.
(3) [1940] Ex. C.R. 9; [1940] 2 D.L.R. 357.

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The determination of the present dispute depends upon whether certain well-known provisions of the *Income War Tax Act* apply to the payment of the solicitor and client costs. Section 9 of the Act is the charging section and by it a tax is to be assessed, levied and paid upon "income" which by section 3 is defined as meaning "the annual net profit or gain * * * being profits from a trade or commercial or financial or other business or calling." By section 6:—

> In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;
>
> (*b*) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence, except as otherwise provided in this Act.

The appellant does not deny that the costs were properly and reasonably incurred but contends that the payment falls within the prohibitions of both clauses (*a*) and (*b*) and that it must not be considered in fixing the annual net profit or gain.

The cases referred to on the argument deal with expressions used in other statutes and certainly, so far as clause (*a*) is concerned, I have been unable to derive any assistance from them. *Ward and Company, Limited* v. *Commissioner of Taxes* (1) was determined on the wording of the New Zealand Act there in question "in the production of the assessable income." In view of the fact that that wording is less liberal and comprehensive than the wording in our statute "laid out or expended for the purpose of earning the income," the decision is, I think, inapplicable.

However, as to the other two contentions, there are three decisions that may usefully be referred to. The first of these is *Robert Addie & Sons' Collieries Ld.* v. *Commissioners of Inland Revenue* (2), where the Lord President stated (3):—

> What is "money wholly and exclusively laid out for the purposes of the trade" is a question which must be determined upon the principles of ordinary commercial trading. It is necessary, accordingly, to attend to the true nature of the expenditure, and to ask oneself the question, Is it a part of the Company's working expenses; is it expenditure laid out as part of the process of profit earning?

(1) [1923] A.C. 145. (2) 1924 S.C. 231.
(3) At p. 235.

The second is the decision in the House of Lords in *British Insulated and Helsby Cables Ltd.* v. *Atherton* (1). In that case a sum had been irrevocably set aside out of profits as a nucleus of a pension fund, but it was held that the expenditure could not be deducted from the profits. Viscount Cave pointed out that an expenditure though made once and for all may nevertheless be treated as a revenue expenditure but he then added (2):—

> But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital.

This speech of Viscount Cave has been referred to a number of times and particularly in two decisions in the English Court of Appeal, *Mitchell* v. *Noble* (3), and *Anglo-Persian Oil Company* v. *Dale* (4), but it is unnecessary to consider the applicability of either of these.

The third case is *Tata Hydro-Electric Agencies* v. *Commissioner of Income Tax* (5),—valuable, in the present instance, not so much for the actual decision as for the fact that their Lordships quoted with approval the extract from the judgment of the Lord President in *Addie's* case (6) set out above. The test established by him is applicable to the case at bar, and I have concluded that the payment of the costs was not an expenditure laid out as part of the process of profit earning. It was a "payment on account of capital," as it was made (to use Viscount Cave's words) "with a view of preserving an asset or advantage for the enduring benefit of a trade."

The appeal should be allowed and the decision of the Minister re-instated, with costs throughout.

Appeal allowed with costs.

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

Solicitor for the respondent: *Hon. George Lynch-Staunton.*

(1) [1926] A.C. 205.
(2) At p. 213.
(3) [1927] 1 K.B. 719.
(4) [1932] 1 K.B. 124.
(5) [1937] A.C. 685.
(6) 1924 S.C. 231, at 235.

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* Oct. 7, 29.

MARY BRODIE LAING ..... APPELLANT;

AND

THE TORONTO GENERAL TRUSTS CORPORATION ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Appeal—Motion to quash—Nature of judgment appealed from—In essence and in substance a matter of procedure only—Practice or course of Supreme Court of Canada in such cases.

The dismissal of an originating motion in the Supreme Court of Ontario was affirmed by the Court of Appeal for Ontario on the ground that the relief asked for and the matters raised were not matters which could be conveniently and properly considered in such a proceeding and that to enable these matters to be properly considered and dealt with there should be an action commenced by writ; and leave was given to appellant to bring such an action. An appeal was brought to this Court, and respondent moved to quash the appeal for want of jurisdiction.

Held: It is the settled practice, the settled course of this Court, not to interfere with a judgment of that type by the Court of last resort in a province. It is in essence and in substance a matter of procedure only. And it is also the settled course of this Court that when on a motion to quash it plainly appears to the Court that the appeal is one which, if it came on in the regular and ordinary way, must be dismissed, the Court will on that ground quash the appeal. The appeal was accordingly quashed. (No opinion was expressed as to respondent's contention that the judgment appealed from was not a "final judgment" within s. 36 of the *Supreme Court Act*, R.S.C., 1927, c. 35).

MOTION to quash an appeal for want of jurisdiction.

The appellant had applied by way of originating notice of motion in the Supreme Court of Ontario for an order terminating the trust declared in a certain trust deed and for other relief. McFarland J. dismissed the motion with costs. His reasons were:

This application does not come within the provisions of Rule 600. The proper procedure is by action.

The appellant appealed to the Court of Appeal for Ontario. That Court, by its order, dismissed her appeal,

with leave to the appellant to bring an action if so advised, without any expression of opinion by this Court as to the merits.

As to costs, the order of the Court of Appeal provided: that upon the trial of the action, if one is had, the costs of this appeal and of the appellant's motion in the High Court Division be in the

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

discretion of the Trial Judge but so nevertheless that the respondent shall be entitled to its costs of this appeal and of the said motion as between solicitor and client to be paid out of the trust fund, after the taxation thereof.

The reasons of the Court of Appeal (Riddell, Masten and McTague, JJ.A.) were given by Riddell J.A. at the conclusion of the argument as follows:

> We consider this case of some importance; and we think the facts should not be disposed of simply on affidavit—the deponents not being cross-examined and not being seen by the Court.
>
> We think that the facts should be determined by a Judge who sees the witnesses and hears their evidence on examination and cross-examination.
>
> We accordingly dismiss the appeal, with leave to the applicant to bring an action, if so advised, without any expression of opinion on our part. [Costs dealt with in terms as above].
>
> Nothing we have said is to be taken as an adjudication on any point in question, except that we do not deal with it.

The appellant appealed to the Supreme Court of Canada. The present motion was made on behalf of the respondent to quash the appeal for want of jurisdiction. It was contended in support of the motion that the judgment appealed from was not a "final judgment" (within s. 36 of the *Supreme Court Act*, R.S.C., 1927, c. 35); that the question was purely one of practice and procedure; and that no injustice would be done to either of the parties by the quashing of the appeal. These contentions were opposed by appellant's counsel, who also complained of delay in making the motion, much work having been done in the meantime in preparing the Appeal Case.

J. J. Connolly for the motion.

J. M. Laing, contra.

The motion was heard on October 7, 1940, and at the conclusion of the argument, the judgment of the Court was delivered orally, to the effect that the appeal be quashed without costs. (A further direction with respect to costs was made on October 29, 1940, as appears at the end of the reasons *infra*).

THE CHIEF JUSTICE (orally, for the Court)—We have considered the very able argument of Mr. Laing and we have come to the conclusion that this is one of those cases in which it is plain that if the appeal came on for hearing

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in the ordinary way it could not be entertained by the Court, conformably to the course of the Court with regard to such matters.

The Court of Appeal for Ontario has held that the relief asked for, and the matters raised by the originating motion, are not matters which could be conveniently and properly considered by the Supreme Court of Ontario in a proceeding of this kind, and that to enable these matters to be properly considered and dealt with the proceedings ought to be commenced by writ; that is to say, they should be dealt with in a proceeding which is an action for all purposes.

Now, it is the settled practice, the settled course of this Court not to interfere with a judgment of that type by the Court of last resort in a province. It is in essence and in substance a matter of procedure and only a matter of procedure. And it is also the settled course of this Court that when on a motion to quash it plainly appears to the Court that the appeal is one which, if it came on in the regular and ordinary way, must be dismissed, the Court will on that ground quash the appeal.

In the result then, this motion must succeed, but in the circumstances of this case we think there should be no costs either of the motion or in the appeal.

We do not decide any question as to whether in the strict sense the Court would have jurisdiction to entertain this appeal; that is to say, whether there is a final judgment. We express no opinion on that point.

(29th October, 1940)

The order as to costs will be without prejudice to the right, if any, of the Trusts Corporation to apply to the proper tribunal for its costs (taxed as between solicitor and client) to be paid out of the trust fund.

Appeal quashed.

Solicitor for the appellant: *J. M. Laing.*

Solicitors for the respondent: *Malone, Malone & Montgomery.*

JOSEPH P. DIEWOLD (DEFENDANT).....APPELLANT;

AND

PETER J. DIEWOLD (PLAINTIFF).....RESPONDENT.

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* Oct. 15.
* Dec. 20.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Farmers' Creditors Arrangement Act, 1934 (Dom., c. 53)—Sale of land—Action by vendor against purchaser under agreement of sale—Order nisi—Effect of terms thereof—Subsequent formulation and confirmation of proposal by Board of Review under said Act—Validity or invalidity of proposal—Existence or non-existence of a "debt."

Plaintiff, vendor, sued upon an agreement of sale of land on which defendant, purchaser, had made default in payment. Plaintiff claimed: specific performance; payment of arrears and interest due, and, under an acceleration clause, payment of the balance of purchase price; in default of payment, cancellation of the agreement and forfeiture of moneys paid thereunder; immediate possession of the land. Defendant did not defend and plaintiff obtained an order *nisi* which fixed the amount due at $8,804.64, of which $4,104.64 was in arrear; ordered that defendant pay into court by a certain date $4,104.64 and interest and costs to be taxed; that in default of payment the agreement be cancelled and determined and all moneys paid thereunder be forfeited and retained by plaintiff; provided that upon payment of $4,104.64 (the sum in arrear) and interest, defendant be relieved from immediate payment of what had not become payable by lapse of time; and ordered that plaintiff have immediate possession of the land. Subsequently to said order *nisi* and before expiry of the time for payment thereunder, the Board of Review, under the *Farmers' Creditors Arrangement Act, 1934* (Dom., c. 53), formulated a proposal reducing the amount owing to plaintiff and extending the time for payment, which proposal was rejected by plaintiff but confirmed by the Board. Thereafter plaintiff issued a writ of possession, which was executed by the sheriff who placed plaintiff in possession. Defendant moved to set aside the writ of possession. The Local Master dismissed the motion. His order was reversed by Bigelow J. ([1940] 1 W.W.R. 204) but was restored by the Court of Appeal for Saskatchewan ([1940] 1 W.W.R. 657). Defendant appealed.

Held: Defendant's appeal should be dismissed. At the time when the Board formulated and confirmed its proposal, there was no "debt" owing by defendant to plaintiff within the meaning of the Act, and therefore defendant was not entitled to the benefits of the Act. When plaintiff elected to take out a judgment in the form in which he did in the order *nisi*, he ceased to have any personal right against defendant. Sec. 11 (1) of the Act did not aid defendant. After the order *nisi* the plaintiff's position was negative, that of defendant, if he wished to retain the land, was positive. Plaintiff had the title to the land and an order for possession. Defendant had no title and no rights unless he actively did what the order *nisi* called for.

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

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APPEAL by the defendant from the judgment of the Court of Appeal for Saskatchewan (1) which (reversing an order of Bigelow J. in chambers (2)) held that, after the issue of a certain order *nisi* obtained by the plaintiff in a certain action upon an agreement for sale of land (in which agreement the plaintiff was the vendor and the defendant the purchaser), there was no "debt" owing by the defendant to the plaintiff within the meaning of the *Farmers' Creditors Arrangement Act, 1934* (Dom., c. 53), and therefore a certain proposal formulated and confirmed by the Board of Review under said Act subsequent to the said order *nisi* was a nullity, as the agreement in question was then outside the Board's jurisdiction. The order of the Court of Appeal restored an order of the Local Master dismissing defendant's motion for an order vacating and rescinding a writ of possession of the land issued by the plaintiff. The material facts of the case are more particularly set out in the reasons for judgment of this Court now reported, and are indicated in the above head-note. Special leave to appeal to this Court was granted by the Court of Appeal for Saskatchewan. By the judgment of this Court now reported the appeal was dismissed with costs.

F. P. Varcoe K.C. for the appellant.

R. M. Balfour for the respondent.

The judgment of the Court was delivered by

HUDSON J.—The question in this appeal is whether or not the appellant is entitled to the benefits provided by the *Farmers' Creditors Arrangement Act, 1934,* and amendments. On the 4th of December, 1933, the respondent agreed in writing to sell farm lands in Saskatchewan to the appellant for the sum of $7,500, payable $300 cash, $500 a year for a number of years and a final payment in 1947, with interest in the meantime at the rate of 7%. The appellant covenanted to pay these sums and also taxes. The agreement contained an acceleration clause by which, in case of default, the total amount should become payable at once. Default was made in payment of various sums and on the 18th

(1) [1940] 1 W.W.R. 657; [1940] 2 D.L.R. 499.
(2) [1940] 1 W.W.R. 204; [1940] 1 D.L.R. 712.

of October, 1938, the respondent commenced an action, alleging that there was due under the agreement as of 1st October, 1938, the sum of $8,804.64, and claiming specific performance of the agreement, payment of the said sum with interest and, in default of payment, cancellation of the agreement and forfeiture of all moneys paid thereunder and, lastly, immediate possession of the lands.

The appellant did not defend and on the 10th of November, 1938, the respondent recovered a judgment in the form of what is called an order *nisi*, whereby the amount due in respect of principal and interest under the agreement was fixed at $8,804.64, of which sum $4,104.64 was in arrears. It further ordered the defendant to pay into court to the credit of the cause on or before the 19th day of February, 1939, the said sum together with interest thereon, and costs to be taxed. It was further ordered that in default of payment into court as aforesaid the agreement should be cancelled and determined and that all moneys paid thereunder by defendant to the plaintiff be forfeited and retained by the plaintiff. There was a proviso, however, that on payment of $4,104.64, the sum in arrears, together with interest, the defendant should be released from immediate payment of so much of the purchase money as may not have become payable by lapse of time. It was further ordered that the plaintiff should have immediate possession of the lands. There was also a provision for rectification of the name of one of the parties, which is not material to the question here involved.

It is important at this point to determine the rights of the parties upon the signing of this judgment. It is clear that the defendant ceased to have right to the possession of the land. It is also clear that he had a right to the restoration of his position as purchaser under the agreement of sale upon payment of the sum of $4,104.64, with interest and costs, and the right to acquire title to the land on payment of the total sum due, providing one or other of these payments was made within the time prescribed by the order of the court, or such extension as might thereafter be given.

The plaintiff became entitled to immediate possession of the land and he had and retained title to the land,

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subject only to the right of the defendant to the restoration of his possession as purchaser under the agreement, on payment of the sum or sums above mentioned.

There remains the question of whether or not the vendor still retained any right to collect the moneys theretofore due under the agreement of sale from the defendant personally. It was held by the learned judges in the court below that he had no longer any such right because he had elected to take the judgment for cancellation. In arriving at this conclusion, it is stated by Mr. Justice Gordon, speaking for the court, that in his opinion this was the effect of the judgment of this court in the case of *Davidson* v. *Sharpe* (1), and a decision of the Saskatchewan Court of Appeal delivered by the late Mr. Justice Lamont in a later case of *Primeau and Imperial Lumber Yards Ltd.* v. *Meagher* (2). Mr. Justice Gordon further states that

> the practice in this Province has been settled for many years and in my view the plaintiff elected to take an order for the determination of his agreement with the defendant when he took out the order *nisi* in its present form.

It was contended on behalf of the appellant that the decisions referred to could not be held to deprive the vendor of a right to collect until after the expiration of the time provided by the order or judgment for final payment. On consideration, it seems to me that the conclusion reached by the learned judges in the Court of Appeal is well founded, and that when the respondent elected to take out a judgment in the form in which he did, he ceased to have any personal right against the appellant.

Subsequently to this order *nisi* and before the time for payment prescribed by the judgment had expired, the Board of Review under the *Farmers' Creditors Arrangement Act* formulated a proposal for submission to the defendant and the plaintiff, who was said by the court below to have been the only creditor of the defendant. This proposal reduced the amount owing to the plaintiff under his agreement for sale to $3,000 as of January 1st, 1939, and extended the payments for ten years. The plaintiff having rejected this proposal, it was confirmed by the Board on February 21st, 1939. Thereafter, the plaintiff issued a writ of possession and this was executed by the

(1) (1920) 60 Can. S.C.R. 72. (2) [1923] 3 W.W.R. 1308..

sheriff, who placed the plaintiff in possession. Following this, there was a motion to set aside the writ before the Local Master, who dismissed same. The defendant appealed to the Judge in Chambers and this application was heard before Mr. Justice Bigelow who allowed the appeal and set aside the writ. From that decision, the plaintiff appealed to the Court of Appeal, where his appeal was allowed as above stated.

The defendant contends that section 7 of the *Farmers' Creditors Arrangement Act* gives the Board of Review authority to formulate the rights of plaintiffs and argued that there was a debt owing by the defendant to the plaintiff. The preamble of the Act states in part as follows:

> Whereas * * * it is necessary to provide means whereby compromises or rearrangements may be effected of *debts of farmers* who are unable to pay.

The word "debt" is not defined by the *Farmers' Creditors Arrangement Act* or the *Bankruptcy Act,* but subsection 2 of section 2 of the *Farmers' Creditors Arrangement Act* provides that expressions in the Act shall be given the same meaning as in the *Bankruptcy Act,* unless it is otherwise provided or the context otherwise requires. The word "debt" is defined in Stroud's Judicial Dictionary as "a sum payable in respect of a liquidated money demand, recoverable by action," and I think that this definition can be accepted as applicable here.

By section 9 of the *Farmers' Creditors Arrangement Act* it is provided that subsection 5 of section 16 of the *Bankruptcy Act* shall not apply in the case of a proposal for a composition, extension or scheme of arrangement made by any farmer. Now, section 16, subsections 1 and 5, provide:

> The court shall, before approving the proposal, hear a report of the trustee as to the terms thereof, and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor.
>
> * * *
>
> 5. No composition, extension or scheme shall be approved by the court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of a bankrupt or authorized assignor.

It was argued that the fact that subsection 5 was expressly excluded had some bearing on the interpretation of the

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Act before us, but this I cannot see. In the argument before us, special reliance was placed on section 11 (1) of the *Farmers' Creditors Arrangement Act* as follows:

> On the filing with the Official Receiver of a proposal, no creditor whether secured or unsecured, shall have any remedy against the property or person of the debtor, or shall commence or continue any proceedings under the *Bankruptcy Act*, or any action, execution or other proceedings for the recovery of a debt provable in bankruptcy, or the realization of any security unless with leave of the court and on such terms as the court may impose; Provided, however, that the stay of proceedings herein provided shall only be effective until the date of the final disposition of the proposal.

Special emphasis was placed on the words "or any action, execution or other proceedings for the recovery of a debt provable in bankruptcy, *or the realization of any security unless with leave of the court.*" Now it seems to me that this section does not aid the appellant in the present case.

After the judgment of the court, the position of the respondent was negative, that of the appellant, if he wished to retain his land, was positive. The respondent had the title to the land and he also had an order for possession. The appellant had no title and no rights unless he actively did what the judgment called for.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *P. G. Hodges.*

Solicitors for the respondent: *Balfour, Hoffman & Balfour.*

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* Feb. 6, 7.
* Nov. 6.

E. SWAIN AND OTHERS (RESPONDENTS) ... APPELLANTS;

AND

HIS MAJESTY THE KING, EX RELATIONE ADOLPH STUDER (PROSECUTOR) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Mines and minerals—Lapse and reinstatement of claims—Conditions of—Mineral claims staked and subsequently forfeited—Order of reinstatement by the Minister—Right of intervening applicant, who had restaked same claims, to mandamus to compel recording of his application by Mining Recorder—The Mineral Resources Act, 1931, c. 16, s. 10, 22 and Regulations 39, 54, 55, 66, 132.

* PRESENT:—Rinfret, Crocket, Davis, Kerwin and Hudson JJ.

Some mineral claims were, in 1937, staked and recorded and subsequently transferred into the name of Mun Syndicate, one of the appellants. By reason of the failure of the latter to comply with the conditions prescribed by the regulations under *The Mineral Resources Act* of Saskatchewan, these claims had become forfeited in the summer of 1938 and were thus open for restaking. Later, in the month of September, 1938, the prosecutor Studer, associated with two others, all of whom held miners' licences, restaked the claims; and applications by them to have the claims recorded in their names, together with assignments thereof by his associates to him, were filed on October 12th, 1938, at the sub-recording office at Prince Albert and the necessary fee was paid. These applications reached the mining recorder at Regina on October 13th, 1938. The pertinent regulation provides that the date upon which the documents are "received in the office of the mining recorder shall govern, and shall be considered the date of the application." Meanwhile, the Mun Syndicate had become active and had secured from the Minister on October 11th, 1938, an order under section 22 of the Act and section 66 of the regulations, reviving their claims to the property. The order of reinstatement expressly stated that it was subject to section 22, which provides that the revesting of rights which have been forfeited or lost shall be subject to the rights intervening between the default and the order of the Minister. This order was then recorded, so that, when Studer's application arrived at the Mining Recorder's Office, the situation was that the Mun Syndicate again stood in the record as the holders of the claim in good standing, subject only to the conditions specified. The Mining Recorder, now the appellant Swain, rejected the applications of the prosecutor Studer on the ground already stated that the prior holders had been reinstated on October 11th, 1938. The prosecutor Studer then applied for a prerogative writ of *mandamus* to compel the appellant Swain, Mining Recorder, to record and enter the name of Studer as holder of the mineral claims in question, his expressed object being to obtain a record of his claims so that he would have the necessary status to maintain an action, against the reinstated claimants, to establish his rights. The trial judge granted the order applied for, which judgment was affirmed by a majority of the Court of Appeal.

Held, Davis and Kerwin JJ. dissenting, that the appeal should be allowed, the judgments of the courts below be set aside, and the writ of *mandamus* discharged, but, under the circumstances of the case, without costs to any party.

Per Rinfret, Crocket and Hudson JJ.—The remedy sought on behalf of Studer was to compel the Recorder in his official quality to record his name as holder of the mineral claims, that is, to do a ministerial act, not to decide a dispute, much less to rule on the legality or propriety of an act of his Minister. The motion for *mandamus* was based on the assumption that Studer would not have an adequate remedy in an action commenced by writ, until he had been first duly recorded as a holder, which assumption has found acceptance in the courts below. But there is no reason in principle why a lack of entry of Studer's name should be a bar to an ordinary action to enforce any such rights as he is entitled to in the matter. Such rights were the very kind of rights which were intended to be preserved by section 22 of the *Mineral Resources Act,* and were preserved by the order of the Minister.

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Per Davis J. (dissenting).—The only remedy sought by the respondent Studer in this case was to have recorded in his name in the books of the Mining Recorder the restaking by him, or by those under whom he claimed, of the mining lands in question in this case, and Studer was entitled to such a remedy. These claims had become forfeited due to the absence of any record of the necessary assessment work required to keep the claims alive, subject to the provisions of section 22 of the statute. But the restaking or relocation was done by Studer after the default and before the order had been made under that section by the Minister. At least fifteen days were made available by the regulations for recording that staking and the fifteen days had not elapsed before the date of the Minister's order. Therefore, notwithstanding the Minister's order relieving against the forfeiture, the restaking of the claims in the interval entitle the licensee Studer to have a record of the staking made in the Recorder's Office. The order of the Minister was not only on its face but by the force of section 22 of the statute subject to that intervening right, while the refusal to record the staking was definitely put by the Mining Recorder upon the ground that "the former claims covering the same area had been reinstated."

Per Kerwin J. (dissenting)—The respondent Studer, having staked claims that were at the time open, could not, under the circumstances, litigate his rights as against the members of the Mun Syndicate without first acquiring a record. Studer could not do this unless it is held that the Mining Recorder had no discretion to decline to receive the application and record it. In view of the fact that the claims were open and the staking done by the respondent Studer before the order was made by the Minister, section 22 of the statute applies, and the interest or rights forfeited or lost are to be revested in the person so relieved, "but subject, however, to any intervening right of any person arising subsequent to the default sought to be remedied and prior to the order of the Minister." The order of the Court of Appeal, granting respondent Studer's application for *mandamus* and thus affording him the opportunity to litigate the rights he claimed, should be upheld.

Osborne v. *Morgan* (13 App. Cas. 227), *Hartley* v. *Maston* (32 Can. S.C.R. 644); *Mutchmore* v. *Davis* (14 Grant 346); *Farmer* v. *Livingstone* (8 Can. S.C.R. 140); *McPhee* v. *Box* ([1937] S.C.R. 385); *Re Massey Mfg. Co.* (13 Ont. A.R. 446) and *Minister of Finance of B.C.* v. *Andler* ([1935] S.C.R. 278) discussed.

APPEAL from a judgment of the Court of Appeal for Saskatchewan (1), affirming a judgment of the trial judge, Embury J. (2) and granting an application for a prerogative writ of *mandamus* to compel the appellant Swain, Supervisor of Mines and Mining Recorder for the province of Saskatchewan, to record and enter in the name of the respondent Studer eight applications for the record of mineral claims.

(1) [1939] 2 W.W.R. 401. (2) [1939] 1 W.W.R. 705.

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. E. Doerr K.C. for the appellants.

J. G. Diefenbaker K.C. for the respondent Studer.

E. G. Gowling for the respondent The Mun Syndicate.

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

HUDSON J.—In this case a motion was made on behalf of the prosecutor Studer before Mr. Justice Embury, for a *mandamus* requiring the appellant Swain, a Supervisor of Mines and Mining Recorder for Saskatchewan, to record and enter in the name of Studer the eight mineral claims in question. Mr. Justice Embury granted the order applied for, with one qualification, which in the view I take of this matter need not be discussed.

On appeal, the Court of Appeal, by a majority of two to one, decided that the *mandamus* should issue without any such qualification. It is from that decision that the present appeal is brought.

It is desirable here to make clear exactly what aid was sought on behalf of Studer. It was to compel the Recorder in his official capacity to record the name of Studer as holder of these claims, that is, to do a ministerial act, not to decide a dispute, much less to rule on the legality or propriety of an act of his Minister. It was simply to enter Studer's name in the record as holder. This is the position taken on behalf of the prosecutor in the court below, as pointed out by Chief Justice Turgeon:

> No relief is claimed against any person other than the Mining Recorder and the only claim of the respondent is that the Mining Recorder be compelled to discharge the legal obligation resting upon him; and that the respondent have executed in his favour, those public duties to which he has a legal right.
>
> It again becomes necessary to point out that the nature of relief prayed for in the present instance is relief against the Mining Recorder, and against the Mining Recorder only. The other parties are joined merely for the purpose of giving them notice of the proceedings.

The position taken before this Court is substantially the same.

The material facts relevant to this issue may be stated briefly. In 1937, the claims in question had been staked

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and recorded and subsequently transferred into the name of Mun Syndicate, parties to these proceedings. By reason of the failure of Mun Syndicate to comply with the conditions prescribed by the regulations, the claims had become forfeited in the summer of 1938. During the time when these claims were still in good standing, Studer had something to do with them and was quite familiar with the property. Later, in the month of September, he, Studer, satisfied himself that the forfeiture had taken place and that the claims were open for staking. He then proceeded, associated with two others, all of whom held Miners' Licences, to restake these claims, and the rights of the others were subsequently transferred to him. On October 3rd, 1938, the Mining Recorder advised him by letter as follows:—

> Concerning the mineral claims named "Contact" and "Golden Bean Nos. 1 to 16, inclusive," these have now all lapsed and are, therefore, available to the first eligible applicant, so that if you want them and providing they have not already been staked you should go ahead to secure such of this property as you deem necessary to round out your holdings.

On October 12th, 1938, Studer presented at the office of the District Superintendent of Mines at Prince Albert an application to have the claims recorded in his name and paid the necessary fee. This was accepted by the District Superintendent but Mining Regulation 45 provides:

> The record of a mineral claim shall be made at the office of the Mining Recorder, but the application may be made to a district superintendent or a sub-recorder, to be forwarded to the mining recorder. The date upon which the application and the fee may be received in the office of the mining recorder, however, shall govern, and shall be considered the date of the application.

The duty of the District Superintendent was to forward Studer's application to the office of the Recorder at Regina, and this was done.

Meanwhile, the Mun Syndicate had become active and had secured from the Minister on October 11th, an order reviving their claims to the property in the following language:

> Pursuant to the power vested in me by authority of Section 66 of the Quartz Mining Regulations, under The Mineral Resources Act, I do hereby order that the Mineral Claims known as "Contact Nos. 1, 2, 3 and 4" be reinstated and the rights forfeited be revested in the former owner subject to Section 22 of The Mineral Resources Act.

A similar order was made in respect of the other claims now in question in this matter. Section 22 of the Act provided that any such reinstatement was to be subject to

> any intervening right of any person arising subsequent to the default sought to be remedied and prior to the order of the Minister.

This order of the Minister was then recorded; so the position when Studer's application arrived at the Mining Recorder's office was that the Mun Syndicate again stood in the record as the holders of the claims in good standing, subject only to the conditions specified. Studer was advised of this position and, after some correspondence, the present proceedings were commenced.

Neither the statute nor the regulations, as I read them, make any provision for placing in the register at the same time the names of two persons with competitive claims, and I agree with the views of Chief Justice Turgeon, that a reading of all of the rules make it quite clear that such was never the intention.

The motion for *mandamus* is based on the assumption that Studer would not have an adequate remedy in an action commenced by writ, until he had been first duly recorded as a holder. This assumption has found acceptance in the court below. It is based on a number of decisions following that of the Judicial Committee in *Osborne* v. *Morgan* (1). The head-note in the report of that decision is as follows:—

> In an action by the holders of "miners' rights" issued to them under the Gold Fields Act 1874 and regulations made thereunder, to set aside the defendants' mining leases also thereunder granted on the grounds (1) that they had been granted contrary to sect. 11 within two years from the proclamation of the goldfield within which the leased areas were contained; (2) that the formalities prescribed by the regulations had not been observed by the defendants when applying therefor:—
>
> Held, that neither under the Act nor otherwise had the plaintiffs any right to interfere with the lessees' possession. Sect. 9 gave them no rights whatever as against lands let by the Crown, and no title to try the validity of Crown leases relating thereto; and the whole tenor of the regulations is opposed to such contention.

The miners' rights, which were all that the plaintiffs held, corresponded with the mining licence held by Studer in the present case. It gave a right to the holder to stake, occupy and work mining properties owned by the Crown, subject to regulations. It did not refer to any specific

(1) (1888) 13 App. Cas. 227.

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land. The defendants had a lease from the Crown and were in possession and working the property. The plaintiffs alleged that this lease was invalid and improperly held and that, therefore, the property should be open to them to stake and brought their action on this basis. The Judicial Committee said that under these circumstances the plaintiffs had no status to attack the defendants' title.

The circumstances in that case were of course very different from the position here. According to Studer's claim, the Mun Syndicate were neither in actual nor in constructive possession at the time. Their right to be there had been forfeited, and while this continued he, Studer, was rightfully entitled to enter on the land and stake it according to the regulations, and he so did and duly presented an application within the time prescribed by such regulations. The only reason why his application was not accepted was that the Mun Syndicate had meanwhile been restored to the record as holder, subject to intervening rights.

The case of *Hartley* v. *Maston* (1) was decided on the authority of *Osborne* v. *Morgan* (2). The facts were very similar. The defendants there had a hydraulic lease of mineral lands in existence and they were in occupation of the land. The plaintiffs entered upon the lands and staked claims and, in their action, alleged that the hydraulic mining lease was invalid. Mr. Justice Davies, who gave the principal judgment in the case, said at page 647:

> I agree substantially with the judgment of the Gold Commissioner, Mr. Senkler. I do not think that the mere fact of the appellants, as free miners, entering upon lands already leased by the Crown and professing to locate claims there gave them any right or interest in the lands, or any status to come into court and ask for any declaration with respect to the validity of a prior lease from the Crown of those very lands.
>
> To attain such a status mere "staking" is not sufficient. They must go further and obtain from the mining recorder their placer grants.

In the judgment of Mr. Senkler, approved of by Mr. Justice Davies, Mr. Senkler says:—

> It appears in this case that the appellants entered upon the lands occupied by the respondents under a lease from the Minister of the Interior. They had no right to do this, and their right to bring this protest is based upon the fact that they are free miners only and the fact of their being free miners does not carry with it any legal or equitable interest in the ground in dispute.

(1) (1902) 32 Can. S.C.R. 644. (2) (1888) 13 App. Cas. 227.

He followed the decision in *Osborne* v. *Morgan* (1), and further referred to the cases of *Mutchmore* v. *Davis* (2), and *Farmer* v. *Livingstone* (3). The present case is distinguishable from that of *Hartley* v. *Maston* (4) for the same reason as from that of *Osborne* v. *Morgan* (1). The determining facts in both of those cases were possession by, and priority of title in, the defendants.

In *McPhee* v. *Box* (5), the facts were somewhat similar, although not identical with those in the present case, and there this Court refused to grant a *mandamus*. The question under immediate discussion here was left open.

I can see no reason in principle why a lack of entry of Studer's name should be a bar to an ordinary action to enforce any such rights as he is entitled to in the matter. Such rights were the very kind of rights which were intended to be preserved by section 22 of the *Mineral Resources Act,* and were preserved by the order of the Minister.

I concur in the views expressed in the court below that the proper authorities should consider the advisability of clarifying the regulations.

I would allow the appeal and set aside the judgments below and discharge the writ of *mandamus* but, under the circumstances, without costs to any party.

DAVIS J. (dissenting)—The relator Adolph Studer became entitled to have recorded in his name on the books of the Mining Recorder the staking of the mining lands in question. The contention of the appellants that *mandamus* cannot lie against the Mining Recorder because he is a servant of the Crown is untenable. The Mining Recorder is in a sense a servant of the Crown but his duties are purely ministerial; they involve nothing in the nature of an executive act. He is, in the relevant sense, an agent of the statute to do the things that he is by the statute directed to do, and *mandamus* may properly be directed to him. See *Re Massey Mfg. Co.* (6); *Minister of Finance of B.C.* v. *Andler et al.* (7).

(1) (1888) 13 App. Cas. 227.
(2) (1868) 14 Grant 346.
(3) (1882) 8 Can. S.C.R. 140.
(4) (1902) 32 Can. S.C.R. 644.
(5) [1937] S.C.R. 385.
(6) (1886) 13 Ont. A.R. 446, at 452.
(7) [1935] S.C.R. 278, at 284, 285.

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The mining claims in question had theretofore become forfeited due to the absence of any record of the necessary assessment work required to keep the claims alive. It may not be a strict forfeiture but rather a qualified forfeiture because the statute provides that the holder of a mining claim which has thus become forfeited may within a certain delay obtain relief from the forfeiture and the reinstatement of his claims upon proof that the necessary assessment work has been done. Sec. 22 of *The Mineral Resources Act,* 1931 (ch. 16 of the 1931 Saskatchewan Statutes) is the governing provision and that section is as follows:

> 22. Where forfeiture or loss of rights has occurred, the minister may, within three months after the default or within such further time as the Lieutenant-Governor in Council upon the recommendation of the minister may direct, upon such terms as he deems just, make an order relieving the person in default from such forfeiture or loss of rights, and upon compliance with the terms, if any, so imposed, the interests or rights forfeited or lost shall be revested in the person so relieved, but subject however, to any intervening right of any person arising subsequent to the default sought to be remedied and prior to the order of the Minister.

Now the regulations provide (No. 39) that

> Within fifteen days after a mineral claim has been staked out by a licensee, either on his own behalf or on behalf of another licensee, application for a record of such claim shall be made to the mining recorder, * * *

subject to certain extensions of time having regard to distance; and then by Regulation 54 (1) any licensee

> having duly located and recorded a mineral claim, shall be entitled to hold it for a period of one year, and thence from year to year without the necessity for re-recording * * *

subject to the performance of certain work on the claim. If the amount of the required assessment work is not done and duly recorded within the period of one year, plus a month of grace thereafter, then by Regulation No. 55

> the claim shall lapse, and shall forthwith be open to relocation under these regulations, without any declaration of cancellation or forfeiture on the part of the Crown, subject, however, to the provisions of section 66 of these regulations.

By Regulation No. 66 the Minister may, within three months after such default has occurred, upon such terms as he may deem just, make an order relieving the person in default from such forfeiture or loss of rights.

It may be noted here that the power of the Lieutenant-Governor in Council from time to time to make regulations and orders is limited (by sec. 10 of the statute) to

> such regulations and orders not inconsistent with this Act as are necessary to carry out its provisions according to their obvious intent or to meet cases which may arise and for which no provision is made therein * * *

We must therefore go back to sec. 22 of the statute itself, which stipulates that if forfeiture or loss of rights is relieved against by the Minister, the interests or rights forfeited or lost shall be "revested" in the person so relieved,

> but subject, however, to any intervening right of any person arising subsequent to the default sought to be remedied and prior to the order of the minister.

In this case the restaking or relocation was done after the default and before the order had been made by the Minister. At least fifteen days were made available by the regulations for recording that staking and the fifteen days had not elapsed before the date of the Minister's order. Therefore, notwithstanding the Minister's order relieving against the forfeiture, the restaking of the claims in the interval entitled the licensee to have a record of the staking made in the Recorder's Office. The order of the Minister was not only on its face but by the force of sec. 22 of the statute subject to that intervening right. The refusal to record the staking was definitely put by the Mining Recorder upon the ground that "the former claims covering the same area had been reinstated." The orders of the Minister covering the reinstatement of the several claims, signed by the Deputy Minister, read as follows:

> Pursuant to the power vested in me by authority of Section 66 of the Quartz Mining Regulations, under *The Mineral Resources Act*, I do hereby order that the Mineral Claims known as * * * be reinstated and the rights forfeited be revested in the former owner, subject to Section 22 of *The Mineral Resources Act*.

All that the respondent has sought in these proceedings is to have the restaking by him, or by those under whom he claims, recorded. He is faced with the difficulty that a mere staker of mineral claims may not have a status to assert his claims to the properties until he gets himself on the Record. That difficulty is envisaged as the result of some words by Davies J. in *Hartley* v. *Matson* (1):

(1) (1902) 32 Can. S.C.R. 644, at foot of 647.

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To attain such a status (i.e., to question the validity of a prior lease from the Crown) mere staking is not sufficient. They must go further and obtain from the Mining Recorder their placer grants. If for any reason he refuses to issue such grants then their remedy is by way of *mandamus* to compel him to do his duty. Until they have obtained such grants they are not in a position to attack the defendants' lease.

I see nothing in the objection raised that the respondent had in respect of some of the claims only a transfer of the rights of the licensee or licensees who actually staked some of the properties. They were all licensees entitled to stake but had assigned their rights to the respondent in respect of their particular stakings.

The further objection is taken that the remedy by *mandamus* is not available because of an alternative remedy. Regulation 132 provides that

> any decision of the Mining Engineer, or other officer of the Department, made under any of the provisions of these regulations, shall be subject to an appeal to the Minister.

That regulation however is dealing only with matters of routine departmental decision and was never contemplated to apply to a case such as this.

The order of the Court directing that the record must be made by the Recorder must necessarily be interpreted as made *nunc pro tunc* because the respondent was in time when he made the application which was improperly refused.

In my opinion the appeal should be dismissed.

KERWIN J. (dissenting)—This is an appeal by Mr. E. Swain, Supervisor of Mines for the province of Saskatchewan, the Minister of Natural Resources for the province, and five individuals carrying on a mining syndicate under the name of Mun Syndicate, from the judgment of the Court of Appeal for the province of Saskatchewan. The respondent is His Majesty the King on the relation of Adolph Studer. The proceedings were commenced by Studer applying in the Court of King's Bench of Saskatchewan for a writ of *mandamus* requiring the Supervisor of Mines, who is also the Mining Recorder, to record and enter in Studer's name eight certain mining claims. Mr. Justice Emery, before whom the application came in the first instance, made the order asked, as to certain claims but not as to others. An appeal and cross-appeal being taken from his order, the Court of Appeal directed the

issue of a writ of *mandamus* with reference to the eight claims. The Chief Justice of Saskatchewan, dissenting, would have allowed the appeal and dismissed the application.

Studer desires the issue of the writ in order that he may be recorded as the holder of the claims and thus acquire a status to question the validity of what was done under the following circumstances. The individuals comprising the Mun Syndicate appeared on the record as the owners of the claims (although under different names) but, because of failure to comply with number 54 of the Saskatchewan Regulations for the Disposal of Quartz Mining Claims, the claims lapsed under regulation 55, and in accordance with the provisions of such last-mentioned regulation were "open to relocation" subject to the provisions of regulation 66. Under the latter, the Minister of Natural Resources has power to make an order relieving the person in default.

The respondent, Studer, having ascertained that a lapse had occurred, located the claims and applied, in due form, for registration. His application was filed in the Prince Albert office but under the regulations the effectual filing date was that on which it was received in Mr. Swain's office in Regina, viz., October 13th, 1938. In the meantime, on October 11th, the Minister, purporting to exercise the powers conferred upon him by regulation 66, had made an order relieving the members of the Syndicate from the lapse. The respondent conceives that he has a claim to be recorded and to have the registration of the Syndicate expunged but he has concluded that, in view of the decisions, he has no status to advance such a claim until he appears upon the record.

In *MacPhee* v. *Box* (1), the Court of Appeal for Saskatchewan determined that the plaintiff in that case could not succeed in view of certain decisions. An appeal to this court (2) was dismissed but as appears from the reasons for judgment, upon a rather limited ground. This Court did not endorse the view taken by the Saskatchewan Court of Appeal but no decision upon the point was given.

(1) [1936] 2 W.W.R. 129; [1936] 3 D.L.R. 286.
(2) [1937] S.C.R. 385.

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In the present case, I think the point must be decided and my view is that, having staked claims that were at the time open, the respondent could not, under the circumstances, litigate his rights as against the members of the Syndicate without first acquiring a record. It is obvious that he cannot do this unless we conclude that the Mining Recorder had no discretion to decline to receive the application and record it. In view of the fact that the claims were open and the staking done by the respondent before the order was made by the Minister, section 22 of *The Mineral Resources Act,* chapter 16 of the statutes of 1931, applies, and the interest or rights forfeited or lost are to be revested in the person so relieved

> but subject, however, to any intervening right of any person arising subsequent to the default sought to be remedied and prior to the order of the Minister.

In fact the order is distinctly made subject to section 22.

It is merely to give the respondent an opportunity to litigate the rights he claims that the present application is made and I think the order of the Court of Appeal affording him that opportunity was right. If, of course, the applicant has another remedy at law, the prerogative writ may not issue. It is contended that he had such a right under regulation 132 whereby

> any decision of the mining engineer or other officer of the department, made under any of the provisions of these regulations, shall be subject to an appeal to the minister.

This regulation, however, in my opinion has no bearing upon an appplication to the Mining Recorder to record a person as the holder of a mining claim.

The appeal should be dismissed with costs and the writ issued *nunc pro tunc* as Studer's application was made within the time limited by regulation 39.

Appeal allowed, without costs.

Solicitor for the appellants Swain and The Minister of Natural Resources: *J. E. Doerr.*

Solicitor for the appellant The Mun Syndicate: *E. M. Miller.*

Solicitor for the respondent Studer: *J. G. Diefenbaker.*

HIS MAJESTY THE KING.....APPELLANT; 1940

AND * Oct. 8, 9, 10. * Dec. 20.

HARRY WILMOT .....RESPONDENT.

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

Criminal law—Appeal—Cr. Code, ss. 951 (3), 285 (6), 1023 (2)—Accused charged with manslaughter—Charge arising out of operation of motor vehicle—At trial accused found not guilty of manslaughter but guilty of driving in a manner dangerous to the public—Appeal by Attorney-General of the province dismissed by appellate court (with a dissent on questions of law)—Appeal by Attorney-General to Supreme Court of Canada—Jurisdiction—Whether there was a "judgment or verdict of acquittal" within s. 1023 (2)—Merits—Evidence and findings at trial.

Accused was charged with manslaughter. The charge arose out of the operation of a motor vehicle. The trial judge (sitting without a jury, as permitted by statute applicable to the province) found accused not guilty of manslaughter but, as provided for by s. 951 (3) of the *Cr. Code* (as amended in 1938, c. 44, s.. 45), found him guilty of driving in a manner dangerous to the public, under s. 285 (6) of the *Cr. Code* (as amended *ibid*, s. 16). The Attorney-General for Alberta appealed, asking that the "judgment or verdict of acquittal" at trial on the charge of manslaughter "be set aside and a conviction made in lieu thereof" or that, in the alternative, there be a new trial of accused upon said charge. The appeal was dismissed by the Appellate Division, Alta., (Harvey, C.J., dissenting on questions of law), [1940] 2 W.W.R. 401. The Attorney-General appealed to this Court.

Held: The appeal should be dismissed.

Per Rinfret, Crocket, Kerwin and Taschereau JJ.: The appeal should be quashed for want of jurisdiction.

Per Rinfret J.: Neither of the conditions of a right of appeal to this Court under s. 1023 (2) of the *Cr. Code* (as amended in 1935, c. 56, s. 16) exists; the Appellate Division did not "set aside a conviction" nor "dismiss an appeal against a judgment or verdict of acquittal." The judgment at trial was not an acquittal; it was a conviction upon the charge as laid, in accordance with s. 951 (3) which indicates that a conviction under s. 285 (6) may be the result of a charge of manslaughter arising out of the operation of a motor vehicle. Further, the right of appeal of an Attorney General of a province under s. 1023 (2), as it was only recently given and as criminal statutes should always be construed favourably to the accused, should not be extended beyond the strict terms of the Code.

Per Crocket J.: The judgment of the Appellate Division did not fall within the terms of s. 1023 (2). The clear intendment of s. 951 (3) is that a charge of manslaughter which arises out of the operation of a motor vehicle must be taken to include the offence described

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

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in s. 285 (6) and that the trial tribunal shall have the right, instead of convicting of manslaughter, to find accused guilty, on the manslaughter charge, of the lesser offence. This having been done, it cannot be said that there was "a judgment or verdict of acquittal" in respect of the charge on which accused was tried.

Per Kerwin J.: Though accused was acquitted of the charge of manslaughter, yet it cannot be said that the judgment at trial was "a judgment or verdict of acquittal in respect of an indictable offence" within the meaning of s. 1023 (2) so as to give this Court jurisdiction, particularly in view of the results which otherwise might follow (as set out *infra, per* Taschereau J.).

Per Taschereau J.: A charge of manslaughter arising out of the operation of a motor vehicle includes, by operation of s. 951 (3), a charge under s. 285 (6), though the offence under 285 (6) is not mentioned in the count. When there is an acquittal on said major offence followed with a conviction on said minor offence, it cannot be said that accused has been acquitted on the *charge as laid;* the degree of his guilt is smaller, but he has nevertheless been found guilty. For the purpose of the right of appeal given by s. 1023 (2), the word "acquittal" therein means a complete acquittal in respect of all the offences charged directly or otherwise in the same count. To hold otherwise would have the very extraordinary result that this Court, entertaining the appeal, would undoubtedly have the power to direct a new trial, as a result of which the accused, without having appealed, might be acquitted even of the charge on which he has already been found guilty at the first trial.

The Chief Justice, but for the above weighty concurrence of opinion by four Judges of this Court against this Court's jurisdiction, would have thought that the Appellate Division, Alta., was right in considering the appeal on the merits. He expressed emphatically his opinion that, on a charge such as that in the present case, a jury, having satisfied themselves that the accused, in the language of s. 951 (3), "is not guilty of manslaughter" (which is a condition of their jurisdiction to find the accused guilty of an offence under s. 285 (6)), must pronounce a verdict to that effect and that the accused is entitled to demand such pronouncement; and that such a pronouncement is an acquittal of the accused upon the charge of manslaughter under the indictment. Whether an appeal lies or not may, of course, be another question.

Per Davis J.: The appeal should be dismissed on the merits. On the evidence and the findings at trial, it cannot be said that accused killed the man with whose death he was charged by the indictment.

Per Hudson J.: The appeal should be dismissed on the ground that the trial judge, on proper interpretation of his statements, found that there was not sufficient evidence to satisfy him beyond reasonable doubt that accused caused the death of the deceased and, as a consequence, found accused not guilty of manslaughter.

APPEAL by the Attorney-General for Alberta from the judgment of the Appellate Division of the Supreme Court of Alberta (1) dismissing (Harvey, C.J., dissenting

(1) [1940] 2 W.W.R. 401; [1940] 3 D.L.R. 358.

on questions of law) his appeal from the judgment of Howson J. (sitting without a jury, as permitted by statute applicable to the province) upon the trial of the accused, respondent, on the charge that he "did unlawfully cause the death of one, Charles W. Stout, and did thereby commit manslaughter." It appeared from the evidence and the record that the charge arose out of the operation of a motor vehicle. The trial judge found the accused not guilty of manslaughter but, as provided for by s. 951 (3) of the *Criminal Code* (as amended in 1938, c. 44, s. 45), found him guilty of driving in a manner dangerous to the public under s. 285 (6) of the *Criminal Code* (as amended in 1938, c. 44, s. 16).

In his appeal to the Appellate Division, the Attorney-General asked that the "judgment or verdict of acquittal" at trial on the charge of manslaughter "be set aside and a conviction made in lieu thereof"; or that, in the alternative, there be a new trial of accused upon the said charge. In his appeal to this Court the Attorney-General asked for an order setting aside the judgment of the Appellate Division "and directing that a verdict or judgment of guilty of manslaughter be entered against" accused "in lieu of said verdict of acquittal and the appropriate punishment imposed or in the alternative an order directing a new trial or such other order as may be proper."

On the hearing before this Court the question was raised whether there had been a "judgment or verdict of acquittal" within the meaning of s. 1023 (2) of the *Criminal Code* (as amended in 1935, c. 56, s. 16) so as to give jurisdiction to hear the present appeal; and argument was heard on this point as well as argument on the merits of the appeal.

H. J. Wilson K.C. and *W. S. Gray K.C.* for the appellant.

E. F. Newcombe K.C. for the respondent.

THE CHIEF JUSTICE—The majority of the Court have come to the conclusion that no appeal lies to the Supreme Court of Canada in this case under section 1023 (2). But for the weighty concurrence of opinion on this point by four judges of this Court, I should have thought that the Court of Appeal for Alberta was right in considering the

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appeal on the merits. I do not further pursue the discussion of the question whether an appeal to this Court arises under section 1023 (2).

I am concerned to emphasize one point. Before proceeding to that point it may be as well to note in passing that Mr. Wilson, on behalf of the Attorney-General for Alberta, contended that the proceedings in the trial did not disclose a charge of "manslaughter arising out of the operation of a motor vehicle" and, consequently, that the case did not fall within section 951.

I say nothing about this point. The point I desire to insist upon is this: The enactment under consideration, section 951, subsection 3, provides in the most explicit way that it is a condition of the jurisdiction of the jury to find the accused guilty of an offence under subsection 6 of section 285 that they shall be "satisfied that the accused is not guilty of manslaughter." In the present case the accused was charged with manslaughter *simpliciter*. I can have no doubt that the jury, having satisfied themselves that the accused, in the language of the section, "is not guilty of manslaughter," must pronounce a verdict to that effect and that the accused is entitled to demand such pronouncement. Nor have I any doubt that such a pronouncement is an acquittal of the accused upon the charge of manslaughter under the indictment. Whether an appeal lies or not may, of course, be another question.

RINFRET J.—I am of opinion that this appeal must be quashed for want of jurisdiction in this Court.

The appeal is asserted by the Attorney-General of the province of Alberta against the judgment of the Appellate Division of the Supreme Court of that province, which affirmed the judgment of Howson, J., finding the respondent guilty "of driving to the public danger," under sec. 285, subs. 6, of the *Criminal Code*.

The charge laid against the respondent was that he "did unlawfully cause the death of one, Charles W. Stout, and did thereby commit manslaughter"; and it appears from the evidence and the record that such charge of manslaughter arose out of the operation of a motor vehicle.

Upon that charge, the trial judge, being satisfied that the accused was not guilty of manslaughter, but was guilty

of an offence under subs. 6 of sec. 285 above mentioned, found him (as he could do under subs. 3 of s. 951 of the *Criminal Code*) guilty of the lesser offence.

The case was then carried to the Appellate Division of Alberta by the Attorney-General, apparently taking advantage of subs. 4 of sec. 1013 of the Code, by force of which

> the Attorney-General shall have the right to appeal to the court of appeal against any judgment or verdict of acquittal of a trial court in respect of an indictable offence on any ground of appeal which involves a question of law alone.

The Court of Appeal merely confirmed the judgment condemning the respondent. It is not necessary to consider whether the right of appeal in this particular case was competently asserted before that Court.

The Attorney-General then appealed from the two concurrent judgments to the Supreme Court of Canada.

Now, the right of the Attorney-General of the province to appeal to this Court, in a case such as this, is regulated by subs. 2 of sec. 1023 of the Code. Under that subsection, the Attorney-General may appeal to this Court only

> from the judgment of any court of appeal setting aside a conviction or dismissing an appeal against a judgment or verdict of acquittal in respect of an indictable offence on an appeal taken under section ten hundred and thirteen on any question of law on which there has been dissent in the Court of Appeal.

It is, therefore, apparent that the right of appeal by the Attorney-General under the above subsection is strictly dependent upon the existence of one of two conditions: Either a judgment of the Court of Appeal setting aside a conviction; or a judgment of a Court of Appeal dismissing an appeal against a judgment or verdict of acquittal.

Neither of these conditions exists here.

The conviction against the respondent has not been set aside but, on the contrary, it was affirmed by the Court of Appeal.

Nor was there a dismissal of an appeal against a judgment or verdict of acquittal.

The respondent was not acquitted either by the trial judge or by the Court of Appeal.

When the informer laid his charge against the respondent, and upon the charge as laid, he was praying, no doubt, for a conviction of manslaughter; but he was also praying, in the alternative, by force of subs. 3 of sec. 951, for a conviction of an offence under subs. 6 of sec. 285.

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And, as a matter of fact, he got the alternative condemnation, or, in other words, he got one of the two things that he had been asking for. Upon the charge as laid, and upon that alone, the respondent was not acquitted, but he was found guilty of having driven his motor vehicle on a highway in a manner which was dangerous to the public, in accordance with the provisions of subsection 6 of sec. 285. There has been no judgment of acquittal, either by the trial judge or by the Court of Appeal, from which it was open to the Attorney-General to bring an appeal to the Supreme Court of Canada.

Subs. 3 of sec. 951 of the *Criminal Code* was introduced in 1930 by ch. 11, sec. 25, of the Statutes of Canada of that year, though in a different form.

The amendment thus introduced stated in terms that

> Upon a charge of manslaughter arising out of the operation of a motor vehicle the jury may find the accused not guilty of manslaughter but guilty of criminal negligence under section two hundred and eighty-four, and such conviction shall be a bar to further prosecution for any offence arising out of the same facts.

Later, in the amendment so made, sec. 285 (6) was substituted for sec. 284.

As a result, the situation in the present case, it seems to me, was as follows:

The accident happened. It was a single occurrence. There was only one set of facts. The informer laid his charge and therein described the occurrence as a manslaughter, without more. But I cannot close my eyes to the fact that, upon the evidence and the record, it was, if at all, a "manslaughter arising out of the operation of a motor vehicle." This, to my mind, brought the charge within the terms of subs. 3 of s. 951 of the *Criminal Code.*

After having heard the witnesses, the trial judge was "satisfied that the accused was not guilty of manslaughter but was guilty of an offence under subsection six of section two hundred and eighty-five." By force of section 951 (3) of the Code, the trial judge could then find the accused guilty of the lesser offence. And that is what he did. Parliament itself indicates in that subsection that a conviction under subs. 6 of s. 285 may be the result of a charge of manslaughter arising out of the operation of a motor vehicle. The trial judge could find the accused guilty of

the lesser offence upon the charge as laid, as a consequence of that single occurrence and upon the evidence of the single set of facts leading to it. By the will of Parliament as expressed in sec. 951 (3), the conviction for the lesser offence was one of the two convictions which the trial judge had the power to make. The judgment of the trial judge, therefore, cannot be styled an acquittal within the meaning of s. 1023 (2) of the *Criminal Code*. It was, and it is, a conviction upon the charge as laid, in accordance with the provisions of sec. 951 (3). By the very terms of that subsection, "such conviction shall be a bar to further prosecution for any offence arising out of the same facts." As a consequence of that provision of the Code, should the accused be later confronted with a charge of manslaughter based upon the same occurrence, he could plead *autrefois convict;* and that plea would have to be maintained upon the plain terms of that section of the Code.

The respondent has, therefore, been convicted upon the charge as laid; and I cannot look upon the judgment now submitted to our Court as being an acquittal in the sense that it may give the Attorney-General a right of appeal to this Court under the provisions of subs. 2 of s. 1023.

In connection with the above, one must recall that it is only recently that the Attorney-General of a province was given the right of appeal under sec. 1023; and, both on that account and because criminal statutes should always be construed favourably to the accused, I do not think the right of appeal of the Attorney-General should be extended beyond the strict terms of the Code.

It follows that the present appeal was not competently asserted and that this Court is lacking of the jurisdiction required to entertain the appeal.

Under these circumstances, the appeal must be quashed.

CROCKET J.—The accused was tried on an indictment for the single offence of manslaughter before Mr. Justice Howson. Such an indictment may be tried in Alberta without a jury, if the accused so elects, under certain unrepealed provisions of the old *North West Territories Act* still in force in that province.

S. 951, subs. 3, of the *Criminal Code* provides that:

> Upon a charge of manslaughter arising out of the operation of a motor vehicle the jury, if they are satisfied that the accused is not guilty

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of manslaughter but is guilty of an offence under subsection 6 of section 285, may find him guilty of that offence, and such conviction shall be a bar to further prosecution for any offence arising out of the same facts.

It is not questioned that this enactment applies to a trial before a Supreme Court Judge in Alberta sitting without a jury, or that the manslaughter charge in the present case arose out of the operation of a motor vehicle. The trial judge specifically found the accused guilty of driving an automobile in a manner dangerous to the public contrary to the provisions of s. 285 (6), and not guilty of manslaughter.

The Attorney-General appealed to the Court of Appeal, which merely confirmed the conviction, the Chief Justice dissenting, and this is the judgment which it is now sought to challenge in this Court under the provisions of s. 1023 (2) of the *Criminal Code* on the point or points of law raised in the dissenting opinion of the learned Chief Justice.

It was contended by counsel for the accused that the judgment of the Court of Appeal does not fall within the terms of subs. 2 of s. 1023 of the Code and that no appeal therefore lies to this Court.

I think this objection is well taken. This Court is authorized by the subsection to hear an appeal at the instance of the Attorney-General of a Province from the judgment of a provincial Court of Appeal only if the judgment is one which sets aside a conviction or dismisses "an appeal against a judgment or verdict of acquittal in respect of an indictable offence." That such conviction, or judgment or verdict of acquittal, as the case may be, must necessarily be upon the charge or indictment upon which the accused has been tried by the trial court, is obvious, for assuredly no accused person could either be convicted or acquitted "in respect of" any indictable offence which was not included in the charge or indictment to which he was required to plead. The clear intendment of s. 951 (3), to my mind, is that a charge of manslaughter which arises out of the operation of a motor vehicle must be taken to include the offence of driving a motor vehicle on a street, road, highway or other public place recklessly or in a manner which is dangerous to the public, as described in s. 285 (6) of the *Criminal Code*, and that the trial tribunal shall have the right, instead

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of convicting the accused of the principal offence of manslaughter, to find him guilty upon that charge of the lesser offence against s. 285 (6). This is what the trial judge did in the present case, he being satisfied that the accused was not guilty of manslaughter, but was guilty under the manslaughter indictment of the latter offence. The learned judge certainly could not have convicted the accused, under the indictment he was trying, of both manslaughter and an offence against s. 285 (6). He could only find him guilty of one or the other, and having found him guilty of the lesser offence, it cannot, in my judgment, rightly be said that there was "a judgment or verdict of acquittal" in respect of the charge upon which the accused was tried; otherwise his conviction for the subordinate offence would not be a bar to his further prosecution for manslaughter or any other offence arising out of the same facts, as the last clause of s. 951 (3) explicitly provides it shall be.

For these reasons I am of opinion that the judgment of the Court of Appeal does not fall within the ambit of s. 1023 (2) and that this appeal therefrom should be quashed for want of jurisdiction.

DAVIS J.—The question of the jurisdiction of this Court to entertain the appeal of the Attorney-General of Alberta, turning on the point of some nicety as to whether or not there was an "acquittal" within the meaning of sec. 1023 (2) of the *Criminal Code* in that while the accused was found not guilty of the charge of manslaughter laid in the indictment he was found guilty under sec. 285 (6) of the lesser offence of driving his motor car to the public danger, was raised by a member of the Court during the argument of the merits of the appeal. I am not prepared, without a full and considered argument of a point of such importance and widespread effect, to dispose of the difficult question involved. Suffice it to say that at present I have much doubt as to the objection to jurisdiction but, in my view of the appeal, it becomes unnecessary to determine the point.

I would dismiss the appeal on the merits. Too much emphasis has been put in this case, I think, upon the difficulties of definition of the crime of manslaughter in running-down cases. *Andrews* v. *Director of Public Prosecutions* (1). The first and fundamental question, not

(1) [1937] A.C. 576.

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touched by such difficulties, is whether or not the accused killed the unfortunate man with whose death he is charged by the indictment. That is a question of fact. Upon the evidence it is plain that the accused was driving his motor car in an easterly direction up a hill on a public highway in the suburb of Alberta Park, near the city of Calgary. It was about eight o'clock on a clear evening, May 30th, 1939. The trial judge found as a fact that the accused was travelling at a moderate rate of speed. On going up the hill the accused had run over the centre line but the trial judge found that the car was only "a little north" of the centre line—"a small amount"—"somewhat but not greatly" on the north side of the centre line. The deceased, a man within a few days of his 67th birthday, was at the same time riding a bicycle along the highway in the opposite direction. He was carrying empty beer bottles, which it had been his custom to collect and sell for a living, in a pasteboard box placed in a metal basket which was fastened to his bicycle in front of the handlebars. The accused said that when he saw the man on the bicycle come over the hill the bicycle was swerving along the road and that he, the accused, applied his brakes. Hodges, an eye witness called by the Crown, testified that the motor car "was either actually stopped or practically stopped at the moment of the impact." The trial judge found that the man on the bicycle swerved or wavered on his bicycle into the left-hand front corner of the motor car. The left front headlight of the motor car was broken and the windshield of the car was caved in. The unfortunate man died shortly thereafter from hemorrhage of the brain due to a fractured skull, and the driver of the motor car was charged with manslaughter.

The accused was tried by a judge of the Supreme Court of Alberta, without a jury, as permitted by the *North West Territories Act* of 1886 made applicable by the *Alberta Criminal Procedure Act*, 1930, Dom., ch. 12. The trial judge found the accused was not guilty of manslaughter and the Court of Appeal of Alberta affirmed that judgment, Harvey, C.J., dissenting.

There was evidence that the accused was under the influence of liquor at the time and on that evidence the learned trial judge found him guilty under sec. 285 (6) of the lesser offence of driving his car to the public danger. No appeal was taken from that conviction.

In my opinion, it cannot be said on the evidence and the findings that the accused killed the man on the bicycle, and on that ground I should dismiss the appeal.

KERWIN J.—I thought, and still think, that the accused was acquitted of the charge of manslaughter. I was at first inclined to the view that we had jurisdiction. Further consideration, however, and particularly the results (set out in the judgment of my brother Taschereau) that would follow from a decision that this Court had jurisdiction have now convinced me that this was not "a judgment or verdict of acquittal in respect of an indictable offence" within the meaning of subsection 2 of section 1023 of the *Criminal Code*. I would therefore dismiss the appeal for want of jurisdiction.

HUDSON J.—As I interpret the remarks of the learned trial judge, he found that there was not sufficient evidence to satisfy him beyond reasonable doubt that the accused caused the death of the deceased and, as a consequence, found the accused not guilty of manslaughter.

On this ground, I would dismiss the appeal.

I am inclined to agree that this Court has no jurisdiction, but as the question was raised only by a member of the Court during the argument, I would prefer to leave it open for further discussion.

TASCHEREAU J.—On the 27th of November, 1939, the respondent, Harry Wilmot, was charged before Mr. Justice Howson of the Supreme Court of Alberta of having unlawfully caused by the operation of a motor vehicle the death of Charles W. Stout, thereby committing the crime of manslaughter. In a very elaborate judgment, the trial judge found the accused not guilty of manslaughter, but found him guilty of driving in a manner dangerous to the public, having regard to all the circumstances of the case.

The section of the *Criminal Code* which authorizes the jury to find the accused guilty of the lesser offence reads as follows:—

951. (3) Upon a charge of manslaughter arising out of the operation of a motor vehicle the jury, if they are satisfied that the accused is not guilty of manslaughter but is guilty of an offence under subsection six of section two hundred and eighty-five may find him guilty of that offence, and such conviction shall be a bar to further prosecution for any offence arising out of the same facts.

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Section 285 (6) says:—

> Every one who drives a motor vehicle on a street, road, highway or other public place recklessly, or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the street, road, highway or place, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on such street, road, highway or place, shall be guilty of an offence and liable * * *

The Crown appealed to the Court of Appeal for Alberta and the judgment was affirmed, Chief Justice Harvey dissenting on a question of law. The Attorney-General of Alberta now appeals to this Court and submits that in law, the respondent should not have been convicted of the lesser offence mentioned in section 285 (6) but of manslaughter.

During the argument the question of jurisdiction of the Court was raised. The right given to the Attorney-General of a province to appeal to the Supreme Court of Canada is found in section 1023 (2) of the *Criminal Code* which is in the following terms:—

> (2) The Attorney-General of the province may appeal to the Supreme Court of Canada from the judgment of any court of appeal setting aside a conviction or dismissing an appeal against a judgment or verdict of acquittal in respect of an indictable offence on an appeal taken under section ten hundred and thirteen on any question of law on which there has been dissent in the Court of Appeal.

The law strictly limits the rights of the Attorney-General to appeal and they can be summarized as follows:

The Attorney-General may appeal:

1. From the judgment of a court of appeal setting aside a conviction;
2. From the judgment of a court of appeal dismissing an appeal against a verdict of acquittal.

It is, therefore, only when the accused has been acquitted that the Crown may appeal to this Court. In the present case, the accused has been acquitted of the charge of manslaughter, but he has been found guilty under section 285 (6) of the offence of driving an automobile in a manner dangerous to the public, and this conviction has been affirmed by the Court of Appeal.

Upon a charge of manslaughter arising out of the operation of a motor vehicle, three verdicts may be rendered: 1o. guilty of manslaughter, 2o. guilty under section 285 (6), and 3o. not guilty.

The power of the Court to convict of a lesser offence upon a charge of manslaughter arising out of the operation of a motor vehicle, was originally given in 1930, when it was said that the accused could be found guilty of criminal negligence under section 284, *Cr. C.* In 1938 (Chap. 44, section 45) the law was amended, and we now have section 951 (3), *Cr. C.*, which clearly says that the lesser offence on a charge of manslaughter arising out of the operation of a motor vehicle is the offence found in section 285 (6).

By the operation of the law, the lesser offence is included in the count, and a charge of manslaughter arising out of the operation of a motor vehicle, therefore, includes a charge under section 285 (6), although this last offence is not mentioned in the count. When there is an acquittal on the major offence followed with a conviction on the minor offence, it cannot be said that the accused has been acquitted on the *charge as laid.* The degree of his guilt is smaller, but he has nevertheless been found guilty.

To my mind, the law requires a complete acquittal in respect of all the offences charged directly or otherwise in the same count, in order to allow the Attorney-General to appeal to this Court.

To hold different views would, in my opinion, lead us to a very extraordinary result. This Court, if it did come to the conclusion that it has jurisdiction to entertain this appeal, would undoubtedly have the power to direct a new trial, and as a result of which the accused, without having appealed, might be acquitted, even of the charge on which he has already been found guilty at the first trial.

I, therefore, have to come to the conclusion that the respondent has not been acquitted within the meaning of section 1023 (2), that this Court has no jurisdiction to hear this appeal, and that it should be quashed.

Appeal dismissed.

Solicitor for the appellant: *Attorney-General for Alberta.*

Solicitors for the respondent: *Short, Ross, Shaw & Mayhood.*

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* May 13, 14.
* Nov. 18.

PORT COLBORNE & ST. LAWRENCE NAVIGATION COMPANY LIMITED (PLAINTIFF)

AND

THE MASTER, OFFICERS, MEMBERS OF THE CREW, AND PASSENGERS OF THE SS. *Benmaple* (ADDITIONAL PLAINTIFFS)..... } APPELLANTS;

AND

THE SHIP *Lafayette*, AND HER OWNERS, LA COMPAGNIE GÉNÉRALE TRANSATLANTIQUE (DEFENDANTS AND COUNTER-CLAIMANTS)..... } RESPONDENTS.

MAPLE LEAF MILLING COMPANY LIMITED AND OTHERS (PLAINTIFFS) } APPELLANTS;

AND

THE SHIP *Lafayette* (DEFENDANT).... RESPONDENT.

ON APPEALS FROM THE EXCHEQUER COURT OF CANADA

Shipping—Collision in St. Lawrence River during fog—Whether proper fog signals given—Whether either one or both ships at fault—Moderate speed in fog—Article 16 of International Rules of the Road—Apportionment of blame on each vessel by trial judge—Alteration of it by appellate courts.

The appellant, Port Colborne & St. Lawrence Navigation Company, Limited, were owners of the SS. *Benmaple,* which sank as a result of a collision between her and the ship *Lafayette,* owned by the respondent, La Compagnie Générale Transatlantique. The collision occurred at about five o'clock in the morning of August 31st, 1936, in the St. Lawrence river, about 25 miles above Father Point, where the *Lafayette* had taken a pilot. There was a dense fog and neither ship saw the other until almost the moment of the collision, apparently too late to avoid it. The *Lafayette,* about ten minutes before the collision, heard an ordinary fog whistle ahead, slightly on her port bow. Up to that time, she had been running through the fog for some 35 minutes at a "standby full speed" which, for her, was about 16 knots "over the ground." The tide was ebb about 2 to 3 knots against her. When the *Lafayette* heard the fog signal, the only one she alleged she did hear, she stopped her engines for three minutes, but the ship still continued running along at about 5 or 6 knots over the ground. Then she went ahead at slow speed for two minutes and then increased to half speed for about five minutes when the collision occurred. The trial judge found that the logs on the *Lafayette* plainly appeared to have been erased and falsified at critical points.

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

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Subsequent to the action in damages by the owners of the *Benmaple* against the ship *Lafayette,* the master and other officers and members of the crew of the *Benmaple* and four passengers on board the steamer were added as plaintiffs for loss of clothing and personal effects. La Compagnie Générale Transatlantique also filed a counterclaim against the owners of the *Benmaple* for $75,000 for damage caused to the ship *Lafayette* by the collision. Another action was taken against the *Lafayette* by Maple Leaf Milling Company, Limited and other owners of cargo or goods laden on the *Benmaple.* The trial judge, Demers J., Judge in Admiralty, hearing the case with two assessors, held that there was no doubt as to the fault on the part of the *Benmaple;* that the *Lafayette* also contributed to the accident, she having been wrong in going half speed before ascertaining that there was no danger from the other ship; and the trial judge apportioned fault three-quarters against the *Benmaple* and one-quarter against the *Lafayette.* On appeal to the Exchequer Court of Canada, Angers J., assisted by one assessor, held that the fault was wholly that of the *Benmaple* and that, even assuming that the *Lafayette's* speed was too great, that was not the proximate cause of the accident, and the actions were dismissed.

Held, Crocket J. dissenting, that there was no doubt as to the fault on the part of the *Lafayette* as well as on the part of the *Benmaple,* as found by the trial judge and that such finding should not have been disturbed on appeal to the Exchequer Court of Canada.

Per the Chief Justice and Davis J.—Under the circumstances of this case, it is plain that the *Lafayette* should have stopped when she heard the first fog signal until she had ascertained "with certainty" what was the position of the ship from which the signal had come.—Comments as to what constitutes a moderate speed in fog; as to the duty of a ship to stop and then navigate with caution until the danger of a collision is over; and as to the question of altering the apportionment of blame on each vessel as fixed by the trial judge.

Per Crocket J. (dissenting):—The vital issue in the case is a question of fact as to whether the fog signals of the *Benmaple* were sounded at regular intervals after the first signal heard by the *Lafayette;* and the trial judge misdirected himself in holding that he was obliged to accept the affirmative testimony of the *Benmaple's* witnesses that they were sounded rather than the negative testimony of the *Lafayette's* witnesses that they were not, following the rule of evidence that the positive or affirmative testimony as to whether a thing did or did not happen should be accepted rather than the negative testimony. Therefore, the judge in appeal was justified in disregarding the trial finding upon that vital issue and himself concluding upon the evidence that the *Lafayette* was not at fault: her act of increasing her speed from slow to half was attributable, not to any negligence on her own part, but solely to the negligent failure of the *Benmaple* to regularly sound her fog signals for a period of at least five minutes.

Judgment of the Exchequer Court of Canada ([1939] Ex. C.R. 355) reversed, Crocket J. dissenting.

APPEALS (heard together before this Court) from the judgments of the Exchequer Court of Canada, Angers

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J. (1), reversing the judgments of the District Judge in Admiralty for the Quebec Admiralty District, Demers D.J.A. (2) and holding that all the actions by the several plaintiffs should be dismissed and that the respondents' counter-claim should be maintained.

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

R. C. Holden K.C. for the appellants.

Lucien Beauregard K.C. for the respondents.

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

DAVIS J.—The appeals in these cases were heard together and arise out of a collision between two ships in the St. Lawrence river at about five o'clock in the morning of August 31st, 1936. The appellants Port Colborne & St. Lawrence Navigation Company, Limited, were owners of the *Benmaple,* which sank as a result of the collision. She was a steel single screw steamer of the Canadian canal type of construction, about 250 feet in length with a beam of about 43 feet and a gross tonnage of about 1,729. She was carrying a heavy cargo of flour and feed and was on her way down the river from Montreal to Halifax. The respondents, La Compagnie Générale Transatlantique, are the owners of the *Lafayette*—a large French passenger motor vessel of a gross tonnage of 25,000 with a net registered tonnage of 14,430. She is a ship over 600 feet in length. The *Lafayette* was coming up the river on an excursion trip from Boston to Quebec. The collision occurred about 25 miles above Father Point where the *Lafayette* had taken on a pilot. There was a dense fog and it is plain that neither ship saw the other until almost the moment of the collision. The *Lafayette* cut into the *Benmaple's* stern about 33 feet, going from starboard to port and from stem to stern, and swinging the *Benmaple* right around. Within about an hour the *Benmaple* with her full cargo sank.

The vital fact in the case, and it is not in dispute, is that the *Lafayette* heard a fog whistle ahead, slightly on

(1) [1939] Ex. C.R. 355. (2) [1938] Ex. C.R. 10.

her port bow, about ten minutes before the collision. It was an ordinary fog signal. Up to that time she had been running through the fog for some 35 minutes at what the witnesses termed "standby full speed" which, for the *Lafayette,* is about 16 knots "over the ground." The tide was ebb about 2 to 3 knots against the *Lafayette.* When the *Lafayette* heard the fog signal (the only one she did hear if any other was given until she was right upon the *Benmaple*) she stopped her engines for three minutes. But the stopping of her engines for such a short time did not mean that the ship stopped going ahead; it appears to have left the ship running along at about 5 or 6 knots over the ground. The *Lafayette,* after stopping her engines for three minutes, then went ahead at slow speed for two minutes and then increased to half speed for about five minutes when the collision occurred. She had heard no further fog signals but when there suddenly appeared on her port bow a white masthead light on an approaching ship (it turned out to be on the *Benmaple*) the Lafayette turned 15 degrees up to the moment of impact. What the appellants say is that on all the authorities the speed of the *Lafayette* was a very serious matter. It is rather apparent that the *Lafayette's* witnesses at the trial endeavoured to keep down the speed of the ship and to extend the range of visibility. The logs on the *Lafayette* plainly appear to have been erased and falsified at critical points as found by the trial judge.

Demers J., the learned district Judge in Admiralty for Quebec, who heard the case with two assessors, said he had no doubt as to fault on the part of the *Benmaple.* She did not have a pilot and while not bound by law to have one she did not follow the usual course of ships going down the Gulf of St. Lawrence. She was not sufficiently manned and the captain failed to meet his responsibilities. Further, the trial judge found that those on board the *Benmaple* were not keeping a proper lookout. The *Lafayette* was equipped with an exceptionally strong diaphone whistle which was placed forward of the funnel and the fog signals of the *Lafayette* were given at regular intervals and were always heard by the officer of the *Daghild,* another ship which was going up the river at the time and which the *Lafayette* had overtaken two or three miles before the collision.

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The trial judge said that he had more difficulty in determining the question whether the *Lafayette* was also in fault. The only serious reproach, he said, was that she violated article 16 of the International Rules of the Road. But he pointed out that she did not entirely disregard the rule; if she had and continued at full speed, very likely nothing would have happened. She started to obey the rule. Hearing a signal, she stopped for three minutes and nothing more being heard, she started to slow for two minutes and then she started at half speed. She was so going for one or two minutes when she saw the *Benmaple* at a distance of between 500 and 1,000 feet. Her engines were stopped and reversed. The learned trial judge then put to himself the question: "Was half speed a reasonable speed?" On the evidence he reached the conclusion that a vessel in such a fog should have been stopped until it could be ascertained with certainty what the position of the *Benmaple* was and what she was doing, and in failing to do so, the *Lafayette* was wrong in going half speed before ascertaining that there was no danger from the other ship. The trial judge was satisfied that the *Lafayette's* neglect contributed to the accident and he apportioned fault three-quarters against the *Benmaple* and one-quarter against the *Lafayette,* and therefore only gave the *Benmaple's* owners and co-plaintiffs one-quarter of their damages without costs. From that judgment the *Lafayette* appealed to the Exchequer Court of Canada and the present appellants, the *Benmaple* and the owners of her cargo, gave notice of a cross appeal asking for an equal division of fault. Angers J. heard the appeal and he came to the conclusion that the fault was wholly that of the *Benmaple,* allowed the appeal and dismissed the actions. From his judgment the *Benmaple* and the owners of her cargo appealed to this Court, asking for the restoration of the trial judgment with a variation to the extent of holding the *Lafayette* equally to blame with the *Benmaple* and condemning her to pay to the appellants one-half of their damages and full costs. Certain members of the crew and the parents of a deceased member of the crew intervened in the actions but when the actions were dismissed by Angers J. they did not carry their interventions to this Court.

Angers J., on appeal, while not inclined to think that the *Lafayette* proceeded at an immoderate speed after stopping her engines for three minutes and then proceeding at slow speed for two minutes, and then at half speed, held even if her speed was too great, that was not the proximate cause of the accident.

> If the *Lafayette* had continued to proceed at slow speed, the damages would very likely have been less serious. I do not think, however, that this is a sufficient reason to hold the *Lafayette* partly responsible for the damages incurred, as, in my opinion, the collision could and would have been avoided had the *Benmaple* given regular fog signals and kept a proper lookout.

For this reason the learned judge on appeal exonerated the *Lafayette* from any fault causing or contributing to the collision.

Mr. Holden for the appellants admitted at once that there was fault on the part of the *Benmaple* in that its speed was not "moderate" as required by article 16 of the International Rules of the Road, but contended, as the trial judge found, that there was clearly fault also on the part of the *Lafayette;* that Angers J. had no just ground for disturbing that finding of the trial judge; and that on the evidence taken as a whole the apportionment of fault should have been an equal division. Mr. Holden's submission was that the *Lafayette* cannot be exonerated: (1) because up to 4.52 a.m. the *Lafayette* by going ahead at full speed in dense fog was guilty of travelling at an immoderate speed; (2) that any ship in a dense fog after hearing even one fog signal ought not to go ahead even at half speed—that was not cautious; (3) that Demers J. in making the apportionment did not take into account the speed of the *Lafayette* before the first whistle but only the speed after it was heard; and if the trial judge had given that aspect of the case its proper weight he could not and would not have put 75 per cent of the blame on the *Benmaple* as against 25 per cent on the *Lafayette.*

The evidence satisfies us that the two ships did not come head to head but that the *Benmaple's* direction was rather that of crossing the other's course. One can only roughly estimate the angle of the collision. While the witnesses no doubt give their best recollection as to the distances in feet between the two ships when each observed the other, it is plain that the ships were practically on top

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of one another at that time. Taking the speed of the two vessels travelling in opposite directions it is estimated by Mr. Holden that their combined speed was about 1,750 feet in a minute and from the various distances of separation given by the several witnesses it would probably be only a matter of seconds when each ship suddenly endeavoured to avoid the other.

There was undoubtedly a thick fog and when the *Lafayette* finally saw the *Benmaple* her orders were: "Stop. Hard to starboard. Full astern." These orders were given almost all at once. Mr. Holden referred to the automatic course recorder as conclusive against the *Lafayette* having stopped. It is contended that she could have stopped in 2·44 minutes but Mr. Holden argued that the chart shows that she could not have been dead in two and a half minutes. I now quote article 16 of the International Rules of the Road:

> Article 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

Now what constitutes a moderate speed in fog? In the House of Lords in *The Oceanic* (1), Lord Halsbury at p. 380 said this:

> Apart from any rule, one would think that where it was known that two bodies were approaching, and that there was no absolute means of knowing the direction in which they were coming and the danger which was to be avoided, the common sense thing would be to stop until the direction was ascertained, and also whether it was possible to avoid the serious danger which might arise.

Lord Shand added, at p. 380:

> It is not denied that the *Kincora* was to blame, and the question now is whether she was solely to blame. The *Oceanic* seems to possess a remarkable stopping power, and it was said that that power of stopping justified the speed at which she was going.. I have come to the opinion after the full arguments which we heard that taking that power of stopping into account, the *Oceanic,* nevertheless, was not going at a moderate speed having regard to the circumstances of the case. The power of stopping within a short distance is no doubt a material circumstance to be taken into account in such a question as this, but here the fog was so thick that the power of stopping was not timeously exercised. As it was not timeously exercised the way on the vessel was such that she by her speed conduced to the collision, and so the *Oceanic* was also, in my opinion, to blame.

(1) (1903) 9 Asp. Mar. Cas. (N.S.) 378.

As to the duty to stop and then navigate with caution until the danger of a collision is over, a leading case is *The Chinkiang* in the Privy Council (1). The judgment was delivered by Sir Gorell Barnes. Their Lordships were clearly of opinion that, having regard to the weather and the circumstances of the case, the ship

> was not proceeding at a moderate speed, and that her excessive speed was a contributing cause to the collision in question.

Dealing with article 16 of the International Regulations,

> Their Lordships cannot consider that the speed which was upon the vessel in this case was such as to comply with the terms of art. 16.

The judgment continues (at p. 259):

> after hearing the first whistle * * * it is notorious that it is a matter of the very greatest difficulty to make out the direction and distance of a whistle heard in a fog, and that it is almost impossible to rely with certainty on being able to determine the precise bearing and distance of a fog signal when it is heard.

and goes on to say that the ship should know "unequivocally and distinctly what was the position" and that the engines

> ought to have been stopped until it could be, with certainty, ascertained what the position of the *Chinkiang* was, and what she was doing.

In 1934 in the Privy Council in *Nippon Yusen Kaisha* v. *The China Navigation Co. Ltd.* (2), Lord Macmillan said, at pp. 534 and 535:

> The result is that their Lordships are of opinion that the *Kiangsu* was in breach of Regulation 16 by reason of her failure to stop her engines * * * She cannot be absolved from a share in the blame for the collision. Their Lordships cannot too emphatically express their sense of the importance of implicit obedience to the regulations on whose observance navigators are entitled at all times to rely.

At the close of the argument of counsel for the respondent the case came down for discussion very much to what was the distance between the two ships when the *Lafayette* first sighted the *Benmaple.* In fact I asked specifically for an answer to that question because it seemed to me that the closer the one ship was put to the other, the stronger became the inference that the five men on the bridge of the *Lafayette* plus two additional lookouts must either have been inattentive if they did not see the *Benmaple* until they were right on top of her, or, that the fog must have been so dense that they could not

(1) [1908] A.C. 251. (2) (1934) 18 Asp. Mar. Cas. (N.S.) 533.

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see her until they were right on top of her, in which case great caution should have been taken in navigating. Mr. Beauregard answered the question by saying in terms of time it was between a minute and two minutes and then translated that into distance, making, as Mr. Holden did, the combined speed of the two ships travelling in opposite directions at about 1,750 feet per minute, although Mr. Beauregard preferred to state that as the maximum. Mr. Justice Demers had said:

* * * when she (i.e. the *Lafayette*) saw the *Benmaple* at a distance of between five hundred and one thousand feet * * *

Mr. Justice Angers put it at 1,000 feet. No matter what the exact distance may have been, it is plain that it was a very short distance but Mr. Beauregard, in a clear and forcible argument, contended that if there was any immoderate speed on the part of the *Lafayette* which might be said to be a breach of article 16, such speed on the facts of this case did not cause or contribute to the collision. It was merely collateral and immaterial, he said.

On the whole case we think it is plain that the *Lafayette* should have stopped when she heard the first fog signal until she had ascertained "with certainty" what was the position of the ship from which the signal had come. There can be no question, we think, of fault on the part of the *Lafayette* as well as on the part of the *Benmaple* and that was the finding of the trial judge, assisted by two assessors. With the greatest respect I can find no ground upon which the learned Judge in the Exchequer Court of Canada on appeal, assisted by one assessor, should have disturbed the finding of liability.

We were pressed by counsel for the appellant, if we came to the above conclusion on the question of liability, to apportion the blame on an equal division rather than on the division of 25 and 75 per cent fixed by the trial judge. But upon the question of altering the share of responsibility Lord Buckmaster in the House of Lords in SS. *Kitano Maru* v. SS. *Otranto* (1) (and his judgment was concurred in by all the other Law Lords who sat upon the appeal) said:

* * * this is primarily a matter for the judge at the trial, and unless there is some error in law or fact in his judgment it ought not to be disturbed.

(1) [1931] A.C. 194, at 204.

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The Luso (1) was an appeal in the Court of Appeal before Lord Justice Scrutton, Lord Justice Greer and Lord Justice Maugham (as he then was). That was a collision case and the only thing in dispute was the measure of apportionment of the damage. Lord Justice Scrutton, after referring to *The Glorious* (2), *The Karamea* (3), and *The Peter Benoit* (4), said (at p. 165):

> The learned Judge below having two admissions from the two sides, has apportioned the damage between them, making certain findings as to the reliability of the evidence given by the two sides, and has apportioned the damage 75 per cent on the Latvian ship and 25 per cent on the Portuguese ship, and before the Court of Appeal ought to interfere with that finding they must be able to put their finger on something and say that the learned Judge has been wrong on some particular point and that that particular point is so substantial that if he had taken what we say is the right view of it he must have altered the proportion of damage.

Lord Justice Greer at p. 166 said:

> It is not an easy problem to set a tribunal of fact to measure the amount of fault there is in the navigation of two ships, but the statute (*Maritime Conventions Act*, 1911, sect. 1 (1)) puts it upon the tribunal to decide that question, and where it is more or less in every case a question of degree, it is right to say that on only very rare occasions is it that the Court of Appeal ought to reverse the decision of the learned Judge, if there is any ground on which there can be established a difference of fault of the two vessels in collision.

We have come to the conclusion that the learned trial judge was justified in his view that there were different degrees of fault of the two vessels in collision and we are not satisfied that in making the apportionment he did he was in any degree acting either on any wrong ground of law or conclusion of fact.

The appeals should be allowed, the judgments of Angers J. set aside and the judgments of Demers J. at the trial restored. The appellants should have their costs of the appeal in the Exchequer Court and in this Court.

CROCKET J. (dissenting)—These actions arose out of a collision, which occurred in the River St. Lawrence at a point 6 or 7 miles west of Bicquette Island about five o'clock a.m. (daylight time), on August 31st, 1936, between the *Benmaple* and the *Lafayette*. The *Benmaple* was a steel single screw steamer of the Canadian canal type with

(1) (1934) 49 Lloyd L.R. 163.
(2) (1932) 44 Lloyd L.R. 321.
(3) (1920) 5 Lloyd L.R. 253; (1921) 9 Lloyd L.R. 375.
(4) (1915) 84 L.J.P. 87.

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triple expansion steam engines. She was 250·1 feet in length and 43 feet in beam and of a net registered tonnage of 1,074, and was on a trip from Montreal to Halifax with a cargo of flour, feed and other general cargo. The *Lafayette* was a motor steel passenger vessel with a length of 184 meters, a width of 26 meters and a net registered tonnage of 14,430 tons. She was equipped with four Diesel engines, her maximum speed being about 17 knots. She was on an excursion trip from Boston to Quebec. For some hours before the collision foggy weather of varying thickness had prevailed in the river between Quebec and Father Point, and the trial judge found that, while the crew of the *Lafayette* saw the *Benmaple* at a distance of between 500 and 1,000 feet, the crew of the *Benmaple* did not see the *Lafayette* until she was within a distance of 50 feet of the motor ship, bearing slightly on the *Benmaple's* starboard bow. It was apparently then too late to avoid the collision. Both vessels at the moment the *Benmaple's* white masthead light was first seen by the *Lafayette* were going at half speed, which, making due allowance for the one moving against the current and tide and the other with it, meant a speed of 9 knots (over the ground) for the *Lafayette* and at least 8½ knots for the *Benmaple.* Notwithstanding that the powerful engines of the *Lafayette* were immediately stopped and reversed to full speed astern, and the helm put hard astarboard, she struck the *Benmaple,* cut through the forecastle and main decks for a distance of 33 feet, and turned her completely around. The *Benmaple* sank with her cargo in a little more than an hour, all 19 members of her crew except one sailor having been rescued by one of the *Lafayette's* life boats.

The actions were tried before Mr. Justice Demers, Local Judge in Admiralty for the district of Quebec, sitting with two assessors. The learned judge held the *Lafayette* one-quarter and the *Benmaple* three-quarters to blame for the collision and rendered judgment accordingly, condemning the *Lafayette* and her bail to pay one-quarter of the plaintiffs' damages and awarding the defendants three-quarters of their damages on their counter-claim, without costs to any of the parties, and with a reference to the Registrar to assess the damages on that basis.

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The defendants appealed from the trial judgment to the Exchequer Court of Canada and the plaintiffs cross-appealed, claiming that the trial judgment should be varied so as to hold the *Lafayette* at least equally to blame with the *Benmaple* for the collision. The result was that the defendants' appeal was allowed, the plaintiffs' action dismissed with costs and the defendants' counter-claim maintained, and a reference to the District Registrar ordered for the assessment of the defendants' damages only.

The one ground, on which the learned trial judge found the *Lafayette* in part to blame for the collision, was that after she had stopped for three minutes upon hearing a fog signal from a ship ahead, which proved to be the *Benmaple,* and then proceeding slow for two minutes, she went to half speed again before ascertaining that there was no danger from the other ship. Other than this he found no negligence of any kind on the part of the *Lafayette.* "Nobody denies," he said,

> that the ship was well manned. Her officers were all on the alert. Her fog whistle was in operation with regularity. There were seven persons on the bridge exercising a vigil and there were two additional lookouts. The master and the staff were all at their posts.

On the other hand, with respect to the *Benmaple,* which admittedly had no pilot, he found in effect that this lack was not made up by the presence of officers, who were conversant with all the difficulties of navigation in that stretch of the river, and that as a result she did not follow the usual course of outgoing ships. The undisputed and admitted fact was that the master of the *Benmaple* had retired to his cabin below the pilot house about midnight, undressed and went to sleep, and continued to sleep until he was awakened by the collision, and that during all this time the vessel was in charge of a master mariner, 64 years of age, who had been on duty for approximately 17 hours except for a few moments' rest, and who the trial judge, in his reasons, described as being deaf. The learned trial judge explicitly found that the master failed to meet his responsibilities, and, moreover, that those on board the *Benmaple* were not keeping a proper look-out.

The appellant, while of course impugning the validity of the Exchequer Court of Canada judgment in exonerating the *Lafayette* from all blame, makes no pretension on this appeal that the trial judge was not fully warranted

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in finding that the *Benmaple* was guilty of negligence, which materially contributed to the collision, but it does contend, as it did in the Exchequer Court of Canada, that it should not be saddled with more than fifty per cent of the responsibility, and that the trial judgment should be varied accordingly. The respondent on the other hand directly challenges, as it did in the Exchequer Court of Canada, the trial finding that the *Lafayette* was at fault in starting her engines at half speed in the circumstances described by the presiding judge before ascertaining that there was no danger ahead. Herein, it seems to me, lies the crux of the problem presented by this appeal—the main issue upon which the trial judge and Angers J. differed.

That the question whether or not the *Benmaple,* in addition to the other grounds of negligence found against her by the trial judge, failed also to properly sound her fog whistle at regular intervals was a matter of first importance in determining whether the *Lafayette* violated its duty in ordering her engines from slow to half speed when she did, goes, I think, without saying. It could hardly be doubted, as pointed out by Angers J., that if the *Lafayette* had heard another signal before the expiry of the three minutes during which her engines were stopped, she would have kept them stopped, and not gone on. No one, I think, can read the learned trial judge's reasons without seeing that he was keenly alive to this fact. Indeed these considered reasons seem to me directly to point to the probability that, had he not felt obliged to accept the affirmative testimony of the *Benmaple's* witnesses that her fog signals were being regularly sounded rather than the negative testimony of the *Lafayette's* witnesses that they were not, he would have exonerated the *Lafayette* from all blame. His finding on this question of the *Benmaple's* signals was the only finding of fact, which the learned judge on appeal does not seem to have followed; and as to this the trial judge says:—

> I must now come to the question of signals. There is positive evidence by the *Benmaple* that they were regularly given. My assessors are of the opinion that they were not. They base their opinion on the fact that the *Lafayette* was stopped three minutes to listen and that all on board were very attentive and heard nothing; that the *Daghild* was coming astern but heard them (the *Lafayette*), though the diaphone was on the funnel; and also very likely by the poor manner in which the

Benmaple was conducted. This, however, being a question of evidence, I consider I am not bound by their opinion and that I must follow the ordinary rules of evidence and that I cannot reject positive evidence on presumption. The doubt in my mind is not sufficient. Plaintiff, therefore, is entitled to the benefit of the doubt.

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No doubt what His Lordship had in mind was the principle that upon an issue as to whether a thing did or did not happen, the positive or affirmative testimony ordinarily should be accepted rather than the negative testimony. The clear implication of his statement is that he felt he was precluded by this so-called rule of evidence from rejecting the positive testimony of the *Benmaple's* witnesses, and that that rule cast upon the defendant ship the burden of proving the negative of the issue beyond all reasonable doubt. With the greatest respect, I am of opinion that the learned trial judge misdirected himself in that regard. No more than a preponderance of evidence upon the particular question involved was required, to my mind, to rebut the affirmative assertions of the *Benmaple's* witnesses, the question always being: on which side does the balance of the probabilities lie? The rule referred to, which some judges have described as being merely a rule of common sense rather than a rule of evidence, is, I think, applicable only to a case where a trial tribunal is obliged to choose between a positive assertion made by one or more apparently credible witnesses on one side that some particular thing happened and its denial by one or more apparently equally credible witnesses on the other. The reason of the rule, as I have always understood it, is that the negative testimony may be explained on grounds, which are perfectly consistent with the good faith and veracity of the negative witnesses, as, for instance, that they were in such a position or the conditions were such that the thing may have happened, notwithstanding that they neither heard nor saw it.

That such was not the case in the present instance is, to my mind, plainly shown by the facts which the learned trial judge has himself found. For instance, he quotes the statement of his assessors regarding the vagaries of sound in a fog and "silent areas" and finds that there was nothing in the conditions prevailing at the time to prevent fog signals being heard. He also explicitly finds in the extracts I have already quoted that the *Lafayette's*

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officers were all at their posts and on the alert and that they heard at least one signal before making the three-minute stop. The obvious purpose of that stop was to watch and listen and assure themselves that the fog signal they did hear did not come from a vessel bearing towards her, and that there was consequently no danger ahead. Then, as the presiding trial judge himself puts it, "*nothing being heard,* she started to slow for two minutes, and then she started half speed." Had the atmospheric conditions in that area been such as were likely to render sound signals inaudible in certain directions, one could perhaps understand the possibility of the *Benmaple* repeating her fog signals at regular intervals as she came nearer and nearer the *Lafayette* without their being heard by the latter; but how can such a hypothesis be reconciled with the trial judge's finding, after consultation with his expert assessors, that no such conditions were present, and at the same time with the completely irreproachable character of the vigil exercised, not only from the bridge but the forward lookout posts of the *Lafayette,* by the master and eight other efficient navigating officers and seamen, all on the alert, as so explicitly certified by the presiding trial judge himself? Or how can it be reconciled with the other equally vital fact that the *Lafayette* had previously heard one fog signal from the *Benmaple,* which must necessarily have been given from a greater distance, and immediately stopped her engines for three minutes for the special purpose of making sure that the vessel, from which the signal had come, was not bearing towards her own course? I should have thought that these facts themselves were quite sufficient, not only to override any assumption that the *Benmaple's* fog signals may have been regularly repeated and yet not heard on board the *Lafayette,* but to leave no other conclusion reasonably open in the situation described than that, if further fog signals were not heard by the *Lafayette's* witnesses after the stop-engines order was given and immediately executed, further signals were not sounded, as alleged by the *Benmaple's* witnesses.

This, however, is not all. The learned trial judge found also that the fog signals of the *Lafayette* were given at regular intervals and were always heard by the officers of the *Daghild,* which was coming astern. It should be explained in this connection that the *Lafayette* shortly

after passing Bicquette Island overtook the *Daghild* proceeding up river, which she passed on the latter's starboard side at a distance of between a quarter and a half mile, when the *Daghild's* lights were plainly visible, as were those of the *Lafayette,* and that from that time the *Lafayette* never got beyond hearing of the *Daghild's* fog signals. When the *Lafayette* stopped her engines for three minutes and then started them at slow for two minutes more, the *Daghild* naturally gained on her. Three witnesses from the *Daghild*—the master, chief officer and pilot—gave evidence before the trial judge, all of whom, though swearing that they distinctly heard the *Lafayette's* signals as they were regularly given, testified that they did not hear any signals from the *Benmaple.* Here is another material fact, proven by three perfectly independent disinterested witnesses, and tending unerringly, as it seems to me, to further confirm the *Lafayette's* case that no further fog signals were sounded by the *Benmaple* while the *Lafayette's* engines remained stopped or were run at slow, i.e., for a period of five minutes, before the motor vessel started them at half speed again.

Adding to these considerations the laxity and carelessness, which marked the navigation of the *Benmaple* during the relevant period, as found by the learned trial judge himself, we have such a formidable series of facts, conditions and circumstances as, considered in relation to each other, cannot reasonably, it seems to me, be squared with the affirmative testimony that the *Benmaple's* fog signals were actually blown at regular intervals.

In my most respectful opinion the learned trial judge misdirected himself when he held that he was precluded by the rule of evidence he had in mind from accepting, not only the advice of his expert assessors upon this question, but the negative testimony upon which the *Lafayette* relied, supplemented, as that testimony was, by all the facts and circumstances I have above indicated. If this be so, it follows that the learned judge in appeal was fully justified in disregarding the trial finding upon that vital issue and himself concluding upon the evidence in relation thereto that the *Benmaple's* signals were not regularly given, and determining the appeal upon that basis and all the other trial findings, in which he concurred.

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Considering this appeal upon that footing, as I think we ought to do, the really decisive question for our determination is as to whether the learned judge of the Exchequer Court of Canada was warranted in setting aside the conclusion of the learned trial judge that the *Lafayette,* after stopping her engines for three minutes upon hearing one fog signal from the *Benmaple,* and then proceeding slow for two minutes, was at fault in proceeding at half speed again before ascertaining that there was no danger from the other ship. As to this conclusion the learned trial judge seems again to be in disagreement with his assessors, who, he says, considering the *Lafayette's* special and powerful equipment, "are inclined to think that under the circumstances (her) speed was moderate." In this instance, however, His Lordship bases himself upon the judgment of Barnes, J., rendered in 1900 in the case of *The Campania* (1), and the judgment of the Privy Council in *The Chinkiang* (2), which was delivered by the same eminent judge (then Sir Gorell Barnes). Both these cases involved the consideration of Article 16 of the International Rules of the Road. This Article reads as follows:—

> Every vessel shall, in a fog, mist, falling snow or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

The Campania case (1) concerned a collision, which took place in St. George's Channel between the well known Cunard transatlantic liner and the barque *Embelton* in a fog so dense that the *Campania* could not be seen until she came within a distance of about half the length of the barque. The liner was running at slow, making between 9 and 10 knots an hour and her whistle was continuously sounding a long blast every minute. The trial judge found that the *Embelton's* fog horn was efficient and that it was being duly and properly sounded, notwithstanding that it did not appear to have reached the ears of those on board the *Campania.* This latter fact, he said, was

(1) (1900) 9 Asp. Mar. Cas. 151. (2) [1908] A.C. 251.

not sufficient to override the positive evidence of the witnesses from the barque that it was properly sounded. The Elder Brethren advised me that, as a matter of experience, sound signals in a fog are not always to be heard as they might be expected to be, and especially by persons on steamers approaching at considerable speed, and sounding their own fog whistles, and that this makes it all the more necessary that the speed of vessels in a fog should be moderate, as provided by the 16th Article.

He held that the *Campania* was guilty of a breach of Article 16, and was solely to blame for the collision. It was contended that the *Campania* could not be safely navigated at sea at less speed; that if she were she would not steer properly and there would be uncertainty about her course and the distance run; and further, that being a twin-screw steamer, she could be brought to a standstill in a very short distance by reversing her engines full speed astern. Barnes, J., held, notwithstanding that it was proved that her engines were so constructed that she could not go slower, that she was not going at a moderate speed within the meaning of the regulation, and that she was solely responsible for the collision. In his reasons he quoted Lord Hannen's dictum in *The Irrawaddy* in the Admiralty Div. in 1887, cited in Marsden on Collisions, 9th ed., at 344, viz.:

> If it be necessary to reduce the speed of a vessel below that which is its lowest speed, though it may cause inconvenience, yet it must be done in what appears to be the only practical way of doing it—viz.: by stopping from time to time.

In *The Chinkiang* (1) the collision took place in a dense fog off the Shantung Promontory, North China, between that steamer and His Majesty's despatch vessel, *Alacrity*. The trial judge held that the *Chinkiang* was solely to blame for not stopping and going at a speed of 9½ knots an hour in the fog which prevailed, but the Judicial Committee held that the *Alacrity* was guilty of negligence, which also contributed to the collision, in that she was going at a speed of about 6·8 knots an hour, which, having regard to the weather and the circumstances of the case, was not a moderate speed within the meaning of the Article, and that by not stopping her engines after hearing the first signals from the *Chinkiang* until he could ascertain her position with certainty and what she was doing, her commander failed to comply with the Article's directions.

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Both these cases are clearly distinguishable from the case at bar in that neither the *Campania* nor the *Alacrity* stopped her engines at all, and that in both cases the weather and fog conditions were apparently such as to render the sound of fog signals uncertain and undependable, which the trial judge distinctly found was not the fact in this case.

While these cases illustrate the marked disinclination of the English courts to recognize any considerations of convenience or even government urgency as an adequate excuse for non-compliance with a code of rules devised to ensure as far as possible the safety of navigation throughout the world, they clearly recognize, as the terms of Article 16 themselves do, that the duty of observing them depends at all times on existing circumstances and conditions. In neither of these cases is any new doctrine propounded, which can well be taken as in any way affecting the application of the general governing principles of the law of negligence to collisions at sea. When a ship is charged with negligence causing or materially contributing to a collision and the relevant facts, conditions and circumstances are proved, there is but one recognized criterion for determining her responsibility. That is, as I apprehend it from the various cases: Did the ship, by her master and those navigating her under his command, exercise that degree of nautical care and skill, which is generally looked for in competent seamen, to avoid such risks as might in the existing circumstances be reasonably anticipated?

In considering whether the *Lafayette* discharged this duty in relation to the *Benmaple* we must bear in mind that both courts below distinctly negatived all negligence on her part up to the moment when she ordered her engines from slow to half speed, and that she was going at that speed only " for one or two minutes when she saw the *Benmaple* at a distance of between five hundred and one thousand feet," as the trial judgment says. I concede at once that, had she heard any further signals forward of her beam or had the atmospheric conditions been such as to render fog signals inaudible or uncertain as to distance or direction, she ought to be held to have violated Article 16, as well as her duty to the *Benmaple.*

As I have already pointed out, however, the learned trial judge himself has expressly found that no such atmospheric conditions prevailed; that her master and his staff were exercising a faultless vigil from the bridge with two special lookouts at their forward posts and that, when she heard a single signal (which turned out to be from the *Benmaple*), "she stopped for three minutes, and *nothing being heard*, she started to slow for two minutes" before going into half speed again. In all these explicit findings the learned judge in appeal has concurred, so that we must, I think, take it as conclusively established that the *Lafayette* heard no further signals during at least the three minutes her engines were stopped. I think, moreover, that, though the trial judge did not distinctly say so, he must be taken to have meant that she heard no further signals during the following two minutes her engines were running at slow, for it is hardly conceivable that a ship, which admittedly stopped for three minutes for the special purpose of listening for further signals, and then, hearing none, proceeded slow for two minutes more, would then double her speed, had she heard any further signals during the latter interval. It follows as a necessary inference, I think, that, when the half speed order was given, the *Lafayette* had not heard a fog signal from the *Benmaple* for at least five minutes before she started half speed again. What else could the master and his navigating staff reasonably assume from the facts, conditions and circumstances, to which they were all during that critical interval admittedly so keenly alive, than that there was no further danger from the *Benmaple?* As Lord Blackburn pointed out in *Cayzer* v. *Carron Co.* (1), they had a right to suppose that the other vessel would observe the requirements of the well known international rules of the road, as she herself was doing, and to regulate their own movements on that supposition. This, it seems to me, makes an end of the charge of negligence against the *Lafayette* concerning the changing of her speed from slow to half after her three-minute stop. The trial judge having, as I have said, negatived all negligence up to that moment, and only found the *Lafayette* at fault in respect of that act, and of going at that speed for not more than one or two minutes before she saw the *Benmaple,* it is

(1) (1884) 9 App. Cas. 873, at 883.

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self-evident that, if the *Lafayette* would not have thus increased her speed from slow to half but for the negligent failure of the *Benmaple* to regularly sound her fog signals for a period of at least five minutes, her act in doing so was attributable, not to any negligence on her own part, but solely to the negligence of the *Benmaple,* as are all the natural and direct consequences thereof.

As to the apparent alteration of the *Lafayette's* deck and engine room logs, this concerned only her speed during the one or two minutes which elapsed between the half speed order and the collision of the two ships and the contention put forward on the trial that the *Lafayette* had come to a full stop before hitting the *Benmaple.* Both the trial judge and the judge in appeal, as well as all three assessors, concurred in the opinion that she had some advance when the two vessels came together.

After the fullest and most careful consideration I have been able to give this case, I have concluded for the reasons, which I hope I have made sufficiently clear, that these appeals should be dismissed with costs.

KERWIN J.—The Local Judge in Admiralty found that the *Benmaple* and *Lafayette* were to blame in the proportions of seventy-five and twenty-five per cent. In view of his findings and the alteration of the logs of the *Lafayette,* I am not prepared to disagree with his conclusion. I would allow the appeal and restore the judgment at the trial. The appellants are entitled to their costs of the appeals in the Exchequer Court of Canada and to their costs of the appeals to this Court.

HUDSON J.—The only questions open for decision by this Court are whether or not the *Lafayette* was in part at fault causing the collision of the two ships and, if so, in what degree. Both of these are questions of fact. The trial was lengthy, many witnesses were heard and the evidence was conflicting. The case was tried by a very able and experienced judge who found that the *Lafayette* was responsible to the extent of 25%. While one may differ from the learned trial judge in some respects, a perusal of the evidence has not convinced me that he was wrong in his conclusions. Therefore, with all respect to the learned judge in appeal, I would restore the judgment at

the trial with costs of the appeal to this Court and of the appeal heard before Mr. Justice Angers in the Exchequer Court of Canada.

Appeals allowed with costs.

Solicitors for the appellants: *Meredith, Holden, Heward & Holden.*

Solicitors for the respondents: *Beauregard, Phillimore & St. Germain.*

THE ATTORNEY-GENERAL FOR ALBERTA AND G. C. WINSTANLEY (DEFENDANTS) ..... APPELLANTS;

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* Oct. 10, 11.
* Dec. 20.

AND

ATLAS LUMBER COMPANY LIMITED (PLAINTIFF) ..... RESPONDENT.

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

Constitutional law—Debt Adjustment Act, Alberta, 1937, c. 9, s. 8—Provincial statutory prohibition against commencement of action against resident debtor for recovery of money recoverable as liquidated demand or debt, without permit from provincial Board—Enactment invalid in so far as affecting right of action on promissory note—Bills of Exchange Act, R.S.C., 1927, c. 16, ss. 74, 134, 135, 136—B.N.A. Act, 1867, ss. 91 (18), 92 (13) (14)—Conflict between Dominion and Provincial legislation—Dominion legislation paramount.

The *Debt Adjustment Act,* Alberta, 1937, c. 9, by s. 8 enacted that "no action or suit for the recovery of any money which is recoverable as a liquidated demand or debt in respect of any claim enforcible by virtue of any rule of law or equity or by virtue of any statute * * * shall be taken * * * by any person whomsoever against a resident debtor in any case" unless the Board constituted by the Act and appointed by the Provincial Government issues a permit consenting thereto.

In an action brought without a permit in the Supreme Court of Alberta against a resident debtor upon a promissory note, it was *held* that a defence pleading said Act could not prevail; that said s. 8 of the Act, in so far as it affects a right of action on a promissory note, is *ultra vires* the Provincial Legislature. (Judgment of the Appellate Division, Alta., [1940] 2 W.W.R. 437, affirming judgment of Ewing J., [1940] 1 W.W.R. 35, affirmed in the result).

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

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Per the Chief Justice and Kerwin J.: In so far as said legislation extends to actions upon bills of exchange and promissory notes, it is plainly repugnant to the enactments in ss. 74, 134, 135 and 136 of the *Bills of Exchange Act*, R.S.C., 1927, c. 16 (which, or substantially the same, enactments have been in the Act since 1890), which, read together, affirm the unqualified right of the holder of a note to sue upon it in his own name and to recover judgment from any party liable on it; and which enactments are necessarily incidental to the exercise of the powers conferred upon the Dominion Parliament by s. 91 (18) of the *B.N.A. Act*. On the passing of the *Bills of Exchange Act* the jurisdiction of a province, if it ever possessed any, to enact such legislation as s. 8 of said *Debt Adjustment Act* (in so far as it extended to actions upon bills and notes) was superseded because it could not be enforced without coming into conflict with the paramount law of Canada. It would not make any difference if said s. 8 were expressed in the form of limiting the jurisdiction of the courts of Alberta. In pith and substance such an enactment, if operative, imposes a condition upon suitors to whom it applies governing them in the exercise of their rights to enforce causes of action vested in them; and, if it contemplates such an action as the present one, it purports to qualify rights in respect of which the Parliament of Canada has legislative jurisdiction in virtue of s. 91 (18) of the *B.N.A. Act*, and has exercised that jurisdiction by affirming them unconditionally. (*Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A.C. 348, at 359, 365, 366, and *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1894] A.C. 189, at 200-201, cited).

Per Rinfret J.: The prohibition in said s. 8 of the Provincial Act goes to the right to sue—a substantive right; it is not a matter of mere procedure. Under said *Bills of Exchange Act* (ss. 74, 134, 135), the holder of a note has the right to sue thereon in his own name and to enforce payment against all parties liable. That right is enforcible by action in the provincial courts (*Board* v. *Board*, [1919] A.C. 956, at 962; also said provisions of the *Bills of Exchange Act* shew that Parliament intended the right to be enforcible by an action in court—the only method open to enforce payment and recover). With respect to matters coming within the enumerated heads of s. 91 of the *B.N.A. Act*, the Parliament of Canada may give jurisdiction to provincial courts and regulate proceedings in such courts to the fullest extent (*Valin* v. *Langlois*, 3 Can. S.C.R. 1, at 15, 22, 26, 53, 67, 76, 77, 89, and 5 App. Cas. 115, at 117-118; *Cushing* v. *Dupuy*, 5 App. Cas. 409, at 415). Said provisions of the *Bills of Exchange Act* relate directly to the matter of head 18 in s. 91 of the *B.N.A. Act;* and therefore defendants' contention, that the provincial legislation was not necessarily incidental to legislation with respect to bills and notes and therefore the Dominion legislation could not encroach on provincial powers to make laws in regard to matters under heads 13 and 14 of s. 92 of the *B.N.A. Act*, could not prevail (*Tennant* v. *Union Bank of Canada*, [1894] A.C. 31; *Cushing* v. *Dupuy*, 5 App. Cas. 409; *Proprietary Articles Trade Assn.* v. *Attorney-General for Canada*, [1931] A.C. 310, at 326-327). The right to sue or to enforce payment or to recover on a bill or note is of the very essence of bills of exchange; it is one of the essential characteristics of a bill or note; the matter falls within the strict limits of s. 91 (18) of the

B.N.A. Act; it flows from the provisions establishing negotiability, which has become the primary quality of a bill or note and in which consist the true character and nature of these instruments; the provisions relating to the right to sue, to enforce payment and to recover before the courts are not incidental; they are the very pith and substance of the statute. The Dominion legislation is valid; the Alberta legislation, in so far as it applies against the institution of an action on a promisorry note, is in direct conflict with it, is overridden by it, and is *ultra vires* on the ground that it attempts to take away from the Alberta courts a jurisdiction conferred on them by the Parliament of Canada with respect to a matter within the exclusive legislative authority of that Parliament; and to that extent it must be held inoperative (*John Deere Plow Company* v. *Wharton,* [1915] A.C. 330; *Board of Trustees of the Lethbridge Northern Irrigation District* v. *Independent Order of Foresters,* [1940] A.C. 513). Whatever jurisdiction there may have been in the province on the subject has been superseded by the Dominion legislation (*Attorney-General for Ontario* v. *Attorney-General for the Dominion et al.,* [1896] A.C. 348, at 369, 370).

Crocket J., while not acceding to the contention that the rights conferred by ss. 74, 134 and 135 of the *Bills of Exchange Act* upon holders of bills and notes to sue, enforce payment and recover thereon in provincial courts, are not subject to provincial legislation relating to the jurisdiction of provincial courts and to procedure in civil matters therein, was not prepared to hold that the prohibitory enactment of said s. 8 (1) of the Alberta statute does not conflict with said Dominion legislation; and he held that if there is conflict, then the Dominion legislation, strictly relating, as it does, to bills of exchange and promissory notes as one of the classes of subjects specially enumerated in s. 91 of the *B.N.A. Act,* in the sense of being necessarily incidental thereto, prevails over the provincial legislation.

Per Davis J.: The Alberta enactment is one of general application, not aimed at, nor legislation in relation to, bills of exchange or promissory notes. Sec. 74 of the *Bills of Exchange Act* deals only with the rights acquired by negotiation, and the words "the holder of a bill" "may sue on the bill in his own name" mean only that he is not liable to be defeated in an action on the bill on the ground that the action has been brought by the wrong party (reference to *Sutters* v. *Briggs,* [1922] A.C. 1, at 15). The Dominion statute is not in any way dealing with access to any court. But the Alberta enactment is *ultra vires* the province. Where legislative power is divided, as in Canada, between a central Parliament and local legislative bodies and the administration of justice in the provinces, including the constitution, maintenance and organization of provincial courts, is given over to the provinces (with the appointment of the judges in the Dominion), a province cannot validly pass legislation, at least in relation to subject-matter within the exclusive competency of the Dominion, which puts into the hands of a local administrative agency the right to say whether or not any person can have access to the ordinary courts of the province. The Debt Adjustment Board of Alberta is an administrative body and is not validly constituted to receive what is in fact judicial authority (*Toronto* v. *York,* [1938] A.C. 415, at 427).

Per Hudson and Taschereau JJ.: The Alberta enactment does not purport to amend or limit the jurisdiction of the Supreme Court of Alberta,

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but to place in the hands of a provincial body the right to say whether or not certain classes of rights, some of which may arise under the laws of Canada, may be established or enforced through the courts. In s. 92 (14) of the *B.N.A. Act,* which gives to the province the exclusive right to make laws in relation to "the administration of justice in the Province," etc., the expression "administration of justice," read in connection with the whole Act, must be taken to mean the administration of justice according to the laws of Canada or the laws of the province, as the case may be. Normally the administration of justice should be carried on through the established courts, and the Province, though it has been allotted power to legislate in relation to the administration of justice and the right to constitute courts, cannot substitute for the established courts any other tribunal to exercise judicial functions (*Toronto* v. *York,* [1938] A.C. 415). There may be administration of law outside of the courts short of empowering provincial officers to perform judicial functions, but in respect of matters falling within the Dominion field a province could not do anything which would destroy or impair rights arising under the laws of Canada. The Dominion has power to impose duties upon courts established by the provinces, in furtherance of the laws of Canada, and a province could not interfere with nor take away the jurisdiction thus conferred (*Valin* v. *Langlois,* 5 App. Cas. 115; *Cushing* v. *Dupuy,* 5 App. Cas. 409). Sec. 74 of the *Bills of Exchange Act* expressly recognizes a right of action on a promissory note. That right of action is one governed by the laws of Canada and therefore excluded from the provincial legislative field. The Alberta enactment is not properly a law as to procedure in courts; it provides for extra-judicial procedure. A province cannot impose extra-judicial control over rights of action under the laws of Canada.

APPEAL by the defendants from the judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming the judgment of Ewing J. (2).

The plaintiff sued to recover upon a promissory note made by the defendant Winstanley. The defendant pleaded the *Debt Adjustment Act,* c. 9 of the Statutes of Alberta of 1937 and amendments, and said that the plaintiff had not been granted a permit under the said Act to commence the action. Ewing J. held that there was direct conflict between the provisions of the *Bills of Exchange Act,* R.S.C., 1927, c. 16, and the provisions of the said *Debt Adjustment Act* as applied to promissory notes; and that the Dominion legislation must prevail; and that the plaintiff should be permitted to proceed with its action without a permit. The formal judgment adjudged and declared that the said *Debt Adjustment Act,* "in so far as the same affects Promissory Notes, is *ultra vires* the powers of the Provincial Legislature" and "that the plain-

(1) [1940] 2 W.W.R. 437; [1940] 3 D.L.R. 648.
(2) [1940] 1 W.W.R. 35; [1940] 3 D.L.R. 648 (at 649-656).

tiff has the right to proceed with this action without a permit of the Debt Adjustment Board". The judgment of Ewing J. was affirmed by the Appellate Division.

The facts, pleadings and legislation involved are more particularly set out in the reasons for judgment in this Court now reported.

The plaintiff, upon its reply to the statement of defence, gave notice to the Attorney-General for Alberta, who was represented on the trial of the action and on the appeal to the Appellate Division (which court had, previously to the hearing of the appeal, made an order adding him as a party defendant).

Special leave to appeal to the Supreme Court of Canada was granted to the defendants by the Appellate Division of the Supreme Court of Alberta.

W. S. Gray K.C. and *H. J. Wilson K.C.* for the appellants.

W. H. McLaws K.C. for the respondent.

F. P. Varcoe K.C. for the Attorney-General of Canada.

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

THE CHIEF JUSTICE—On the 9th of May, 1939, the respondent company sued the defendant, Winstanley, upon a promissory note dated the 9th of October, 1935, payable on demand for One Thousand Dollars ($1,000.00) and interest at the rate of eight per cent., the payee's name on the note being the Revelstoke Sawmill Company which, it was alleged, had endorsed the promissory note to the plaintiff. The defendant, the maker of the note, set up this defence:—

> In answer to the Plaintiff's Statement of Claim herein, the Defendant pleads the Debt Adjustment Act, being Chapter 9 of the Statutes of Alberta for 1937 and amendments, and says that the Plaintiff has not been granted a permit under the said Act to commence this action.

In reply the respondent company alleged, *inter alia,* as follows:—

> (1) The promissory note referred to in the Statement of Claim was made and taken pursuant to and in accordance with the provisions of "The Bills of Exchange Act", being Chapter 16 of the Revised Statutes of Canada, 1927, and amendments thereto, and the Parliament of the Dominion of Canada has the exclusive power of legislating with respect

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to promissory notes and bills of exchange, and the rights of the Plaintiff are determined by the provisions of the said "The Bills of Exchange Act" and not otherwise.

(2) The said "The Bills of Exchange Act" gives to the Plaintiff an immediate cause of action on the said promissory note against the Defendant, upon default being made in paying the said promissory note when it became due and payable, and the immediate right to sue thereon.

* * *

(5) The said Debt Adjustment Act and amendments thereto are *ultra vires* the Legislature of the Province of Alberta in so far as the provisions of the said Act are applicable to the promissory note referred to in the Statement of Claim and a permit under the said Act is not necessary before commencing this action.

The pertinent enactment of the *Debt Adjustment Act* set up in the statement of defence is section 8, which is in these words:—

8. (1) Unless the Board or any person designated by the Board under the provisions of this Act, issues a permit in writing giving consent thereto,—

(*a*) no action or suit for the recovery of any money which is recoverable as a liquidated demand or debt in respect of any claim enforcible by virtue of any rule of law or equity or by virtue of any statute, except money payable in respect of rates and taxes payable pursuant to any statute, and debts owing to a hospital for hospital services;

* * *

shall be taken, made or continued by any person whomsoever against a resident debtor in any case.

* * *

The trial Judge and the Court of Appeal for Alberta unanimously held that the defence set up in the pleadings by the appellant, Winstanley, is without legal validity.

By *The Alberta Act,* under which the Province of Alberta came into existence (4 and 5 Edward VII, Chap. 3, sec. 3) it was provided:—

The provisions of *The British North America Acts,* 1867 to 1886, shall apply to the province of Alberta in the same way and to the like extent as they apply to the provinces heretofore comprised in the Dominion, as if the said province of Alberta had been one of the provinces originally united, except in so far as varied by this Act and except such provisions as are in terms made, or by reasonable intendment may be held to be, specially applicable to or only to affect one or more and not the whole of the said provinces.

By section 91 of the *British North America Act,*—

* * * * 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; that is to say,— * * * 18. Bills of Exchange and Promissory Notes. * * * * 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.

By Chap. 33, 53 Victoria, the Parliament of Canada enacted the *Bills of Exchange Act, 1890*. Sections 38 and 57 were reproduced in the *Bills of Exchange Act*, Chap. 119, R.S.C., 1906, as section 74, which corresponds textually to section 38 of the parent Act, and as sections 134, 135 and 136 which correspond to section 57, slightly altered in form without change in substance or effect. These enactments of R.S.C., 1906, appear in the revision of 1927 (Chap. 16) without change as to the numbers of the sections or otherwise, and still retain that form.

The substantive question in controversy, as I view it, does not lend itself to extended discussion. Sections 74, 134, 135 and 136 of the *Bills of Exchange Act*, read together, affirm the unqualified right of the holder of a promissory note to sue upon the note in his own name and to recover judgment from any party liable on it damages according to the measure defined by sections 134 and 136. These enactments were in force when the *Debt Adjustment Act* was passed in 1937. The appellants contend that by section 8 of that Statute a condition is imposed upon this unqualified right of the holder of a promissory note to sue upon it, a condition that he shall first obtain the consent of a Board appointed by the Government of the Province.

I think it is convenient at this place to reproduce textually the well-known passage in the judgment of Lord Watson in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1); Lord Watson is here, of course, speaking for the Judicial Committee:—

> It was apparently contemplated by the framers of the Imperial Act of 1867 that the due exercise of the enumerated powers conferred upon the Parliament of Canada by s. 91, might, occasionally and incidentally, involve legislation upon matters which are *prima facie* committed exclusively to the provincial legislatures by s. 92. In order to provide against that contingency, the concluding part of s. 91 enacts that "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." It was observed by this Board in *Citizens' Insurance Co. of Canada* v.

(1) [1896] A.C. 348, at 359.

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Parsons (1) that the paragraph just quoted "applies in its grammatical construction only to No. 16 of s. 92." The observation was not material to the question arising in that case, and it does not appear to their Lordships to be strictly accurate. It appears to them that the language of the exception in s. 91 was meant to include and correctly describes all the matters enumerated in the sixteen heads of s. 92, as being, from a provincial point of view, of a local or private nature. It also appears to their Lordships that the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen subsections, save to the extent of enabling the Parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91. That view was stated and illustrated by Sir Montague Smith in *Citizens' Insurance Co. of Canada* v. *Parsons* (2) and in *Cushing* v. *Dupuy* (3); and it has been recognized by this Board in *Tennant* v. *Union Bank of Canada* (4) and in *Attorney-General of Ontario* v. *Attorney-General for the Dominion* (5).

Their Lordships observed further at page 365:—

> In the able and elaborate argument addressed to their Lordships on behalf of the respondents it was practically conceded that a provincial legislature must have power to deal with the restriction of the liquor traffic from a local and provincial point of view, unless it be held that the whole subject of restriction or abolition is exclusively committed to the Parliament of Canada as being within the regulation of trade and commerce. In that case the subject, in so far at least as it had been regulated by Canadian legislation, would, by virtue of the concluding enactment of s. 91, be excepted from the matters committed to provincial legislatures by s. 92.

And again at page 366:—

> It has been frequently recognized by this Board, and it may now be regarded as settled law, that according to the scheme of the British North America Act the enactments of the Parliament of Canada, in so far as these are within its competency, must override provincial legislation.

Section 8 of the *Debt Adjustment Act*, if (as the appellants contend and I agree) it extends to actions upon bills of exchange and promissory notes, is plainly repugnant to the enactments of the *Bills of Exchange Act* in the sections mentioned above. Nor can I think it susceptible of dispute that the enactments are "necessarily incidental to the exercise of the powers conferred upon the Dominion Parliament" by section 91 of the *British North America Act* in relation to bills of exchange and promissory notes. On the passing of the *Bills of Exchange Act* of 1890, therefore, the jurisdiction of any province of Canada, if it ever possessed any, to enact such legislation was, to borrow the

(1) (1881) 7 App. Cas. 96, at 108.
(2) (1881) 7 App. Cas. 96, at 108, 109.
(3) (1880) 5 App. Cas. 409, at 415.
(4) [1894] A.C. 31, at 46.
(5) [1894] A.C. 189, at 200.

language of the same judgment (at p. 369), "superseded" because it could not be enforced "without coming into conflict with the paramount law of Canada."

I do not think it would make any difference if section 8 were expressed in the form of limiting the jurisdiction of the courts of Alberta. In pith and substance such an enactment, if operative, imposes, I repeat, a condition upon suitors to whom it applies governing them in the exercise of their rights to enforce causes of actions vested in them; and, if it contemplates such an action as this, it purports to qualify rights in respect of which the Parliament of Canada has legislative jurisdiction in virtue of section 91 (18), and has exercised that jurisdiction by affirming them unconditionally.

Once again, the Dominion Parliament has seen fit "to deal with" those rights (to adapt the language of Lord Herschell, L.C., speaking for the Judicial Committee in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1) "as part of a * * * law" concerning bills of exchange and promissory notes; and the provincial legislatures are consequently "precluded from interfering with this legislation inasmuch as such interference would affect the * * * law of the Dominion Parliament" touching that subject.

This is the ground upon which, as it appears to me, the defence to the action and (consequently) this appeal, demonstrably fail.

RINFRET J.—In this case, action was brought by the respondent, Atlas Lumber Company Limited, to recover from the appellant Winstanley the amount due on a promissory note for $1,000 payable on demand, with interest at 8% per annum, said note being dated the 9th of October, 1935.

In answer to the respondent's statement of claim, the appellant Winstanley pleaded the *Debt Adjustment Act,* being chapter 9 of the Statutes of Alberta for 1937 and amendments, and said that the respondent had not been granted a permit under the said Act to commence its action and that, therefore, it could not proceed to judgment thereon.

(1) [1894] A.C. 189, at 200 and 201.

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In reply, the respondent invoked the *Bills of Exchange Act,* being chapter 16 of the Revised Statutes of Canada (1927) and amendments thereto. It alleged that the Parliament of the Dominion of Canada had the exclusive power to legislate with respect to promissory notes and that the rights of the respondent were determined by the provisions of the said *Bills of Exchange Act,* and not otherwise. That Act gave the plaintiff an immediate cause of action on the promissory note held against the appellant Winstanley, upon default being made in paying the said promissory note when it became due and payable, and the immediate right to sue thereon. The respondent contended that it was not subject to the provisions of the *Debt Adjustment Act* with respect to the said promissory note and that the right of recourse against Winstanley was not subject to, or conditional upon, the granting of a permit under the said statute.

The reply further stated that the respondent had made application under the provisions of the *Debt Adjustment Act* for a permit to commence proceedings in the trial division of the Supreme Court of Alberta against the appellant Winstanley on the promissory note in question, that he had complied with the provisions of the said Act, but that the officers authorized under the Act in that behalf refused a permit.

The respondent further replied that, if it should be contended that the *Debt Adjustment Act* and amendments was meant to cover a case such as this one, then it was *ultra vires* the Legislature of Alberta, in so far as the provisions of the said Act were intended to be applicable to the promissory note referred to in the respondent's statement of claim, and a permit under the *Debt Adjustment Act* was not necessary before commencing the action.

Simultaneously with the filing of the respondent's reply, notice was served upon the Attorney-General for Alberta that the respondent had, by its reply, pleaded that the Adjustment Act and amendments thereto were *ultra vires* the Legislature of the Province of Alberta, in so far as it may be contended that the Act applied to an action under a promissory note made and taken in accordance with the provisions of the *Bills of Exchange Act.* Counsel for the Attorney-General appeared and took part in the trial.

In the Appellate Division, the Court ordered that he be added as a party in the case and that the style of cause be amended accordingly.

In this Court, the Attorney-General of Alberta appeared as appellant, together with Winstanley, the debtor on the promissory note.

Both the trial court and the Appellate Division came to the conclusion that, to the extent that the *Debt Adjustment Act* purported to include within its operation the debt sued upon here, it was *ultra vires* of the provincial legislature.

In the result, the respondent was permitted to proceed with his action without a permit from the Adjustment Board, and the question is whether the concurrent judgments below ought to be confirmed.

The material provisions of the *Debt Adjustment Act* (c. 9 of the Statutes of Alberta, 1937) read in part as follows:

> 8. (1) Unless the Board or any person designated by the Board under the provisions of this Act, issues a permit in writing giving consent thereto,—
>
> (*a*) no action or suit for the recovery of any money which is recoverable as a liquidated demand or debt in respect of any claim enforcible by virtue of any rule of law or equity or by virtue of any statute, except money payable in respect of rates and taxes payable pursuant to any statute, and debts owing to a hospital for hospital services;
>
> * * *
>
> shall be taken, made or continued by any person whomsoever against a resident debtor in any case.

The note sued on in this action is not among the exceptions stated in subsec. 1 (*a*) or any of the other subsections of section 8. In terms, section 8 prohibits an action of the nature of the one brought here by the respondent, except where a permit is issued by a Board appointed and controlled by the Provincial Government under the provisions of the Act. The prohibition goes to the right to sue. It has nothing to do with mere procedure. The right to bring an action is not procedure; it is a substantive right.

The Debt Adjustment Board has the power to grant or to refuse permits. It can do so wholly within its discretion. It may refuse a permit indefinitely and is not called upon to give reasons for its decision.

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In effect, in view of the unlimited powers of the Board, the holder of a promissory note, and more particularly the respondent, may be entirely denied access to His Majesty's courts.

It does not diminish the impropriety of the situation that, in the present case, the respondent is a federally incorporated company.

It could not be seriously disputed by the appellants herein that the *Debt Adjustment Act* applied in the premises and was meant to prevent the institution of actions, even in the case of promissory notes. The appellant Winstanley took that ground from the very start and pleaded the Act in his statement of defence. As for the Attorney-General, he intervened in the case at the trial and later was made a party for the very purpose, of which he took full opportunity, of arguing both that the Act applied and that it was well within the powers of the Alberta Legislature.

The only point remaining for decision, therefore, is the constitutionality of the legislation now before us.

Of course, it need only be stated that the *Bills of Exchange Act*, which gives to the holder of the note its rights and powers, is within the legislative competence of the Parliament of Canada. The subject of "bills of exchange" and "promissory notes" is specifically mentioned in sub-head 18 of sec. 91 of the *B.N.A. Act*.

Among the rights and powers given to the holder of a promissory note under the *Bills of Exchange Act*, is the right to "enforce payment" of the note and to "recover" from persons liable thereon by an action, *inter alia*, in the Supreme Court of Alberta:

Rights and Powers of Holder

74. The rights and powers of the holder of a bill are as follows:

(*a*) He may sue on the bill in his own name;

(*b*) Where he is a holder in due course he * * * may enforce payment against all parties liable on the bill;

* * *

134. Where a bill is dishonoured, the measure of damages which shall be deemed to be liquidated damages shall be,

(*a*) the amount of the bill;

(*b*) interest thereon * * *;

(*c*) the expenses of noting and protest.

135. In the case of the dishonour of a bill the holder may recover from any party liable on the bill * * * the damages aforesaid.

The effect of the above sections is that the holder of a bill or note has the right to sue on the bill or note in his own name, to enforce payment against all parties liable; and, in case of a dishonour of the bill or note, he may recover from any party liable under the bill both the amount of the bill with interest and the expense of noting the protest, of which it is stated that they "shall be deemed to be liquidated damages."

These rights and powers are enforceable by action in the provincial courts (*Board* v. *Board* (1)):

> If the right exists, the presumption is that there is a court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of Justice. In order to oust jurisdiction, it is necessary, in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court.

In this case, the right is conferred, the Act does not exclude the jurisdiction of the provincial court and there is no other court in which that right could be enforced.

Further, the provisions of the Act show that Parliament intended the rights and powers conferred by it to be enforceable by an action in court. The statute expressly provides that the holder of a bill or note may enforce payment, may sue on the bill or note, and may recover from any party liable thereon. Action in the courts is the only method open to enforce payment and recover.

The appellants contend that such provisions of the *Bills of Exchange Act* exceed the powers of the Dominion Parliament, in so far as they provide for procedure in such an action, on the ground that the provincial legislature had the exclusive right to legislate with respect to the administration of civil justice in the province, the constitution of courts and the proceedings in civil matters in those courts.

They further contend that the legislation in question is not necessarily incidental to legislation with respect to bills and notes and that, therefore, in legislating on the subject, Parliament could not encroach on the powers of the provincial legislature to make laws in regard to property and civil rights in the province (sub-head 13 of sec. 92 *B.N.A. Act*) and the administration of justice in the province, including the constitution, maintenance and organization

(1) [1919] A.C. 956, at 962.

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of provincial courts, both of civil and criminal jurisdiction and including procedure in civil matters in those courts (sub-head 14 of sec. 92).

But it has long since been decided that, with respect to matters coming within the enumerated heads of sec. 91, the Parliament of Canada may give jurisdiction to provincial courts and regulate proceedings in such courts to the fullest extent.

That question was decided by this Court in *Valin* v. *Langlois* (1). An application was made to the Judicial Committee of the Privy Council for leave to appeal, and Lord Selborne (2) said:

> On the other hand, the same considerations make it unfit and inexpedient to throw doubt upon a great question of constitutional law in Canada, and upon a decision in the Court of Appeal there, unless their Lordships are satisfied that there is, *prima facie*, a serious and a substantial question requiring to be determined. Their Lordships are not satisfied in this case that there is any such question, inasmuch as they entertain no doubt that the decisions of the lower Courts were correct.

See also *Cushing* v. *Dupuy* (3).

As for the further contention of the appellants, it ought to be said that, so long as Dominion legislation directly relates to matters enumerated in the heads of sec. 91, no question of the legislation being incidental can be raised (*Tennant* v. *Union Bank of Canada* (4); *Cushing* v. *Dupuy* (5)).

I would like to quote the following passage from Lord Atkin, delivering the judgment of the Privy Council in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (6):

> If then the legislation in question is authorized under one or other of the heads specifically enumerated in s. 91, it is not to the purpose to say that it affects property and civil rights in the Provinces. Most of the specific subjects in s. 91 do affect property and civil rights, but so far as the legislation of Parliament in pith and substance is operating within the enumerated powers, there is constitutional authority to interfere with property and civil rights. The same principle would apply to s. 92, head 14, "the administration of justice in the Province", even if the legislation did, as in the present case it does not, in any way interfere with the administration of justice. Nor is there any ground for suggesting that the Dominion may not employ its own executive

(1) (1879) 3 Can. S.C.R. 1, at 15, 22, 26, 53, 67, 76, 77 & 89.
(2) (1879) 5 App. Cas. 115, at 117-118.
(3) (1880) 5 App. Cas. 409, at 415.
(4) [1894] A.C. 31.
(5) (1880) 5 App. Cas. 409.
(6) [1931] A.C. 310, at 326-327.

officers for the purpose of carrying out legislation which is within its constitutional authority, as it does regularly in the case of revenue officials and other matters which need not be enumerated.

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And in this case it should be pointed out that the right to sue, or to enforce payment, or to recover on a bill or note is of the very essence of bills of exchange; it is one of the essential characteristics of a bill or of a promissory note. The matter falls within the strict limits of subhead 18 of sec. 91. It flows from the provisions establishing negotiability, which has become the primary quality of a bill or note and in which consist the true character and nature of these instruments.

The provisions relating to the right to sue, to enforce payment and to recover before the courts are not incidental provisions; they are, in truth, the very pith and substance of the statute.

If that be so, there is no question but that the Alberta *Debt Adjustment Act* providing, as it does, that no action or suit "shall be taken, made or continued" to enforce payment of a debt—including debts evidenced by bills of exchange or promissory notes—is in direct conflict with valid Dominion legislation.

The Board created under the Provincial Act, as we have seen, has an absolute discretion to say whether or not the particular holder of a bill of exchange or of a promissory note will have the right and power to enforce payment by action or suit. The effect is to destroy the value of the negotiability of the bill or note and to deprive the holder of a bill or note of the right and power to sue and enforce payment and recover, which are conferred upon him by the *Bills of Exchange Act.*

The consequence is that the Alberta Act, being in direct conflict with the above two provisions of the *Bills of Exchange Act,* are overridden by the latter; and that, in so far as the Alberta Act may be interpreted as applying to this action, it is *ultra vires* of the Alberta Legislature, on the ground that it attempts to take away from the Alberta courts a jurisdiction conferred upon such courts by the Parliament of Canada with respect to a matter within the exclusive legislative authority of that Parliament. To that extent, the provisions of the Alberta Adjustment Act must be held inoperative (*John Deere*

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Plow Company v. *Wharton* (1); *Board of Trustees of the Lethbridge Northern Irrigation District* v. *Independent Order of Foresters* (2)). Whatever jurisdiction there may have been in the province on the subject has been superseded by the Dominion legislation (*Attorney-General for Ontario* v. *Attorney-General for the Dominion and The Distillers and Brewers' Association of Ontario* (3)).

For these reasons, it must be held that the judgment *a quo* is right and the appeal ought to be dismissed with costs.

CROCKET J.—While I cannot at all accede to the respondent's contention that the rights conferred by ss. 74, 134 and 135 of the *Bills of Exchange Act* upon holders of bills of exchange and promissory notes to sue, enforce payment and recover thereon in provincial courts, are not subject to provincial legislation relating to the jurisdiction of provincial courts and to procedure in civil matters therein, I am not prepared to hold that s. 8 (1) of the Alberta *Debt Adjustment Act* does not conflict with the Dominion enactment in prohibiting all actions "for the recovery of any money which is recoverable as a liquidated demand or debt," etc., without the consent of a Board constituted by the Provincial Government.

If the two enactments do conflict, as both courts below have adjudged, then the Dominion legislation, strictly relating, as it does, to Bills of Exchange and Promissory Notes as one of the classes of subjects specially enumerated in s. 91 of the *B.N.A. Act,* in the sense of being necessarily incidental thereto, unquestionably prevails over the provincial.

I agree that the appeal should be dismissed with costs.

DAVIS J.—The provincial legislation in question, *The Debt Adjustment Act, 1937,* of Alberta, is not aimed at bills of exchange or promissory notes; nor is it legislation in relation to bills of exchange or promissory notes. It is a statute of general application whereby no action or suit for the recovery of any money which is recoverable as a liquidated demand or debt in respect of any claim enforceable by virtue of any rule of law or equity or by

(1) [1915] A.C. 330. (2) [1940] A.C. 513.
(3) [1896] A.C. 348, at 369 and 370.

virtue of any statute (except money payable in respect of rates and taxes payable pursuant to any statute, and debts owing to a hospital for hospital services); and no proceedings by way of execution, attachment or garnishment; and no action or proceeding for the sale under or foreclosure of a mortgage on land, or for cancellation, rescission or specific performance of an agreement for sale of land or for recovery of possession of land, whether in court or otherwise; and other specified proceedings for seizure or distress; and "no action respecting such other class of legal or other proceedings as may be brought within the provisions" of the statute "by order of the Lieutenant-Governor in Council" shall be taken, made or continued in the courts of the province by any person whomsoever against a resident debtor (a person who is a debtor and who is an actual resident of and personally living in Alberta) without a permit in writing giving consent thereto issued by the Debt Adjustment Board constituted by the province pursuant to the statute. The statute further provides that such consent whenever given shall relate back to anything done in the action or other proceedings in respect of which the permit is given. The statute does not apply to any contract made or entered into by a debtor where the whole of the original consideration for the contract arose on or after the 1st day of July, 1936, but does apply to any agreement, contract, stipulation, covenant or arrangement made since that date which purports to substitute a new indebtedness in the place of any indebtedness created or arising before the 1st day of July, 1936, or to any guarantee whensoever made for the payment of any debt payable in respect of any contract, the whole of the original consideration for which arose before the 1st of July, 1936.

The principal submission of the Attorney-General of Canada and of the respondent (plaintiff) was that the statute is in conflict with the Dominion legislation under the *Bills of Exchange Act*, R.S.C., 1927, ch. 16. Particular emphasis was put upon sec. 74 of that statute, which provides that the holder of a bill may sue on the bill in his own name. It is contended that the provincial legislation is in conflict and therefore invalid or inoperative in so far as it affects bills of exchange or promissory notes. A holder means a payee or endorsee

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of a bill or note who is in possession of it, or the bearer thereof. But the words "the holder of a bill may sue on the bill in his own name" mean only "not liable to be defeated in an action on the bill on the ground that the action has been brought by the wrong party" (see the judgment of Lord Birkenhead in *Sutters* v. *Briggs* (1)). Section 74 deals only with the rights acquired by negotiation (sec. 60), that is, by transfer according to the form required by the law merchant. Falconbridge on Banking, 5th ed., 1935, pp. 698-99.

I do not think that the Dominion statute is in any way dealing with access to any court, general or particular, provincial or Dominion. The original statute, the *Bills of Exchange Act, 1890,* was a re-enactment (with only some slight modifications with which we are not concerned) of the *Bills of Exchange Act,* 1882, as enacted by the Imperial Parliament. Our present section 74 is the original sec. 38 of the Imperial statute. The argument before us was directed to the contention that the Dominion statute expressly gave access to the courts and that the provincial legislation closed the door of the particular court in which this action was instituted, that is, the Supreme Court of Alberta, and that was a conflict, and the Dominion legislation prevailed. But, as I have said, I do not think the Dominion statute was in any way dealing with courts as such, either general or particular.

Section 92 (14) of the *British North America Act* gave the legislatures of the provinces exclusive jurisdiction in relation to "the administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts." It is of vital importance to the integrity of our system of constitutional government that full recognition be given to the rights of the provinces in the exercise of their powers by their elected legislative bodies. If they have legislative competency in relation to the matters dealt with, then that any particular enactment may appear to us to be inadvisable or unjust has nothing whatever to do with its validity.

If the constitution of the civil courts by a province and the provincial legislation governing the administration of

(1) [1922] 1 A.C. 1, at 15.

justice in a province is not adequate at any time in the view of the Parliament of Canada for the purposes of those specific matters which are within the exclusive legislative competency of the Dominion, the Parliament of Canada may itself establish additional courts, as it did in the Exchequer Court of Canada which has original as well as appellate jurisdiction, or designate any existing provincial courts, as was done in sec. 63 of the Dominion *Bankruptcy Act,* 1919, ch. 36, now sec. 152 of R.S.C., 1927, ch. 11 (pursuant to the power vested in the Dominion by sec. 101 of the *British North America Act*) "for the better administration of the laws of Canada," i.e., laws passed by the Dominion Parliament (*Consolidated Distilleries Ld.* v. *The King* (1)).

But I am prepared to hold for the purposes of this action (both the Attorney-General of Canada and the Attorney-General of the province having been represented before us) that the provincial legislation relied upon as a defence to the action is *ultra vires* the province. Where legislative power is divided, as in Canada, between a central Parliament and local legislative bodies and the administration of justice in the provinces, including the constitution, maintenance and organization of provincial courts, is given over to the provinces (with the appointment of the Judges in the Dominion), a province cannot, in my opinion, validly pass legislation, at least in relation to subject-matter within the exclusive competency of the Dominion, which puts into the hands of a local administrative agency the right to say whether or not any person can have access to the ordinary courts of the province. The Debt Adjustment Board of Alberta is an administrative body and is not validly constituted to receive what is in fact judicial authority. *Toronto* v. *York* (2).

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

The judgment of Hudson and Taschereau JJ. was delivered by

HUDSON J.—In this action the plaintiff, as holder, claims from the defendant, a resident of Alberta, as maker, the amount of an overdue promissory note made and payable in Alberta. The only defence set up by the defendant

(1) [1933] A.C. 508, at 521-522. (2) [1938] A.C. 415, at 427.

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is the *Debt Adjustment Act,* being chapter 9 of the Statutes of Alberta of 1937 and amendments, and that the plaintiff has not been granted a permit under the said Act to commence the action. In reply it was claimed that this Act was *ultra vires* of the Province.

The Attorney-General of Alberta intervened to support the defence.

The action was tried before Mr. Justice Ewing, who gave judgment: (1) declaring that the *Debt Adjustment Act* of Alberta, 1937, in so far as the same affects promissory notes, is *ultra vires* the powers of the Provincial Legislature; (2) that the plaintiff has the right to proceed with this action without a permit of the Debt Adjustment Board.

On appeal, the Court of Appeal in a unanimous judgment confirmed the decision of Mr. Justice Ewing.

The *Debt Adjustment Act* of 1937, as amended, constituted a Board to be known as the Debt Adjustment Board, the member or members to be named by the Lieutenant-Governor in Council.

Section 4 empowers the Board to nominate agents who, with the approval of the Lieutenant-Governor in Council, shall have power to grant or refuse permits under the Act.

Section 6 empowers the Board to make inquiries with regard to the property of a resident debtor and the disposition made by him of the property, and may examine under oath certain persons and others.

Section 7 constitutes the Board a body politic and corporate and provides that any member of the Board is empowered to act for and on behalf of the Board.

Section 8, which is the important section, in part is as follows:

> 8. (1) Unless the Board or any person designated by the Board under the provisions of this Act, issues a permit in writing giving consent thereto,—
>
> (*a*) no action or suit for the recovery of any money which is recoverable as a liquidated demand or debt in respect of any claim enforcible by virtue of any rule of law or equity or by virtue of any statute, except money payable in respect of rates and taxes payable pursuant to any statute, and debts owing to a hospital for hospital services;
>
> * * *
>
> (*g*) no action respecting such other class of legal or other proceedings as may be brought within the provisions of this section by order of the Lieutenant-Governor in Council,—

shall be taken, made or continued by any person whomsoever against a resident debtor in any case.

Subsection 3 limits the application of the section to debts where the original consideration arose prior to the 1st of July, 1936.

Subsection 5 provides that the Board may at any time in its discretion cancel or suspend any permit which has been previously issued under this section by the Board.

Section 10 provides that where a creditor asks for a permit, the Board shall proceed to make such inquiries as it may deem proper, and thereupon may issue a permit or refuse or adjourn the application, and may give directions to the resident debtor as to the conduct of his affairs.

Section 23 provides that in case any person makes wilful default in complying with any order, direction or condition of the Board, or wilfully takes or continues any action or proceeding, or makes or continues any seizure, etc., in contravention of the provisions of this Act, or makes default in complying with any direction of the Board under the provisions of this Act, then he shall be liable on summary conviction to a fine, and, in default, to imprisonment.

Section 26 indemnifies the Board and its members from liability for any act done under the Act.

Section 27 provides that every action, order or decision of the Board as to any matter or thing in respect of which any power, authority or discretion is conferred on the Board shall be final and shall not be questioned, reviewed or restrained by injunction, prohibition or mandamus or other process or proceeding in any court, or be removed by certiorari or otherwise in any court.

It is further provided that the provisions of this Act shall not be so construed as to authorize the doing of any act or thing which is not within the legislative competence of the Legislative Assembly.

This Act, if valid, effectually bars access to the established courts of justice in respect of a large class of rights arising under the laws of Canada as well as the laws of Alberta, unless a nominee of the Provincial Executive of his or its own free will, ungoverned by any law, chooses to give consent.

The right of the Province to pass such a law, in so far as it affects a promissory note made and payable in Alberta, is directly challenged in this action.

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The *British North America Act,* sec. 91, subsection 18, particularly enumerates as a class of subjects falling exclusively within the legislative authority of the Parliament of Canada: "18. Bills of Exchange and Promissory Notes," and under the authority of this heading the Parliament of Canada passed the *Bills of Exchange Act.* In the court below, reference was made to section 74, which provides:

> The rights and powers of the holder of a bill are as follows:
>
> (*a*) He may sue on the bill in his own name;
>
> (*b*) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill.

This section expressly recognizes a right of action on a note such as is here in question.

The action was entered in the Supreme Court of Alberta. This court was constituted by statute of the Province of Alberta and given civil and criminal jurisdiction similar to that exercised by superior courts in England and, in addition, was expressly given the jurisdiction up until then exercised by the former Supreme Court of the North West Territories. This latter court was a Dominion court created by the statutes of the Parliament of Canada and maintained and organized under Dominion authority. The express grant of this jurisdiction merely emphasizes in the case of Alberta what has always been recognized since Confederation, that a provincial court has jurisdiction to entertain actions founded on the laws of Canada as well as on the laws of the Province.

Upon the constitution of this court by the Province, qualified judges were appointed by the Dominion, as provided for in section 96 of the *British North America Act,* and thus the court was enabled to function as contemplated by the statute.

There can be no doubt that it had jurisdiction and that it was its duty to entertain this action, unless that right had been taken away by competent authority.

The *Debt Adjustment Act,* which is set up as a defence, does not purport to amend or limit the jurisdiction of the Supreme Court. What it does is to place in the hands of a provincial body the right to say whether or not certain classes of rights may be established or enforced through the courts.

The contention of the Attorney-General and of the defendant in support of this statute is based primarily on sub-head 14 of section 92 of the *British North America Act,* which reads as follows:

92. In each Province the Legislature may exclusively make laws in relation to * * *

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

The expression "administration of justice" taken by itself is most comprehensive, but it must be read as part of the *British North America Act;* otherwise, it would enable the Legislature to make and enforce laws within the field allotted exclusively to the Dominion Parliament. The expression must mean, the administration of justice according to the laws of Canada or the laws of the Province, as the case may be.

Normally, the administration of justice should be carried on through the established courts, and the Province, although it has been allotted power to legislate in relation to the administration of justice and the right to constitute courts, cannot substitute for the established courts any other tribunal to exercise judicial functions: see *Toronto* v. *York* (1).

There may be administration of law outside of the courts short of empowering provincial officers to perform judicial functions, but in respect of matters falling within the Dominion field a province would certainly not be justified in doing anything which would destroy or impair rights arising under the laws of Canada.

The province is given the power to constitute courts, and this would imply a power to define, limit, or enlarge the jurisdiction of those courts, at least in so far as the laws of the province may be involved.

The Dominion Parliament has power to impose duties upon courts established by the provinces in furtherance of the laws of Canada, and a province could not interfere with, nor take away, the jurisdiction thus conferred: see *Valin* v. *Langlois* (2); *Cushing* v. *Dupuy* (3).

(1) [1938] A.C. 415. (2) (1879) 5 App. Cas. 115.
(3) (1880) 5 App. Cas. 409.

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In the present case, as already pointed out, the Province has not directly altered the jurisdiction of the Supreme Court of Alberta. It has set up a commission without whose approval all courts are forbidden to act within a prescribed field.

Under section 92 (14) a Provincial Legislature has power to legislate in respect of procedure in the courts in respect of matters exclusively allocated to the provinces under other headings of section 92, and no doubt to regulate procedure in those courts in respect of enforcement of the laws of Canada where Parliament has not otherwise provided and where the result is not in conflict with the laws of Canada.

It is said that a right of action on a promissory note is a "civil right" within the meaning of section 92 (13), but it is a civil right governed by the laws of Canada and, for that reason, excluded from the provincial legislative field.

However, the *Debt Adjustment Act* is not properly a law as to procedure in courts. It provides for extra-judicial procedure.

We are not concerned here with the law of executions, exemptions from seizure or property rights and it is neither necessary nor advisable to discuss the validity of the *Debt Adjustment Act,* in so far as it affects matters not now directly in issue in this action.

The real question here appears to be this: Can a province impose extra-judicial control over rights of action arising under the laws of Canada? To answer this in the affirmative would, in my opinion, conflict with the distribution of legislative power contemplated by the Constitution.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

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

Solicitor for the appellant Winstanley: *W. B. Cromarty.*

Solicitors for the respondent: *McLaws, Redman & McLaws.*

HIS MAJESTY THE KING.....APPELLANT; 1940

AND * Oct. 29. * Dec. 20.

WILLIAM SINGER.....RESPONDENT.

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

Criminal law—War Measures—Regulation made by Governor in Council—No sanction provided—Application of section 164 of the Criminal Code—Regulation to "have the force of law"—Whether deemed to be an Act of Parliament—War Measures Act, R.S.C., 1927, c. 206, ss. 3 (2) and 4—Criminal Code, ss. 2 (1) and 164.

An order or regulation made by the Governor in Council under the *War Measures Act,* although it is thereby enacted that such order or regulation "shall have the force of law," is not an enactment passed by Parliament, i.e., an Act of Parliament, but is merely an enactment passed by the Government.

When an accused is charged of having disobeyed such an order or regulation, for the violation of which no penalty or other mode of punishment has been expressly provided, the disobedience so complained of is not punishable under section 164 of the Criminal Code, which relates only to violations of Acts of Parliament or of provincial legislatures.

Davis and Hudson JJ. dissenting.

APPEAL by the Attorney-General for Quebec from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), which (Barclay and Francoeur JJ. dissenting) dismissed the Attorney-General's appeal against the acquittal of the accused by Guérin C.E., Judge of Sessions of the Peace (2) on an information for violation of a regulation, restricting the sale of codeine, made by the Governor in Council under section 3 of the *War Measures Act,* R.S.C., 1927, c. 206, such violation allegedly constituting wilful disobedience of an Act of the Parliament, contrary to section 164 of the Criminal Code.

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

O. Legrand K.C. for the appellant.

L. Gendron K.C. for the respondent.

* PRESENT:—Rinfret, Crocket, Davis, Hudson and Taschereau JJ.

(1) (1940) Q.R. 69 K.B. 121; 74 Can. Cr. Cas. 290.
(2) (1940) Q.R. 78 S.C. 126.

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The judgment of Rinfret and Crocket JJ. was delivered by

RINFRET J.—The *War Measures Act* was enacted in 1914. With certain modifications, it has remained in the statutes and is now found in chapter 206 of the Revised Statutes of Canada, 1927.

Its object is to confer special powers to the Governor in Council, which he may, by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada.

The Act reads (subs. 2 of s. 3) as follows:

> All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation.

The Governor in Council is by sec. 4 of the Act empowered to

> prescribe the penalties that may be imposed for violations of orders and regulations made under this Act, and
>
> (to)
>
> also prescribe whether such penalties shall be imposed upon summary conviction or upon indictment, but no such penalty shall exceed a fine of five thousand dollars or imprisonment for any term not exceeding five years, or both fine and imprisonment.

On the 11th day of September, 1939, purporting to act under the provisions of the *War Measures Act* and upon a report of the Minister of Pensions and National Health, the Governor in Council made an order to the following effect, amongst others:

> 2. No retail druggist shall sell or supply straight Codeine, whether in powder, tablet or liquid form, or preparations containing any quantity of any of the narcotic drugs mentioned in Parts I and II of the Schedule to the *Opium and Narcotic Drug Act*, mixed with medicinal or other ingredients, except upon the written order or prescription therefor signed and dated by a physician, veterinary surgeon or dentist whose signature is known to the said druggist, or, if unknown, duly verified before such order or prescription is filled. No such order or prescription shall be filled upon more than one occasion, and it shall be filed by such retail druggist and be available for subsequent inspection.
>
> 3. Any person found in possession of Codeine or preparation containing narcotic drugs mentioned in Parts I and II of the Schedule to the *Opium and Narcotic Drug Act*, mixed with other medicinal ingredients, save and except under the authority of a licence from the Minister

of Pensions and National Health first had and obtained, or other lawful authority, shall be liable to the penalties provided upon summary conviction under the provisions of Section 4 of the *Opium and Narcotic Drug Act.*

The *Opium and Narcotic Drug Act* referred to in the above quoted paragraphs of the Order is a Dominion statute (R.S.C., 1927, c. 144) which, as stated, contains a schedule wherein certain narcotic drugs are enumerated and which, up to the date of the Order, did not include Codeine.

Under the provisions of that Order, on November 6th, 1939, a charge was laid against the respondent, a retail druggist of the city of Montreal, for that

he did, without lawful excuse, disobey an Act of the Parliament of Canada for which no penalty or other mode of punishment is expressly provided, to wit: Paragraph two of regulations dated 11th day of September, 1939, of the *War Measures Act,* Chapter 206 of Revised Statutes of Canada, 1927, by wilfully selling Codeine, a narcotic drug mentioned in Part Two of the Schedule to the *Opium and Narcotic Drug Act* without first having had and obtained a written order or prescription therefor signed and dated by a physician, the whole contrary to Sec. 164 Criminal Code of Canada.

As must have been noted, the charge stated that "no penalty or other mode of punishment is expressly provided"; and it is a fact that the order or regulation under which the charge was laid does not contain any provision for a "penalty or other mode of punishment."

On this charge, the trial judge (C. E. Guérin, Judge of Sessions of the Peace) liberated the accused and dismissed the complaint on the ground that the order or regulation, as a consequence of which the charge was laid, was not an "Act of the Parliament of Canada or of any legislature of Canada," and that, therefore, section 164 of the Criminal Code did not apply.

Upon appeal, this judgment was affirmed (Tellier, C.J., St. Germain and Bond, JJ., forming the majority; Barclay and Francœur, JJ., dissenting). The formal judgment specifies as follows the ground in law on which the dissent is based:

Sur le motif qu'en loi le règlement en question doit être considéré comme faisant partie de la *Loi des Mesures de Guerre,* et que partant il y a lieu à l'application de l'article 164 C. Cr.

The Attorney-General is now before this Court under section 1023 of the Criminal Code on the question of law over which there has been dissent in the court of appeal.

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Section 164 of the Criminal Code enacts specifically that the offence must consist in wilfully doing any act which is forbidden, or omitting to do any act which is required to be done by an "Act of the Parliament of Canada."

It is an Act of the Parliament of Canada which the guilty person must have disobeyed without lawful excuse. And under those circumstances, if some penalty or other mode of punishment has not been otherwise expressly provided by law, the person found guilty is declared to be "liable to one year's imprisonment." In the present case, although the respondent was charged of having disobeyed an Act of Parliament for which no penalty or other mode of punishment was expressly provided, it is stated in the information and complaint that the disobedience complained of was in reality a disobedience to paragraph 2 of the regulation already referred to in this judgment.

The information is, therefore, for having disobeyed not an Act of Parliament, but a regulation made under an Act of the Parliament of Canada.

I agree with the trial judge and with the majority of the court of appeal that, in the premises, section 164 of the Criminal Code has no application.

Of course, the *War Measures Act* enacts that the orders and regulations made under it "shall have the force of law." It cannot be otherwise. They are made to be obeyed and, as a consequence, they must have the force of law. But that is quite a different thing from saying that they will be deemed to be an Act of Parliament.

An Act of Parliament is defined in the Criminal Code (sec. 2-1). It is there declared to include

> an Act passed or to be passed by the Parliament of Canada, or any Act passed by the legislature of the late province of Canada, or passed or to be passed by the legislature of any province of Canada, or passed by the legislature of any province now a part of Canada, before it was included therein.

In terms, therefore, the words: "Act of the Parliament of Canada" do not include regulations made under the provisions of such Act. It is clearly indicated in section 2 (1)—which is the Interpretation clause of the Criminal Code—that, in order to come under the appellation of an Act, the enactment must have been "passed by the Parliament of Canada" or "by the legislature of any province of Canada," etc.

A regulation made under an Act, and in particular a regulation under the *War Measures Act,* is not an enactment passed by Parliament; it is an enactment made by the Government.

An Act of Parliament, in order to become law and to form part of the statutes of Canada, must be adopted by the House of Commons, the Senate and receive the Royal Assent. It is debated publicly, to the knowledge of the public, and it comes into force on the day of its sanction by Royal Assent, which is given publicly.

The regulation takes the form of an Order in Council, debated secretly by the Privy Council and, generally speaking, will come into force as soon as it is signed by the Governor General, without there being any essential requirement for its publication.

These circumstances show the great difference between the Act of Parliament and the Order in Council, in so far as the people is concerned; and the difference takes even more importance when it is applied to section 164 of the Criminal Code, which requires for the guilt of an accused that he should have been doing or omitting any act "wilfully" and "without lawful excuse."

An additional point in respect of the difference between an Act of Parliament or a statute and an Order in Council may be found in the Act respecting the Publication of the Statutes (ch. 2 of the Revised Statutes of Canada, 1927) and in the *Canada Evidence Act,* with regard to evidence and to judicial knowledge.

It should be further noted that the delegation of powers to the Governor in Council, as expressed in the *War Measures Act* with regard to orders and regulations, merely enacts that these orders and regulations

> shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe,

with further power given to the Governor in Council to "prescribe the penalties that may be imposed for violation" etc. These provisions in the Act are far from being as strong, for the purpose of the appellant's argument, as the similar provision contained, for example, in the *Bankruptcy Act* (c. 11, R.S.C., 1927): "Such rules shall be judicially noticed and shall have effect as if enacted

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by this Act" (s. 161, par. 3), or in the *Explosives Act* (c. 62, R.S.C., 1927):

> All regulations made under this Act * * * shall have the same force as if they formed part of this Act (s. 5, par. 2),

or in the *Fisheries Act* (c. 73 of R.S.C., 1927):

> Every offence against any regulation made under this Act may be stated as in violation of this Act (s. 46).

or in the *Meat and Canned Foods Act* (c. 77, R.S.C., 1927):

> Such orders and regulations shall have the same force and effect as if embodied in this Act (s. 4, par. 2).

In the statute now under consideration, provisions equivalent to those just quoted are nowhere to be found; and, on the contrary, the clear distinction between the Act itself and the regulations made under the Act is recognized.

One would think that if Parliament intended the regulations under the *War Measures Act* to be considered by the courts as forming part of the Act and, therefore, to be susceptible of the application of section 164 of the Criminal Code, Parliament would have said so at least in similar language to that employed in the several Acts just above referred to.

Far from it, in paragraph 3 of the regulation made on the 11th day of September, 1939, the Governor in Council provides for penalties, and it is said therein that these penalties will be imposed "under the provisions of section 4 of the *Opium and Narcotics Act,*" thus relieving any offence against paragraph 3 of the regulation from the application of section 164 of the Criminal Code.

That indeed would lend colour to the respondent's argument that the regulations now under discussion, although in terms passed in virtue of the powers given to the Governor in Council by the *War Measures Act,* were, in fact, meant to affect the schedule of the *Opium and Narcotic Drug Act,* to which both the preamble of the Order in Council and paragraphs 2 and 3 thereof specifically refer. And it is interesting to note that, under that Act, the Governor in Council may make such orders and regulations as are deemed necessary or expedient for the carrying out of the intention of the Act, or may from time to time add to the schedule of the Act; but every Order

in Council in that behalf must be published in the *Canada Gazette* and shall take effect only at the expiration of thirty days from the date of such publication (ss. 21 & 22).

The question is not whether the consent of Parliament may be expressed by delegated authority and that consequently it is not necessary that an Act should be complete when it emerges from the debates in Parliament or at the time it leaves the hands of the legislative body; but the only question we have to decide in this case is whether the Orders in Council made by force of the delegated authority are to be deemed equivalent to an Act of Parliament within the meaning of section 164 of the Criminal Code. It is not to the purpose to call them "subordinate legislation" or the "complement of the legislation," for there is no denying the fact that the regulations provided for in the *War Measures Act* are not declared by Parliament to form part and parcel of the Act itself; and whether they are as effectual for the purpose of obedience and disobedience of the subject, they are not assimilable to the Act itself; and so far as concerns the application of section 164 of the Code, they may not be treated as if they had been enacted and were incorporated in the *War Measures Act.*

This view, it seems to me, is further strengthened by the fact that, by force of the Act itself, Parliament put it in the hands of the Governor in Council to prescribe the penalties that may be imposed for violation of the regulations, thus indicating further its intention that the matter should not be left to the general provisions contained in section 164 of the Code.

We have not here a statute such as was under consideration by the House of Lords in the case of *Chartered Institute of Patent Agents* v. *Lockwood* (1), where the words of the Act were that the rules "shall be of the same effect as if they were contained in this Act and shall be judicially noticed." The distinction between that Act and the *War Measures Act* is abundantly clear.

So, in the case before the House of Lords in *Minister of Health* v. *The King* (*on the prosecution of Yaffe*) (2), where the language was:

> The order of the Minister, when made, shall have effect as if enacted in this Act.

(1) (1894) 71 L.T.R. 205.

(2) [1931] A.C. 494.

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It was held there that this enactment did not preclude the Court from calling in question the order of the Minister, where the scheme presented to him for confirmation is inconsistent with the provisions of the Act, although in the particular case the scheme, whatever its defects, was found to be an improvement scheme within the meaning of the Act. However, it is evident that the wording of the statute discussed in that case was far different from the wording of the *War Measures Act,* in so far as it concerns the point now submitted to this Court.

We have been referred also to a number of other decisions rendered in English cases. I have very serious doubt whether, in any event, these decisions could be allowed to prevail against our Criminal Code and the plain language of section 164. But, moreover, in those cases, the English courts were called upon to interpret statutes differing in language and in aim from the Acts now before this Court (see Lord Davey in *Commissioners of Taxation* v. *Kirk* (1); and there is a clear distinction to be made between the present case and those in which the decisions referred to were rendered. In the latter, the offences against the regulations were common law misdemeanours before the statutes or the regulations prohibited them; in the matter now before us, the sale of Codeine never was in itself a misdemeanour; it was not even prohibited by the *Opium and Narcotic Drug Act* before the regulation of the 11th of September, 1939, came into force under the provisions of the *War Measures Act,* and for purposes which are there stated as being due to the existence of war. As I read the decisions, where an act, heretofore a misdemeanour at common law, is subsequently made an offence under the Criminal Code or under a statute or by virtue of the regulations made thereunder, if the code or the statute provides for no penalty as a consequence of the doing of the act which it prohibits, or of omitting the act which it requires to be done, the law steps in and establishes the mode of punishment; but if the act is made an offence merely as a result of the regulations and, I repeat, was not, up to the coming into force of the regulation, a common law misdemeanour, then the penalty must be found either in the regulation itself or must have been provided for by the Act of Parlia-

(1) [1900] A.C. 588, at 593.

ment or the statute under which the regulation is made, or otherwise the regulation is inoperative for want of any sanction.

For all these reasons, I am of the opinion that section 164 of the Criminal Code does not apply to a charge such as that brought against the respondent and that, under the circumstances, the information and charge was rightly dismissed by the trial judge and by the Court of King's Bench.

The appeal to this Court should, therefore, be disallowed.

The judgment of Davis and Hudson JJ. (dissenting) was delivered by

HUDSON J.—The question for decision in this case is whether or not the breach of a duty validly created by an Order in Council passed under the *War Measures Act* is a breach of that statute itself, within the meaning of article 164 of the Criminal Code.

The power of Parliament to pass the *War Measures Act* is not now open to question; nor is there any doubt about the power of the Governor in Council under the provisions of this Act to pass the particular order under consideration: see *In Re Gray* (1); *Rex* v. *Halliday* (2).

There is, however, in the Order in Council in question no provision for punishment in case of violation of its orders or regulations, although by the statute the Governor in Council were given express powers to impose penalties within prescribed limits.

In view of the absence of such a provision, the prosecution in this case was based on article 164 of the Criminal Code, which reads as follows:

> Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any Act of the Parliament of Canada or of any legislature in Canada, by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty or other mode of punishment is expressly provided by law.

The matter was heard in the first instance before Judge Guérin, Judge of the Sessions of the Peace at Montreal, who gave a considered judgment, in which he came to the conclusion that article 164 did not apply on the ground

(1) (1918) 57 Can. S.C.R. 150. (2) [1917] A.C. 260.

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that the offence charged was a violation of an Order in Council and not of a statute. On appeal to the Court of King's Bench, this was affirmed by a majority of the court, Mr. Justice Barclay and Mr. Justice Francœur dissenting.

At common law it was well settled that either a breach of a statute which concerns the public or any part of the public even where no penalty was prescribed, or a breach of an order or regulation passed under the authority of such a statute, was indictable: see Hawkins' Pleas of the Crown, 1824 edition, page 65, and *The King* v. *Harris* (1). The general rule as stated in Stephen's Digest of the Criminal Law, article 166, is as follows:

> Every one commits a misdemeanour who wilfully disobeys any statute of the realm by doing any act which it forbids, or by omitting to do any act which it requires to be done, and which concerns the public or any part of the public, unless it appears from the statute that it was the intention of the Legislature to provide some other penalty for such disobedience.

and in support of this article the learned author refers to the common law authorities above referred to, as well as others. The article as drawn by him in this Digest appeared in substantially the same form in the draft Bill attached to the Report of the English Royal Commission on Criminal Law, 1880.

A similar statement is made by the late Mr. Justice Burbidge in his Digest of Criminal Law of Canada, 1890, at page 115, in the following language:

> Every one commits a misdemeanour who wilfully disobeys any statute by doing any act which it forbids or by omitting to do any act which it requires to be done, and which concerns the public or any part of the public, unless it appears from the statute that it was the intention of the Legislature to provide some other penalty for such disobedience.

The Canadian Criminal Code, as will be seen, follows very closely the language of this article. Beyond this and the statutes referred to by Judge Guérin and the *Interpretation Act*, there seems to be nothing bearing on the history of the present article 164 of the Code.

Section 2 of the *War Measures Act* provides that "all orders and regulations made under this section shall have the force of law."

Parliament has said to residents of Canada: "You must obey what is prescribed by the Governor General in Council within the limits of the authority we here give

(1) (1791) 4 Term 202.

them." If a person fails to observe the requirements of an Order in Council legally passed under this Act, he, in my opinion, disobeys the requirements of the statute itself, and in support of this, reference might be made to the case of *Willingale* v. *Norris* (1). The head-note is:

Where a statute gives power to an authority to make regulations, a breach of the regulations so made is an offence against the provisions of the statute.

A breach of regulations made under s. 4 of the *Hackney Carriages Act,* 1850, for enforcing order at standings for hackney carriages, is subject to the penalty of 40s. provided by s. 19 of the *Hackney Carriage Act,* 1853, for offences against that Act; inasmuch as the effect of s. 21 of the Act of 1853, which provides that the Acts of 1850 and 1853 are to be construed as one Act, is that s. 4 of the Act of 1850 has the same operation as if it were in fact contained in the Act of 1853, and therefore an offence against regulations made under s. 4 of the Act of 1850 is an offence against the Act of 1853.

Lord Alverstone, C.J. said at page 64:

I am of opinion that the effect of the provision contained in s. 21 of the Act of 1853 was to make one code or statute for the regulation of hackney carriages, and that therefore a general penal clause for breach of the provisions of the Act of 1853 would apply to any provision contained in the three Acts of 1843, 1850, and 1853. That is the natural effect of this legislation where there are amending Acts intended to be read as one statute. If it be said that a regulation is not a provision of an Act, I am of opinion that *R.* v. *Walker* (2) is an authority against that proposition. I should certainly have been prepared to hold apart from authority that, where a statute enables an authority to make regulations, a regulation made under the Act becomes for the purpose of obedience or disobedience a provision of the Act. The regulation is only the machinery by which Parliament has determined whether certain things shall or shall not be done.

and Mr. Justice Bigham at page 66:

In my opinion, to break the regulations made under the authority of a statute is to break the statute itself.

and Mr. Justice Walton at page 67:

Upon the second question, again not without some difficulty, I have come to the conclusion that in the present case there was charged against the respondent an "offence against the provisions of this Act" within the meaning of s. 19 of the Act of 1853. It seems clear that the Act of 1850 must be read as one—construed as one—with the Act of 1853, and therefore s. 4 of the Act of 1850 has now exactly the same effect as if it were in fact a section contained in the Act of 1853, and I have come to the conclusion that, if the facts should be proved hereafter, there was a breach of the provisions of s. 4 of the Act of 1850. That section gives power to make regulations, and I think there is involved in this that regulations so made must be obeyed, and if so it follows that a breach of such regulations is a breach of the law contained in that sec-

(1) [1909] 1 K.B. 57. (2) (1875) L.R. 10 Q.B. 355.

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tion. Section 4 of the Act of 1850 is made a provision of the Act of 1853, and therefore I think that the alleged offence was one "against the provisions of this Act" within the meaning of s. 19 of the Act of 1853. My difficulty has been—and I had considerable doubt about it at first—as to whether the words "provisions of this Act" can be read as meaning or including "regulations made under this Act," assuming that the regulations were made under this Act, i.e., under the Act of 1853; whether there is not a distinction between provisions of the Act and regulations made under the Act; and whether one can read s. 19 of the Act of 1853 as if the words were "for every offence against the provisions of this Act, or regulations made under this Act." The doubt largely arises from the fact that in the Act of 1853 there is a series of provisions, e.g., in ss. 14, 15 and 16, which are express provisions of the Act, and to which directly, and naturally, the words of s. 19 apply. My doubt is whether s. 19 was intended to apply to anything beyond offences against express provisions contained in the Act of 1853. However, on the whole I have come to the conclusion that it applies to any breach of what must be construed as being a provision of the Act of 1853. In my judgment an offence against s. 4 of the Act of 1850 is an offence within the meaning of s. 19 of the Act of 1853.

This case was followed in the case of *Hart* v. *Hudson* (1), and is accepted by all of the text books as stating the law.

Another argument was also put forward, which is best stated in the language of Mr. Justice St. Germain as follows:

> Le Parlement a donc délégué tous ses pouvoirs au gouverneur en conseil pour la mise en exécution des arrêtés ministériels passés en vertu de la dite loi, sauf la restriction ci-dessus quant à la peine, et il appartenait par conséquent au gouverneur en conseil de mentionner dans le décret en vertu duquel l'intimé a été mis en accusation que quiconque contreviendrait à ce décret serait sujet à telle peine fixée par le dit décret; bien plus, il appartenait aussi au gouverneur en conseil de déclarer que les peines qui seraient imposées pour infractions aux arrêtés et règlements établis sous la dite loi seraient ainsi imposées, soit après déclaration sommaire de culpabilité "upon summary conviction", ou soit par voie de mise en accusation "upon indictment."

It seems to me, however, that article 164 of the Criminal Code was passed for the very purpose of providing for cases where penalties were not otherwise imposed by the law, and applies to violation of the provisions of such orders as form part of the law authorized by a statute, as in this case.

With all respect to those who take a different view, I agree with the views of Mr. Justice Barclay and Mr. Justice Francœur in the court below, and would allow the appeal.

(1) (1928) 2 K.B. at p. 635.

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TASCHEREAU J.—The respondent, a druggist, was acquitted by Mr. Justice Guérin, of Montreal, of the charge of having without lawful excuse disobeyed an Act of Parliament for which no penalty is expressly provided, to wit, paragraph (2) of Regulations, dated the 11th day of September, 1939, of the *War Measures Act,* by wilfully selling codeine, a narcotic drug, without first having obtained a written order or prescription signed and dated by a physician, thus, committing an offence against section 164 of the Criminal Code.

The Court of King's Bench of the province of Quebec (Barclay and Francœur JJ. dissenting) affirmed the judgment of the trial judge and the Crown has appealed to this Court.

The reason given by the trial judge, and the Court of King's Bench, is that there is an offence under section 164 of the Criminal Code, only when the Act complained of is forbidden by an Act of the Parliament of Canada, or of any legislature of Canada, and that a regulation passed under the *War Measures Act,* is not an Act of Parliament. Section 164 of the Code reads as follows:

> 164. Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any Act of the Parliament of Canada or of any legislature in Canada, by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty or other mode of punishment is expressly provided by law.

Section (3) of the *War Measures Act* confers special powers to the Governor General in Council and amongst other things says:—

> The Governor in Council may do and authorize such Acts and things and make from time to time such orders and regulations as he may, by reason of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, order and welfare of Canada.

The same section has also the following provisions:—

> All orders and regulations made under this section shall have the force of law and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation.

Section 4 of the same Act empowers the Governor in Council to

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prescribe the penalties that may be imposed for violations of orders and regulations made under this Act, and (to) also prescribe whether such penalties shall be imposed upon summary conviction or upon indictment, but no such penalty shall exceed a fine of five thousand dollars or imprisonment for any term not exceeding five years, or both fine and imprisonment.

Pursuant to these powers given by Parliament, the Governor General in Council passed regulations forbidding the sale of codeine without a written prescription signed by a physician, but these regulations do not contain any provisions for a penalty.

It is beyond all dispute that Parliament has power to authorize the making of such regulations. The only question is whether the Order in Council can be interpreted as meaning an Act of Parliament. There is no doubt that all orders and regulations made under section 3 of the *War Measures Act* have the force of law, and may be enforced as the Governor General may prescribe, but, can it be said that a disobedience to the Order in Council is a disobedience to the statute itself?

It has been submitted by the Crown that an Order in Council issued in virtue of the *War Measures Act* becomes an integral part of the Act and that a violation of the Order in Council is a violation of the *War Measures Act* itself, and, therefore, of an Act of Parliament.

The *War Measures Act* does not, like other Acts enacted by the Parliament of Canada, provide that the regulations passed by the Governor General in Council shall form part of the Act nor does it say that every offence against such regulations shall be considered as a violation of the Act. Such provisions may be found in the *Bankruptcy Act,* the *Explosives Act,* the *Fisheries Act,* etc., but nothing of the kind is incorporated in the *War Measures Act,* and we find no provisions analogous to those which are in the Acts above mentioned.

I cannot come to the conclusion that in the present instance the violation of the Order in Council is tantamount to the violation of the *War Measures Act.* An Order in Council is passed by the Executive Council, and an Act of Parliament is enacted by the House of Commons and by the Senate of Canada. Both are entirely different, and unless there is a provision in the law stating that the Orders in Council shall be considered as forming part of the law itself, or that any offence against the regulations

shall be a violation of the Act, it cannot be said that the violation of an Order in Council is a violation of an Act of Parliament within the meaning of section 164 of the Criminal Code.

Furthermore, the word "Act" is defined in the Criminal Code as follows:—

Section 2, paragraph (1):

"any Act," or "any other Act," includes any Act passed or to be passed by the Parliament of Canada, or any Act passed by the legislature of the late Province of Canada, or passed or to be passed by the legislature of any province of Canada, or passed by the legislature of any province now a part of Canada before it was included therein.

It is to my judgment impossible to stretch the meaning of the word "Act" to such an extent so as to include an Order in Council.

I would, therefore, dismiss this appeal.

Appeal dismissed.

Solicitor for the appellant: *Omer Legrand.*

Solicitors for the respondent: *Gendron, Monette & Gauthier.*

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* Oct. 21
* Dec. 20.

IN THE MATTER OF THE ESTATE OF MARIA FAMICHA GANONG, DECEASED.

ARTHUR D. GANONG AND OTHERS....APPELLANTS;

AND

JEANNETTE R. BELYEA AND ANOTHER RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Will—Construction—Bequests of shares in company—Direction that shares remain property of testatrix's estate until certain dividends received for benefit of estate—No dividends earned or declared by company within dividend periods mentioned in the will—Vesting of shares in legatees—Time for delivery of shares to legatees.

A testatrix, in her will and a codicil thereto, made bequests of preferred and common shares of stock in a company, and by the codicil provided that all succession duties payable upon any of her bequests be

* PRESENT:—Crocket, Davis, Kerwin, Hudson and Taschereau JJ.

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paid out of her personal estate and then directed that any and all of the shares in said company bequeathed by her "shall be and remain the property of my estate and be held by my executors and trustees as part of my estate until all dividends on the preferred shares accrued to the date of my death have been paid in full and also until the two half-yearly dividends which shall accrue immediately subsequent to the date of my death shall have been paid in full to my estate for the benefit thereof, it being my intention * * * that all dividends on said preferred shares accrued due to the date of my death, whether earned or declared or not, together with a full year's dividends accruing due after my death, whether earned or declared or not, shall be paid to my executors and trustees for the benefit of my estate before making any transfers of the stock or shares" of said company, common or preferred, bequeathed by her.

The codicil was made in October, 1934. The testatrix died on November 30, 1934. No dividends were earned or declared by the company in 1934 or 1935. The dividends on the preferred shares were at a fixed rate and cumulative, but payable only out of profits, and there were no profits sufficient to justify any dividend in those years.

Baxter C.J. held (14 M.P.R. 306) that the shares vested in the legatees at the death of the testatrix; that the dividends, until the payment of which the shares were to remain in the estate, had never accrued, and the time fixed by the will for the shares to remain in the estate had elapsed, and the legatees were entitled to receive them. The Appeal Division of the Supreme Court of New Brunswick held (15 M.P.R. 130) that the legatees had a vested interest in the shares subject to a charge thereon in favour of the executors and trustees to the amount of two years' dividends on the preferred shares bequeathed, and that the legatees were entitled to delivery of the shares when the amount of the charge had been paid to the estate or the charge released. The specific legatees of shares appealed to this Court. In this appeal it was not disputed that the shares vested in the legatees on the death of the testatrix; but the respondents (residuary legatees) contended that the judgment of the Appeal Division was right.

Held: The judgment of Baxter C.J. should be restored. No dividends could be said to have "accrued due" or to be "accruing due" within the intendment of the reservation in the codicil. The shareholders acquired no right to payment of any dividends until there were profits and until the directors determined they should be paid (*Bond* v. *Barrow Haematite Steel Co.*, [1902] 1 Ch. 353, at 362; *In re Wakley*, [1920] 2 Ch. 205, at 217). The reservation in the codicil was directed wholly to the payment of dividends on the bequeathed preferred shares during the anticipated period of the administration of the estate and could only apply to the payment of dividends as such to the executors and trustees of the estate, as the registered holders of the shares, by the company itself as a going concern, and clearly excluded any payment in lieu thereof by the beneficiaries, in whom the shares themselves were vested. The executors and trustees, as the registered holders of the shares, had never acquired the right to demand payment from the company of any dividends to cover either the year 1934 or the year 1935. It could not be said that the testatrix intended that the transfer of the

shares to the legatees should be withheld indefinitely until the actual payment of the deferred dividends, which might possibly never happen. If such were the interpretation, the reservation (whether or not the words "whether earned or declared or not" be eliminated as repugnant) would have to be held void for uncertainty. The uncertainty would go, not to the validity of the bequests, but to the validity of the reservation (*Egerton* v. *Earl Brownlow*, 4 H.L.C. 1, at 181; *Hancock* v. *Watson*, [1902] A.C. 14, at 22; *Fyfe* v. *Irwin*, [1939] 2 All E.R. 271). The intention of the testatrix must be taken to be that the executors should not withhold transfer to the legatees beyond a year after her death and to withhold from them their right to receive the unearned and undeclared dividends only in the event of their being paid by the company to the executors, as the registered holders of the shares for the purpose of administering the estate, within a period of one year following the death of the testatrix.

APPEAL by certain legatees under the will, or codicil thereto, of Maria Famicha Ganong, deceased, from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), which allowed (*per* Harrison and Fairweather JJ.; Grimmer J. dissenting) an appeal by the residuary legatees (the present respondents) from the judgment of Baxter C.J. (2).

The material facts of the case are sufficiently stated in the reasons for judgment in this Court now reported and also in the reasons for judgment in the Courts below. Proceedings were begun by originating summons dated December 1st, 1939, for the determination of the following questions:

1. Who are entitled to the shares in the capital stock of Ganong Bros., Limited, either common or preferred, bequeathed under any clauses of either the Last Will and Testament of Maria Famicha Ganong or the second codicil thereto?

2. When are the beneficiaries of the said shares entitled to delivery thereof?

Baxter C.J. held that the shares vested in the legatees at the death of the testatrix but that the executor could not transfer them upon the books of the company until certain dividends were paid; that no such dividends ever accrued; that the time fixed by the will had elapsed and that the legatees were entitled to receive their legacies. The Appeal Division of the Supreme Court of New Bruns-

(1) 15 M.P.R. 130; [1940] 4 D.L.R. 4.

(2) 14 M.P.R. 306; and (in abridged form) [1940] 1 D.L.R. 790.

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wick held that the legatees had a vested interest in the shares subject to a charge thereon in favour of the executors and trustees to the amount of two years' dividends on the preferred shares bequeathed and that the legatees were entitled to delivery of the shares when the amount of the charge had been paid to the estate or the charge released. (Grimmer J. dissented, agreeing with the judgment of Baxter C.J.). From that judgment the present appellants, who were legatees of shares in the said company under specific bequests thereof in the will or codicil appealed to this Court.

J. H. Drummie for the appellants.

O. M. Biggar K.C., C. F. Inches K.C. and *W. J. West* for the respondents, residuary legatees.

R. B. Hanson K.C. for the executor and trustee (respondent).

The judgment of the Court was delivered by

CROCKET J.—This is an appeal from a judgment of the Appeal Division of the Supreme Court of New Brunswick, varying the judgment of Baxter, C.J., on an originating summons taken out by the sole executor of the estate of Maria Famicha Ganong, late of the town of St. Stephen, N.B., widow, deceased, for the interpretation of certain provisions of a codicil to her will concerning the disposition of some 4,800 and odd preferred shares and 4,000 and odd common shares of the capital stock of Ganong Bros. Ltd.

Thirty-seven hundred and ninety (3,790) of these preferred shares and 3,600 of the common shares had been bequeathed to her by her late husband, Gilbert W. Ganong, who died as Lieutenant-Governor of New Brunswick in the year 1916. All these shares she assigned to the Eastern Trust Company on March 15th, 1918, by a trust indenture made between herself as party of the first part, the said Trust Company as party of the second part, and William F. Ganong, James E. Ganong, Walter K. Ganong and Arthur D. Ganong, four nephews of her late husband, as parties of the third part. The indenture provided that all dividends payable thereon should be paid direct by the company to her "under a sufficient

order or orders therefor to be deposited by the trustee with the company," and that upon her death, provided there should not theretofore have occurred any default thereunder, the trustee should assign and transfer to the said four nephews all the said common shares to be divided amongst them as they should think proper, and the preference shares to a sister and fourteen nephews and nieces, including the said four nephews of her late husband, in the numbers respectively specified in a schedule annexed to the trust indenture, or to their legal representatives in the event of the death of any of them.

This indenture Mrs. Ganong expressly confirmed by par. 15 of her will, executed on September 25th, 1924, and declared to be binding on herself and her estate. At this time she was possessed of several hundred additional preferred and common shares of the capital stock of Ganong Bros. Ltd., of which she bequeathed 600 preferred shares to her brother, Edgar M. Robinson, in trust for his three children and 200 more to the children themselves. One hundred more preferred shares were to go to an Old Folks Home fund, 20 to the Chipman Memorial Hospital, while a further number of 120 were to be distributed as bequests to four named beneficiaries. No specific mention is made in the will of her common shares, and they would consequently fall into the residue of the estate, which was devised and bequeathed to her brother and sister in equal shares.

The trust deed provided for its revocation in the event of default in payment of the dividends, and, the company having failed in the years 1933 and 1934 to earn and declare the customary dividend upon the preferred shares, Mrs. Ganong, on September 29th, 1934, gave the necessary notice of default and of her intention to revoke the trust. Two weeks later, in anticipation of the reversion to her or her estate of these trust shares, she executed the codicil, which created the difficulty it became necessary to submit to the Supreme Court of New Brunswick for solution. Shortly after doing so Mrs. Ganong went to Florida, where it had been her custom for some years to spend the winter months, and there contracted pneumonia, from which she died on November 30th, 1934, and the Trust Company some time later returned the trust shares to the executors of her estate.

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The principal change the codicil made concerning the disposition of the 3,790 preferred and 3,600 common shares, which were still in the hands of the Eastern Trust Company at that time, was the revocation of par. 15 of the will, by which the testatrix had confirmed the trust assignment of March 15th, 1918, and their distribution among the beneficiaries named in pars. 14, 15 and 16 of the codicil. Of the 3,790 preferred shares, which were allotted by the schedule of the trust deed to the testatrix's deceased husband's sister, seven nephews and seven nieces, 3,290 were apportioned by par. 14 among the same nephews and nieces, except that one of the nephews, Frank Ganong, was replaced by his son, Edwin M. Ganong. The sister, Mrs. Perkins, to whom 583 shares had been allotted by the schedule of 1918, was not named. Par. 15 of the codicil, however, provided for the handing over of the remaining 500 of the 3,790 preferred shares to the Trustees of the Maria F. Ganong Old Folks' Home, as an additional endowment, when that institution should be incorporated by a proposed provincial statute, as "The Gilbert White Ganong Memorial." Thus did pars. 14 and 15 of the codicil provide for the disposition of the full 3,790 preferred shares, then in the hands of the Trust Company. Two thousand of them were divided between the nephew Arthur D. Ganong and three of the surviving nieces, Mrs. Hyslop, Mrs. Christmas and Mrs. Caldwell, the last named being a daughter of Mrs. Perkins, and the remaining 1,290 among the other surviving nephews and nieces in varying lots of from 200 to 90 shares.

Par. 16 of the codicil provided for the disposition of the common shares, then in the hands of the Trust Company. Of these the testatrix bequeathed 2,694 shares to the four nephews, who joined her in the execution of the trust deed of 1918, and 250 to Arthur D. Ganong's son. The remainder of the 3,600 shares were bequeathed to old employees and representatives of the company throughout Canada.

As regards the 1,040 additional preferred shares, which the testatrix held independently of the trust, the codicil made no material alteration in the provisions of her will of September 25th, 1924, for their disposition, except that she expressly revoked one of the bequests for 50 of these shares and directed her executors to purchase in lieu there-

of a government annuity sufficient to yield an annual income to the legatee named of $400 for the term of her natural life.

The rights and interests of every beneficiary, to whom any lot of either the preferred or the common stock of the company was bequeathed, whether by the original will or by the codicil, are, however, materially affected by the provisions of par. 20 of the codicil. This paragraph revokes par. 17 of the will of September 25th, 1924, and provides in lieu thereof that her executors and trustees

> shall pay out of my personal estate any and all succession duties which may at my death become payable upon any of the bequests made in my said last will and testament or in any codicil thereto, including this codicil, it being my intention that all gifts and bequests, including gifts of shares in the capital stock of Ganong Bros. Limited, either preferred or common, to any nephew or niece of my late husband, shall be free from succession duty.

Par. 17 of the original will, while providing that her executors should pay out of her personal estate all succession duties payable upon the bequests made thereby, distinctly provided that her estate should not be liable

> for any succession duties or other dues, duties, taxes or other charges or expenses of any kind payable * * * upon or in respect of any moneys, stocks, shares of stocks, gifts or other benefits which have passed or which may hereafter pass under the provisions of the said trust agreement

of March 15th, 1918. Having thus declared that all bequests of shares in the capital stock of Ganong Bros. Ltd., either preferred or common, to any nephew or niece of her late husband should be free from succession duty, as well as all other bequests, whether made by the original will or by the codicil, par. 20 of the codicil goes on to say:

> But while I make the aforegoing provision with respect to succession duty it is my express will and intention and I hereby direct that notwithstanding anything hereinbefore contained any and all of the shares of the capital stock of Ganong Bros. Limited, in and by my said last will and testament and in and by this second codicil to my said last will and testament bequeathed by me, shall be and remain the property of my estate and be held by my executors and trustees as part of my estate until all dividends on the preferred shares accrued to the date of my death have been paid in full and also until the two half yearly dividends which shall accrue immediately subsequent to the date of my death shall have been paid in full to my estate for the benefit thereof, it being my intention by this paragraph of this second codicil to my will that all dividends on said preferred shares accrued due to the date of my death, whether earned or declared or not, together with a full year's dividends accruing due after my death, whether earned or declared or not, shall be paid to my executors and trustees for the benefit

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of my estate before making any transfers of the stock or shares of Ganong Bros. Limited, common or preferred, devised and bequeathed under my said last will and testament and under this second codicil thereto.

These last provisions of par. 20 of the codicil were clearly intended as a substitution for par. 20 of the original will, which applied to "any and all of the shares of Ganong Bros. Limited," bequeathed by the will, and not to any of the shares which the testatrix had assigned to the Trust Company six years before she made the will. The codicil, however, did not expressly revoke par. 20 of the will, the provisions of which must be examined closely for the purpose of determining whether any and what portions thereof are inconsistent with and consequently replaced by the provisions of clause 20 of the codicil, the testatrix having declared by the concluding paragraph of the codicil that she ratified and confirmed her said last will and testament "save in so far as any part thereof shall be revoked or altered by this codicil thereto or any previous codicil." Par. 20 of the will read as follows:

I hereby further will and declare that it is my intention and purpose that any and all of the shares of Ganong Bros. Limited, so hereby bequeathed as aforesaid, shall be and remain the property of my estate and be held by my executors and trustees as part of my estate until after the first annual meeting of Ganong Bros. Limited, shall have been held subsequent to my decease and until all dividends accruing on said shares of stock from the business of the year in which my decease may occur shall have been paid to my estate for the benefit of my estate intending by this section of my will to show that both semi-annual dividends on the preferred shares that will be paid during the fiscal year subsequent to my decease but which will have been earned during the fiscal year my decease may occur must be paid to my estate before making any transfers of the stock, shares devised and bequeathed as aforesaid.

When one compares the language of these provisions of the codicil with that of par. 20 of the will, it is not surprising that the sole remaining executor and trustee, who was responsible for the administration of this estate and who more than five years after the death of the testatrix still held in his possession all the bequeathed preferred and common shares of Ganong Bros. Ltd., should have sought the intervention of the Supreme Court to straighten out the apparent confusion, and proposed the following questions on his application for an originating summons:

1. Who are entitled to the shares in the capital stock of Ganong Bros., Limited, either common or preferred, bequeathed under any clauses of either the last will and testament of Maria Famicha Ganong or the second codicil thereto?
2. When are the beneficiaries of the said shares entitled to delivery thereof?

During the argument another question was added as follows:

3. Under the circumstances of the present case are any dividends and if so, what, apportionable?

On the hearing, which took place before the learned Chief Justice on documentary evidence only, it was contended in behalf of the residuary legatees that there was no vesting of the shares in the persons to whom they were given until after the payment of two years' dividends, and that, no dividends having yet been paid and as no one could tell that any ever would be paid, the rule against perpetuities applied and the shares consequently passed into residue. The Chief Justice, however, held that this contention could not prevail and that the persons and institutions named in the will and codicil were entitled to delivery of the shares immediately. He also held that no question of apportionment arose.

On an appeal from this judgment to the Appeal Division of the Supreme Court, which was heard by Grimmer, Harrison and Fairweather, JJ., all three of the learned justices agreed that the shares vested in the beneficiaries on the death of the testatrix; but Harrison and Fairweather, JJ., Grimmer J. dissenting, held that the Chief Justice was in error in holding that the beneficiaries, to whom the shares had been bequeathed, were entitled to their delivery immediately. They took the view that par. 20 of the codicil created a charge upon these shares in favour of the executor and trustee to the amount of a sum of money representing two years' dividends at 7% on the bequeathed preferred shares, which they calculated at $68,460, and that the beneficiaries were not entitled to their delivery until that amount of money had been paid to the estate or the charge released.

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No contention is now made on this appeal that the shares did not vest in the beneficiaries, to whom they were bequeathed, but the respondent residuary legatees contend that in the light of other provisions of the will and of the circumstances, as they existed at the time of the execution of the codicil, no other construction can consistently be placed upon the relevant language of the codicil than that adopted by Harrison, J., in the majority judgment of the Appeal Division. Having conceded that all the shares vested in the several beneficiaries on the death of the testatrix, it is obvious that this is the only position they could possibly take.

There is no ambiguity whatever regarding the bequests of the preferred shares as made in pars. 14 and 15 of the codicil or of the common shares as made in par. 16. Each one of them is distinct and definite as to the number of shares bequeathed and the persons and institutions to whom the shares are given. The whole difficulty has been created by the language of par. 20 of the codicil, which, while indicating clearly enough an intention to postpone the transfer by the executor and trustee of the bequeathed shares to the various beneficiaries pending the payment to him of dividends accrued to the date of the testatrix's death and two prospective half-yearly dividends during the following year, enshrouds the intended reservation in such apparent ambiguity and uncertainty as to endanger its entire validity. The difficulty arises primarily from the insertion of the phrase "whether earned or declared or not" in reference first to the payment of "all dividends on said preferred shares accrued due" to the date of the testatrix's death, and its repetition in reference to "a full year's dividends accruing due" after her death.

The words "all dividends accrued due" can surely only mean dividends which have become payable by the corporation to the shareholder, as the words "dividends accruing due" during any stated period can only mean dividends as they become payable by the corporation to the shareholder. The share certificates by a condition endorsed thereon state that the holders shall be entitled out of the net profits whenever ascertained to a fixed cumulative preference dividend at the rate of 7% per annum in priority to any payment of dividend upon the common stock,

such dividend to be paid at such times as the directors may determine but to be payable only out of the profits, and the holders shall not be entitled to participate in further dividends or profits.

This condition is in accordance with the provisions of the by-law of June 28th, 1916, under which these shares were issued. This by-law provides that the preference shares shall have a fixed cumulative preference dividend of 7% per annum, payable as may be convenient half yearly, and that such dividend

shall be payable only out of the net profits of the company, but they shall be cumulative dividends, that is to say, if not earned fully and paid in each year, the amount of such dividend or any portion thereof remaining unpaid from time to time shall be paid out of the first net profits of the company accumulated or earned thereafter.

The by-law also provides that the said dividend shall begin to run from July 1st, 1916.

A preferential dividend at a fixed rate may be said, of course, to be always running between fixed dividend periods and perhaps in that sense to be accruing from day to day, but how can these dividends in the face of the express terms of the share certificates and of the by-law, in pursuance of which they were issued, possibly be said to have "accrued due" or to be "accruing due" when no profits have been earned to provide for their payment and no declaration has been made by the directors fixing any date therefor? The shareholders acquire no right to payment of any dividends until there are net profits, out of which alone they can be paid, and until such time as the directors determine they shall be paid. See judgment of Farwell, J., in *Bond* v. *Barrow Haematite Steel Co.* (1); also judgment of Lord Sterndale, M.R., in *In re Wakley* (2).

That the clause is directed wholly to the payment of dividends on the bequeathed preferred shares during the anticipated period of the administration of the estate cannot be doubted, now that it is conceded that it was the testatrix's intention that the shares themselves should vest in the various legatees at her death. This can only apply to the payment of dividends as such to the executors and trustees of the estate, as the registered holders of the bequeathed preferred shares, by the corporation itself as a going concern, and clearly excludes, to my mind, the pay-

(1) [1902] 1 Ch. 353, at 362. (2) [1920] 2 Ch. 205, at 217.

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ment of any sum or sums of money in lieu thereof by or in behalf of the beneficiaries, in whom the shares themselves were vested. The qualifying phrase is so obviously repugnant to the principal phrase that one or the other must be disregarded and the whole clause recast in order to express any such intention as that contended for by the residuary legatees.

If the clause be read without the qualifying phrase, and the words

> all dividends on said preferred shares accrued due to the date of my death * * * together with a full year's dividends accruing due after my death * * * shall be paid to my executors and trustees for the benefit of my estate before making any transfers * * *

be given their ordinary meaning, they clearly contemplate only the payment of dividends which the directors of the corporation might legally declare to be payable thereon on definitely appointed dates. The corporation admittedly never having since earned sufficient profits to justify the declaration of any dividend to cover 7% of the par value of the preferred shares remaining unpaid at the time of the testatrix's death in November, 1934, or any part thereof or any proportion of the two half-yearly dividends, which ordinarily would have matured during the following year, the executors and trustees of her estate, as the registered holders of all the bequeathed shares, have never acquired the right to demand payment from the corporation of any dividends thereon to cover either the year 1934 or the year 1935. They have consequently never "accrued due" within the intendment of the reservation.

But how upon this basis does the non-payment of the dividends affect the condition prescribed by the concluding lines of the paragraph as a prerequisite to the executors' right to transfer the shares? Did the testatrix intend that the executors should not withhold their transfer to the legatees for more than a year after her death in the event of the company's failure up to that time to earn the necessary profits to enable them to declare dividends to cover the arrears for the two years 1934 and 1935, or did she intend that the condition should continue, unlimited as to time, with the inevitable result of indefinitely tying up the administration of her estate until the actual payment of the deferred dividends, which might possibly never happen? The latter hypothesis may at once be

dismissed, I think, as wholly inadmissible. The former, though not entirely consistent with the testatrix's undisputed intention to vest the shares in the various legatees at her death, may surely be more reasonably harmonized with it as a modification of the absolute bequests to the extent of withholding from the legatees their right to receive the deferred dividends for the two years in question in the event, and only in the event, of their being paid by the corporation to the executors and trustees as the registered holders of the shares for the purpose of administering the estate, within a period of one year following the death of the testatrix.

If no limitation of the prescribed condition for the transfer of the shares to the legatees can reasonably be inferred from the clause as framed, the reservation itself, in my opinion, must be held to be void for uncertainty, whether the alleged qualifying phrase be eliminated or not. As already pointed out, the residuary legatees contended before the learned Chief Justice below that the bequests of the shares were themselves void for uncertainty for the reason that no one could tell when the dividends would be paid or indeed whether they ever would be paid at all. This uncertainty, however, goes, not to the validity of the bequests, but to the validity of the reservation. As Lord Truro expressed it in *Egerton* v. *Earl Brownlow* (1),

> Where a gift is good in itself, but is followed by an unlawful or repugnant condition or qualification in a distinct clause, the gift is upheld and the condition or qualification, which alone is obnoxious, is rejected.

In *Hancock* v. *Watson* (2), Lord Davey said:

> It is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next of kin as the case may be.

This statement was expressly reaffirmed by the House of Lords in *Fyfe* v. *Irwin* (3).

The learned majority judges in the Appeal Division apparently agreed with the Chief Justice and Grimmer, J., that the clause should be read as indicating that the condition was intended to lapse upon the expiration of one year after the death of the testatrix, but in their natural

(1) (1853) 4 H.L.C. 1, at 181. (2) [1902] A.C. 14, at 22.
(3) [1939] 2 All Eng. Rep. 271.

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anxiety to give some effect to the phrase, "whether earned or declared or not," sought very properly to solve the perplexing problem by deducing from it and the language of the entire par. 20 of the codicil and other provisions of the will an intention to impose a charge in favour of the estate, either upon the bequeathed preferred shares themselves, or upon the donees, to the amount of the unpaid dividends for the years 1934 and 1935. They relied especially upon the change made by the opening clause of the paragraph, providing for the payment out of the testatrix's personal estate of all succession duties in respect of the gifts of all shares in the capital stock of the corporation as evidencing an intention to accumulate a fund, equal to two years' dividends on all the bequeathed preferred shares, for the special purpose of compensating the estate for relieving them of the payment of succession duties.

While the opening lines of the long clause immediately following the succession duties provision would seem to impart no little colour to this view, I find myself, after anxious consideration of the entire will and codicil, quite unable to adopt it. In the first place, par. 20 of the codicil contains nothing in the nature of a direction to the executors and trustees to collect the two years' unpaid dividends from the beneficiaries, in whom the shares were vested, or to fund them, if and when collected, for any such purpose. The creation of such a charge seems to me to be wholly inconsistent with her wish to relieve all gifts and bequests made in both the will and the codicil from any and all succession duties at the expense of her personal estate, including gifts of shares in the capital stock of Ganong Bros. Limited, either preferred or common, as so explicitly stated in the opening clause of the paragraph. Having thus clearly indicated her desire to relieve the bequeathed shares from any and all liability for the payment of succession duties and thus place them on a footing of equality with all other gifts provided for in the will and codicil, I cannot believe that she intended by the succeeding clause, not only to immediately cancel this additional bounty to the specific legatees of the preferred shares, including her late husband's nearest relatives, and her own brother and his wife and children and such institutions as the Old Folks Home and the Chipman

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Memorial Hospital, but to charge them $14 a share in the event of the corporation's inability to earn sufficient profits to pay anything on account of the deferred dividends, and this for no other apparent purpose than that of increasing the value of the residuary estate.

The appeal should be allowed and the judgment of the learned Chief Justice on the originating summons restored. We were informed that practically all the estate had been distributed apart from the shares of the company. We think in the circumstances the costs of the appellants on this appeal and of the executor should be paid by the executor and charged by him against the residue of the estate and not against the specific legatees, those of the executor as between solicitor and client; the disposition of costs of the appeal to the Appeal Division to stand as unanimously directed by that court.

Appeal allowed with costs.

Solicitor for the appellants: *J. H. Drummie.*

Solicitor for the residuary legatees, respondents: *W. J. West.*

Solicitor for the Executor and Trustee, respondent: *R. B. Hanson.*

ANNETTE GAUVREMONT (PLAINTIFF) ..... APPELLANT;

AND

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA (DEFENDANT) ..... RESPONDENT.

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* Nov. 6, 7.
* Dec. 20.

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

Insurance (Life)—Nullity of policy—Written application—Medical "questionnaire"—Answers to questions by assured—Alleged failure to disclose facts as to his true medical history—Whether answers are representations or warranties according to terms of policy—Whether such misrepresentation or concealment of facts by assured is "of a nature to diminish the appreciation of risk."—Arts. 2485, 2487, 2488, 2489, 2490, 2491, 2588 C.C.

* PRESENT:—Rinfret, Crocket, Davis, Kerwin and Hudson JJ.

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The appellant's husband, holder of an insurance policy issued by the respondent company, died, and, by the terms of his will, the appellant was made universal legatee and as such became entitled to the benefit of the insurance policy. On an action by the appellant claiming the payment thereof, the respondent pleaded that the policy was issued upon the written application of the insured, including a "questionnaire" and a medical examination attached to and forming part of the policy in question; that the statements and answers of the insured in the application and the medical "questionnaire" constituted warranties on the truth and accuracy of which the validity of the contract depended; that the insured failed to disclose to the medical examiner his true medical history, notwithstanding the fact that the questions put to him called for such disclosure; that his answers were untrue, inaccurate and misleading and as such were a cause of nullity of the contract of insurance; that, in any event, the insured, in giving his answers, was guilty of misrepresentation and concealment of a nature to affect the appreciation of the risk by the respondent, and consequently, whether made by him in error or by design, they were a cause of nullity of the contract, and there never was any contract of insurance binding on the respondent. The respondent prayed for a declaration that the policy was null and void and that it had no binding effect.

The General Clauses which were at the back of the policy contained the following clause (translated): "This policy, with the application of which copy is attached, contains and constitutes the integral contract intervened between the parties to the said contract, and all the declarations made by the assured shall, in the absence of fraud, be considered as "déclarations" and not as "affirmations" and no declaration shall annul the policy nor shall serve as a basis of contestation of a claim based on this contract, unless this declaration be contained in the application of the policy and unless a copy of this application be endorsed on the policy or be attached to it at the time of its issue." The trial judge maintained the appellant's action, but that judgment was reversed by the appellate court.

Held, Davis and Hudson JJ. dissenting, that the appeal to this Court should be allowed and the judgment of the trial judge restored. The answers, or statements, made by the assured in his proposal, must, in the absence of fraud (and the trial judge found no fraud), be considered only as representations, and not as warranties. As a copy of the proposal has been attached to the policy and the proposal formed part thereof, these answers and statements may be used by the respondent for the purpose of contesting the claim of the appellant, and they may result in avoiding the policy; but they always remain representations, and they do not become warranties, notwithstanding the fact that a copy thereof has been attached to the policy and that they formed part of the contract. [In other words, by force of the clause above quoted, the parties have agreed to submit their contract purely and simply to the provisions of the Civil Code with regard respectively to warranties and representations.] Upon the evidence, and applying these provisions of the law of Quebec, the alleged misrepresentations by the assured, invoked by the respondent company, and specially the alleged failure by the assured to disclose the facts that he had consulted doctors and had gone to a sanatorium, are not shown to have had any influence upon

the respondent company in its appreciation of the risk; and it is also impossible on a fair consideration of the evidence to come to the conclusion that disclosure of the matters concealed or misrepresented would have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium. *Mutual Life Insurance Company* v. *Ontario Products Company* ([1925] A.C. 344) foll. As to the clause of the policy quoted in the head-note, the word "déclarations," used therein four times, must of necessity, except on the first occasion, be understood to mean "représentations"; while the word "affirmations," in that same clause, must be given the meaning of warranties.

Per Davis and Hudson JJ. (dissenting)—Even assuming, without deciding the point, that the answers to the questions were, by virtue of certain language in the policy, representations and not warranties, there is sufficient evidence to conclude that, if these facts as they existed had been disclosed by the insured, special mention of the facts would have been made to the respondent company by any medical examiner and a more careful and serious examination would have been ordered by the company. Such concealment of the facts was "of a nature to diminish the appreciation of the risk," and therefore "is a cause of nullity," according to the provisions of article 2487 C.C.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Langlois J., and dismissing the appellant's action based on a policy of insurance issued by the respondent company upon the life of the appellant's deceased husband, for an amount of $5,000.

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

Antoine Rivard K.C. and *Jules Savard* for the appellant.

J. P. A. Gravelle K.C. for the respondent.

The judgment of Rinfret and Crocket JJ. was delivered by

RINFRET J.—The appellant's husband, the late Clifford Huot, holder of an insurance policy issued by the respondent, died in Quebec on January 20th, 1938.

By the terms of his will, the appellant was made universal legatee of her late husband, and as such became entitled to the benefit of the insurance policy. She claimed the payment thereof from the respondent, which pleaded that the policy was issued upon the written application of the insured, including a "questionnaire" and a medical examination attached to and forming part of the policy

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in question; that the statements and answers of the insured in the application and the medical "questionnaire" constituted warranties on the truth and accuracy of which the validity of the contract depended; that the insured failed to disclose to the medical examiner his true medical history, notwithstanding the fact that the questions put to him called for such disclosure; that his answers were untrue, inaccurate and misleading and as such were a cause of nullity of the contract of insurance; that, in any event, the insured, in giving his answers, was guilty of misrepresentation and concealment of a nature to affect the appreciation of the risk by the respondent, and consequently, whether made by him in error or by design, they were a cause of nullity of the contract, and there never was any contract of insurance binding on the respondent. The respondent tendered with its plea the amount of $73.55, representing the premium paid in respect of the policy and, by its conclusions, prayed for a declaration that the policy was null and void, that it had no binding effect and that the appellant's action be dismissed.

The trial judge maintained the action and condemned the respondent to pay to the appellant the sum of five thousand dollars ($5,000), being the amount of the policy; but the Court of King's Bench reversed that judgment by a majority of four judges to one and dismissed the action with costs.

The decision in this Court, as it did in the other courts, turns upon the effect to be given to certain answers contained in the "questionnaire" put to Mr. Huot, when he made his application to the insurance company.

The questions and the answers thereto were as follows:

6. A. Avez-vous jamais eu une maladie sérieuse? Non.

B. Recu une blessure grave? Non.

C. Eu une opération chirurgicale? Non.

D. Avez-vous jamais été dans un hôpital, sanatorium ou autre institution pour observation, diagnose, repos ou traitement? Non.

* * *

9. Avez-vous consulté ou été soigné par un médecin au cours des trois dernières années? Indiquez date, maladies, nom et adresse des médecins? Pour aucune.

* * *

10. A. Avez-vous jamais souffert de:

Asthme, toux habituelle, pleurésie, crachements de sang, ou tuberculose des poumons, ou de toute autre partie du corps? Non.

Vertigo, épilepsie, folie, évanouissement, paralysie, névralgie, maux de tête fréquents ou sévères? Non.

Dyspepsie, ulcère gastrique, ou duodénaux, calcul biliaire, ou colique, appendicite, diarrhée (chronique), maladie de l'anus ou du rectum, ou fistule? Non.

Hernie? Non.

Cancer ou tumeur? Non.

Maladie des reins, de la vessie ou prostate, colique rénale, ou calcul? Non.

Palpitation du cœur, essoufflement, douleur dans la poitrine ou maladie de cœur? Non.

Ecoulements d'oreilles? Non.

Goître? Non.

Ulcère sur une partie quelconque du corps? Non.

Rétrécissement? Non.

Syphilis? Non.

10. B. Les réponses intégrales aux questions 6, 7, 9 et 10A avec détails donnés à l'espace ci-dessous constituent-elles un relevé complet de toutes vos maladies, opérations chirurgicales et de tous vos séjours dans les hôpitaux, sanatoriums ou autre institutions? Oui.

Those are the answers which the respondent contends were untrue, inaccurate and misleading. In this it was sustained by the majority of the Court of King's Bench.

The evidence at the trial showed that Mr. Huot died "à la suite d'une hépatite aiguë."

The policy was issued on August 2nd, 1937. The death took place on January 20th, 1938.

The application was made on July 23rd, 1937.

The trial judge made a very careful analysis of the medical evidence adduced before him. He began by stating that the insured consulted Dr. Courchesne in 1932 and 1933 and, subsequently, in 1936 and 1937. In 1932, the assured consulted him "sur une question de vertige". The doctor advised and caused to be made an X-ray examination. He found "aucune lésion fonctionnelle". He simply ordered "quelques digestifs". In 1936, upon the recurrence of the stomach trouble he advised the assured to consult a specialist; and Mr. Huot then saw Dr. Langlois of Montreal.

Dr. Langlois is a neurologist in charge of the neurology department of Notre-Dame Hospital and of a private sanatorium. He says that Mr. Huot complained of dizzy spells, with a special character of the spells, with propulsion forward, with "bourdonnements d'oreilles". The doctor made a thorough examination in his office on January 16th, 1937. As he was of the opinion that it was a case

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of "vertige de Menière", he asked the patient to come to his sanatorium for a more complete examination, for a day or so. Mr. Huot went to the sanatorium on the 18th and stayed there for twenty-four hours. As a result, the doctor convinced himself that Mr. Huot was suffering of "vertige de Menière"; but he did not treat him at the sanatorium. He gave him a special diet to follow and certain pills ("pastilles") to take. He states that

> from the beginning of the treatment, Mr. Huot never suffered again from any attack of "vertige";

and this is confirmed by Dr. Courchesne:

> Aussitôt qu'il a suivi le régime, les indications du docteur Langlois, il s'est aussitôt amélioré et guéri; en 1937, il n'a jamais souffert de vertige de Menière.

Mr. Huot again saw Dr. Langlois on March 6th, May 14th and October 19th, 1937. He did not come to Montreal for the special purpose of seeing Dr. Langlois. His business brought him to Montreal and, on those occasions, he took the opportunity of seeing the doctor.

At the outset, Dr. Langlois had advised Huot not to drive his car, because, as he explained, if Huot had a sudden attack of dizziness or "vertige," it might lead to accidents. But afterwards the doctor gave Huot permission to drive his car, "because he had no more spells of dizziness." That was on the occasion when he saw him on March 6th, 1937. Further, on that occasion, the doctor advised Huot to continue the diet but to cease taking the "pastilles," because the "vertige" or "étourdissements" had ceased. When Dr. Langlois saw Huot on May 14th, he considered him as cured of his "vertige."

As to the nature of this "vertige de Menière," the specialist himself, Dr. Langlois, says that it is

> une maladie banale du système nerveux localisée * * * pas dangereuse au point de vue organique * * * due à une petite lésion de son oreille.

He considered it as a "chose banale," and he was not of the opinion that any recurrence of it was possible.

Dr. Alphonse Giguère, also heard on behalf of the appellant, medical examiner for several insurance companies (Northern Life, Excelsior, Confederation Life, L'Union St-Joseph), describes the "vertige de Menière" as

> un groupe de syndrômes, surtout du côté du système nerveux, qui se manifestent par des vertiges, étourdissements, quelquefois aussi par des

vomissements. C'est une maladie qui siège ordinairement dans l'oreille interne, au niveau des canaux qu'on appelle semi-circulaires, qui voient à l'équilibre de l'individu * * * Plusieurs causes peuvent produire le vertige de Menière, notamment les troubles digestifs, infection de l'oreille, corps étrangers dans l'oreille, intoxication; comme, par exemple, certains médicaments peuvent produire cela.

Ce n'est pas une maladie à proprement parler, c'est un groupement de syndrômes, lorsque des causes d'intoxication se produisent; lorsque les causes disparaissent, ordinairement le malade guérit; excepté s'il y a eu lésion de l'oreille interne, infection des tissus osseux, le vertige de Menière est supposé réapparaître par périodes à mesure que l'infection se manifeste, enfin par recrudescence.

* * *

Avec un régime déconstipant, tout entre dans l'ordre.

Dr. James Stevenson, heard on behalf of the respondent, describes the "vertige de Menière" as

a disease of the nervous system * * * having to do with the mechanism of the internal ear and the balancing centres of the brain. True Menière's disease symptoms are dizziness or vertige and disturbance of the balancing centres in the nervous system, and usually noises in the ear and in the brain as well * * * It is a symptom rather than a disease.

As for Dr. Armand Rioux, the physician who proceeded to the medical examination attached to the application for the insurance policy, he says:

ce vertige de Menière, c'est un vertige qui donne des troubles, évidemment d'instabilité, et qui est souvent en rapport avec des troubles d'oreille * * * Il est d'origine digestive surtout.

A little later, in his deposition, he adds:

C'est une maladie nerveuse en rapport avec des troubles d'estomac, mauvaise digestion, trouble digestif * * * Si la digestion s'améliore, évidemment la conséquence qui est le vertige, peut s'améliorer également. * * * Il peut guérir sûrement.

Dr. Rioux says that if he had known that Mr. Huot had already suffered of "vertige de Menière,"

J'aurais simplement conseillé à la Compagnie de lui faire faire certains examens spéciaux pour préciser la question.

If he had discovered it, he would have made a mention of it in his medical report, and this would have led to "un examen plus précis du tube digestif."

The above is substantially the evidence of the medical practitioners on the nature of the "vertige de Menière," and the extent to which Mr. Huot was affected by it in the years preceding his application for the policy.

Turning now to that application, it contains a certain number of questions addressed to the applicant in connec-

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tion with his name, his occupation, the nature of his work and other matters which it is not necessary to state in detail, since they are not made a subject of complaint by the respondent. Then comes the following declaration made by Mr. Huot:

> Je déclare par la présente que toutes les déclarations et réponses faites aux questions ci-dessus sont complètes et vraies, que je consens que ce qui précède ainsi que cette déclaration et les déclarations faites ou à faire au médecin examinateur de la compagnie * * * ou dans mes déclarations au lieu d'examen médical, forment l'ensemble de la proposition et fassent partie du contrat d'assurance proposé par la présente.

That is followed by a report from the agent of the company, and then by the answers made to the medical examiner, of which it is stated that they form part of the proposal for the insurance made to the respondent on the life of Mr. Huot.

I have already stated the answers which, in that part of the application, are alleged by the respondent to have been erroneous, untrue and misleading. There follows afterwards a confidential report from the medical examiner; and this completes the several documents comprised in the proposal.

The policy proper begins by stating:

> En considération de la proposition qui lui a été faite de cette Police, Proposition qui, par la présente, est constituée partie intégrante de ce contrat et dont copie est ci-jointe, * * * etc.

Then comes the respective obligations of the insured and of the insurer, followed by "Dispositions générales," among which is the following clause, on which the respondent laid special stress:

> Contrat Intégralement Contenu Dans Cette Police—Cette Police, avec la Proposition dont copie est ci-jointe, contient et constitue le contrat intégral passé entre les parties dudit contrat, et toutes les déclarations faites par l'Assuré seront, en l'absence de fraude, considérées comme des déclarations et non comme des affirmations, et aucune déclaration n'annulera la Police, ni ne sera employée pour contester une réclamation basée sur ce contrat, à moins que cette déclaration ne soit contenue dans la Proposition de la Police, et qu'une copie de cette Proposition ne soit endossée sur la Police ou n'y soit jointe lors de son émission.

The remainder of the policy, which is rather a bulky document, need not be referred to, as the parties do not rely on any of its provisions.

With regard to the clause just quoted, however, some observations might be made as to its wording. It must be noticed that the word "déclarations" is there used

four times; and it seems to be clear from the context that when it is first used, it has not the same meaning as on the three other occasions. The first word "déclarations" is evidently used to refer generally to the answers or statements made by the insured in the "questionnaire" put to him, either by the agent or by the medical examiner, while on the three other occasions, it is intended to have the meaning of "représentations"; and, in fact, such is the word used and the meaning given to it in articles 2485 and 2489 of the Civil Code.

On the other hand, the word "affirmations," in that same clause, must of necessity be given the meaning of warranties. That follows necessarily from the distinction therein made between the "déclarations" and the "affirmations." In the clause, the "déclarations" are opposed to the "affirmations" in the same way as in the Code the representations are opposed to the warranties and the former are distinguished from the latter. Unless these words are understood as we have just stated, the clause does not make sense.

The analysis of the policy, including the several documents forming part of the proposal, therefore, shows that the proposal forms an integral part of the contract; and, moreover, it should be stated that it was attached to the policy in accordance with the requirements of sec. 214 of ch. 243 of the Revised Statutes of Quebec (1925), being the *Insurance Act* of Quebec.

Further, the answers, or statements, made by the assured in his proposal, must, in the absence of fraud, be considered only as representations, and not as warranties. As a copy of the proposal has been attached to the policy and the proposal forms part thereof, these answers and statements may be used by the respondent for the purpose of contesting the claim of the appellant, and they may result in avoiding the policy; but they always remain representations, and they do not become warranties notwithstanding the fact that a copy thereof has been attached to the policy and that they form part of the contract. In other words, by force of the clause above quoted, the parties have agreed to submit their contract purely and simply to the provisions of the Civil Code with regard respectively to warranties and representations.

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The material provisions of the Code which are pertinent in the premises are the following:

2485. The insured is obliged to represent to the insurer fully and fairly every fact which shows the nature and extent of the risk, and which may prevent the undertaking of it, or affect the rate of premium.

2487. Misrepresentations or concealment, either by error or design, of a fact of a nature to diminish the appreciation of the risk or change the object of it, is a cause of nullity. The contract may in such case be annulled although the loss has not in any degree arisen from the fact misrepresented or concealed.

2488. Fraudulent misrepresentation or concealment on the part either of the insurer or of the insured is in all cases a cause of nullity of the contract in favour of the innocent party.

2489. The obligation of the insured with respect to representation is satisfied when the fact is substantially as represented and there is no material concealment.

2490. Warranties and conditions are a part of the contract and must be true if affirmative and if promissory must be complied with; otherwise the contract may be annulled notwithstanding the good faith of the insured.

They are either express or implied.

2491. An express warranty is a stipulation or condition expressed in the policy, or so referred to in it as to make part of the policy.

Implied warranties will be designated in the following chapters relating to different kinds of insurance.

2588. The declaration in the policy of the age and condition of health of the person, upon whose life the insurance is made, constitutes a warranty upon the correctness of which the contract depends.

Nevertheless in the absence of fraud the warranty that the person is in good health is to be construed liberally and not as meaning that he is free from all infirmity or disorder.

As a result of the special agreement between the parties as contained in the clause of the policy already mentioned, the answers and statements of the assured are to be taken as representations, and not as warranties; and, incidentally, it would appear, with due respect, that the majority of the Court of King's Bench misdirected itself by regarding these answers and statements as warranties, for the sole reason that they were attached to the policy and formed part of the contract. On the contrary, the express stipulation was that these answers and statements, in the absence of fraud, were to be considered merely as representations, and not as warranties. As we have already stated, the reference in the clause to the condition that these answers or statements be contained in the application and that copy thereof be attached to the policy does not transform the representations into warranties. Its only effect is that, in such a case, they may be made use of by the respondent to con-

test the claim, as a result of which they may avoid the contract. But they remain representations and they do not become warranties.

The only declarations made by the insured in this case which may possibly be styled warranties are those with regard to age and with regard to "condition of health of the person." This would follow not from the policy itself, but from art. 2588 of the Civil Code. However, that article expressly enacts that, in the absence of fraud, the warranty that the person is in good health is to be construed liberally and not as meaning that he is free from all infirmity or disorder. No help can come to the respondent from the application of this provision of the law. The declarations made by the insured in respect of his age and of his health, on the date of the application, were proven to have been true. The evidence is clear that, on that date, his health was good and that he had no reason to suspect any impairment thereof. The medical examination, according to Dr. Rioux himself,

indiquait qu'il était en excellente santé. Pression artérielle bonne. Bon sujet d'après l'examen du cœur * * * Poumons bons * * *

This, of course, bears out the statement of Dr. Courchesne that, as soon as Huot followed the régime prescribed by Dr. Langlois, "il a guéri"; and that he had no troubles in 1937. This is in accordance with what Dr. Langlois himself said that he found Huot in very good health, when he saw him on May 14th. He was then cured; he had no longer any "vertiges." And the medical evidence concurs with the testimony of the plaintiff, Huot's wife, that her husband was in good health, that he suffered no longer of his dizzy spells after the diet prescribed by Dr. Langlois, and that during the summer of 1937, "il n'avait plus rien du tout."

Huot was the manager of the Roofers' Supply Company; and it was stated that during the year 1937 "il n'a jamais perdu une heure; il ne connaissait pas beaucoup les médecins."

So that the respondent does not get any help from the application of art. 2588 of the Civil Code in respect of any warranty with regard to the correctness of Huot's declarations in the policy about his age and about the condition of his health when he made his application.

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The other answers or statements which he made, in the questionnaire forming part of the application, by the very terms of the policy itself, as we have seen, are not, in the absence of fraud, to be considered as warranties, but merely as representations.

That there was no fraud on the part of Mr. Huot, when he gave his answers to the questions put to him by the medical examiner, can hardly be disputed. The burden of proving fraud was, of course, upon the respondent. Far from having succeeded in that respect, the evidence is clearly to the contrary. The trial judge so held; and while that finding, not being based on credibility, is open to review, I have no hesitation in concurring in it.

The death did not result from the "vertige de Menière." That is abundantly established by the medical evidence; death had no connection with that "vertige." But, even "although the loss has not in any degree arisen from the fact misrepresented or concealed," the contract may nevertheless be annulled if the misrepresentation or concealment was "of a fact of a nature to diminish the appreciation of the risk or change the object of it" (C.C. 2487).

The misrepresentations invoked by the respondent are to be found in the answers 6 (*d*), 9 (*a*), 10 (*a*) and 10 (*b*) of the medical questionnaire.

Question 10 (*b*) may be discarded for the purpose of the present discussion. It only emphasizes, if that was necessary, the answers to questions 6 (*d*), 9 (*a*) and 10 (*a*). It states that the answers given to those questions constitute

> un relevé complet de toutes vos maladies, opérations chirurgicales et de tous vos séjours dans les hôpitaux, sanatoriums ou autres institutions.

It does not add any new facts to the questions and answers already made.

The untruthfulness in the answer to question 6 (*d*) is found in the fact that Mr. Huot was there asked whether he had ever been in a sanatorium, and he answered No, while, as we have seen, he spent twenty-four hours in the private sanatorium of Dr. Langlois in January, 1937.

Question 6 (*d*) is the fourth of a series of questions inquiring from the applicant if he has suffered (*a*) of a "maladie sérieuse," (*b*) of a "blessure grave," and (*c*) if he has undergone an "opération chirurgicale." The ques-

tion, as put, being only a subdivision of question 6, may well be understood to mean that the applicant was asked whether he has ever been in a hospital, a sanatorium, or another institution, for observation, diagnosis, rest or treatment, in connection with a "maladie sérieuse," a "blessure grave" or an "opération chirurgicale." That is, as we understand it, the interpretation put upon question 6 (*d*) both by the trial judge and by Mr. Justice Létourneau, the dissenting judge in the Court of King's Bench. To my mind, that interpretation is the more plausible. The least that can be said is that the question was susceptible of being understood in that way; and, as a result, that is sufficient to establish that the answer to it may not be pronounced untruthful by a court of justice.

But if it should be interpreted as being disconnected from the first three sub-questions, as forming a question by itself, then it must be admitted that, when Mr. Huot answered "No" to question 6 (*d*), he was not correct, since he had been for twenty-four hours in Dr. Langlois' sanatorium for the purpose of observation.

Then also, although to a lesser degree, the same thing may be said of question 9 (*a*) and of the answer to it. It may well be understood by an applicant to whom the question is put as part of the "questionnaire" that, when he is asked whether he has consulted a doctor or been treated by a doctor during the last three years, and to indicate the date, the sickness, the name and the address of his doctors, the inquiry is in respect of a "maladie sérieuse," a "blessure grave," or an "opération chirurgicale" about which the previous questions were concerned. Under such circumstances, the answer made by Huot to question 9 (*a*): "Pour aucune," should be found to have been true.

If, however, in the same way as for question 6 (*d*), the answer should be more meticulously scrutinized, one would have to say that it was not strictly true that Huot had neither consulted a doctor, nor been treated by a doctor during the three years preceding his application. The application was made on July 23rd, 1937, and since July, 1934, he had consulted, or, at least, he had seen Dr. Courchesne in 1936, and he had consulted Dr. Langlois on January 16th and March 6th and on May 14th, 1937.

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Then, if we turn to question 10 (*a*), it inquires whether the applicant has ever suffered of a number of ailments or sicknesses, which are there enumerated, and in each case the answer is "No." But there is the fact that, as admitted by himself, the medical examiner never put that question to Huot. The examiner says that he read all the questions to the latter,

> excepté celles qui regardent le numéro 10 (*a*), où je simplifie en demandant simplement: Avez-vous consulté un médecin depuis trois ans et avez-vous souffert de quelque maladie quelconque? Il n'y a aucune maladie en cours?
>
> * * *
>
> Je lui demande s'il a souffert de quelque maladie quelconque et consulté un médecin depuis trois ans?

That is not the question as put in the "questionnaire"; and that is not the question which forms part of the application. As a result, it was never, in that form, attached to the policy and it does not, as such, form part of the contract between the parties. It is not necessary to decide whether, in such a case, although the real question which was put must be disregarded, yet the question as it appears in 10 (*a*) should still be considered as forming part of the application, because Huot signed the "questionnaire" after it had been filled. Of course, the respondent contends that, on the strength of such cases as *Biggar* v. *Rock Life Assurance Company* (1); *New York Life Insurance Company* v. *Fletcher* (2); *Newsholme* v. *Road Transport & General Insurance Company* (3); and *Dawsons* v. *Bonnin* (4), Mr. Huot must be held to the answer written down after question 10 (*a*) as it appears in the "questionnaire," because he signed the "questionnaire," and notwithstanding that the medical examiner himself states positively that he never put that question and that he put an altogether different question.

In the *Biggar* case (1), in the *New York Life Insurance case* (2) and in the *Newsholme* case (3), the question had been put, but the answer was falsely written down by the agent who was filling the "questionnaire" form. It was there held that notwithstanding that the falsity of the answer was due to the agent and not to the applicant, because the latter had signed the "questionnaire," and that

(1) [1902] 1 K.B.D. 516.
(2) (1886) 117 U.S. Rep. 519.
(3) [1929] 2 K.B.D. 356.
(4) [1922] 2 A.C. 413.

he should have read it as filled in by the agent before he signed it, he could not be relieved of the effect of his signature; and that, therefore, he was bound by the answer as it had been written down.

In the *Dawsons* case (1), decided by the House of Lords, the inaccurate answer had been made by inadvertance; but it was found that, apart from materiality, the answer was a condition of the liability of the insurers, and the policy was void.

I see a great difference between those cases and the present case, where admittedly question 10 (*a*) was never put to the applicant; another question was put instead; and the applicant thus being put under a wrong impression by the medical examiner, and while being under that impression, although he was imprudent perhaps in signing the "questionnaire" without reading it, yet, having faith in the medical examiner, he signed the "questionnaire" as it had been filled in by the latter. In my view, the present case may well be distinguished from the four cases relied on by the respondent.

As I have said, however, I do not find it necessary to discuss that point here, because, even assuming that the question as it appears in 10 (*a*) had been put to the applicant, his answer to it, to my mind, ought not to be allowed to affect the validity of the contract, in the circumstances.

That question has already been reproduced at the beginning of the present judgment. It will be noticed that, although it contains a very long enumeration of several distinct ailments or sicknesses, it does not include "vertige de Menière." The nearest approach to it is the word "vertigo." The respondent cannot ask the courts to take judicial notice of the fact that "vertigo" may be the same as "vertige de Menière." It may be that it is, although no evidence at the trial was specially directed to establish that fact. But what is sure is that the medical examiner never explained to Mr. Huot that, in medical phraseology, "vertigo" may be regarded as the equivalent of "vertige de Menière." It is impossible on the record to hold that they are one and the same trouble; and Mr. Huot, when he answered "No," even if the question had been put to him as appeared in 10 (*a*), would have been per-

(1) [1922] 2 A.C. 413.

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fectly justified to believe that "vertigo" was not the same as "vertige de Menière"; and that he was well warranted in answering that he never suffered of "vertigo."

It follows that question 10 (*a*) cannot enter into any consideration as to whether the representations made by Mr. Huot in giving, to the questions invoked by the respondent, the answers he gave, was guilty of concealment of a nature to diminish the appreciation of the risk or change the object of it.

We are left, therefore, with the misrepresentation in the answers given to questions 6 (*d*) and 9 (*a*), such misrepresentation consisting in the fact that Mr. Huot did not disclose that he had consulted or seen Dr. Courchesne in the year 1936, and that he had consulted Dr. Langlois in January, 1937, having gone to the latter's private sanatorium for observation for a period of twenty-four hours.

Assuming, merely for the purpose of meeting the argument of the respondent and not forgetting what has already been said that these two questions may well be interpreted, as they have been by the trial judge and Mr. Justice Létourneau, as having to do only with a "maladie sérieuse," a "blessure grave," or an "opération chirurgicale," it is impossible, on the evidence, to come to the conclusion that the mere disclosure of that fact by Mr. Huot would have made the slightest difference in the appreciation of the risk by the respondent and that, if the respondent had known such a fact, it would either have prevented from undertaking the risk or it would have affected the rate of premium.

Dr. Rioux, who made the medical examination for the application, states in his evidence that if he had known that Mr. Huot had already suffered of "vertige de Menière,"

j'aurais simplement conseillé à la compagnie de lui faire faire certains examens spéciaux pour préciser la question.

He adds that if he had discovered it, he would have mentioned it in his medical report. He does not, however, go the length of saying that it would have affected the risk:

Tout aurait dépendu du rapport sur l'examen spécial—un examen plus précis du tube digestif.

But he says that, although a note of it must be made in the medical report:

Il n'y a pas de raison spéciale de refuser celui qui en aurait déjà souffert;

and that, upon finding that he was cured, he would have accepted the risk. The evidence, both from Dr. Courchesne and from Dr. Langlois, is that when Mr. Huot made his application he was cured.

Dr. Courchesne, who was heard on behalf of the respondent, states that the mere fact that Mr. Huot had, at one time, suffered of "vertige de Menière" was no reason to refuse his application and that, for himself, as soon as Huot was cured, he would have accepted the risk. He says it was the usual practice to mention the "vertige de Menière" in medical examinations, so that the examination may be complete, but that, so far as he was concerned, as he knew that Mr. Huot was cured, he would have accepted him.

Dr. Stevenson says that he would not consider as a "first class risk" a man who had suffered from "vertige de Menière," although he adds that "a good deal depends upon what the applicant was applying for." He states that "vertige of any nature is a symptom rather than a disease," but that it is a symptom of sufficient importance to be mentioned, because vertige would affect the risk in other ways. As an instance of what he had in mind when making that statement, he refers to his practical experience of

> a man who suffered from vertige and during an attack of vertige fell off a train or ran his automobile into an obstruction.

What he means, therefore, is that it may be a cause of accident and

> it adds to the natural hazard of death to which healthy persons are exposed.

Those are the very words of Dr. Stevenson; and it would follow that his views have no particular reference to Mr. Huot and that he would hold to them even with regard to a healthy person who might occasionally be subject to vertige.

Dr. Stevenson's statement, however, is merely that of a physician who came to give expert evidence on a medical question. Dr. Courchesne had had the advantage of seeing Mr. Huot in person; and, of course, the evidence most to be relied on, in view of the closer relation which he had with Mr. Huot, is that of Dr. Langlois. The latter says that Mr. Huot "souffrait de troubles nerveux d'aucune

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gravité" and that, when he saw him again in May, 1937, he was cured. After having had him under observation at his sanatorium for twenty-four hours, he did not treat him in any special way, but merely prescribed a diet and gave him some pills. He had, however, for the same reason as mentioned by Dr. Stevenson, advised him not to drive his car. In that connection, he says that, if called upon to make a medical examination for an insurance application, he would mention "vertige de Menière," not because he considers it a serious disease, but because of the possibility of an accident on the street. He calls it, "Une maladie banale * * * pas dangereuse au point de vue organique." In May, 1937, all vertige had disappeared. He found Mr. Huot "très bien et guéri." He permitted him again to drive his car, and he adds that, upon the condition and the state of health found in May, he would have recommended the risk to an insurance company. He then said to Mr. Huot: "Je crois que vous n'en aurez plus jamais"; and adds that Huot was certainly put by him under the impression that the ailment was not serious, and left him "rassuré."

Can it be said that, under the circumstances, even if it had been mentioned in the medical report that Mr. Huot had at one time suffered from "vertige de Menière," this would have influenced a reasonable insurer to have refused the risk or to have stipulated for a higher premium?

It ought to be pointed out that none of the officers, agents or representatives of the respondent has ventured to offer evidence to that effect in the present case. The Court is left to decide for itself and to surmise what might have taken place if the exact and precise fact had been disclosed, even if we assume that the question for that purpose had properly been put to the applicant.

The answer must be that upon the information given by the doctors who were heard at the trial and which is the only one upon which the Court is asked to pronounce, the conclusion reached by the trial judge and by Mr. Justice Létourneau in the Court of King's Bench is the right one and that the so-called misrepresentations could not possibly have had any effect on the assumption of the risk by the respondent.

That conclusion, as a matter of fact, follows almost forcibly from the evidence of Dr. Giguère, the medical

examiner for the four insurance companies already mentioned at the beginning of this judgment. He says that, in his experience, "vertige de Menière," which is not a maladie but a "groupement de syndrômes," gradually disappears, after which a man who has had it is nevertheless considered as a first class risk. He does say that it is customary to mention it in the medical report; but he shows the unimportance of a mention of that kind by stating that, even if a man has suffered from toothache ("affection de dents"), the medical examiner is supposed to make a note of it in his report. In a case of "vertige de Menière" having already existed, he says that a new special examination might be asked by the insurance company; but he has no doubt that, in the present case, this new examination would have shown that Mr. Huot was cured and that he would have been accepted.

Comme dans le cas qui nous intéresse, voici un malade qui a eu tous ses examens, sa pression artérielle est normale, son sang est normal aussi; il n'y a pas de raison de ne pas le passer.

This case is in the same category as *Fidelity & Casualty Ins. Co.* v. *Mitchell* (1); and more particularly *Mutual Life Insurance Company* v. *Ontario Products Company* (2), where the Privy Council, confirming this Court, dismissed the appeal of the insurance company and found that the so-called misrepresentations would not have influenced a reasonable insurer to refuse the risk or demand a higher premium, and accordingly held the policy valid and compelled the insurance company to abide by its contract.

My conclusion, therefore, is that the appeal should be allowed and the judgment at the trial should be restored with costs throughout.

DAVIS J. (dissenting)—This appeal arises out of an action by the appellant to recover upon a policy of insurance issued by the respondent company upon the life of her deceased husband (hereinafter for convenience called "the insured").

The policy was dated August 2nd, 1937, and the insured died within six months, on January 28th, 1938. The policy was not only what is called a life policy, for the sum of $5,000, but contained special benefits in the event of disability.

(1) [1917] A.C. 592. (2) [1925] A.C. 344.

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The defence to the action is based upon certain answers made to questions put to the insured by the medical examiner; the questions and answers are not only attached to the policy but are stated in the policy to form a part of the contract.

There is little if any conflict of evidence on the facts. In 1932 the insured, who resided in Quebec City, had consulted his own local physician, Dr. Courchesne, and again in 1933, as to spells of dizziness from which he had been suffering—a feeling of falling forward and buzzing in the ears. Upon the recurrence of the trouble in 1936 the insured again consulted Dr. Courchesne, who advised him to consult a named specialist in Montreal, Dr. Langlois. Dr. Langlois is a neurologist in charge of the neurological department of the Notre Dame Hospital and has a private sanatorium. The insured consulted Dr. Langlois in his office on January 16th, 1937. Dr. Langlois was of the opinion that it was a case of "vertige de Menière," and advised the insured to go into his sanatorium for a more complete examination. The insured did so on January 18th, 1937, and remained in the sanatorium for observation for twenty-four hours. Dr. Langlois was then convinced that the insured was suffering from "vertige de Menière"; he gave the patient a special diet to follow and certain medicine to take. The insured again consulted Dr. Langlois in Montreal on March 6th, May 14th and October 19th, 1937.

On July 23rd, 1937, the insured made application to the respondent company for the policy in question; $5,000 life insurance and certain benefits in the event of disability. The policy in question was issued August 2nd, 1937. At the time of his medical examination on the said July 23rd, 1937, certain written questions were submitted to the insured to which he gave written answers and these questions and answers were, as I have said, made a part of the policy.

The insured as applicant for the policy was amongst other questions asked if he ever had a serious illness (une maladie sérieuse), to which he answered, No, and specifically if he had had "vertigo," to which his answer was No. He was asked further if he had consulted a doctor during the past three years, and he answered, No. He was asked if he had ever been in a sanatorium for observation and he answered, No.

The insurance contract was made in the province of Quebec. I shall assume, without deciding the point, that the answers to the questions were, by virtue of certain language in the policy, representations and not warranties. Article 2487 of the Civil Code provides:

2487. Misrepresentation or concealment either by error or design, of a fact of a nature to diminish the appreciation of the risk or change the object of it, is a cause of nullity. The contract may in such case be annulled although the loss has not in any degree arisen from the fact misrepresented or concealed.

The evidence satisfies me that if the facts as they existed had been disclosed by the insured, special mention of the facts would have been made to the company by any medical examiner and a more careful and serious examination would have been ordered by the company. The concealment of the facts was in my opinion "of a nature" to diminish the appreciation of the risk. Dr. Langlois forbade the insured to drive his motor car though later on, in his visit in May or possibly in October, 1937 (the exact date is not clearly fixed), he was allowed again to use his car. In this connection it is important to observe that the policy applied for carried disability benefits. *Mutual Life Insurance Company* v. *Ontario Products Company* (1), relied upon by the appellant, was decided upon its own facts. I cannot hold that the appellant is entitled to recover on the policy. That was the conclusion of the majority of the Court of King's Bench (appeal side) of the province of Quebec—Sir Mathias Tellier, C.J., Bernier, Hall and Galipeault JJ. (Létourneau J. dissenting) and I should therefore dismiss the appeal with costs.

KERWIN J.—The facts in the present case are set out in the judgment of Mr. Justice Rinfret and need not be repeated. I am clearly of opinion that the answers to questions 6D, 9A, 10A and 10B in the medical questionnaire are representations and not warranties or conditions under article 2490 of the Quebec Civil Code. The policy is not in the same form as that which was in question in *Dawsons* v. *Bonnin* (2). In the present case, the following clause appears under the heading "Dispositions Générales":—

Contrat intégralement contenu dans cette police.—Cette Police, avec la Proposition, dont copie est ci-jointe, contient et constitue le contrat

(1) [1925] A.C. 344. (2) [1922] 2 A.C. 413.

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intégral passé entre les parties dudit contrat, et toutes les déclarations faites par l'Assuré seront, en l'absence de fraude, considérées comme des déclarations et non comme des affirmations, et aucune déclaration n'annulera la Police ni ne sera employée pour contester une réclamation basée sur ce contrat à moins que cette déclaration ne soit contenue dans la Proposition de la Police et qu'une copie de cette Proposition ne soit endossée sur la Police ou n'y soit jointe lors de son émission.

Kerwin J.

I agree with what my brother Rinfret has said with reference to this clause.

As to the answers to the various questions mentioned above, that given to 10B may be disregarded as it is merely a general clause adding nothing to the effect of the answers to the others. The answer to 6D was clearly inaccurate and I can read the answer to 9A in no way that would render it correct. According to the evidence detailed in the judgment of my brother Rinfret, the answer to 10A, wherein Vertigo is mentioned but not Vertige de Menière, is correct as Huot never suffered from vertigo and we are not entitled to assume that the two mean the same thing. I desire to make it clear, however, that I am assuming and not deciding that the appellant is bound by Huot's answer to question 10A even though it was not read or explained to him by the medical examiner.

The answers to 6D and 9A being inaccurate, the question is whether article 2487 of the Civil Code applies. That article reads as follows:

> Misrepresentation or concealment either by error or design, of a fact of a nature to diminish the appreciation of the risk or change the object of it, is a cause of nullity. The contract may in such case be annulled although the loss has not in any degree arisen from the fact misrepresented or concealed.

It is beside the point that Huot did not die either from vertigo or vertige de Menière; but were the inaccuracies of a nature to diminish the appreciation of the risk or change the object of it? The criterion, I apprehend, that is to be followed is the same as that set forth by the Privy Council in *Mutual Life Insurance Company* v. *Ontario Metal Products Company* (1), i.e., whether if the matters concealed or misrepresented had been truly disclosed they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium. There is no evi-

(1) [1925] A.C. 344.

dence in the present case that the Company would have done either of these things nor is there anything in the record from which either may be presumed.

Fraud, of course, would prevent the appellant succeeding. The trial judge found no fraud. This conclusion not being based upon the credibility of witnesses is open to review by an appellate court but in my view the evidence is overwhelmingly against making any finding of fraud.

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

HUDSON J. (dissenting)—This action was brought on an insurance policy which provided for benefits in case of (*a*) death, (*b*) permanent disability which included the loss of one or both eyes, one or both hands, one or both legs, "causée par maladie ou par lésion, contusion ou blessure corporelle". It also provided:

> Les dispositions d'invalidité dans cette Police, sont accordées sans qu'une surprime spécifique soit exigée pour elles, mais le coût en est inclus dans la prime pour cette Police.

When making his application for this policy, the deceased, in answer to the questions put to him by the medical examiner of the company, gave the following replies:

> 6. (*d*) Avez-vous jamais eu une maladie sérieuse? Non.
>
> 9 (*a*) Avez-vous consulté ou été soigné par un médecin au cours des trois dernières années? Indiquez date, maladies, nom et adresse des médecins? Pour aucune.
>
> 10. (*a*) Avez-vous jamais souffert de: vertigo, épilepsie, folie, évanouissement, paralysie, névralgie, maux de tête fréquents ou sévères? Non.

These answers were untrue.

If the answers thus given amount to a warranty or if they were made in bad faith, they would vitiate the policy, and further article 2487 of the Civil Code provides:

> Misrepresentation or concealment either by error or design, of a fact of a nature to diminish the appreciation of the risk or change the object of it, is a cause of nullity. The contract may in such case be annulled although the loss has not in any degree arisen from the fact misrepresented or concealed.

The learned trial judge took the view that the above statements were not in the nature of warranties, that there

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was no bad faith on the part of the deceased and that the misrepresentation did not diminish the appreciation of the risk.

A majority of the Court of King's Bench in Appeal, consisting of Chief Justice Tellier, Mr. Justice Bernier, Mr. Justice Hall and Mr. Justice Galipeault, took a contrary view on each of these points.

The question of whether the answers amounted to a warranty is debatable and on the question of a good faith, in view of the finding of the trial judge, I do not express an opinion although there is much to be said on the position taken in the Court of Appeal.

There is no question as to the misrepresentations. What has to be decided is whether or not these misrepresentations were, in the language of article 2487, "of a nature to diminish the appreciation of the risk."

Briefly, the facts are that the deceased had suffered from occasional spells of dizziness onwards from the year 1932 and had consulted and had been treated by the family physician for this illness. In the month of January, 1936, at the suggestion of the family doctor, he went to consult a neurologist, Doctor Langlois of Montreal. He was put in that doctor's sanatorium twenty-four hours for examination and then Doctor Langlois diagnosed his trouble as being "vertige de Menière" and prescribed some medicines and a diet, and forbade him to drive his automobile.

The deceased afterwards consulted Doctor Langlois in the months of March and May and October. Apparently, outside of the vertige de Menière he was in good general health and he did not suffer any relapses of the "vertige" after having taken the doctor's treatment for some months. Doctor Langlois states:

Q. Au mois de mars, il a constaté lui-même, comme vous qu'il était considérablement amélioré?

R. Non seulement amélioré, mais au mois de mars il m'a dit qu'il n'avait aucun vertige.

Q. Est-ce qu'il pouvait penser qu'il était absolument guéri?

R. Je peux répondre ce que j'ai pensé.

Q. Qu'est-ce que vous lui avez dit?

R. Je lui ai dit que j'étais encouragé mais que c'était un peu trop tôt pour lui dire que j'étais guéri (sic) mais au mois de mai, avec la continuation de la diète, je l'ai considéré à peu près sûrement guéri.

However, Doctor Langlois was evidently not absolutely sure that he was cured, because he told him to come in

again when he was in Montreal and, as a result of this request, he returned in October. It was in July in the interim that he applied for the life insurance and gave the answers above mentioned. At the same time, it is not quite clear when he was given permission to again drive his automobile. Doctor Langlois:

Q. Vous lui avez dit au mois de mars ou au mois de mai qu'il pouvait conduire son automobile?

R. Je peux pas dire exactement si c'est en mai ou octobre, je ne peux pas dire quand je lui ai permis, mais je me rappelle bien lui avoir dit: "Ca fait plusieurs mois que vous n'avez pas de vertige, je suis certain que vous pouvez conduire votre automobile." Je ne peux pas dire si c'est en mai ou octobre.

It appears from the medical evidence that the "vertige de Menière" is not a disease which is likely to result in death, other than through accident. I think also from the evidence that it is a disease which may recur. The fact that, although the deceased had been consulting Doctor Langlois from January until May, the latter still thought it wise to have him come back, is some evidence of a fear on the part of the doctor of recurrence of the trouble.

The medical evidence is to the effect that the condition of the deceased was such that if true answers had been given, a further thorough medical examination would have been required before an insurance company would have decided to issue the policy. In view of the fact that there was the possibility of the recurrence of this dizziness and that the policy covered disability from accidents as well as death, I find it very difficult to hold that the failure to answer these questions truly did not "diminish the appreciation of the risk" insured against, particularly in view of the fact that the additional provisions for benefits in case of invalidity were provided without any special addition to the premium. On this ground, I agree with the majority in the Court of Appeal and would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitor for the appellant: *Jules Savard.*

Solicitors for the respondent: *Gravel, Thomson & Gravel.*

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*Nov. 4, 5, 6.
*Dec. 20.

GUARDIAN INSURANCE COMPANY OF CANADA (PLAINTIFF) ..... APPELLANT;

AND

F. W. SHARP AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

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

Insurance — Fidelity — Companies — Auditors' duties — Statutory audit — Special and complete audit—Cashier's dishonesty—Failure to check customer's accounts—Cash book—Bank deposit slips—Dominion Companies Act, 1934, 24-25 Geo. V, c. 33, s. 120.

When a firm of accountants has merely been appointed to act as auditors of an advertising company, without any special terms or conditions as may have been contained in a by-law or a special contract and, thus, where the definition of their duties must be found entirely within the language of section 120 of the Dominion *Companies Act*, their duties are those, and only those, imposed upon them by the statute.

A contract imposing upon them the duty of making the statutory audit therein referred to and of issuing a certificate to the effect that the balance sheet was "properly drawn up so as to exhibit a true "and correct view of the state of the company's affairs * * * as "shown by the books of the company" does not call for a more complete and detailed audit, unless some circumstances would give rise to suspicion of dishonesty or irregularities.

In the absence of any suspicion as to the honesty of a cashier, who as a fact had been guilty of defalcations for a period of nearly six years before they were discovered, the auditors were not obliged, as in this case, to compare the details of the bank daily deposit slips with the entries in the cash book: they were bound only to exercise a reasonable amount of care and skill in order to ascertain that the books were showing the company's true position; or, adopting the words used by Lopes L.J. in *In re Kingston Cotton Mill Co.* (1896 2 Ch. 279), "it is the duty of an auditor to bring to bear on the work he has to perform, that skill, care and caution which a reasonably competent, careful and cautious auditor would use"; and, using a term of the Quebec law system, auditors must act "en bons pères de famille".

Upon an action brought by an insurance company, which had issued a fidelity bond on the employees of the advertising company and which had been subrogated in that company's rights, if any, against the auditors, *held*, applying the principles enunciated in the decisions below-mentioned to the particular facts of this case, that there was no such neglect or default on the part of the auditors as would entitle the advertising company, were it the plaintiff, to succeed in the action.

*PRESENT:—Rinfret, Crocket, Davis, Hudson and Taschereau JJ.

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In re London and General Bank (No. 2) ([1895] 2 Ch. 673); *In re Kingston Cotton Mill Company (No. 2)* ([1896] 2 Ch. 279); *London Oil Storage Company Limited* v. *Seear, Hasluck and Co.* (Dicksee on Auditing, 11th ed., p. 783) and *In re City Equitable Fire Insurance Company Limited* ([1925] Ch. 407) referred to.

Comments as to whether, assuming that there was some breach of duty on the part of the auditors, a claim based on such a breach of duty would have been covered by the subrogation document in favour of the appellant; and also, assuming it were covered by the subrogation, what would be the measure of damages for such a breach of duty.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, L. Cousineau J. and dismissing the appellant's action.

The appellant company, having by its policy of insurance guaranteed to the Claude Néon General Advertising, Limited the honesty of its cashier, A. O. Clément, was, since the cashier turned out to be a defaulter, obliged to pay the Néon Company $5,000, and, having received subrogation of that company's rights, instituted an action against the respondents, alleging that the theft, misappropriation or fraudulent conversion by Clément, were rendered possible and caused through the neglect and want of professional skill of the respondents, in particular because they failed to check the bad accounts of the company and to compare, check and verify the moneys received, as shown by the general cash book and the certified bank deposit slips, in which were entered the names of the makers of cheques which did not appear in the cash book itself. The respondents alleged that they exercised reasonable care and skill in the performance of their duty; that Clément was never subject to their discipline or control, and that he succeeded in deluding his employers, the officers of the Néon Company, into extraordinary practices, by which were created possibilities for dishonesty which were beyond the scope of investigation and inquiry of an ordinary audit; that any loss sustained by the Néon Company is attributable to the dishonesty of Clément and the gross negligence and incompetence of the assistant-secretary of the Néon Company, whose duty it was to supervise Clément.

The questions at issue and more detailed statement of the facts are contained in the judgments now reported.

(1) (1940) Q.R. 68 K.B. 391.

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Aimé Geoffrion K.C. and *N. Charbonneau* for the appellant.

John T. Hackett K.C. and *Lindsay H. Place* for the respondents.

The judgment of Rinfret and Taschereau JJ. was delivered by

TASCHEREAU J.—La Guardian Insurance Company, l'appelante, avait émis une police d'assurance destinée à indemniser la Claude Néon General Advertising Limited jusqu'à concurrence de $5,000 contre les défalcations de ses employés. Comme résultat de la manipulation de certains comptes, le caissier de cette dernière compagnie a détourné durant une période de près de cinq ans une somme de $6,756.41, et l'appelante a dû payer à son assurée, en vertu de sa police, la somme de $5,000.

Elle poursuit maintenant pour ce montant les intimés-auditeurs de la Claude Néon, et ayant été subrogée dans les droits de cette dernière, elle allègue qu'ils ont été négligents dans l'exercice de leurs fonctions et qu'ils n'ont pas, comme ils auraient dû le faire, découvert le système employé par Clément pour frauder son employeur. En Cour Supérieure, l'action a été maintenue, mais la Cour du Banc du Roi, l'honorable juge-en-chef et l'honorable juge Gibsone dissidents, en est venue à la conclusion que la responsabilité des intimés n'avait pas été établie, et a rejeté l'action.

Le système employé par Clément pour convertir à son usage personnel les fonds dont il avait la garde était assez ingénieux. Lorsqu'un client de Claude Néon se prévalait de la *Loi des Faillites,* ou lorsqu'on faisait avec lui un compromis pour la paiement de son compte, ou bien encore lorsque l'on confiait la réclamation contre lui aux avocats de la Compagnie, on inscrivait son nom dans un régistre spécial avec tous les autres mauvais comptes. L'assistant-secrétaire-trésorier, M. Tulloch, apposait ses initiales vis-à-vis le nom de celui qui ainsi était considéré comme incapable de remplir son obligation. Depuis ce moment, aucune facture n'était adressée à ce débiteur et il fallait attendre la remise de l'avocat de la Compagnie ou les dividendes du syndic à la faillite. Le système imaginé par Clément consistait à s'emparer de ces remises, à ne les

entrer nulle part dans les livres, et à garder ces chèques en sa possession jusqu'au moment où des clients dont les comptes étaient actifs venaient au comptoir payer en argent ce qu'ils devaient.

Clément s'appropriait alors cet argent, jusqu'à concurrence du montant des chèques des mauvais comptes, entrait dans le livre de caisse les noms de ceux qui payaient en argent, et, pour balancer, déposait en banque les chèques qu'il avait en sa possession. Ce système dont les auditeurs ne s'aperçurent pas dura au-delà de quatre ans et permit au caissier de détourner la somme de $6,756.41. A cause d'un changement dans le système de perception des comptes, on découvrit qu'un montant de $13.50 qui avait été payé n'était crédité nulle part. La Compagnie en avertit aussitôt les auditeurs qui firent une enquête spéciale avec les résultats que cette fraude fut mise à jour et le montant de la défalcation définitivement établi.

La faute des auditeurs réside, prétend l'appelante, dans le fait qu'ils n'ont pas comparé les entrées quotidiennes du livre de caisse avec les copies des bordereaux de dépôts. On aurait pu s'apercevoir ainsi, parce que les noms des signataires des chèques apparaissaient sur les bordereaux, qu'il y avait sur ceux-ci des noms ne figurant pas au livre de caisse et ces dissemblances auraient immédiatement fait naître des soupçons.

Il est nécessaire, pour bien déterminer les responsabilités, s'il en existe, d'examiner la nature et l'étendue des services que les intimés étaient appelés à rendre à Claude Néon. Aucun contrat écrit n'a été produit, mais on trouve cependant un règlement des actionnaires passé conformément aux dispositions de la Loi Fédérale des Compagnies, nommant les intimés auditeurs, et rien dans le dossier ne détermine les devoirs qu'ils doivent remplir. Il n'y a aucune restriction qui limite, et aucun engagement qui augmente leurs obligations. Il s'ensuit donc qu'ils ont à remplir les devoirs imposés par la loi telle qu'interprétée par les auteurs et la jurisprudence.

L'article 120 de la Loi Fédérale des Compagnies se lit de la façon suivante:—

120. (1) Les vérificateurs doivent faire aux actionnaires un rapport sur les comptes qu'ils ont examinés et sur tout bilan présenté à la Compagnie lors d'une assemblée annuelle pendant la durée de leur charge. Ce rapport doit mentionner:

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(a) s'ils ont obtenu ou non tous les renseignements et explications qu'ils ont demandés; et,

(b) si, à leur avis, le bilan qui fait l'objet de leur rapport est bien dressé de manière à donner un état véritable et exact des affaires de la Compagnie, du mieux qu'ils ont pu s'en rendre compte par leurs renseignements et les explications qui leur ont été données et d'après ce qu'indiquent les livres de la Compagnie.

Taschereau J.

Comme il est facile de s'en rendre compte, cet article ne détermine pas tous les devoirs des auditeurs. Il dit bien que ceux-ci doivent faire un rapport aux actionnaires, qu'il est de leur devoir de révéler si le bilan, dans leur opinion, représente l'état véritable des affaires de la Compagnie d'après les informations obtenues et les livres de la Compagnie. Mais, jusqu'où va leur rôle d'investigateurs, et où s'arrête leur obligation de chercher dans les livres pour trouver des irrégularitiés, voire même des fraudes?

Cette cause qui a pris naissance dans la province de Québec, doit nécessairement être jugée suivant les lois de cette province. Il ne s'agit nullement d'une réclamation délictuelle ou quasi-délictuelle fondée sur l'article 1053 C.C., mais bien d'une réclamation basée sur le défaut d'accomplir certaines obligations résultant d'un contrat d'engagement.

Il n'y a pas dans la province de Québec d'arrêts qui ont été rendus et qui puissent nous aider à solutionner le problème de la responsabilité des auditeurs. Ayant en vue toujours qu'il s'agit de l'inexécution d'une obligation contractuelle, je crois qu'il est difficile de mieux définir les devoirs résultant d'un semblable contrat, que ne l'a fait l'honorable juge Létourneau qui s'exprime de la façon suivante:—

> Or, il n'y a de responsabilité en dommages pour inexécution d'obligation que si le débiteur de cette obligation a fait ou omis ce que n'eut pas fait ou omis en semblable occasion un bon père de famille. Et ceci dépend entièrement, dans l'espèce qui nous est soumise, du critère que voici: qu'aurait donc fait dans les mêmes circonstances, tout autre vérificateur compétent, diligent?

Ce principe qui doit nous guider est bien semblable à la doctrine maintes fois appliquée en Angleterre, et où les juges des plus hautes cours ont maintenu que les auditeurs doivent dans l'exercice de leurs fonctions, faire preuve d'un degré raisonnable d'habileté et d'attention. Et nous devons d'autant plus nous inspirer de cette jurisprudence, si l'on

considère que l'article 120 de la Loi Fédérale des Compagnies que je viens de citer est semblable au texte de la loi anglaise.

Quelques extraits des causes les plus importantes nous font voir l'uniformité de la jurisprudence anglaise, et ceux-ci, dans les limites déterminées par cette Cour dans *The King* v. *Desrosiers* (1), et *Latreille* v. *Curley* (2), peuvent sans doute nous servir de guides. Dans *In re London and General Bank (No. 2)* (3), Lindley L.J. s'exprime de la façon suivante:—

> He must take reasonable care to ascertain that the books show the Company's true position.

Dans *In re Kingston Cotton Mill Company (No. 2)* (4):

> He is bound only to exercise a reasonable amount of care and skill.

Et plus loin, Lopes L.J. dit:—

> He is only bound to be reasonably cautious and careful.

Et plus loin, à la page 288 de la même cause:—

> It is the duty of an auditor to bring to bear on the work he has to perform, that skill, care and caution which a reasonably competent, careful and cautious auditor would use.

Les auditeurs, comme dans le cas actuel, à qui on n'a pas confié la tâche d'exécuter un travail spécial, doivent donc remplir leurs devoirs avec la prudence, l'attention et l'habileté qu'un autre auditeur compétent montrerait dans des conditions identiques. C'est en "bons pères de famille" qu'ils doivent agir. Leur tâche consiste à vérifier si le bilan représente bien la position financière de la Compagnie, d'après les livres et les informations obtenues. Ils ne sont pas des détectives et ils ne sont donc pas tenus de prévenir et de retracer toutes les fraudes que des employés malhonnêtes et ingénieux peuvent commettre au préjudice de leur employeur.

Ils sont justifiables de croire à l'honnêteté de certains employés qui jouissent de la confiance des directeurs de la Compagnie depuis de nombreuses années de service, et il leur est également permis, lorsque les livres ne donnent naissance à aucun soupçon, de s'abstenir de faire certaines recherches et investigations, qui pourraient être nécessaires dans des cas d'auditions particulières où des instructions

(1) (1919) 60 Can. S.C.R. 105.
(2) (1919) 60 Can. S.C.R. 131.
(3) [1895] 2 Ch. 673.
(4) [1896] 2 Ch. 279.

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spéciales leur sont données. C'est d'ailleurs la jurisprudence constante telle qu'établie et par les arrêts cités antérieurement et aussi par les suivants:—

Dans la cause de *In re London and General Bank (2)* déjà citée (1), Lindley L.J. dit:—

> An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of a Company is being conducted prudently or imprudently, profitably or unprofitably. * * * his business is to ascertain and state the true financial position of the Company at the time of the audit, and his duty is confined to that.

Dans la même cause, à la page 683:—

> Where there is nothing to excite suspicion, very little inquiry will be reasonably sufficient * * * where suspicion is aroused, more care is obviously necessary; but still an auditor is not bound to exercise more than reasonable care and skill even in a case of suspicion, and is perfectly justified in acting upon the opinion of an expert where special knowledge is required.

Dans *In re Kingston Cotton Mill Company (2)* (2),, il a été décidé:—

> that, it being no part of the duty of the auditors to take stock, they were justified in relying on the certificates of the manager, a person of acknowledged competence and high reputation, and were not bound to check his certificates in the absence of anything to raise suspicion and that they were not liable for the dividends wrongfully paid.
>
> An auditor is not bound to be suspicious where there are no circumstances to arouse suspicion; he is only bound to exercise a reasonable amount of care and skill.

Lopes L.J., dans la même cause, nous dit:—

> An auditor is not bound to be a detective, or as was said, to approach his work with suspicion or with a foregone conclusion that there is something wrong. He is a watch-dog, but not a bloodhound. He is justified in believing tried servants of the Company in whom confidence is placed by the Company. He is entitled to assume that they are honest, and to rely upon their representations, provided he takes reasonable care. If there is anything calculated to excite suspicion he should prove it to the bottom; but in the absence of anything of that kind he is only bound to be reasonably cautious and careful.

Et plus loin,

> Auditors must not be made liable for not tracking out ingenious and carefully laid schemes of fraud when there is nothing to arouse their suspicion, and when those frauds are perpetrated by tried servants of the company, and are undetected for years by the directors. So to hold would make the position of an auditor intolerable.

Aller au-delà de cela serait créer pour les auditeurs, comme il est dit dans les arrêts ci-dessus, une situation

(1) [1895] 2 Ch. 673. (2) [1896] 2 Ch. 279.

intolérable, et signifierait qu'ils assurent contre la fraude, et qu'ils sont responsables des habiles manipulations d'employés peu scrupuleux qui réussissent à tromper la surveillance de leurs employeurs.

Dans le cas actuellement soumis à la Cour, on reproche aux intimés, et c'est le seul grief sérieux invoqué contre eux, de ne pas avoir comparé les bordereaux de dépôt avec les entrées au livre de caisse. Il est utile de se rappeler ici que tous les mauvais comptes de la Compagnie étaient initialés par l'assistant-secrétaire-trésorier, M. Tulloch, et, en conséquence, soustraits du compte des profits et pertes. M. Turner, le vice-président, le trésorier et le gérant général de la Compagnie nous dit:—

> When the bankrupt estate of a customer was wound up, Mr. Tulloch's job was to see to it that we had received whatever dividends were due to the Company as disclosed by the report of the Trustee, and to authorize the balance of the account being written off as a bad debt. Mr. Tulloch was instructed to signify his scrutiny of the whole transaction by placing his initials on the entry writing off the bad debt.

Lorsque Clément réussissait à percevoir le montant de certains de ces comptes, il déposait, comme nous l'avons vu, ces chèques au compte de banque de la Compagnie sans faire d'entrée au livre de caisse, et s'appropriait d'autres montants égaux payés en argent. Il est possible que la vérification des bordereaux eût révélé certaines de ces malversations, mais les experts entendus, sauf M. Parent et M. Grant, nous disent qu'on ne peut se fier à une pareille comparaison. M. Gordon Scott nous affirme que l'examen détaillé des bordereaux de dépôt n'est d'aucune utilité. M. Young, un des associés de Price, Waterhouse & Co., nous dit que l'examen des copies de bordereaux de dépôt a peu de valeur comme moyen de vérifier l'exactitude des recettes en argent. Il affirme que ces bordereaux ne sont pas une preuve de réception d'argent, mais bien une preuve que de l'argent a été donné à la banque. M. L. E. Potvin jure que le bordereau de dépôt peut faire mention d'entrées qui n'ont aucune relation avec le commerce du client, qu'il peut y avoir eu échange de chèques avec ce client et autres accommodations, et il nous dit qu'il ne pourrait pas se fier à ces copies de bordereaux de dépôt. C'est aussi l'opinion de M. Maurice Chartré et de M. K. W. Dalglish qui tous deux croient que cette façon de vérifier n'est pas certaine et qu'elle n'est pas généralement employée.

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La raison se devine facilement. Il peut se présenter des cas nombreux où un caissier honnête ne pourra jamais faire concorder les entrées d'un jour inscrites au livre de caisse avec le bordereau de dépôt. Si, ainsi, il reçoit au comptoir d'un client débiteur de $25, un chèque de $50, et lui remet $25 en change, le livre de caisse comportera une recette de $25 et le bordereau un dépôt de $50. Si un autre client paye le même montant au moyen de trois chèques différents signés par des tiers, et endossés par lui il y aura encore une entrée de $25 au livre de caisse, et sur le bordereau, le dépôt de trois chèques qui n'ont aucune relation avec les affaires de la Compagnie. Le caissier peut changer le chèque d'un officier de la Compagnie, qui apparaîtra au bordereau mais nullement au livre de caisse. Il peut aussi recevoir des chèques postdatés qui ne seront pas sur le bordereau à la date qui correspond à celle inscrite au livre de caisse.

L'on voit donc par ces témoignages des experts et les exemples cités que cette faute reprochée aux intimés n'en est pas une en réalité. Ils se sont contentés de vérifier le total des dépôts, comme le font tous les auditeurss prudents et ayant un degré raisonnable d'habileté professionnelle. Les intimés ont agi comme les autres auditeurs agissent dans des conditions identiques, et parce qu'ils ont omis de faire cette vérification qui ne se fait pas habituellement, on ne peut pas dire qu'ils n'ont pas agi en "bons pères de famille".

Devaient-ils surveiller davantage des comptes considérés comme mauvais comptes? Il ne faut pas oublier que l'appelante a été subrogée aux droits de Claude Néon Limited. Elle a tous les droits de celle-ci, mais elle n'en a pas davantage. Les auditeurs ont suggéré à M. Turner, vice-président et gérant général, d'adresser une circulaire à tous les débiteurs de la Compagnie pour vérifier l'exactitude des montants dus, mais celui-ci a refusé cette suggestion en disant que le contrôle interne de la Compagnie était suffisant. Il y avait donc lieu d'assumer que ces comptes disparus des livres l'étaient régulièrement. On sait que des auditeurs, qui louent leurs services à une corporation employant de nombreux commis, sont tenus de donner moins d'attention à certains détails précisément à cause du contrôle interne exercé par les employés.

Les tribunaux ne doivent pas être plus sévères vis-à-vis les auditeurs qu'ils ne le sont vis-à-vis les autres professionnels. Du moment qu'ils agissent suivant les principes que j'ai mentionnés déjà, ils sont à l'abri de responsabilité civile, et ne peuvent pas être recherchés en dommages si l'on découvre des vols dont l'examen raisonnable des livres ne faisait pas soupçonner l'existence. Il est vrai, comme on l'a dit, qu'ils ne sont pas employés seulement pour additionner, soustraire ou diviser, et qu'on a droit d'attendre d'eux un degré d'habileté qui permette à la Compagnie de se rendre compte de sa situation financière. Mais il est également vrai qu'on ne peut pas exiger d'eux que le bilan qu'ils contresignent comporte une garantie d'honnêteté de tous les employés, et qu'il est une assurance que leur vigilance n'a pas été trompée.

Le certificat qu'ils donnent aux actionnaires indique la situation de la Compagnie, telle que révélée par les livres qui n'ont pas éveillé de soupçons, et d'après les informations fournies par des employés responsables qui ont la confiance des directeurs. Ils sont des auditeurs, et non des enquêteurs spéciaux qui, eux, souvent doivent présumer, à cause de soupçons préexistants, la malversation et le détournement.

Pour ces raisons, je crois que le jugement de la Cour du Banc du Roi, qui a rejeté l'action, est bien fondé, et je suis d'opinion de le confirmer avec dépens.

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

DAVIS J.—Claude Néon General Advertising Limited (hereinafter for convenience called "the company"), with head office in the city of Montreal in the province of Quebec, carries on the business of manufacturing and leasing advertising signs. The company was incorporated in 1929 for the purpose of consolidating the activities of several advertising businesses theretofore carried on separately and became one of a group of nine companies whose consolidated balance sheet shows total assets to the amount of approximately four million dollars. That indicates in a general way the nature and extent of the business of the company.

In November, 1935, shortly after a collector of accounts in the employ of the company had introduced for his own

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protection the use of a counterfoil receipt book, the auditors discovered that the company's cashier, Clément, had stolen some money from the company. He had been a trusted employee against whom there had never been any suspicion of wrongdoing but when the defalcation was discovered an investigation was at once commenced to ascertain if there had been any other defalcations by this man. A thorough investigation of all customers' accounts, deposit slips, bankruptcy dividends and agreements with customers was made, with the result that this special investigation disclosed that comparatively small sums of cash had been taken by Clément from time to time from as early as January 29th, 1931 (when $13.50 was taken) over a period of nearly six years, the total amounting to $6,756.41. Each of the items going to make up this total was a comparatively small sum, such, for instance, as $11.50, $7, $21.25, $18.65, $2, $14.44, $6.20, $1.74, $83.25, $10.31, $27.50, $19. I have picked out these items at random throughout the long list. In only a few instances was more than $100 taken at one time; the defalcations were usually of small amounts at a time.

One at once asks how this sort of thing was done in that it was not discovered for nearly six years. The obvious answer on the evidence is that Clément was fully trusted by his superior officers in the large business, that there was no suspicion that anything like this was going on. And one naturally asks then: How did Clément do this so as to evade discovery? Like most consistent practices of fraud, the system when explained seems very simple, though perhaps ingenious at its inception in the mind of the guilty person. What happened was this: Clément from time to time induced Tulloch, the assistant treasurer of the company whose duty it was to supervise Clément and who was specifically entrusted with credits and bad debts, to write off some comparatively small accounts as bad debts, though apparently Clément himself regarded them as accounts from which the company might well receive some further payments. These accounts, I should think negligently by Tulloch, were closed and written off on the books of the company and became dead accounts. No further monthly or other statements of account went out to these customers and therefore if any of them subsequently paid in anything on their accounts they did not

thereafter receive statements of account which would have indicated at once that their payments had not been properly credited to their accounts on the books of the company. Further, there were accounts of persons or firms which went into bankruptcy; when notice of bankruptcy was received the company filed its claim with the trustee in bankruptcy and these accounts were then closed out on the books of the company. Other accounts from time to time were given over to the solicitors of the company for collection and when that was done these accounts were closed on the books of the company and no further statement of account was sent by the company to the customer; the matter was left in the hands of the solicitor. Those three named classes of accounts, I take it from the evidence, represent the basis of the system upon which Clément, the cashier, worked in taking moneys from the company. He did it this way: the company had an ordinary cash ledger in which he daily recorded or was supposed to have recorded all the incoming moneys which in most cases were by cheques but in some cases by small cash payments. Every day the cashier sent, or was supposed to send, all the moneys taken in that day, whether represented by cash or by cheque, to the company's bank for deposit. On the whole this was done faithfully day after day during the six years in question. But from time to time in order to take some money to himself Clément did this: having received a cheque from a bankrupt estate or from the company's solicitor on a collection or in respect of one of the accounts that had been written off as a "bad debt," he would hold the particular cheque and not enter it in the cash ledger. And then, when sufficient cash was in to amount to or exceed the amount of the cheque, he deposited the cheque at the bank to the company's credit but would take to himself the equivalent amount out of the cash in hand. It is plain that each day Clément deposited or caused to be deposited in the company's bank the exact amount of money, represented by cheques or cash, which was shown in the cash ledger of the company as having been received that day by the company. The amount of the daily deposits as shown on the original bank statements to the company agreed exactly with the amount of the daily receipts as shown in the company's cash ledger.

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The company carried a fidelity bond on its employees which had been issued to it by the appellant, Guardian Insurance Company of Canada, and the appellant paid the company in respect of Clément's defalcations $5,000, being the full amount of the bond. Upon payment the appellant took from the company a document headed "Subrogation Receipt," in which the company acknowledged receipt of the $5,000 from the appellant in full settlement of all claims and demands under the bond in respect of defalcations on the part of Clément and, in consideration of such payment, the company

> hereby assign and transfer to (the Guardian Insurance Company of Canada) each and all claims and demands against any other party, person, persons, property or corporation, arising from or connected with such loss and the said (the Guardian Insurance Company) is hereby subrogated in the place of and to the claims and demands of the undersigned (Claude Néon General Advertising Limited) against said party, person, persons, property or corporation in the premises to the extent of the amount above named, and the said (Guardian Insurance Company) is hereby authorized and empowered to sue, compromise or settle in its name or otherwise to the extent of the money paid as aforesaid.

The document is dated July 10th, 1936.

Neither the appellant nor the company itself took any proceedings against Clément to recover the amount of his defalcations, or any part of them, but the appellant commenced this action on November 10th, 1936, in its own name, against the auditors of the company (who are the respondents in this appeal) to recover $5,000, the amount it had paid on its bond, alleging that the "theft or misappropriation or fraudulent conversion" by Clément

> was rendered possible by and was caused through the neglect, want of professional skill of the defendants; that such conversion would have been impossible if the defendants had done what they were bound to do, and what they had agreed to do towards the said company, Claude Néon General Advertising Limited, and its directors, and that the said loss was caused immediately by the said negligence, want of profesional skill of the defendants.

The appellant put its case on the alleged neglect of the auditors in failing to check what are called the "deposit slips." Clément had made out day by day the usual form of bank deposit slip in connection with the daily deposit of company's moneys at the bank. The original deposit slip was retained by the bank. The amount of the daily deposit would vary considerably but on some days would be several thousand dollars. But on any day that Clément

intended to misappropriate some of the cash on hand, he would deposit the particular cheque which he had been holding back with the other cheques received that day but the amount of cash he would deposit would be the amount actually received less the amount of the cheque which he had been holding back until that day. Clément kept a carbon copy of each of these daily bank deposit slips. They appear to have been kept by him openly on a file on his desk; he must have known that it was not customary for auditors to check these carbon deposit slips or else he would not have adopted the system he did. While the bank stamped each of these carbon copies, it merely acknowledged that it had received "the total amount" as shown on the slip. The original deposit slips, which were left with the bank, do not appear to have been produced but I understand it is admitted that they were the same as the carbon copies. Strange as it may appear, on the days when misappropriations took place Clément made marginal notes on the copy of the deposit slip for the day which he retained which would give him the information, if he ever wanted the information, as to what cheque was added in the deposit of that day that had not been shown in the cash ledger, and in some cases a notation of the difference in the cash. There was no explanation for the making or for the keeping of these annotated copies but I suspect that Clément, at least at the inception of the defalcations, hoped to make good later on and wanted a record of exactly what he had taken. However that may be, the appellant says that if the auditors had checked not only the books of the company but these copies of bank deposit slips in Clément's possession, his system would have failed and the company would not have lost the money. What the auditors say is that it is not customary in the practice of auditors to check copies of bank deposit slips because they are not original documents and that the bank's stamp on them is expressly limited to an acknowledgment that "the total amount" shown on the slip has been received and deposited to the credit of the company's account. The auditors say that they entirely shared the confidence of the superior officers of the company in Clément's honesty and had no ground for suspicion and that as a matter of auditing practice a stamp by the bank on a carbon copy of a deposit slip

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that the total amount shown thereon had been received by the bank was not something which in the ordinary course they would examine because they had before them the company's original cash ledger with its details of the daily receipts and they checked and examined the original statements received by the company from the bank, showing the total daily deposits, against the daily receipts as shown by the company's cash ledger. The appellant's factum contains the admission:

> There is no doubt that if these duplicate deposit slips had been in the form usually employed, they could have been of no assistance, in order to check the cash book.

The auditors had been appointed at the time of the incorporation and organization of the company in 1929. They then made out a programme or chart of their work which was known and accepted by the company and to which they adhered. They are admitted to be an old Montreal firm with an excellent reputation.

It is indeed a striking fact that Turner (himself a chartered accountant), who was the senior officer in charge of the company's office (being vice-president and secretary-treasurer for some years), testified that the company had foreseen "something like this" and had sought to cover it by internal checks and controls which he described. He said he did not criticize the auditors after the investigations had revealed the losses. Further, the Hon. Gordon W. Scott, who is acknowledged to have been one of the outstanding chartered accountants in this country and who was himself a director of the company, testified that had the audit of the company been under his supervision he would not have thought it an essential part of his duty to check the deposit slips. "In a large public corporation," he said,

> I think the greatest safeguard you have is the internal organization, that one man is checking another all through the process, and if that is functioning properly, as is done in the larger corporations, we rely on the organization for the honesty of the employees, and in no sense do I believe it is the duty of an auditor to be a detective.

Mr. Scott said there was

> something like three or four hundred thousand dollars coming in within a year

and

> something like a million and a half dollars on the books of the company and three thousand accounts and a lot of little accounts in instalments,

and he thought the checking of the daily deposit slips by the auditors would be "superfluous" and "useless" work in the circumstances. Dempster, one of the partners in the auditing firm, testified that he had at one time suggested to the company that a communication be sent to each customer to ascertain if the customer admitted that his indebtedness to the company was exactly as shown on his card or ledger sheet but that his suggestion had not been carried out; Mr. Turner felt that the system of internal control was a sufficient safeguard against defalcations.

But Mr. Geoffrion for the appellant, with his usual vigour and lucidity of argument, pressed upon us his contention that the appellant was entitled to succeed in the action upon the ground that it was negligence on the part of the auditors not to have examined these copies of the bank deposit slips and that if they had, Clément would have been frustrated in his scheme of taking the moneys from the company and consequently the auditors were responsible in law for the company's loss caused by Clément's misappropriations. The liability of the auditors was put as coterminous with the liability of Clément himself to the company.

In the view I take of the case it is unnecessary to determine the question whether or not under Quebec law the so-called subrogation receipt is sufficient to entitle the appellant in its own name to maintain this action against the auditors.

I turn now to the consideration of the nature and extent of the duty of the auditors to the company. It was admitted that they had merely been appointed by resolution of the company "to be the auditors of the company," without any special terms or conditions by by-law or agreement, and that the definition of their duty was to be found entirely within the language of sec. 120 of the Dominion *Companies Act*, 1934, ch. 33, which reads as follows:

120. (1) The auditors shall make a report to the shareholders on the accounts examined by them and on every balance sheet laid before the company at any annual meeting during their tenure of office, and the report shall state

(*a*) whether or not they have obtained all the information and explanations they have required; and,

(*b*) whether, in their opinion, the balance sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of

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the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company.

(2) Every auditor of a company shall have a right of access at all times to all records, documents, books, accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as may be necessary for the performance of the duties of auditor.

(3) The auditors of a company shall be entitled to attend any meeting of shareholders of the company at which any accounts which have been examined or reported on by them are to be laid before the shareholders for the purpose of making any statement or explanation they desire with respect to the accounts.

The respondents were engaged then to make what is called a statutory audit for the company and their duties were those and only those imposed by the statute. A distinction was very properly made in the argument between a statutory audit and a special investigation that may be undertaken by auditors under terms of a special contract.

The language of the statutory duty here is substantially the same as the language in the *Companies Act,* 1879, which was under consideration in *In re London and General Bank (2)* (1). In that case Lindley L.J. said at p. 683:

> An auditor, however, is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer; he does not guarantee that the books do correctly shew the true position of the company's affairs; he does not even guarantee that his balance-sheet is accurate according to the books of the company. If he did he would be responsible for error on his part, even if he were himself deceived without any want of reasonable care on his part, say, for the fraudulent concealment of a book from him. His obligation is not so onerous as this. Such I take to be the duty of the auditor: he must be honest—i.e., he must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes that what he certifies is true. What is reasonable care in any particular case must depend upon the circumstances of that case. Where there is nothing to excite suspicion very little inquiry will be reasonably sufficient, and in practice I believe business men select a few cases at haphazard, see that they are right, and assume that others like them are correct also. Where suspicion is aroused more care is obviously necessary; but, still, an auditor is not bound to exercise more than reasonable care and skill, even in a case of suspicion, and he is perfectly justified in acting on the opinion of an expert where special knowledge is required.

Lopes L.J., who concurred in the judgment of Lindley L.J., said in another case that came up the following year, *In re Kingston Cotton Mill Company (2)* (2):

(1) [1895] 2 Ch. 673. (2) [1896] 2 Ch. 279, at 288, 289.

But in determining whether any misfeasance or breach of duty has been committed, it is essential to consider what the duties of an auditor are. They are very fully described in *In re London and General Bank* (1), to which judgment I was a party. Shortly they may be stated thus: It is the duty of an auditor to bring to bear on the work he has to perform that skill, care, and caution which a reasonably competent, careful, and cautious auditor would use. What is reasonable skill, care, and caution must depend on the particular circumstances of each case. An auditor is not bound to be a detective, or, as was said, to approach his work with suspicion or with a foregone conclusion that there is something wrong. He is a watch-dog, but not a bloodhound. He is justified in believing tried servants of the company in whom confidence is placed by the company. He is entitled to assume that they are honest, and to rely upon their representations, provided he takes reasonable care. If there is anything calculated to excite suspicion he should probe it to the bottom; but in the absence of anything of that kind he is only bound to be reasonably cautious and careful.

Lord Alverstone C.J., in summing up to a special jury in a case in the King's Bench Division on June 1st, 1904, said (*London Oil Storage Company Limited* v. *Seear, Hasluck and Co.* reported in Dicksee on Auditing, 11th ed., p. 783, at pp. 785 and 786):

I will not adopt any fanciful expression which may be quoted from any particular judgment, but he (the auditor) has got to bring to bear upon those duties reasonable and watchful care, he has got to discharge those duties remembering that the company look to him to protect their interests. He is not, however, supposed to be a man constantly going about suspecting other people of doing wrong, and that is the only respect in which, I think, Mr. Bankes in his most able speech pressed the matter a little too high. While Mr. Hasluck has by the exercise of due and reasonable care to see that all the officials of the company are doing their duty properly in so far as the accounts are concerned, he is not bound to assume when he comes to do his duty that he is dealing with fraudulent and dishonest people; and there comes in the most important consideration from one point of view—perhaps more important than the other, though I do not think of such substantial weight in this matter—if circumstances of suspicion arise, it is the duty of the auditor, in so far as those circumstances relate to the financial position of the company, to probe them to the bottom.

And further on at p. 787:

Mr. Isaacs is quite right in saying to you, as I have already indicated, that the auditor is not bound to assume that people are dishonest. On the contrary, he is entitled to think that they are honest.

Lord Alverstone later on said, p. 787:

* * * I think the best concluding direction I can give to you for which I am responsible is, that he must exercise such reasonable care as would satisfy a man that the accounts are genuine, assuming that there is nothing to arouse his suspicion of honesty, and if he does that he fulfills his duty; if his suspicion is aroused, his duty is to "probe the thing to the bottom," and tell the directors of it, and get what information he can.

(1) [1895] 2 Ch. 673.

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In re City Equitable Fire Insurance Company Limited (1) affords an exhaustive discussion, by Romer J. (as he then was) and on appeal by Pollock M.R., Warrington L.J., and Sargant L.J., of the duties of auditors. The report of the case extends to 125 pages. I shall quote only one passage from the judgment of Pollock M.R., at p. 509:

> What is the standard of duty which is to be applied to the auditors? That is to be found, and is sufficiently stated, I think, in *In re Kingston Cotton Mill Co. (No. 2)* (2). As I have already said it is quite easy to have discovered something which, if you had discovered it, would have saved us and many others from many sorrows." But it has been well said that an auditor is not bound to be a detective or to approach his work with suspicion or with a foregone conclusion that there is something wrong. "He is a watchdog, but not a bloodhound." That metaphor was used by Lopes L.J., in *In re Kingston Cotton Mill Co. (No. 2)* (2). Perhaps, casting metaphor aside, the position is more happily expressed in the phrase used by my brother Sargant L.J., who said that the duty of an auditor is verification and not detection. The *Kingston Cotton Mill* case (2) is important, because expansion is given to those rather epigrammatic phrases. Lindley L.J. says: "It is not sufficient to say that the frauds must have been detected if the entries in the books had been put together in a way which never occurred to anyone before suspicion was aroused. The question is whether, no suspicion of anything wrong being entertained, there was a want of reasonable care on the part of the auditors in relying on the returns made by a competent and trusted expert relating to matters on which information from such a person was essential." The judgment of Lopes L.J., as well as that of Kay L.J., may be looked at in support of the words of Lindley L.J., and also in support of what I have called the epigrammatic way of putting the auditors' duty.

The legal standard of duty of auditors (to adopt a phrase of Lindley L.J.), in the absence as here of any special by-law or stipulation of the terms of employment, is plainly defined in the decisions to which I have referred, and applying the principles of those decisions to the particular facts of this case I am unable to hold that there was any such neglect or default on the part of the auditors as would entitle the company, were it the plaintiff, to succeed in the action. The question is whether before the discovery of the thefts, in the then existing state of experience, failure of knowledge or foresight is to be imputed to the auditors for a breach of duty. Conduct pursued in the light of experience derived from the present knowledge of the system of defalcations can hardly be taken as a sufficient basis for a charge of want of care. There was nothing to indicate that the accounting methods and con-

(1) [1925] Ch. 407. (2) [1896] 2 Ch. 279.

trol of the company were so lax and inadequate that reliance could not properly be placed upon the books.

But assuming that there was some breach of duty on the part of the auditors to the company, there would be two answers, I should think: firstly, a claim based on such a breach of duty may not be covered by the subrogation document in favour of the appellant; and, secondly, assuming it were covered by the subrogation, what is the measure of damages for such a breach of duty? The auditors did not steal the money; they were not the direct cause of the loss. As Lord Alverstone told the jury in the *London Oil Storage Company* case above mentioned (Dicksee on Auditing, 11th ed., at p. 797):

> I do not know that I ever remember a question the solution of which was more difficult in the concrete. It is easy to put it in general terms: Was he guilty of breach of duty, and, if so, what loss was occasioned to this company by that breach of duty? You must not put upon him the loss by reason of theft occurring afterwards or before, but you must put upon him such damages as you consider in your opinion were really caused by his not having fulfilled his duty as auditor of the company.

The loss of the plaintiff amounted to £760; the jury awarded five guineas against the auditors.

Canadian Woodmen of the World v. *Hooper et al.* (1), was a somewhat recent Ontario case. The auditors were held liable for breach of their duties to the plaintiff corporation. The trial judge, Raney J., awarded the corporation the full amount of its loss, $8,840.32, against the auditors as well as against an official of the corporation, but after the case had been twice before the Ontario Court of Appeal (1) the protracted litigation ended, so far as the auditors were concerned, with a judgment against them of only $1 as nominal damages. I do not pursue the difficult question of the measure of damages because, in my view of the case, it is unnecessary to do so. Nor do I find it necessary to consider the question of prescription raised by the respondents.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Charbonneau, Charbonneau & Charlebois.*

Solicitors for the respondents: *Hackett, Mulvena, Foster, Hackett & Hannen.*

(1) (1932) 41 O.W.N. 328; [1935] O.W.N. 113.

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*Oct. 3.
*Nov. 18.

LOUIS SKELDING (PLAINTIFF).....APPELLANT;

AND

F. T. DALY AND ANOTHER (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Patent—Action for infringement—Plea alleging invalidity of patent—Jurisdiction of provincial courts—Whether concurrent with the Exchequer Court of Canada—Patent Act, (D) 1935, c. 32, ss. 54, 59, 60, 63—Patent Act, (D) 13-14 Geo. V, c. 23, ss. 33, 37.

In an action brought by a plaintiff in a provincial court for a declaration that his patent had been infringed by the defendant, the latter denied such infringement and further pleaded that the patent was invalid. The plaintiff having raised on appeal the point that the provincial courts had no jurisdiction to entertain such a defence on the ground that the Exchequer Court of Canada alone has the authority and the power to declare a patent or any claim therein invalid or void,

Held, affirming the judgment of the Court of Appeal for British Columbia, that the provincial courts have jurisdiction, concurrently with the Exchequer Court of Canada, to entertain a defence of invalidity of a patent. In doing so, the provincial courts will not assume to give any judgment setting aside the patent, but will merely deny the plaintiff the relief sought on the ground that the plaintiff's patent was invalid.

Durable Electric Appliance Co. Ltd. v. *Renfrew Electric Products Ltd.* (59 O.L.R. 527; [1928] S.C.R. 8) ref.

APPEAL from the judgment of the Court of Appeal for British Columbia, reversing the judgment of the trial judge, Morrison C.J., and dismissing the appellant's action.

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

H. R. Bray for the appellant.

E. G. Gowling for the respondents.

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

RINFRET J.—This appeal is from the courts of British Columbia and it concerns a patent bearing number 283712, issued on the second day of October, 1928, for "Hot Air Heating Systems," upon an application filed March 23rd, 1927.

The appellant brought his action in the British Columbia courts under section 54 (1) of the *Patent Act*, 1935. He complained that his patent had been infringed by the respondents; and he asked for a declaration to that effect, accompanied by an injunction restraining the respondents from constructing, using and vending the Hot Air Heating System, as well as for an order directing them to deliver up all articles found to have infringed, that all necessary accounts be taken and enquiries made and for the payment of damages, or profits, and costs.

In the trial court, the appellant succeeded; but in the Court of Appeal the judgment was reversed, on the ground that, as to a certain feature concerning top and rear radiators in the furnace, there was no claim in the patent to protect the monopoly invoked by the appellant, and, in respect of another feature called the "Breather", the device was not patentable at the time of the application therefor because it had been in public use or sale in Canada for more than two years prior to the application for the patent, and because the knowledge and use of that device was of a public and open character several years at least previous to the application.

Although the appellant brought the action before the British Columbia courts and prayed for a declaration that his patent was valid and in full force and effect, he raised before us, as he had done before the Court of Appeal, the point that the provincial courts had no jurisdiction to entertain the defence of the respondents based on the ground of invalidity, and that the Exchequer Court of Canada alone could do so.

The argument was that the respondents before the provincial courts could meet the appellant's action only by showing that they had not infringed the patent. If, on the other hand, they intended to urge the invalidity of the whole patent, or of some of the claims thereof, according to the appellant, they could do so exclusively by bringing themselves a substantial action for impeachment of the patent before the Exchequer Court of Canada, which alone had the authority and the power to declare the patent or any claim therein invalid or void.

We agree with the Court of Appeal that, in the premises, this objection to the jurisdiction of the provincial courts cannot be sustained.

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Rinfret J.

For the purpose of the present argument, it is immaterial whether we refer to the *Patent Act*, ch. 23 of the Statutes of Canada (13-14 Geo. V), assented to on the 13th of June, 1923, or to the *Patent Act*, 1935. The right of the respondents to plead as matter of defence any fact or default which, by statute or by law, rendered the patent void, is expressed in identical terms either in sec. 37 of the Act of 1923, or in sec. 59 of the Act of 1935. These sections read as follows:—

> The defendant, in any action for infringement of a patent, may plead as matter of defence any fact or default which by this Act or by law renders the patent void, and the Court shall take cognizance of such pleading and of the relevant facts and decide accordingly.

The court referred to in these sections is

> that court of record having jurisdiction to the amount of damages claimed in the province where the infringement is said to have occurred

(sec. 33 of the Act of 1923, or sec. 54 of the Act of 1935). It is not disputed that the court where the present action was brought in British Columbia is a court of record within the meaning of these sections; and we have no doubt that the respondents, in an action for infringement such as the present one, had the right to plead the invalidity of the patent in whole or in part. That right flows evidently from the terms of the relevant sections of the *Patent Act*.

We may say that jurisdiction in a case like this was entertained, without there being any point raised in regard to it, by the Appellate Division of the Supreme Court of Ontario in *Durable Electric Appliance Company Ltd.* v. *Renfrew Electric Products Ltd.* (1), from which a further appeal to this Court was dismissed (2). In that case, the Appellate Division held that the patent in question was invalid and that the plaintiffs' action for infringement should be dismissed. In delivering the unanimous judgment of this Court, Anglin C.J.C., said:

> The ground on which the Court of Appeal has rested its judgment is, we think, sound.

Even if we were not bound by the judgment in the *Durable* case (2), we would certainly decide in a similar way in the present case.

Turning now to the merits of the judgment in the Court of Appeal of British Columbia:

(1) (1926) 590 L.R. 527. (2) [1928] S.C.R. 8.

The appellant, heard at the trial, declared in positive terms that his invention consisted in the combination of a top radiator and a back radiator in a furnace:

Q. You are claiming that your invention is a combination of these two? A. Yes, sir.

And, at bar, counsel for the appellant did not put it on any different ground; but, when asked by this Court wherein the specifications and the claims of the patent covered such an invention, he referred to claims 8 and 9.

For the present purposes, it will be sufficient to set out claim 9, as the wording of claim 8 is wholly reproduced in claim 9, which consists merely of the same wording, plus the addition of the two last lines in the latter. Claim 9 reads as follows:

9. In a hot air furnace having a casing enclosing a fire pot, and a dome in communication with a smoke header and a jacket depending from the smoke header and within the casing through which the smoke is adapted to pass to increase the heat radiating areas of the furnace, said jacket comprising a vertical pipe having a dividing wall defining a down flow and an upflow passage.

Now, it is not possible to read into this claim a combination of what was described throughout the evidence as a top radiator and a back radiator.

When called upon to show to the Court wherein no. 9 claimed such a combination as new and requested therefor the grant of "an exclusive property or privilege" (sec. 14-1 of the Act of 1923, or sec. 35-2 of the Act of 1935), counsel for the appellant contended that the words "smoke header" in the said claim were there to indicate the top radiator, and the word "jacket" to indicate the rear radiator.

Unfortunately for the appellant, it is impossible so to read claim 9, in view of the wording of the whole specification and also of the reference therein to the drawings accompanying his application and which form an essential part of the patent issued to him. Wherever, in the descriptive part of the specification, the appellant wished to refer to the top radiator, he invariably described it as "a radiator"; whilst the expressions "smoke-header" and "jacket" are invariably used for the purpose of designating the rear radiator.

In claims 6 and 7, which admittedly have reference only to the top radiator, the latter is called "radiator"; but—

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which is still more significant—the reference by number indicating the corresponding part in each figure of the drawing is no. 5 for the device designated as radiator and nos. 16 and 32 for the devices designated respectively as "smoke-header" and "Jacket." And a mere glance at the drawings will show that no. 5 is there used to indicate the top radiator, while nos. 16 and 32 represent the Smoke-Header and Jacket. The latter aggregation, as described throughout the evidence, is declared to form what is called the rear radiator.

It follows that the same words (Smoke-Header and Jacket), in claim 9, cannot be taken, as contended, to indicate, the former (Smoke-Header) the top radiator, and the latter ("Jacket") the rear radiator. By the very terms of the specifications and by the references therein made to the drawings, it is shown inescapably that "smoke-header" and "Jacket" form together only the rear radiator, and the consequence is that the top radiator is not mentioned at all in claim 9, that nowhere in any of the claims referred to or invoked is there a claim made for an invention consisting in the combination of the top radiator and the rear radiator; and that, therefore, the appellant never got a patent protecting such a combination, nor granting an exclusive property and privilege therein.

We agree with the Court of Appeal that, as a result, the appellant fails in his contention that his alleged invention of the so-called combination was ever protected by the patent issued to him and that, therefore, he cannot make his patent the basis of an action for infringement against the respondents on that score.

As for the "breather," which, we are told, is designated in the patent and more particularly in claims 10 and 11 as "a tubular ring having a plurality of air jets," we find it impossible to follow the appellant in his contention that such "breather" was not fully anticipated within the meaning of the *Patent Act*. The Court of Appeal was unanimous in its finding to that effect and we think the finding is unquestionably warranted by the evidence, as we read it. In fact, the anticipation dated back to a great number of years previous to the application made by the appellant for his patent.

It is not disputable that the "breather" was used by others before the appellant contends that he invented it;

that it was in public use and on sale in Canada for more than two years prior to the application, and in such a manner that it had become available to the public (sec. 7-1 of the Act of 1923; sec. 26-1-a and b and sec. 61-1-a of the Act of 1935).

Moreover, it is even doubtful whether the appellant has adduced satisfactory evidence that the respondents, when they were using a breather in their furnace as far back as many years preceding the date of the application for the appellant's patent, were using a similar breather or, in the terms of claims 10 and 11 a similar "tubular ring having a plurality of air jets."

But, be that as it may, the appellant finds himself on the horns of a dilemma for, either the breather used by the respondents was the same as that claimed by the appellant, and, therefore, the said "breather" was anticipated; or it was different and, in that case, there was no infringement of the appellant's claims 10 and 11 for the breather therein described.

In either case, the appellant fails and his action in that respect was rightly dismissed by the Court of Appeal.

Under the circumstances, it is not necessary to declare the appellant's patent invalid or void. It is sufficient to say that the patent, so far as concerns the alleged combination of the top and rear radiators, did not claim such a combination, or certainly did not claim it by "stating it distinctly and in explicit terms," as required by the *Patent Act;* and, as a consequence, there could be no legal infringement of the combination alleged by the appellant to have been the substance of his invention.

In so far as regards the "breather," on the evidence, it must be held to have been anticipated, as found by the Court of Appeal; and so far as claims 10 and 11 of the patent are concerned, they are invalid and void and they cannot form the basis of an action for infringement against the respondents.

The appeal is, therefore, dismissed with costs.

DAVIS J.—This appeal arises out of one of two actions commenced in the Supreme Court of British Columbia for damages for alleged infringement of two patents. The actions were consolidated and tried together. Morrison C.J., the trial judge, found in favour of the plaintiff on

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both patents. The Court of Appeal for British Columbia allowed an appeal in respect of patent no. 283712 issued October 2nd, 1928, for certain improvements in hot air heating systems or furnaces but dismissed an appeal in respect of the other patent relating to sawdust burners or feed units. The appeal to this Court, by special leave of the Court of Appeal, was limited to that part of the judgment of the Court of Appeal which relates to the firstly mentioned patent.

The defendant not only denied infringement but pleaded that the patent was invalid. The first point taken by Mr. Bray on behalf of the patentee, appellant before us, was that the defence of invalidity was an impeachment of the patent and was not open to the respondents in a provincial court. Mr. Bray contended that jurisdiction rests solely in the Exchequer Court of Canada, relying on sec. 60 (1) of the *Patent Act,* 1935, which reads:

> 60. (1) A patent or any claim in a patent may be declared invalid or void by the Exchequer Court of Canada at the instance of the Attorney-General of Canada or at the instance of any interested person.

But by sec. 54 jurisdiction is expressly given to the provincial courts in an action for the infringement of a patent. It is provided, however, that nothing in this section shall impair the jurisdiction of the Exchequer Court of Canada under section 22 of the *Exchequer Court Act* or otherwise.

Section 59 of the *Patent Act,* 1935, reads as follows:

> 59. The defendant, in any action for infringement of a patent may plead as matter of defence any fact or default which by this Act or by law renders the patent void, and the Court shall take cognizance of such pleading and of the relevant facts and decide accordingly.

The provincial court did not assume to give any judgment setting aside the patent; it merely denied the plaintiff the relief sought on the ground that the plaintiff's patent was invalid. That was the same course which was taken by the Ontario Court of Appeal in *Durable Electric Appliance Co. Ltd.* v. *Renfrew Electric Products Ltd.* (1), which judgment was affirmed on appeal to this Court (2).

On the merits of the appeal I agree entirely with the judgment of the Court of Appeal and do not find it necessary to add anything to the reasons given by the learned judges of that Court.

I would therefore dismiss the appeal with costs.

(1) (1926) 59 O.L.R. 527. (2) [1928] S.C.R. 8.

TASCHEREAU J.—The plaintiff Louis Skelding took action before the Supreme Court of British Columbia against the defendants, and claimed damages for infringement of his patent no. 283712, and an injunction restraining the defendants from constructing, using and selling the hot air heating system described in the letters patent. In his statement of claim, the plaintiff also prays for a declaration that the letters patent are valid and in full force and effect.

The action was maintained by the Honourable the Chief Justice of British Columbia, but the Court of Appeal allowed the appeal, and set aside that part of the judgment relating to patent no. 283712 for any alleged infringement thereof.

The appellant submitted before this Court that under the dispositions of the *Patent Act,* the Exchequer Court of Canada alone had jurisdiction to hear the plea of invalidity of the patents raised by the defence.

I cannot agree with that contention. Under the heading of "Infringement" the *Patent Act* says (sec. 54, par. (1)):

(1) An action for the infringement of a patent may be brought in that court of record which, in the province wherein the infringement is said to have occurred, has jurisdiction, pecuniarily, to the amount of the damages claimed and which, with relation to the other courts of the province holds its sittings nearest to the place of residence or of business of the defendant. Such court shall decide the case and determine as to costs, and assumption of jurisdiction by the court shall be of itself sufficient proof of jurisdiction.

This section clearly gives jurisdiction to the Supreme Court of British Columbia to hear the present case which is an action for the infringement of a patent, but this jurisdiction conferred to the provincial court does not, as provided by subsection (2) of section 54, impair the jurisdiction of the Exchequer Court of Canada under section 22 of the *Exchequer Court Act.*

Furthermore, section 59 which reads as follows:—

The defendant, in any action for infringement of a patent, may plead as matter of defence any fact or default which by this Act or by law renders the patent void, and the court shall take cognizance of such pleading and of the relevant facts and decide accordingly.

gives the right to the defendants to do precisely what they have done in the present case. Having been sued by the plaintiff for infringement, they raise in their plea

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that the letters patent are invalid because the invention is not novel, is not useful, does not involve any inventive step having regard to what was known prior to the date of the letters patent, and because what is claimed to be an invention is not a proper subject-matter of letters patent.

Under the heading of "Impeachment," section 60, subsection (1) says:—

> (1) A patent or any claim in a patent may be declared invalid or void by the Exchequer Court of Canada at the instance of the Attorney-General of Canada or at the instance of any interested person.

It is, therefore, obvious that the Exchequer Court has jurisdiction to declare a patent void or invalid in an action for its "impeachment," and that the provincial courts, and the Exchequer Court have jurisdiction in an action for "infringement" to entertain the issue of invalidity raised by the defence.

Moreover, section 63 which reads as follows:—

> Every judgment voiding in whole or in part or refusing to void in whole or in part any patent shall be subject to appeal to any court having appellate jurisdiction in other cases decided by the court by which such judgment was rendered.

indicates clearly that the provincial courts of appeal have jurisdiction to hear appeals from provincial courts voiding or refusing to void any patent.

Having come to the conclusion that the provincial courts have jurisdiction, I will now deal with the merits of the case itself.

I see no good reasons to interfere with the judgment of the Court of Appeal.

In his specifications the applicant must fully describe the invention and its use as contemplated by the inventor in such clear and exact terms as to enable any person skilled in the art or science to which it appertains, to make, construct, compound or use it. The specification must end with a claim or claims stating distinctly and in explicit terms the things or *combinations* which the applicant regards as new and in which he claims an exclusive property or privilege. In his evidence, the appellant claims that his invention is a combination of a top and rear radiator. Nothing in the claims indicates that the invention for which letters patent were issued is such a combination.

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As to the "breather," I believe that it lacked novelty, and that many years before Skelding obtained his letters patent, this device was of a public and open character.

This appeal should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *F. J. Bayfield.*

Solicitor for the respondents: *J. M. Coady.*

PAMPHILE FORTIER (PLAINTIFF) .....APPELLANT;

AND

JOSEPH LONGCHAMP (DEFENDANT) ...RESPONDENT.

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* Feb. 18.
* Mar. 10.

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

Appeal—Jurisdiction—Petition for leave to appeal—Question of law of general importance—Whole working of provincial statute throughout a province—Party in a suit being ousted from jurisdiction of His Majesty's courts—Future rights—Title to real estate—Jurisdiction of provincial appellate courts to grant leave to appeal to this Court—Discretion—Supreme Court Act, s. 41—Watercourse Act, R.S.Q., 1925, c. 46.

The appellant is the owner of some land on the Etchemin river, in the province of Quebec, and of an island in the same river. Some eighty years ago, a wooden dam was built on this river; it was replaced in 1913 by a concrete dam about eight inches higher and was again raised another fourteen inches or so in 1928. The dam is owned by the respondent. The appellant claimed that, through the raising of the dam, his land was damaged by flood and by erosion; and asked that the respondent be condemned to pay the sum of one hundred and fifty dollars for damages caused during the two preceding years and, moreover, that the respondent be condemned to demolish his dam, on the ground that it had been raised illegally and without complying with the formalities required by the *Watercourse Act* (R.S.Q., 1925, c. 46). The respondent pleaded that he had acquired by prescription the right to flood the lands of the appellant; that the raising of the dam consisted merely in ordinary repairs and did not require compliance with the enactments of the *Watercourse Act;* that the raising of the dam did not bring the Etchemin river at a higher level than it had been previously raised when the dam was at its original height; that no damage had been caused to the appellant's land through the raising of the dam; and that, at all events, the whole matter was within the exclusive jurisdiction of the Quebec Public Service Commission, and the Superior Court was not competent to hear and determine the case. The trial judge, Langlais J., dismissed the action on the ground that, in view of the provisions of the *Watercourse Act,* the Superior Court had no juris-

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

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diction, which judgment was affirmed by a majority of the appellate court. Special leave to appeal to this Court was refused by the appellate court, and the appellant moved before this Court for special leave to appeal.

Held that the appellant's petition for special leave to appeal to this Court ought to be granted.

The present case not only raises a "question of law of great importance" (*Street* v. *Ottawa Valley Power Co.* [1940] S.C.R. 40); but it concerns the whole working and operation of the *Watercourse Act* throughout the province of Quebec, and still more the ousting of the jurisdiction of His Majesty's courts on a point likely to arise frequently and of general application. Therefore it follows that the matter in controversy is of such general importance that leave ought to be granted, provided this Court has the required jurisdiction to grant it.

There is jurisdiction in this Court, as the matter in controversy comes within the provisions of section 41 of the *Supreme Court Act:* it may come under sub-paragraph (*c*), as being within the words "other matters by which rights in future of the parties may be affected"; but it clearly comes under paragraph (*d*): "the title to real estate or some interest therein."

Comments as to the bearing of the decision of this Court in *Hand* v. *Hampstead Land and Construction Co.* ([1928] S.C.R. 428), where it was held that leave would not be granted to appeal from a judgment "solely" because it involved the construction of a provincial statute of a public nature. Generally speaking, a strictly municipal matter is of a somewhat local character and of restricted interest. In such a case, the matter in controversy, even if it does involve the interpretation of a provincial Act, may not always be found of such general interest and of such importance as to warrant the granting of special leave to appeal to this Court; but the decision in the *Hand* case is far from holding that, whenever the construction of a provincial statute is involved, *ipso facto* the matter in controversy will not be found of sufficient importance to justify the granting of special leave.

Held, also, as already decided by this Court in *Canadian National Railway Co.* v. *Croteau and Cliche* ([1925] S.C.R. 384) and in *Hand* v. *Hampstead Land and Construction Co.* ([1928] S.C.R. 428), that "the highest court of final resort having jurisdiction in the province "in which the judicial proceeding was originally instituted," exercising the authority to grant special leave to appeal to this Court under section 41 of the *Supreme Court Act,* is not limited by any rule "supposed to be laid down in this Court touching the exercise "of that jurisdiction." The granting of special leave to appeal to this Court by a provincial court of appeal, conferred by section 41, "is untrammelled and free from restriction, save such as is implied "in the term 'special leave'."

MOTION for leave to appeal to the Supreme Court of Canada from a judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Langlais J., and dismissing the appellant's action.

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

Alleyn Taschereau K.C. and *Arthur Bélanger K.C.* for the motion.

Edgar Gosselin K.C. contra.

The judgment of the Court was delivered by

RINFRET J.—This is a motion by the appellant for special leave to appeal under section 41 of the *Supreme Court Act.*

The appellant is the owner of some land on the Etchemin river, in the province of Quebec, and of an island in the same river.

Some eighty years ago, a wooden dam was built on this river. It was replaced in 1913 by a concrete dam about eight inches higher. It was again raised another fourteen inches or so in 1928. The dam is owned by the defendant-respondent.

The appellant claimed that, through the raising of the dam, his land was damaged by flood and by erosion; and, in the conclusion of his declaration, he asked that the respondent be condemned to pay the sum of one hundred and fifty dollars for damages caused during the two preceding years; but, moreover, that the defendant be condemned to demolish his dam, on the ground that it had been raised illegally and without complying with the formalities required by the *Watercourse Act* (R.S.Q., 1925, c. 46).

The respondent pleaded that he had acquired by prescription the right to flood the lands of the appellant; that the raising of the dam consisted merely in ordinary repairs and did not require compliance with the enactments of the *Watercourse Act;* that the raising of the dam did not bring the Etchemin river at a higher level than it had been previously raised when the dam was at its original height; that no damage had been caused to the appellant's land through the raising of the dam; and that, at all events, the whole matter was within the exclusive jurisdiction of the Quebec Public Service Commission, and the Superior Court was not competent to hear and determine the case.

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Langlais J., by whom the case was heard in the Superior Court at Quebec, dismissed the action on the ground that, in view of the provisions of the *Watercourse Act*, the Court had no jurisdiction.

In the Court of King's Bench (appeal side) the majority (Rivard, Bond and Barclay JJ.) were of the same opinion. They adopted the view of the trial judge and they confirmed his judgment on the ground of jurisdiction.

Létourneau J.A. was inclined to share the opinion of the majority so far as the ascertainment of damages was concerned; but he thought that the prayer for the demolition of the dam was within the competency of the Superior Court because, as he remarked, the conclusion of the appellant in his declaration was clearly based on the illegality of the construction on account of the fact that the respondent had not complied with the requirements of the *Watercourse Act* in failing to obtain the previous authorization and approval of the Lieutenant-Governor in Council (subs. 2 of s. 5 of the Act).

He proceeds, however, to inquire whether, in the premises, the mere raising of the dam did not come within s. 11 of the Act exempting from the necessity of previous approval by the Lieutenant-Governor in Council works constructed before the 9th of February, 1918.

After having examined the evidence, he comes to the conclusion that "une surélévation, un changement dans la hauteur, n'est pas en soi la construction du barrage". Accordingly, he expresses the opinion that the raising of the dam in this particular case was not that kind of work which required the authorization and the approval under the Act and that it cannot be said, in the circumstances, that the new work was illegal. For that reason, in his opinion, the appellant's prayer for the demolition should not be granted. So far as the damages were concerned, as already mentioned, he thought they came expressly under the jurisdiction of the Quebec Public Service Commission.

As for Galipeault J., he dissented from the majority, on the ground that the Superior Court was competent to assess and award the damages claimed by the appellant, and he would have allowed one hundred dollars for the two years preceding the introduction of the action.

Although holding the view that the raising of the dam in 1928 was subject to s. 5 of the *Watercourse Act* and that this new construction was illegal, he was for reserving the appellant's right for its demolition in a subsequent action, if necessary (art. 1066 C.C.).

The appellant applied to the Court of King's Bench for special leave to appeal to this Court. This was refused on the ground that

> la permission demandée n'est pas justifiée et qu'il n'y a pas lieu pour cette Cour de l'accorder.

There is no denying the fact that the matter in controversy is of such general importance that leave ought to be granted, if it can be shewn that this Court has the required jurisdiction to grant it.

At the outset, perhaps it would not be out of the way to reiterate that

> the highest court of final resort having jurisdiction in the province in which the judicial proceeding was originally instituted,

exercising the authority to grant special leave to appeal to this Court under s. 41 of the *Supreme Court Act,* is not limited by any rule

> supposed to be laid down in this Court touching the exercise of that jurisdiction,

as observed by the Chief Justice in *Canadian National Railway Company* v. *Croteau & Cliche* (1).

> This court has no authority, and, of course, never pretended to exercise any authority, to lay down rules restricting the scope of the jurisdiction or governing the exercise of the jurisdiction conferred by s. 41 upon provincial courts of appeal. The statute gives a discretion to such courts, and, where a statutory discretion is conferred upon a court, it is not within the authority of any other court to give directions as to the manner in which the discretion is to be exercised. *Attorney-General* v. *Emerson* (2).

The granting of special leave by the provincial court of appeal, conferred by s. 41, "is untrammelled and free from restriction, save such as is implied in the term 'special leave'."

In support of the contention that the present petition for special leave ought not to be granted by this Court, the respondent relied on our decision in *Hand* v. *Hampstead Land and Construction Company* and *The Town of Hampstead* (3).

(1) [1925] S.C.R. 384, at 385. (2) (1889) 24 Q.B.D. 561, at pp. 58, 59.
(3) [1928] S.C.R. 428.

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In that case, the point was whether a transfer of land was invalid on the ground that the consideration was illegal because in contravention of a provision of the municipal law of the province of Quebec. The Court of King's Bench had granted the conclusion of the plaintiff's action and had declared the transfer null and without effect.

This judgment no doubt involved the validity of the title to the land acquired by the municipality from the mis-en-cause Hand. Special leave to appeal from the adverse judgment of that Court had been refused by the Court of King's Bench, for the reason that

> the only question of law was whether it was within the authority of a municipal council to acquire property from a ratepayer of the municipality for the consideration of granting to the ratepayer exemption from taxation on other property owned by the ratepayer within the municipality.

Upon application to this Court for special leave to appeal, the judgment of the Court, delivered by Anglin C.J.C., decided that leave would not be granted to appeal from a judgment solely because it involved the construction of a provincial statute of a public nature. The emphasis here should be placed on the word "solely," for the Chief Justice said:

> We are not disposed to hold that every judgment of a provincial appellate court interpreting a statute of purely provincial application is *per se* of such general importance as to warrant the granting of special leave to appeal to this court * * * We think it was not the purpose of Parliament in providing for special leave to appeal to this court that every case of this type might be brought before it.

Generally speaking, of course, a strictly municipal matter is of a somewhat local character and of restricted interest. In such a case, the matter in controversy, even if it does involve the interpretation of a provincial Act, may not always be found of such general interest and of such importance as to warrant the granting of special leave to appeal to this Court. That is the ground upon which special leave was refused in the *Hand* case (1); but the decision in that case is far from holding that, whenever the construction of a provincial statute is involved, *ipso facto* the matter in controversy will not be found of sufficient importance to justify the granting of special leave.

(1) [1928] S.C.R. 428.

This principle was applied in refusing leave, on June 17th, 1936, in *St. Catharine's* v. *Hulse,* and, on May 7th, 1940, in *Harper* v. *City of St. Thomas,* two judgments of this Court which have not been reported because it was not felt necessary.

The present case, however, is an instance of the contrary situation. Not only does it raise a "question of law of great importance" (*Street et al.* v. *Ottawa Valley Power Company* (1), but it concerns the whole working and operation of the *Watercourse Act* throughout the province of Quebec, and still more the ousting of the jurisdiction of His Majesty's courts on a point likely to arise frequently and of general application.

The question remains, however, whether the matter in controversy comes within one of the sub-paragraphs of section 41 of the *Supreme Court Act.*

It may come under sub-paragraph (*c*), as being within the words

other matters by which rights in future of the parties may be affected.

The respondent does not indicate any intention of cutting down his dam to the level at which it was before 1928. On the contrary, not only does he show every intention of maintaining the dam at its present level, but he even contends that he has acquired by prescription the right to flood the appellant's lands, as he is at present doing. The damages which allegedly the dam causes to the appellant's lands are continuing damages. If they exist, which, of course, will have to be decided on the merits of the case, they will persist so long as the dam stands as it is.

It would seem that the appellant on this point could rightly rely on *Christie* v. *The York Corporation* (2).

But we think the appellant's case clearly comes under sub-paragraph (*d*) of sec. 41: "the title to real estate or some interest therein."

The exercise by the respondent of the right to flood the appellant's property, by the raising of the level of Etchemin river through his dam, is a servitude established by law, having for its object public utility and that of

(1) [1940] S.C.R. 40. (2) [1939] S.C.R. 50.

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the owners of mills or factories bordering on rivers or streams. It is a real servitude imposed as a charge on one real estate for the benefit of another belonging to a different proprietor (Arts. 499 & 503 C.C.; Planiol, Traité Elémentaire de Droit Civil, tome 1er, nos. 2880 & 2886; See what is said by the present Chief Justice in *Gale* v. *Bureau* (1)).

The appellant, in the present case, disputes the legal title of the respondent to the real servitude which he is exercising. The appellant contends that the respondent has not fulfilled the formalities and the conditions required for the purpose of acquiring a valid title to the servitude which he claims. That puts undoubtedly in controversy as between the parties the title to an interest in the real estate of the appellant; and on that ground there is jurisdiction in this Court to entertain the application for special leave to appeal.

If authority should be required for that proposition, it will be found in several cases in this Court, where jurisdiction was entertained (*Blachford* v. *McBain* (2); *Macdonald* v. *Ferdais* (3); *Chamberlain* v. *Fortier* (4); *Berthier* v. *Denis* (5); *Riou* v. *Riou* (6); *Lafrance* v. *Lafontaine* (7); *Grand Trunk Railway Co.* v. *Perrault* (8); *Audette* v. *O'Cain* (9); *Cliche* v. *Roy* (10); *Tanguay* v. *Canadian Electric Company* (11); *King's Asbestos Mines* v. *South Thetford* (12); *Thompson* v. *Simard* (13).

For the above reasons, the petition for special leave ought to be granted, costs to follow the event.

Petition granted, costs to follow event.

(1) (1910) 44 Can. S.C.R. 305, at 312.
(2) (1890) 19 Can. S.C.R. 42.
(3) (1893) 22 Can. S.C.R. 260.
(4) (1894) 23 Can. S.C.R. 371.
(5) (1896) 27 Can. S.C.R. 147.
(6) (1897) 28 Can. S.C.R. 53.
(7) (1899) 30 Can. S.C.R. 20.
(8) (1905) 36 Can. S.C.R. 671.
(9) (1907) 39 Can. S.C.R. 103.
(10) (1907) 39 Can. S.C.R. 244.
(11) (1907) 40 Can. S.C.R. 1.
(12) (1909) 41 Can. S.C.R. 585.
(13) (1908) 41 Can. S.C.R. 217.

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CANADIAN NORTHERN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... APPELLANT; * Oct. 1, 3.

AND * Oct. 3.

PETER CHESWORTH (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Railways — Automobiles — Level crossing accident — Evidence — Whether crossing sign properly maintained as required by Railway Act— Whether kept "painted white"—Effect of subsequent finding by Board of Transport Commissioners under section 309 that the crossing was sufficiently protected. Railway Act, R.S.C., 1927, c. 170, sections 267 and 309.

In an action tried without a jury, resulting from a level-crossing accident, the main issue was as to whether there was sufficient evidence to connect such accident with an alleged default of the appellant railway company in respect of its obligation to properly maintain a crossing sign as required by the *Railway Act* and the regulations thereunder. At the trial, the appellant company produced as evidence a finding by the (then) Board of Railway Commissioners, made under section 309 after the accident, affirming a report of its inspector made when the crossing was in the same condition as it was at the time of the accident,—that the crossing in that condition was sufficiently protected. The trial judge, although rejecting such evidence, nevertheless dismissed the respondent's action. On appeal, the judgment was reversed and the action maintained; but the appellate court also held that the finding of the Board of Railway Commissioners was not binding upon the parties to the action or upon the courts, and that it was not admissible evidence upon the issue whether the regulation requiring the placing of the sign at the crossing had been observed.

Held, reversing the judgment appealed from, ([1940] I W.W.R. 643) that the evidence did not justify the finding of the appellate court that the default in the condition of the crossing sign materially contributed to the accident, and, such being the case, the respondent's action ought to be dismissed.

Held, also, affirming the judgment appealed from as to that ground, that the finding of the Board of Railway Commissioners was not admissable evidence. Such finding was not evidence which did go to the crucial issue on the appeal, i.e., whether the default of the appellant company materially contributed to the accident.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Manson J., and maintaining the respondent's action.

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

(1) [1940] 1 W.W.R. 643.

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CANADIAN NORTHERN PACIFIC RY. CO. v. CHESWORTH.

The action was for damages resulting from a collision at a level crossing between a train of the appellant company and an automobile driven by one Valentine, the respondent and his wife being passengers. The accident took place on a dark rainy night and the visibility was very poor. The driver stopped his car on the track, and six seconds later it was struck by the engine of a train. The respondent's wife died from injuries received.

A. Alexander for the appellant.

R. O. D. Harvey for the respondent.

After the conclusion of the arguments by counsel for the appellant and for the respondent, and without calling on the former to reply, the Chief Justice, speaking for the Court, delivered the following oral judgment.

THE CHIEF JUSTICE—It will not be necessary to call upon you, Mr. Alexander.

We have very fully considered the able argument that has been presented on behalf of the respondent and the evidence, as well as the judgments in the courts below, and we have come to the conclusion this appeal ought to be allowed.

The crucial issue—the one issue—is whether, or not, there is evidence which connects the alleged default of the railway company in respect of its obligation to maintain a sign in accordance with the regulation which has been produced and has been relied upon, and the most unfortunate accident in which the wife of the respondent lost her life. We have the greatest sympathy with the respondent, but in our judicial capacity we cannot allow considerations of that kind to weigh with us.

Now, on that issue the learned trial judge found against the respondent; the Court of Appeal reversed his judgment and held either that this default connected itself with the accident, or that there was evidence connecting it with the accident. In other words, that the respondent had acquitted himself of the onus resting upon him.

The first thing to be noticed is that there is no finding of a jury. There is a finding in the judgment at the trial and that judgment was reversed by the Court of Appeal and this Court in these circumstances is in this position: it must examine the evidence and form its conclusion as

to the issue upon which it has to base its judgment, but the Court will not reverse the judgment of the Court appealed from unless it comes to a conclusion which is different from that at which that Court arrived. In that sense it must be satisfied that the judgment below is wrong, that the evidence leads to a conclusion which is not the conclusion at which the Court below arrived.

Now, we are all satisfied that the evidence does not justify the finding that this default materially contributed to the accident, and such being the case the respondent must fail.

It is necessary to advert to the evidence that was before the trial judge which was rejected by the Court of Appeal. There was a finding by the Board of Railway Commissioners after this accident, when the crossing was in the same condition as it was at the time of the accident, that the crossing in that condition was sufficiently protected. The Court of Appeal held that that finding was not binding upon the parties to this action, or upon the Court, and that it was not admissible evidence upon the issue whether the regulation requiring the placing of the sign at the crossing had been observed. We are satisfied that the Court of Appeal was right in its conclusion that the evidence was not admissible. Counsel for the respondent dwelt upon the fact that the trial judge rejected that evidence, but it must be noticed, and it is very important to notice, that that evidence did not go to the issue which we regard as the crucial issue on this appeal; it did not go to the issue whether the default of the Railway Company materially contributed to the accident; it went only to the issue whether there was default in a failure to comply with the order of the Board of Railway Commissioners.

In any case, the real substantial question for this Court is the question whether, on its own view of the evidence, the judgment of the Court of Appeal ought to be sustained, and our view as to the effect of the evidence leads to a conclusion contrary to that of the Court of Appeal, whose judgment is therefore reversed with costs.

Appeal allowed with costs, if asked for.

Solicitor for the appellant. *A. R. MacLeod.*

Solicitors for the respondent: *Harvey & Twining.*

1940
*Nov. 21, 22.
1941
* Feb. 4.

THE CORPORATION OF THE UNITED COUNTIES OF NORTHUMBERLAND AND DURHAM (DEFENDANT) ..... APPELLANT;

AND

THE BOARD OF PUBLIC SCHOOL TRUSTEES UNION SCHOOL SECTIONS 16 AND 18 TOWNSHIPS OF MURRAY AND BRIGHTON (NORTHUMBERLAND COUNTY) (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Schools—School board providing transportation of county pupils to and from continuation school—Liability of county in respect of cost of such transportation—"Cost of education"—Continuation Schools Act, Public Schools Act, High Schools Act, R.S.O., 1937, c. 359, c. 357, c. 360.

The respondent Board of Public School Trustees had established and maintained a Grade B Continuation School in its Union School Sections, which were in the County of Northumberland, Ontario. Respondent had provided in the year 1937 transportation by motor buses to and from said continuation school for pupils residing outside said school sections though in the County of Northumberland (called "county pupils"), and sought to hold liable the appellant, the Corporation of the United Counties of Northumberland and Durham, in respect of the cost of such transportation, as being part of the cost of educating such county pupils.

Held (Davis J. dissenting): Respondent Board was entitled to recover from appellant corporation payment in respect of said costs of transportation. (Judgment of the Court of Appeal for Ontario, [1940] 2 D.L.R. 28, affirmed.)

The Continuation Schools Act, R.S.O., 1937, c. 359, particularly ss. 3 (2), 5, 8 (1), 15; *The Public Schools Act,* R.S.O., 1937, c. 357, particularly ss. 94, 95, 86, 87, 89 (*p*); *The High Schools Act,* R.S.O., 1937, c. 360 (particularly, *per* Davis J., s. 24 (*h*), as amended in 1938, c. 35, s. 17), considered.

Doubt expressed (*per* the Chief Justice and Kerwin and Taschereau JJ.) as to the right of the parties to have determined by action the above question of liability, in view of s. 36 (4) of *The High Schools Act* (as to determination by the Judge of the County Court), and as to the discretion under s. 15 (*b*) of the Ontario *Judicature Act* to make a mere declaratory judgment in this action; but in view of certain proceedings before action and the course of proceedings in the action, the appeal to this Court was (but without in any way creating a precedent) dealt with on the merits. (In the view of the merits taken by Davis J., dissenting, it became unnecessary to

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

consider whether said s. 36 (4) of *The High Schools Act* precluded the Supreme Court of Ontario from entertaining an action for the declaration made by that Court.)

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1) which reversed the judgment of Greene J.

The plaintiff, the Board of Public School Trustees of Union School Sections 16 and 18, Townships of Murray and Brighton, in Northumberland County, Ontario, had established and maintained a Grade B Continuation School within its Union School Sections. In the year 1937 the plaintiff Board provided transportation to and from its said continuation school for pupils residing in the County of Northumberland but not within said union school sections, who, being so resident, were "county pupils" as defined in s. 1 (*b*) of *The Continuation Schools Act,* R.S.O., 1937, c. 359. In this action the plaintiff sought a declaration that the cost of transporting county pupils to and from the said school was part of the cost of educating such county pupils, and to recover from the defendant, the Corporation of the United Counties of Northumberland and Durham, payment in respect of the cost of such transportation for the year 1937.

Greene J. dismissed the action with costs. His judgment was reversed by the Court of Appeal for Ontario (Harrison J.A. dissenting) (1) which by its formal judgment declared

that the cost of transportation of county pupils to and from the Continuation Grade B School maintained by the plaintiff is part of the cost of education of such county pupils to be paid by the defendant to the plaintiff and charged, levied and collected in the manner provided in sections 35, 36, 37 and 38 of *The High Schools Act,* being ch. 360, R.S.O., 1937.

and directed that there be no order as to costs of the action or of the appeal.

Special leave to appeal to the Supreme Court of Canada (defendant undertaking not to ask for costs of such appeal against the plaintiff) was granted by the Court of Appeal for Ontario.

D. L. McCarthy K.C. for the appellant.

W. N. Tilley K.C. and *John Callahan K.C.* for the respondent.

(1) [1940] 2 D.L.R. 28.

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CORPORATION OF THE UNITED COUNTIES OF NORTHUMBERLAND AND DURHAM v. BOARD OF PUBLIC SCHOOL TRUSTEES UNION SCHOOL SECTIONS 16 AND 18 TOWNSHIPS OF MURRAY AND BRIGHTON.

Kerwin J.

The judgment of the Chief Justice and Kerwin and Taschereau JJ. was delivered by

KERWIN J.—The appellant, the Corporation of the United Counties of Northumberland and Durham, in the Province of Ontario, was sued by the respondent, the Board of Public School Trustees, Union School Sections 16 and 18, Townships of Murray and Brighton. The action was dismissed by the trial judge but the Court of Appeal for Ontario, granting the relief sought by the respondent, declared

> that the cost of transportation of county pupils to and from the Continuation Grade B School maintained by the plaintiff is part of the cost of education of such county pupils to be paid by the defendant to the plaintiff and charged, levied and collected in the manner provided in sections 35, 36, 37 and 38 of The High Schools Act, being ch. 360, R.S.O., 1937.

By special leave of the Court of Appeal, the Corporation of the United Counties now appeals.

The Townships of Murray and Brighton are situate in Northumberland, one of the United Counties. The respondent board was constituted under the provisions of *The Public Schools Act* and its powers in connection with the public school maintained by it may now be found in *The Public Schools Act,* R.S.O., 1937, chapter 357, and amendments. Under *The Continuation Schools Acts* in force from time to time, provision was made for the establishment of continuation schools. Pursuant to what is now subsection 1 of section 3 of *The Continuation Schools Act,* R.S.O., 1937, chapter 359, the respondent board established a Grade B Continuation School in its Union School Section and by subsection 2 of section 3, in respect of the maintenance of that school, it has all the powers conferred on it as a public school board. Maintenance is defined in *The Continuation Schools Act* but, in my opinion, has no bearing on the issue in dispute.

By section 5 of *The Continuation Schools Act,* no fees are payable by or in respect of a pupil attending the respondent's continuation school who is,—

> (*a*) a pupil who resides or whose parent or guardian resides, or is assessed for an amount equal to the average assessment of the ratepayers in the municipality or school section by the board of which the school is established;
>
> (*b*) a pupil whose cost of education is payable under the provisions of section 8 either as a county pupil or otherwise.

"County pupils" is defined in the Act and there is no doubt that such pupils attended the respondent's continuation school, that is, pupils outside the limits of those parts of the townships of Murray and Brighton included in Union School Sections 16 and 18 but still within Northumberland, one of the United Counties. The cost of education of those county pupils at the respondent's continuation school is, by virtue of subsection 1 of section 8 of *The Continuation Schools Act*, to be paid by the appellant to the respondent and charged, levied and collected in the manner provided in certain enumerated sections of *The High Schools Act*. There is no dispute as to the manner of working out this cost, based upon the total number of days' attendance of county pupils as compared with the total number of days' attendance of all pupils. What is in issue is whether an item of $1,176, representing the amount paid by the respondent board for transporting county pupils to and from its continuation school, was properly included in the total cost of education of all the pupils of the school.

Section 15 of *The Continuation Schools Act* provides:—

> Such of the provisions of *The Public Schools Act* in the case of a continuation school under the jurisdiction of a public school board as are applicable and are not inconsistent with this Act, shall be read as part of this Act.

Sections 94 and 95 of *The Public Schools Act* read as follows:—

> 94. The board may provide for the transportation of pupils to and from a school maintained by it or which is used jointly by it and another board or other boards, and any payment made or any liability heretofore made or incurred for such purpose under agreement or otherwise is hereby validated and confirmed and declared to have been legally made or incurred.
>
> 95. (1) The board of a section or municipality may provide for the transportation of pupils residing in the section or municipality, as the case may be, to and from a continuation, high or vocational school situate elsewhere which such pupils have the right by law to attend, and for the purpose may co-operate with any other board.
>
> (2) The cost of providing transportation under section 94 or this section shall be an expense to be included in the estimates for the current year.

Subsection 1 of section 95 may be disregarded; it permits a public school board to provide for the transportation of pupils residing in its section to and from a continuation school situate elsewhere and is therefore not applicable to

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Kerwin J.

the respondent, which maintains a continuation school. Under section 94, however, the board of a public school section "may provide for the transportation of pupils to and from a school maintained by it or which is used jointly by it and another board or other boards." I agree with the Chief Justice of Ontario that there is nothing in *The Public Schools Act,* or elsewhere, which prohibits a public school board carrying on some of its functions or duties beyond the territorial limits of the section it serves. In addition to the examples given by him, the reference in section 94 to a school used jointly by a board with others would indicate that the transportation therein referred to would in that case necessarily extend beyond such limits. Again, as the Chief Justice points out, a public school board, under section 86 of *The Public Schools Act,* must in certain circumstances admit to its public school non-resident pupils. It is true that under section 87 special provision is made for the cost of transportation where there is no school in a rural school section but that might well be because of questions that would otherwise arise as to what expenditures the board of a rural section which maintained no school could incur.

Section 94 is applicable to the respondent board and is not inconsistent with *The Continuation Schools Act.* With reference to its continuation school, the respondent may exercise the same powers as it has with respect to its public school, and by virtue of another applicable and not inconsistent provision (subsection 2 of section 95) the total cost of transportation thus properly incurred is "an expense to be included in the estimates for the current year." These are the estimates referred to in section 89 (*p*) of *The Public Schools Act* which must show "any revenues estimated to be derived by the board during the current year from all sources." The item in question having been properly included in the total cost of education of all the pupils attending the school, it follows that under subsection 1 of section 8 of *The Continuation Schools Act* it represents part of the cost of education of county pupils to be paid by the appellant and charged, levied and collected in the manner indicated.

I share the doubt expressed by the judges in the Court of Appeal as to the right of the parties to have determined by action the question of liability in view of the provisions

of subsection 4 of section 36 of *The High Schools Act*, and also the doubt that the Court had a discretion under clause (*b*) of section 15 of the Ontario *Judicature Act* to make a mere declaratory judgment in this action. But, as pointed out by the Chief Justice of Ontario:—

> No objection was taken, either in the statement of defence or at the trial or on the argument in this Court to proceeding by way of action. It further appears that the County Judge, before action, had been asked to determine the dispute, but he thought he had no jurisdiction to do so, and this view seems to have been acquiesced in at the time by the respondent's solicitor. Without deciding one way or the other as to the jurisdiction of the county judge, it may be well, in view of the costs incurred and the very full and careful arguments that have been made, that this Court should make a declaration of the rights of the parties.

The appellant sought and was given leave to appeal from the decision of the Court of Appeal, and before us no question was raised by either party as to the right of the Ontario Courts or of this Court, to pronounce upon the matter.

It is under these circumstances and without in any way creating a precedent that this Court has undertaken the responsibility of deciding whether the Court of Appeal's order was correct or not. We are of opinion that it was right. The appeal should be dismissed but without costs.

DAVIS J. (dissenting)—This appeal involves the interpretation of what I venture to call *mutatis mutandis* legislation—legislation by reference is, I think, the common and perhaps the more accurate expression—and presents, as such legislation usually does, vexatious and quite unnecessary difficulties. If a legislature does not see fit to express itself in clear and simple language but prefers to adopt the objectionable course of making so much of another statute as is "applicable" and "not inconsistent with" a particular statute to be "part of" the particular statute, the applicability and the consistency ought to be very plain.

The respondent is the Board of Trustees of a continuation school having a definite area within, but covering a portion only of, the United Counties of Northumberland and Durham in the Province of Ontario. It provided transportation by motor buses for pupils who resided outside the school section but within the boundaries of the United

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Davis J.

Counties and now seeks to include the cost of such transportation as one of the items of the cost of the school, a portion of which cost is chargeable against the United Counties. The United Counties, appellants, refused to accept this position. They say that, whether the continuation school had power or not to transport pupils from outside the school section to and from the school, there is no statutory authority to impose the cost, or any part of the cost, upon the counties either as part of the cost of education or as part of the cost of maintenance of the school.

In the case of high schools the legislation in this connection is explicit. By sec. 24 (*h*) of *The High Schools Act* (R.S.O., 1937, ch. 360, as amended in 1938 by 2 George VI, ch. 35, sec. 17), it shall be the duty of every board of high school trustees and it shall have power

> to provide, where the board deems it expedient, for the transportation of resident pupils, and with the approval of the Minister, of county pupils, attending high school * * * and to pay for such transportation out of any funds available for the maintenance of the high school.

This statutory provision introduced in 1926 (ch. 67, sec. 6) only referred to resident pupils until the amendment in 1938 expressly extended the duty and power of high school trustees to county pupils, provided that in their case the board obtained the approval of the Minister of Education.

The Continuation Schools Act, R.S.O., 1937, ch. 359, says nothing whatever about the transportation of pupils to and from a continuation school—nothing about transportation of pupils who reside within the school section or of pupils who reside outside the school section. But the school board relies upon sec. 15 of the statute, which reads as follows:

> 15. Such of the provisions of *The Public Schools Act* in the case of a continuation school under the jurisdiction of a public school board as are applicable and are not inconsistent with this Act, shall be read as part of this Act.

That section was added as sec. 14 by an amendment to the statute passed in 1932 by sec. 16 of ch. 42 of the Statutes of that year. In the same amending statute, by sec. 13 thereof, the following section (now sec. 95 of the present Act) was added to *The Public Schools Act:*

92a. (1) The board of a section or municipality may provide for the transportation of pupils residing in the section or municipality, as the case may be, to and from a continuation, high or vocational school situate elsewhere which such pupils have the right by law to attend, and for the purpose may co-operate with any other board.

(2) The cost of providing transportation under section 92 or this section shall be an expense to be included in the estimates for the current year.

That provision plainly deals with transportation of pupils "residing in" a school section or municipality to and from a continuation, high or vocational school "situate elsewhere." Even if this provision be read as part of *The Continuation Schools Act*, I cannot see that it confers any duty or power upon a continuation school board to transport to and from their school, at the expense or partial expense of the county, pupils who do not reside in the school section but reside elsewhere within the larger area of the county. I cannot see any occasion for twisting and turning a section of one statute in an attempt to make it applicable to another.

Section 94 of *The Public Schools Act* (it was sec. 92 at the date of the 1932 amendment above referred to) was also invoked as applicable and not inconsistent with *The Continuation Schools Act*. That section, which has been in *The Public Schools Act* since 1925, reads as follows:

94. The board may provide for the transportation of pupils to and from a school maintained by it or which is used jointly by it and another board or other boards, and any payment made or any liability heretofore made or incurred for such purpose under agreement or otherwise is hereby validated and confirmed and declared to have been legally made or incurred.

That section is dealing with public school pupils attending a public school. It is contended that you unreasonably confine sec. 94 when you take it away from the context of sec. 86 which provides for the admission to the school of any non-resident pupil if the inspector reports in writing to the parent and to the secretary of the board affected that the accommodation is sufficient for the admission of such pupil and that the school is more accessible for him than the school in the section or urban municipality in which the pupil resides. But sec. 86 is known to have a very limited application for exceptional cases in public school attendance. Here again I do not think

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that sec. 94 is applicable to continuation schools to the extent of justifying a continuation school board charging against the county the expense of transporting pupils from all over the county to its particular school. At any rate, I am not prepared to grope my way through the numerous sections of *The Public Schools Act* in an attempt to justify the creation of the liability sought to be imposed by a local continuation school section against the whole county on the basis of legislation by reference. If legislation is desirable to accomplish what is sought, it can be easily and simply formulated and enacted by the legislature.

In this view of the matter, it becomes unnecessary to consider whether or not the provision of sec. 36 (4) of *The High Schools Act*, R.S.O., 1937, ch. 360, that where the council of a county and the board of a high school attended by county pupils from such county are unable to agree upon the sum to be paid for the cost of education of county pupils, the matter shall be referred to the judge of the county court for such county "who shall determine such sum," precludes the Supreme Court of Ontario from entertaining an action for such a declaration as was made by the Court of Appeal in this case.

The appeal, in my opinion, should be allowed, the judgment below set aside and the judgment at the trial restored. As the appellant, as a condition of obtaining leave to appeal, undertook not to ask for costs against the respondent of the appeal to this Court, there should be no costs of the appeal. But I should give the appellant its costs in the courts below.

HUDSON J.—I agree that this appeal should be dismissed without costs.

Appeal dismissed without costs.

Solicitor for the appellant: *Frederick Desmond Boggs.*

Solicitors for the respondent: *John Callahan & Co.*

JAMES STAPLES (PLAINTIFF) ..... APPELLANT;

AND

GREAT AMERICAN INSURANCE COMPANY, NEW YORK (DEFENDANT) ..... RESPONDENT.

1940
* Nov. 25.
1941
* Feb. 4.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Insured motor yacht lost by fire—Suit to recover under policy—Warranty by insured as to use of the yacht—Alleged breach of warranty—Construction of warranty—"Private pleasure purposes"—Nature of policy—Whether a policy of "fire insurance" and whether subject to Part IV (and statutory conditions therein) of The Insurance Act, R.S.O., 1937, c. 256—Policy of marine insurance.

Respondent insured appellant's motor yacht in respect of perils "of the seas and waters, * * * fires, collisions, jettisons, salvage * * * and all other similar marine perils, losses and misfortunes * * *." Appellant warranted that the yacht would be confined to a named Ontario inland lake and tributary waters; and by a marginal endorsement warranted that it "shall be used solely for private pleasure purposes and not to be hired or chartered unless approved and permission endorsed hereon." The yacht was destroyed by fire on said lake during the currency of the insurance policy. At the time of the fire it was being used by appellant's friend, R. (who, as found by the trial judge, had taken it without appellant's knowledge but in pursuance of a vague general consent to use it), to take (without remuneration) R.'s uncle to a part of the lake where the uncle was to inspect a mine for his own benefit (the yacht was not hired or chartered either by R. or his uncle). About a month before the fire, one C. on two occasions had used the yacht to convey C.'s workman across the lake for the purpose of filling C.'s boom with logs, had tied up the yacht there, worked for about four hours logging, and then brought the workman back in the yacht. (As found by the trial judge, this was done without appellant's knowledge, but C. had appellant's general permission to use the yacht; its said use by C. had nothing to do with its loss). Appellant sued to recover under the policy. His action was dismissed by the trial judge, who found breach of appellant's warranty in R.'s use of the yacht at the time of its destruction, and in C.'s use of it as above stated. An appeal to the Court of Appeal for Ontario was dismissed, and appellant appealed to this Court.

Held: There was no breach of warranty, and appellant was entitled to recover.

Per the Chief Justice and Crocket and Davis JJ.: A "strict though reasonable construction" (*Provincial Ins. Co.* v. *Morgan*, [1933] A.C. 240, at 253-4) of the marginal endorsement is to treat the words "not to be hired or chartered" as set in apposition to, and declaring the meaning of, the words "solely for private pleasure purposes." The evidence showed that appellant's intention was that the yacht would be used solely for private pleasure purposes and

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

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that that became in fact its normal use; there was no intention to hire or charter it, and it was never hired or chartered during the currency of the policy.

Per Rinfret, Crocket and Kerwin JJ.: In construing the policy, the marginal statement should not be read as a condition that the policy would be avoided upon the yacht being used for other than private pleasure purposes even though at the time a loss was suffered it was not being so used (*Provincial Ins. Co.* v. *Morgan*, [1933] A.C. 240, affirming [1932] 2 K.B. 70. Judgment of Scrutton L.J. in [1932] 2 K.B., at 79, 80, particularly referred to). As to the use of the yacht at the time of the fire: The word "private" in the marginal statement must be read in conjunction with the words "and not to be hired or chartered unless approved and permission endorsed hereon"; and so read, the "pleasure purposes" may be private even when the yacht was used by R. with appellant's implied permission; and the use by R. in question was such as was within the words "private pleasure purposes."

Per Rinfret, Crocket and Kerwin JJ.: The contract was not a policy of fire insurance within the meaning of the Ontario *Insurance Act*, R.S.O., 1937, c. 256, and it was not subject to Part IV (and the statutory conditions therein) of that Act; the contract was one of insurance against losses incident to marine adventure, and the policy was one of marine insurance. Secs. 23 (1), 1 (39), 1 (30), 102 (1), of said Act considered.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario dismissing his appeal from the judgment of Urquhart J. dismissing his action for recovery of $1,500 and interest under an insurance policy issued by the defendant upon appellant's motor yacht which, within the period covered by the policy, was destroyed by fire. The material facts of the case and the questions before this Court are sufficiently stated in the reasons for judgment now reported and are indicated in the above head-note. Special leave to appeal to this Court was granted by the Court of Appeal for Ontario.

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

J. D. Watt and *J. C. Osborne* for the respondent.

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

DAVIS J.—The respondent company insured the appellant against loss of a motor boat owned by him. The policy was for $1,500 and the annual premium was $71.25. The boat became a total loss by fire during the currency of the policy. The appellant made claim under the policy; the respondent refused to pay the claim; hence this action.

One defence was that the appellant had fraudulently over-valued the boat in his application for the policy; another defence was fraudulent over-valuation in the proof of loss. These defences were not pressed before us in view of the evidence and the findings of the trial judge. A third ground of defence, and it prevailed at the trial, was that the policy contained a warranty and that a breach of that warranty had occurred and avoided the policy. Urquhart J., who tried the case, found a breach of warranty but said that the appellant was entirely innocent in the matter and that the respondent had taken too narrow a view of its liability under the policy but he said he felt compelled on the law to decide in favour of the respondent and he therefore dismissed the action without costs.

The appellant appealed to the Court of Appeal for Ontario. That Court dismissed the appeal without any written reasons and then, by a subsequent order, granted the appellant special leave to appeal to this Court, the amount involved being less than $2,000. There were no written reasons for the latter order either, and this Court is now in the unfortunate position of not having the advantage of the reasons which led the Court of Appeal to dismiss the appeal from the judgment at the trial or of the reasons which led that Court to grant further leave to appeal.

The words endorsed in the margin of the policy and relied upon by the respondent read as follows:

> Warranted by the insured that the within named yacht shall be used solely for private pleasure purposes and not to be hired or chartered unless approved and permission endorsed hereon.

The motor boat at the time of the fire was being used by a friend of the appellant, one Racicot, to take his uncle up to another part of the lake (the lake on which the boat was usually used) to a dam where the uncle was to inspect a mine for his own benefit. The trial judge found that Racicot had taken the boat without the knowledge of the appellant but in pursuance of a vague general consent to use the boat. It is not suggested by the respondent that the boat was hired or chartered by Racicot. This incident was one of two grounds upon which the trial judge found that there had been a breach of the warranty. The other ground was the use of the boat on occasions by one

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Davis J.

Cryderman. Cryderman had built the boat for the appellant and the appellant admitted that Cryderman might use it whenever he wanted to, without asking permission. Cryderman testified that on two occasions about a month before the burning of the boat, having a boom at the other side of the lake, he took an employee of his across the lake in the boat for the purpose of filling the boom with logs belonging to him which were at or near the shore; that he tied the boat up there; worked for about four hours logging; and then brought his workman back home in the boat. The trial judge found that this had nothing to do with the loss of the boat by fire—that it was in fact a month or more previous thereto—and that it was done without the knowledge of the appellant. The appellant testified that he had heard rumours that Cryderman had used the boat to tow logs and that he went up to where the logs were and made inquiries and found, as he thought, that Cryderman was not using the boat for that purpose; his fears were allayed and he did nothing further about it. The trial judge referred to the appellant as a man "who appears to be a simple sort of man" and said:

> He did not think, I presume, that the slight use of the boat by Cryderman in conveying a workman across the water to go to work would be a breach of the warranty. I do not suppose, as a matter of fact, that he ever gave that point a thought.

But the trial judge concluded that although Cryderman's use of the boat was antecedent in time and in no way connected with the loss of the boat—"merely taking it across the lake, and tying it up"—nevertheless it was, in his opinion, a breach of the warranty. The trial judge put his judgment upon two distinct grounds, (1) Racicot's use of the boat at the time of its destruction, and (2) Cryderman's use of the boat on the occasions mentioned when he conveyed his workman and himself to the boom of logs.

There was evidence that the appellant had used the boat commercially on a few occasions, receiving in all about $15, once from a tourist and at other times taking parties to the blueberries, but the trial judge accepted the appellant's statement that these occasions were before he had taken out the insurance on the boat and did not occur afterwards. There was also some evidence that Cryder-

man had used the boat for hauling logs across the lake and had been paid for this work but the trial judge disbelieved this evidence. There was also evidence that Cryderman on two occasions had taken a Dr. McCullough from Sudbury when Dr. McCullough's boat had broken down and that the doctor had paid for the gasolene, but the trial judge said he was not inclined to find that on those occasions the boat was not being used solely for private pleasure purposes.

The statement endorsed in the margin of the policy was of a promissory nature and was in apt language to create a warranty or a condition. It is clear law, said Lord Wright in the House of Lords in *Provincial Insurance Co.* v. *Morgan* (1), that a warranty or condition, "though it must be strictly complied with, must be strictly though reasonably construed." That leaves the essential problem to be what is the exact scope of the language used. As Lord Haldane said in *Dawsons'* case (2), the question which really lies at the root of the matter in dispute is one of construction simply, or, as Lord Buckmaster said in the *Morgan* case (3), the question on this appeal depends upon the true construction of the policy of insurance. In my opinion, a strict though reasonable construction of the marginal endorsation is to treat the words "not to be hired or chartered" as set in apposition to the words "solely for private pleasure purposes," the latter words in the document declaring the meaning of the former words. The evidence shows that the appellant's intention was that the boat would be used solely for private pleasure purposes and that that became in fact the normal use of the boat. There was no intention to hire or charter it, and on the evidence the boat was never hired or chartered during the currency of the policy.

I would allow the appeal, set aside the judgments below and direct judgment to be entered for the appellant (plaintiff) as of the 2nd day of November, 1939, for the full amount of his claim with interest from the 25th day of June, 1938, with costs throughout.

(1) [1933] A.C. 240, at 253-4. (2) *Dawsons Ltd.* v. *Bonnin*, [1922] 2 A.C. 413.
(3) [1933] A.C. 240.

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Kerwin J.

The judgment of Rinfret and Kerwin JJ. was delivered by

KERWIN J.—The respondent insurance company issued to the appellant a policy of insurance covering his motor yacht *Silver Foam* and its tackle, apparel, etc. By the policy, it was warranted by the insured that the yacht would be confined to Lake Wanapitei (an Ontario inland lake) and tributary waters. The adventures and perils which the company took upon itself

> are of the seas and waters, as hereinabove described, thieves (but against theft of the entire yacht only), fires, collisions, jettisons, salvage and general average charges, and all other similar marine perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of said yacht or any part thereof, during the life of this Policy.

On November 2nd, 1937, during the period covered by the policy, the boat and its equipment were destroyed by fire on Lake Wanapitei. Suit was brought by the appellant to recover the sum of $1,500, at which amount the yacht, etc., was valued by the policy. For reasons to be mentioned later, the trial judge dismissed the action and an appeal to the Court of Appeal for Ontario was dismissed without reasons being given. By leave of that Court, the present appeal is now before us.

The appellant contends that the contract was a policy of fire insurance within the meaning of the Ontario *Insurance Act*, R.S.O., 1937, c. 256, or, at any rate, as it included fire risks, was subject to Part IV of the Act. I cannot accede to either argument.

This contract is not a policy of fire insurance. By subsection 23 of section 1 of the Act:—

> "Fire insurance" means insurance (not being insurance incidental to some other class of insurance defined by or under this Act) against loss of or damage to property through fire, lightning or explosion due to ignition.

Loss by fire was a risk insured against but the mere reading of the policy demonstrates that this was insurance incidental to some other class of insurance; and subsection 39 of section 1 shows that it was incidental to a class of insurance defined by the Act, i.e., marine insurance:—

> "Marine insurance" means insurance against marine losses; that is to say, the losses incident to marine adventure, and may by the express terms of a contract or by usage of trade extend so as to protect the insured against losses on inland waters or by land or air which are incidental to any sea voyage.

The contract was one of insurance against losses incident to marine adventure. By its express terms, it not only extends so as to protect the insured against losses on inland waters but is confined to protection against losses on an inland lake and tributary waters. It is clear from a consideration of the history of the relevant sections of *The Insurance Act* that subsection 39 of section 1 must be read so that the words "which are incidental to any sea voyage" do not apply to "losses on inland waters" but only to the words "against losses" "by land or air." By subsection 28 of section 1 of chapter 222 of *The Insurance Act,* R.S.O., 1927:—

"Inland marine insurance" means marine insurance in respect of subjects of insurance at risk above the harbour of Montreal;

and this subsection remained in the Act until 1934 when it was repealed and "inland transportation insurance" was defined by subsection 30 of section 1 as meaning,—

insurance against loss of or damage to property while in transit by land, or by water and by land, or by air and by land or by water, or during delay wholly incidental to or accidentally arising out of the transit.

In the same year, "marine insurance" was defined as we now find it in subsection 39 of section 1. The 1934 definition of "inland transportation insurance" was repealed in 1935 and re-enacted as it now appears in subsection 30 of section 1:—

"Inland transportation insurance" means insurance (other than marine insurance) against loss of or damage to property,—

(*a*) while in transit or during delay incidental to transit; or

(*b*) where, in the opinion of the Superintendent, the risk is substantially a transit risk.

The policy is not subject to Part IV of the present Act. By subsection 1 of section 102, that part applies "to fire insurance and to any insurer carrying on the business of fire insurance in Ontario." For the reasons already given, the insurance against loss by fire was incidental to marine insurance and, therefore, not within the definition of "fire insurance" in subsection 23 of section 1. The statutory conditions do not apply and need not be considered.

The policy being one of marine insurance, the respondent relies upon the following statement in the margin of the policy:—

WARRANTED by the Insured that the within named yacht shall be used solely for private pleasure purposes and not to be hired or chartered unless approved and permission endorsed hereon.

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Kerwin J.

The trial judge, adopting the language of Lord Finlay in *Dawsons, Limited* v. *Bonnin and others* (1), was of the view that

> the expression "warranty" imports that a particular state of facts in the present or in the future is a term of the contract, and, further, that if the warranty is not made good the contract of insurance is void.

Dawsons' case (2) was considered in *Provincial Insurance Company, Limited* v. *Morgan* (3). In the Court of Appeal, Lord Justice Scrutton, at pages 79-80, states:—

> No doubt a great deal turns upon the language of the particular policy; but it must be remembered that in contracts of insurance the word "warranty" does not necessarily mean a condition or promise the breach of which will avoid the policy. A warranty that a marine policy is free from particular average certainly does not mean that if there is a partial loss to the insured ship the whole policy is avoided. It merely describes the risk, and means that the only risk being insured against is the risk of a total loss and that a partial loss is not the subject of the insurance. Again, if a time policy contains the clause "warranted no St. Lawrence between October 1 and April 1," and the vessel was in the St. Lawrence on October 2, but emerged without loss, and during the currency of the policy in July a loss happens, the underwriters cannot avoid payment on the ground that between October 1 and April 1 the vessel was in the St. Lawrence: *Birrell* v. *Dryer* (4). That is an example of a so-called warranty which merely defines the risk insured against.

In that case the proposal for insurance signed by the applicant contained questions to be answered, one of which, as to the purposes for which the lorry proposed to be insured was to be used and the nature of the goods to be carried, was answered that the purpose was the delivery of coal and that the substance to be carried was coal; and the applicant thereby warranted and declared that the questions were fully and truthfully answered, and that the declaration and the answers should be the basis of the contract. The policy recited the proposal and stated that it was a condition precedent to any liability on the part of the insurer, (1) that the terms, conditions and endorsements thereof should be duly and faithfully observed; and (2) that the statements made and the answers given in the proposal form should be true, correct

(1) [1922] 2 A.C. 413, at 428. (2) [1922] 2 A.C. 413.
(3) [1932] 2 K.B. 70 (*sub nom. In re Morgan and Provincial Insurance Co. Ltd.*); [1933] A.C. 240.
(4) (1884) 9 App. Cas. 345.

and complete. Under the heading "Endorsements and Use Clauses" in the policy were the words: "Transportation of own goods in connection with the insured business." The premium paid by the assured was less than that which would have been payable if they had stated that the lorry was to be used for the purposes of general haulage. On a day during the period covered by the policy, the assured were using the lorry for carrying a load of timber under a contract, together with 5 cwt. of coal. After they had delivered all the timber and 3 cwt. of the coal and while they were on their way to deliver the remaining 2 cwt. of coal to a customer, a collision occurred.

In the House of Lords, the affirmance of the order of the Court of Appeal was put by Lord Buckmaster on this ground:—

> To state in full the purposes for which the vehicle is to be used is not the same thing as to state in full the purposes for which the vehicle will be exclusively used, and as a general description of the use of the vehicle it is not suggested that the answer was inaccurate.
>
> I am therefore of opinion that there was no bargain here so to confine the use of the vehicle to the cartage of coals as to make any occasional use that did not destroy the general purpose of its user a breach of the condition upon which the policy was based.

Lord Blanesburgh and Lord Warrington of Clyffe agreed; the latter also concurred with Lord Wright. Lord Wright treated the matter, as did Lord Buckmaster, as a question of the scope of the condition and held that it had not been broken.

In other words, both in the Court of Appeal and in the House of Lords, the promises of the assured were treated as merely descriptive of the risk and not that a certain state of things should continue, or a certain course of conduct be pursued during the whole period covered by the policy so that, if the particular promise be not kept, the policy was invalidated; that is,

> provided the loss occurs while the state of things is in being the policy is not avoided by the fact that at some other time the state of things has been discontiued or iterrupted (1).

I refer particularly to the judgment of Lord Justice Scrutton because, as I read the speeches in the House of Lords, a majority, if not all, of the peers did not disagree with his views. Lord Buckmaster, with the con-

(1) *Per* Scrutton L.J., [1932] 2 K.B. at 79.

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currence of Lord Blanesburgh and Lord Warrington of Clyffe, thought the judgment of the Court of Appeal was right "and the full explanation given by Scrutton L.J. renders further elaboration unnecessary." In any event, Lord Buckmaster also pointed out that in *Dawsons'* case (1), Lord Haldane had stated that the question which lies at the root of the matter is simply one of construction.

In the case at bar, I cannot read the statement in the margin of the policy as a condition that upon the yacht being used for other than private pleasure purposes the policy would be avoided even though at the time a loss was suffered the yacht was not being so used. One ground, therefore, upon which the trial judge concluded that the company was not liable,—"that Cryderman's use of the boat on the occasions mentioned when he conveyed his workman and himself to the boom of logs," cannot be sustained.

As to the other ground, the trial judge thus expresses his views:—

> Then the fourth and most serious objection is that Mr. Racicot used the boat on the very occasion when it burned, to convey his uncle to his mine for purposes of the uncle's. While I believe that he was not paid for it, and it was an entirely voluntary service that he was rendering his uncle, it can hardly be said in this instance that the boat was being used "for pleasure purposes." My finding of fact on that is that Racicot was using the boat without the knowledge of Staples, and therefore Staples had not knowledge of the purpose for which the boat was used; that Racicot was using it to convey his uncle to the mine, not for pleasure but to oblige his uncle in some business of the latter's; that he was not remunerated for the service; that he merely drove the boat to the mine; that the uncle got out of the boat to go about his business and while Racicot was backing up and turning around in the ordinary and usual manner, the boat caught fire and burned as has been described.

In the first place, there is nothing in the statement attached to the policy to prohibit the use of the yacht by someone other than the insured. The word "private" must be read in conjunction with the words "and not to be hired or chartered unless approved and permission endorsed hereon." So read, the "pleasure purposes" may be private even when the yacht was used by Racicot with the appellant's implied permission. On the day of the fire,

(1) [1922] 2 A.C. 413.

it was certainly not hired or chartered, and the question is whether Racicot, who "took his uncle up to another part of the lake, without remuneration, to a dam where the uncle was to inspect a mine for his own benefit," was using the yacht solely for private pleasure purposes. That question, in my view, must be answered in the affirmative. The yacht was not hired or chartered either by Racicot or by his uncle. The word "pleasure" has various meanings, depending upon the context in which it is used, and I think that on the occasion in question, it must be held that Racicot experienced "enjoyment, delight, gratification" (Oxford Dictionary), in transporting his uncle from one part of the lake to another, equally as well as if he had taken his uncle as a matter of friendship to a part of the lake in order to board a train or bus.

The trial judge disposed of the other defences raised by the company and I can see no reason to disagree with his conclusions. The appeal should be allowed and judgment directed to be entered for the appellant as of the date of the trial judgment (November 2nd, 1939) for $1,500 and interest from June 25th, 1938, and costs. The appellant is entitled to his costs of the appeals to the Court of Appeal and to this Court.

CROCKET J.—I agree that this appeal should be allowed for the reasons stated by my brothers Davis and Kerwin.

Appeal allowed with costs.

Solicitor for the appellant: *A. Gordon Wallingford.*

Solicitors for the respondent: *Herridge, Gowling, MacTavish & Watt.*

1940
* May 21, 22.
1941
* Feb. 4.

NORTHERN ELECTRIC COMPANY, LIMITED, AND WESTERN ELECTRIC COMPANY, INC. (PLAINTIFFS) ..... APPELLANTS;

AND

BROWN'S THEATRES LIMITED (DEFENDANT) ..... RESPONDENT.

BROWN'S THEATRES LIMITED (DEFENDANT) ..... APPELLANT;

AND

NORTHERN ELECTRIC COMPANY, LIMITED, AND WESTERN ELECTRIC COMPANY, INC. (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Validity—Subject-matter—Infringement.

An appeal by the plaintiffs from the judgment of Maclean J., [1940] Ex. C.R. 36, in so far as that judgment dismissed their action in respect of alleged infringement by defendant of Canadian patent 333,478 (granted on petition of one Miller for an alleged new and useful improvement in Sound Reproducing Systems), and an appeal by the defendant from said judgment in so far as it granted relief to the plaintiffs in respect of alleged infringement by defendant of Canadian patent 218,931 (granted on petition of one Wilson for an alleged new and useful improvement in Electron Discharge Devices), were both dismissed.

APPEAL by the plaintiffs from the judgment of Maclean J., President of the Exchequer Court of Canada (1), in so far as that judgment dismissed their action in respect of alleged infringement by defendant of Canadian patent 333,478 granted on the petition of one Miller for an alleged new and useful improvement in Sound Reproducing Systems; and APPEAL by the defendant from the said judgment in so far as it granted relief to the plaintiffs in respect of alleged infringement by defendant of Canadian patent 218,931 granted on the petition of one Wilson for an alleged new and useful improvement in Electron Discharge Devices.

(1) [1940] Ex. C.R. 36; [1939] 3 D.L.R. 729.

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

The said appeals were consolidated by an order in this Court. Both said appeals were dismissed with costs.

O. M. Biggar K.C. and *R. S. Smart K.C.* for the plaintiffs (appellants in one appeal and respondents in the other).

H. N. Chauvin K.C. and *F. B. Chauvin* for the defendant (respondent in one appeal and appellant in the other).

The judgment of the Court was delivered by

THE CHIEF JUSTICE—The appeal of the plaintiff companies concerns a patent granted to one, Miller, on the 20th of June, 1933, and the defendant company's appeal concerns a patent granted to one, Wilson, on the 23rd of May, 1922. I have reached the conclusion that both appeals should be dismissed with costs.

First, of Wilson's patent. Some years before the date of this patent it had come to be recognized that in the operation of vacuum tubes in signal receiving apparatus there are very important advantages in maintaining a negative bias upon the grid. There were different ways of doing this, those commonly used in such apparatus at that period being, (1) by connecting the grid with a separate source of negative potential, and (2) by inserting a resistance in the filament heating circuit and applying the drop of potential thus obtained to the grid. Wilson conceived the idea of imparting the negative bias to the grid by availing himself of the plate circuit. The advantages of this will be referred to later. There was a possible disadvantage against which provision had to be made; a disadvantage so great that if means were not found for surmounting it, it would be prohibitive. The disadvantage was this: If the rapid signal variations in the plate current were repeatedly impressed upon the grid, interference and loss of control would almost certainly result. It was essential to avoid this.

Wilson's invention consists in the idea of resorting to the plate circuit for the source of negative potential for the grid with the provision of means for meeting the practical objection that to allow the rapid variations in the plate current to be imposed upon the grid at this stage would be inadmissible. He solved this by provid-

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NORTHERN ELECTRIC CO. LTD. ET AL. v. BROWN'S THEATRES LTD.

Duff C.J.

ing separate paths for the two components of the plate current (the rapid signal variations component and the steady component) and connecting the grid with that part of the circuit not traversed by the rapidly fluctuating signal variations component. Wilson states in his specification that his invention provides a valuable improvement in vacuum tubes used in signal reception apparatus because it provides compensation against what he describes as "the contact difference in potential between grid and cathode." Apparently, by reason of advances made toward perfecting the manufacture of vacuum tubes, this advantage of Wilson's invention has become obsolete. But it is said that by deriving the biasing potential from the steady component of the plate current, compensation is provided for slow changes in that current and this results in a uniformity of the operation of the tube which is not secured when the potential is derived from a special battery, or from the filament heating circuit. This is explained in the evidence of the plaintiffs' witness, Stevenson, at page 64 of the Appeal Case:—

> Q. * * * What about variations in strength of the battery itself? A. If the strength of that current, the steady current, changes for any reason, it will produce a proportionate change in the bias potential and it will produce it in such a sense as to oppose the change itself.
>
> Q. With what result? A. With the result that the change is diminished.

In support of the contention that Wilson's invention had been anticipated, two patents are referred to, that of Mathes and that of Langmuir.

Mathes' arrangement bears some resemblance to that of Wilson's; his output circuit is so arranged as to separate the fluctuating signal component from the steady component of the plate current, but at the trial it was not disputed that approximately ninety-nine per cent of the negative potential supplied to the grid is obtained from the filament battery.

As to Langmuir, his invention had nothing to do with wireless receiving sets. Langmuir derives the negative potential for the grid from the plate circuit, but he was not concerned with the question with which Wilson had to deal, namely, the diversion of the fluctuating signal

component of the plate current in such manner as to avoid impressing a second time the signal impulses upon the plate filament current.

I think neither Langmuir's device, nor Mathes' device, constitutes anticipation of Wilson's invention.

I have, I must say, been much concerned with the question whether Wilson's combination exhibits subject-matter. The means by which he provides separate paths for the two components of the plate current cannot, in themselves, be said to possess patentable novelty, as the learned President of the Exchequer Court points out, but the idea of providing separate paths for these components in order to obtain from the steady component of the plate filament current the negative potential requisite for biasing the grid was new and it seems, moreover, to have constituted a valuable improvement. I repeat, I have had a good deal of doubt on the point, but this much is certain, I am not sufficiently clear in my own mind that subject-matter is absent to justify the conclusion that the finding of the learned President in the opposite sense should be set aside.

There remains the question of infringement. The learned trial judge has found that Wilson's invention has been substantially taken. Once again, I can only say I think the point is a very arguable one, but I am not satisfied that the judgment of the learned President of the Exchequer Court can properly be reversed.

As to the Miller patent, I think the learned President arrived at the right conclusion; and I do not think it necessary to add anything to his reasons, with which I agree.

Appeal by plaintiff and appeal by defendant both dismissed with costs.

Solicitors for the plaintiffs (appellants in one appeal and respondents in the other): *Smart & Biggar.*

Solicitors for the defendant (respondent in one appeal and appellant in the other): *Chauvin, Walker, Stewart & Martineau.*

1941

* Feb. 5.
* Feb. 21.

HIS MAJESTY THE KING.....APPELLANT;

v.

J. W. R. McLEOD .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Companies—False statement by director—False by implication—Liability of director—Balance sheet of company—Loan to company treated as cash asset—Particulars—Criminal Code, sections 413 and 414.

APPEAL by the Attorney-General for British Columbia from the judgment of the Court of Appeal for British Columbia (1) which (Macdonald C.J.B.C. and O'Halloran J.A. dissenting) allowed the respondent's appeal and quashed the conviction of the accused respondent.

The respondent, who was president and managing director of the Freehold Oil Corporation Limited, obtained the sum of $40,336.46 on the 31st of March, 1937, from an associate named Miller through his secretary (Miller being away at the time) and deposited it to the credit of the Freehold Company. In repayment thereof he handed the said secretary six post-dated cheques of the Freehold Company aggregating the above sum and dated respectively the 8th, 9th, 10th, 12th, 13th and 14th of April, 1937. Three days later the Freehold Company's balance sheet was made up by the company's chartered accountants, showing current assets as of March 31st, 1937, to include " cash in bank $48,789.76." This amount included the sum of $40,336.46 obtained by the respondent as aforesaid. Four days later at a meeting of the directors the balance sheet was approved. The annual meeting of the company was called for April 14th and a copy of the balance sheet was directed to be forwarded to the shareholders with the notice calling the meeting. No disclosure was made to the shareholders of the six post-dated cheques. Particulars delivered pursuant to order stated that the false statement consisted in entries in the books of the company showing a sale of shares of another company for $40,336.46 and a re-purchase of the same number of shares from a third company for the same amount, and an audited balance sheet showing as an asset " Cash in bank " $48,789.76,

(1) (1940) 55 B.C. Rep. 439; [1940] 3 W.W.R. 625.

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

which did not reflect the true financial position of the respondent's company. The respondent was convicted under section 414 of the Criminal Code, for that he, being a director of a public company, did, with intent to deceive its shareholders, concur in making a statement of its financial position which he knew to be false in a material particular, viz., that the assets of the company consisted of $48,789.76 in cash. The trial judge, Lennox Co.J., found that although on the material date the company had cash in the bank in said amount, yet the statement was false in that it did not show that of that amount $46,336.46 represented money borrowed by the company which was still owing to the lender. The Court of Appeal reversed that judgment, quashed the conviction and held (Macdonald C.J.B.C. and O'Halloran J.A. dissenting) that while the respondent might have been charged with falsifying the balance sheet at large in not showing the true state of the company's affairs or that it was false in particular in not disclosing the liability for the loan, nevertheless the respondent ought not to have been convicted of making a false balance sheet as alleged in the terms of the conviction, because in truth the company had in the bank to its credit the sum of $48,789.76 and that sum was an asset of the company no matter what liabilities there were against it: the Crown elected to complain of only one item and that item by itself was unquestionably a true and not a false "material particular."

E. Pepler for the appellant.

H. Aldous Aylen K.C. for the respondent.

On appeal to the Supreme Court of Canada, after hearing the arguments of counsel for the appellant and for the respondent, the Court reserved judgment, and on a subsequent day delivered judgment allowing the appeal.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—We have come to the conclusion that this appeal must be allowed. We agree with the reasons of the learned Chief Justice of British Columbia and think it unnecessary to add to them.

Appeal allowed.

Solicitor for the appellant: *Eric Pepler.*

Solicitor for the respondent: *Elmore Meredith.*

1940
* Oct. 4, 7, 8.
1941
* Feb. 4.

M. DESBRISAY AND H. A. BULWER, CARRYING ON BUSINESS UNDER THE FIRM NAME AND STYLE OF M. DES BRISAY & COMPANY, AND THE SAID M. DESBRISAY & COMPANY (PLAINTIFFS) ..... APPELLANTS;

AND

CANADIAN GOVERNMENT MERCHANT MARINE LIMITED AND CANADIAN NATIONAL STEAMSHIP COMPANY LIMITED (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Fire—Loss of plaintiffs' goods, while awaiting shipment, on defendant's pier when pier destroyed by fire—Cause of fire unknown—Duty and liability of defendant—Question as to negligence, in origin of fire, and in failing to stop its spread.

Plaintiffs sued defendant companies, one hereinafter called the "Steamship Co." and the other the "Marine Co.", for damages for loss of plaintiffs' goods by a fire which destroyed the Steamship Co.'s pier at Vancouver on which the goods were. Plaintiffs had arranged with the Marine Co. (which was agent for a number of individual ships, each owned by a separate company) for carriage of the goods to Montreal by a certain steamer, then inbound, and were directed by the Marine Co. to send the goods to said pier, where said steamer would on its arrival load Vancouver cargo. A wharfage charge in respect to said goods was payable to the Steamship Co. The pier was in process of being enlarged, but at the time of the fire, which was on a Sunday afternoon, no construction work was going on; nor were there at the pier any ships or movement of freight or transaction of any passenger or other business; and on the day before, a weekly clean-up of the pier had been made; there were two watchmen on duty, stationed at the shore end of the pier, to prevent visiting by the public. The fire started at the other end of the pier from an unknown cause.

The trial judge, Manson J., dismissed the action, holding that plaintiffs' loss did not arise out of any act or omission of either of the defendants (53 B.C.R. 207). His decision was affirmed by the Court of Appeal for British Columbia ([1940] 2 W.W.R. 97; [1940] 4 D.L.R. 171). Plaintiffs appealed to this Court.

Held: Plaintiffs' appeal should be dismissed.

The trial judge's findings against negligence by defendants, as to origin of the fire, or its spreading so as to destroy plaintiffs' goods, were, on the evidence, agreed with or accepted in the reasons for judg-

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

ment in this Court. (The question of onus of proof with respect to negligence was discussed to some extent, but, on the evidence and findings, decision thereon was unnecessary).

Per Crocket and Davis JJ.: Outbreak of fire in a structure where fire is not employed in its operation or use is a remote, not a probable, risk, and the trial judge found upon the evidence that the risk of fire was in fact remote. In view of the varying risks of fire in different classes of buildings, no rule can be laid down. "The degree of want of care which constitutes negligence must vary with the circumstances. What that degree is, is a question for the jury or the Court in lieu of a jury. * * *" (*Caswell* v. *Powell,* [1940] A.C. 152, at 176). Whether there was negligence by the Steamship Co. in failing to stop the fire before it spread to plaintiffs' goods was a question of fact, and on the evidence the destruction of the goods was not caused by its negligence; and the same must apply to the carrier, the Marine Co., which at the time of the destruction had not taken delivery of the goods from the pier.

Per Kerwin J.: The Marine Co. could not be liable on any basis; even if it be treated as the owner of said steamer, the highest at which its arrangement with plaintiffs might be put was that the goods should be carried on the steamer to Montreal; and the goods were destroyed without ever having come into the Marine Co.'s possession in any capacity. The Steamship Co. was not the carrier but received and held the goods merely as warehouseman. (Discussion of onus of proof as to negligence in the fire's origin). On the evidence, the Steamship Co. fulfilled its full duty to exercise the same degree of care towards the preservation of plaintiffs' goods as "might reasonably be expected from a skilled storekeeper, acquainted with the risks to be apprehended either from the character of the storehouse itself or of its locality" (*Brabant* v. *King,* [1895] A.C. 632, at 640). As to precautions against spread of fire—The pier was in process of construction; it was impossible to do everything at once; and though certain standards may be set before prospective builders by insurance men as something desirable to be attained, a warehouseman cannot be held liable merely because he did not choose to spend as much money as the adoption of those standards would involve.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for British Columbia (1) in so far as that judgment dismissed their appeal from the judgment of Manson J. at trial (2).

The action was brought to recover damages from the defendants in the sum of $13,406.10, as being the value of the plaintiffs' goods lost by a fire which destroyed the pier of the defendant Canadian National Steamship Co. Ltd. at Vancouver on August 10, 1930. At the time of the fire the goods were on the pier awaiting shipment on a certain vessel (owned by a separate company) of which the defendant Canadian Government Merchant Marine

(1) [1940] 2 W.W.R. 97; [1940] 4 D.L.R. 171.
(2) 53 B.C. Rep. 207; [1938] 3 W.W.R. 209; [1940] 4 D.L.R. 171.

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Ltd. was agent. The material facts and circumstances of the case (on findings made or accepted in this Court) are sufficiently stated in the reasons for judgment in this Court now reported.

The trial judge, Manson J., dismissed the action, holding that the loss sustained by the plaintiffs did not arise out of any act or omission of either of the defendants. His judgment in that respect was affirmed by the Court of Appeal (*per* Martin C.J.B.C. and Sloan J.A. O'Halloran J.A., dissenting in part, would have allowed the plaintiffs' appeal as against Canadian National Steamship Co. Ltd.).

Manson J., subsequent to delivering his reasons for judgment dismissing the action, gave a decision as to the tariff of costs applicable (a substituted tariff having come into force since his reasons for dismissing the action were delivered) and as to the scale of costs and as to the date which the judgment should bear. In respect of these matters the plaintiffs' appeal to the Court of Appeal was allowed; and this was the subject of a cross-appeal by the defendants to this Court.

The appeal and the cross-appeal to this Court were dismissed with costs.

R. L. Maitland K.C. and *A. C. DesBrisay* for the appellants.

A. Alexander for the respondents.

THE CHIEF JUSTICE—I concur in dismissing the appeal.

The judgment of Crocket and Davis JJ. was delivered by

DAVIS J.—The appellants' goods, being 1,588 cases of canned salmon, were destroyed by fire while on the pier of the respondent, Canadian National Steamship Company Limited (hereinafter referred to as "the Steamship company"), at Vancouver awaiting shipment by water by the respondent Canadian Government Merchant Marine, Limited (hereinafter referred to as "the Marine company"). This action was brought against both companies for damages for the loss sustained; against the Steamship company, as a warehouseman, and against the Marine company, as a carrier, upon the basis that the carriage must

be considered as having been commenced when the goods were left on the pier designated by the carrier as the place from which the goods would be picked up for carriage.

The pier was a large terminal pier in the port of Vancouver owned and operated by the Steamship company which engages in a freight and passenger trade on the Pacific coast. The Marine company did not own or operate any pier or dock terminals at Vancouver but had an office in the Canadian National Railway depot in Vancouver and carried on business as agent for a number of individual ships, each owned by a separate incorporated company. The pier in question was 1,000 feet long and 220 feet wide. The sub-structure consisted of creosoted piles driven in coarse sand and gravel fill. The piles were capped and upon the stringers laid thereon was a deck. Upon the deck was located a warehouse—a two-storey structure at the south end, the upper storey of which was divided into a passenger concourse and offices. Around the whole warehouse on the second storey there ran a promenade gallery for the use of friends of ships' passengers. Outside the warehouse the deck, which was referred to as an apron, was made of four-inch planks with a $\frac{3}{8}$-inch space between them laid on the stringers. The apron was 12 feet wide.

The appellants in July, 1930, having agreed to sell 1,588 cases of canned salmon to a purchaser in Montreal, made arrangements for their shipment from Vancouver to Montreal via the Panama canal. The manager telephoned to the offices of the Marine company in Vancouver and "booked" space for their carriage on a then inbound steamer, the *Canadian Miller*. The manager was informed that the *Miller* would on her arrival load Vancouver cargo at the Steamship company's pier, and he was directed to send the goods there, which was done. The arrangement, if any, existing at the time of the fire between the Marine company and the Steamship company, and the terms, if any, upon which the *Canadian Miller* would have used the facilities upon arrival in Vancouver, and any arrangement there may have been between the two companies, were not the subject of any evidence at the trial.

As to part of the shipment, 388 cases, the appellants were given a receipt at the pier which purported to be from the pier owners, acknowledging receipt of the goods

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but stating that they would not be liable for loss unless loss was due to negligence on their part. The other portion of the shipment, 1,200 cases, was received at the pier but it came in by water and the master of the boat when he left these goods on the pier received a manifest which was a mere acknowledgment of receipt of the goods, and there was no limitation of liability on the document. In the view I take of the appeal, the question of onus does not, however, become of any consequence.

The distinction must be drawn, it seems to me, and it is a distinction vital to a case of this sort, between negligence in the origin of a fire and negligence in suffering a fire to spread. I did not understand it to be seriously contended by counsel for the appellants that the origin of the fire in question could be attributed to any negligence on the part of the respondents, or either of them, and in any case there are, I think, concurrent findings that there was no such negligence. That being so, the case is taken out of the line of authorities in which on the facts there was negligence which caused the fire, such, for instance, as a boiler in a factory being carelessly looked after, resulting in the commencement of a fire. On the basis that the fire did not originate through any negligence on the part of the respondents, the case must then be approached from the point of view whether or not there was negligence in suffering the fire to spread from the place of its origin to the place in the shed on the pier where the particular goods were stored at the time, and if so, then was that the direct cause of the loss of the goods?

The action was not brought to trial until nearly eight years after the date of the fire. The fire was on August 10th, 1930, and the case did not come to trial until June, 1938. That may well account for much lack of exactness in the evidence as to the place and circumstances of the origin of the fire, the location of the goods in the shed on the pier and the efforts actually made to prevent the spread of the fire. No satisfactory explanation was offered for the long delay in taking the case to trial.

The fire occurred on a Sunday afternoon, when the whole structure was destroyed. No ships lay at the pier, no freight was being moved, no passenger or other business was being transacted, and although operations then in progress for the enlargement of the pier were being carried

on during the week-days, there were no workmen doing any work or present on the pier that day. There were two watchmen on duty at the pier for each eight-hour shift—one employed by the Steamship company and one by the contractors—but they were stationed at the time at the shore end of the long pier to prevent the public from visiting it. The only foreseeable risk that day was theft or fire that might be caused by trespassers coming on the pier. Consequently the watchmen were on duty at the shore end of the pier to keep people out. The fire broke out as a small flame at the extreme northwest corner of the pier (that is, the end of the pier far out in the water)—the evidence is not precise whether it originated below the deck (or apron) of the pier or upon it—at any rate the fire originated at a point which at least gives weight to the respondents' contention that it probably originated from sparks from some passing steamer becoming lodged in the wooden part of the structure at the extreme end of the pier. Whether the fire started under the deck or on top of it, it is clear that the fire was burning underneath the deck during its early stages. No one appears to have noticed the flame for some minutes until it had then become a substantial fire ready to spread itself over the pier and the storage shed upon the pier. There were some twenty or more hand chemical fire-extinguishers on the pier; one was placed in the dock office and three or four were placed along each side of the shed, about 100 yards apart. Some of the fire-extinguishers were loose and when men were working on week-days they would take them around with them so that in case of fire they had fire-extinguishers close to them. Measures were taken to keep the pier free of dirt and debris. A weekly clean-up had been carried out the day before the fire and the structure was clean from end to end on the day of the fire. In addition to the regular fire service provided by the Vancouver Fire Department, the respondent Steamship company had engaged the services of the British Columbia District Telegraph and Messenger Company which provided a special watchman and fire service. Five fire-alarm signal boxes were installed on the pier. The structure itself had fire-resisting features; a lower fire insurance rate had been fixed for this pier than for any of the other piers of the same class in Vancouver. The evidence goes to indi-

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cate that the fire at its inception could not adequately have been fought from the shore end and that the only way it could have been promptly handled was by means of fire-boats, which were lacking in Vancouver harbour.

Outbreak of fire in a structure where fire is not employed in its operation or use is a remote, not a probable, risk and the learned trial judge found upon the evidence that the risk of fire was in fact remote. It is not possible, of course, in view of the varying risks of fire in different classes of buildings, to lay down any rule. The learned trial judge expressly found that the watchman service was adequate. While twenty minutes may have elapsed between the commencement of the fire and the turning in of the fire alarm, the fire was for at least half of that time a very insignificant flame partly, if not wholly, under the apron of the northwest corner of the pier—a most unlikely place to suspect the outbreak of a fire and a most difficult place to detect in its early stages. As to water being available to extinguish the fire, the finding of the trial judge was that there were available four stand-pipes 200 feet apart, serviced by a six-inch water main carrying about 115 pounds pressure on fifty feet of hose attached to each outlet. There was complaint of what was said to be unnecessary delay in connecting up the sprinkler system, but the learned trial judge found that the installation of such a system was not necessary to satisfy the standard of care required of a bailee. In any event, the evidence does not establish unnecessary delay in this regard and it was not one of the several heads of negligence set forth in the statement of claim. As Lord Wright said in *Caswell* v. *Powell* (1):

> The degree of want of care which constitutes negligence must vary with the circumstances. What that degree is, is a question for the jury or the Court in lieu of a jury. It is not a matter of uniform standard. It may vary according to the circumstances from man to man, from place to place, from time to time.

It is a question of fact whether there was negligence on the part of the Steamship company in failing to stop the fire before it spread to the goods in question. I am satisfied on the evidence that the destruction of the goods was not caused by negligence on the part of the Steamship company. And the same, of course, must apply to

(1) [1940] A.C. 152 at 176.

the carrier, the Marine company, which at the time of the destruction of the goods had not taken delivery of them from the pier.

I would dismiss the appeal.

The cross-appeal as to costs should also, in my opinion, be dismissed for the reasons given in the Court below.

KERWIN J.—This is an action in the name of M. DesBrisay and H. A. Bulwer (carrying on business under the name of M. DesBrisay and Company) and the said M. DesBrisay and Company against Canadian National Steamship Company Limited, hereafter referred to as the Steamship company, and Canadian Government Merchant Marine Limited. The action arises out of the delivery to the Steamship company's dock, in Vancouver, of 1,588 cases of canned salmon and their loss when the dock was destroyed by fire on August 10th, 1930. The salmon was owned by M. DesBrisay and Company, who had insured themselves against loss by fire, and these proceedings are really brought by the Insurance company which paid the loss and was subrogated to the rights of the owner.

Sometime during the month of July, 1930, the plaintiff arranged, by telephone, with Canadian Government Merchant Marine Limited for the carriage of the salmon to Montreal by the S.S. *Canadian Miller,* and the plaintiff was directed to send the goods to the Steamship company's dock. Of the total number of cases of salmon, 1,200 came from Ewen's Cannery, Fraser River, British Columbia, by the S.S. *Westham* addressed to the order of B.C. Packers Limited, Vancouver, and were delivered to the dock on July 30th, 1930. C. B. Smith, the Steamship company's dock agent, merely acknowledged receipt of them by signing his name and the date at the foot of the *Westham's* manifest. On July 31st, B.C. Packers Limited signed a delivery order in favour of the Bank of Montreal, who, on August 8th, sent it to the Steamship company and directed the latter to release the goods to the plaintiff. The order and direction were received by the Steamship company on August 9th. In the meantime the plaintiff had employed an outside company to label the cases on the dock and this work was completed on August 7th.

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The remainder of the salmon, consisting of two lots of 338 and 50 cases respectively, were sent by the plaintiff from the Ballantyne Pier in Vancouver on August 8th and received at the Steamship company's dock on the same day. Their receipt was acknowledged on forms prepared for use by Vancouver Harbour Commissioners but there can be no dispute that they expressed the terms upon which the two lots were received and held by the Steamship company for the plaintiff. So read, they provide that the Steamship company received the goods as warehousemen and "are not to be liable for any loss or damage from whatever cause arising unless proved to have resulted from negligence of the [Company] or of their servants." In a note at the bottom, it is stated: "Shipper should exchange this Original Receipt for Steamship Lines usual Bill of Lading before sailing of the Steamer."

At the trial, the plaintiff put in as evidence parts of the examination for discovery of Mr. Keeley, the Manager of the Steamship company and General Manager of Canadian Government Merchant Marine Limited, which part included a statement by counsel for the defendants. This statement was taken as Mr. Keeley's answer to a question put to him. From this statement it appears that the S.S. *Canadian Miller* was owned by an incorporated company bearing the same name; that Canadian Government Merchant Marine Limited acted as agent for it and some other coastwise steamers; and that such ships used, in Vancouver, the dock owned by the defendant Steamship company. I have no hesitation in agreeing with all the judges below that Canadian Government Merchant Marine Limited is not liable in this action on any basis. Even if it be treated as the owner of the S.S. *Canadian Miller,* the highest at which the arrangement made between the plaintiff and it may be put, is that the salmon should be carried on the *Canadian Miller* to Montreal. The salmon was destroyed without ever having come into the possession of that defendant in any capacity.

So far as the defendant Steamship company is concerned, the 388 cases came into its possession by the clear terms of the receipt forms used, as warehousemen. The trial judge was of opinion that the 1,200 cases must be taken to have come into the Steamship company's possession upon the same terms as are expressed in these forms.

I cannot agree that this is so, since the 1,200 cases were received some days before the other two lots; they were received from B.C. Packers Limited ex S.S. *Westham* and any alleged practice between the plaintiff and the defendants, or either of them, could not, as against the latter, apply to a consignment received from a third person and, so far as the evidence discloses, never owned by the plaintiff until the Bank of Montreal, on August 8th, directed the Steamship company to release the goods to the plaintiff or, at any rate, until the plaintiff authorized the labelling of the cases. However, on the first issue raised by the Steamship company, the result is the same, i.e., the Steamship company was not the carrier but received and held all the salmon merely as warehousemen.

There remains the question whether the Steamship company fulfilled its duty to the plaintiff as warehouseman of the salmon,—with respect to all of which a wharfage charge was payable. As to the 388 cases, the onus was plainly, by the terms of the receipts, upon the plaintiff to prove negligence. As to the 1,200 cases, the proceedings might have been differently framed but as a matter of fact, the action was treated as one for damages for the loss, by negligence, of the three lots of salmon. It was common knowledge, I think, that the salmon had been destroyed in the fire, and this is not a case where the return of the warehoused goods had been demanded by the plaintiff. The sole issue was negligence or no negligence. It is true that at the opening of the trial, counsel for the plaintiff stated:—

> The goods were not returned to the plaintiff, and were not delivered to anyone else to their order, and the value of them was not paid. Our contention is that the onus in that respect is entirely upon the defendants. The goods have never been delivered, and their price has never been paid.

He immediately continued, however:—

> We say that they were negligent in their duty in not properly caring for the goods when they were in their possession.

and examinations for discovery were put in on behalf of the plaintiff with a view of showing that the dock was not erected in accordance with certain recommendations that had been made, that a sprinkler system had been installed but had not been connected with the water supply at the

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time of the fire, and that waste from the spinning of oakum had been allowed to remain on the apron of the dock.

Assuming, however, that the ordinary responsibility of a warehouseman rested upon the Steamship company to explain its inability to return the 1,200 cases, the evidence discloses that explanation,—loss by fire. So much being shown, it is at least arguable that the onus was then on the plaintiff to prove that the fire was a negligent one and did not "accidentally begin" within the meaning of 14 Geo. III, c. 78, s. 86. *Port Coquitlam* v. *Wilson* (1); *McAuliffe* v. *Hubbell* (2); Beven on Negligence, 4th edition, page 624, where, referring to *Filliter* v. *Phippard* (3), it is stated:

> The effect of this decision is to require the plaintiff affirmatively to show negligence before he can recover; unless, indeed, the facts are such as raise the inference of negligence.

Facts sufficient to raise the inference of negligence were present in *United Motors Service Inc.* v. *Hutson* (4) but not here.

In reality it is not necessary in the present case to rely upon any onus cast upon the plaintiff, because I agree, as did the majority of the Court of Appeal, with this statement of the trial judge:—

> No evidence was led to even remotely suggest that the fire had its origin through any act or omission of the defendants, their servants or agents,

and with this definite finding made by him, which follows the statement just quoted:—

> In my view it was satisfactorily shown that the fire was due to some extraneous circumstance over which the defendants, their servants or agents had no control.

I entirely agree with the trial judge and the majority of the Court of Appeal that there was nothing done or omitted by the Steamship company in connection with the building of the dock or the use of it which caused or contributed to the starting of the fire. The Steamship company fulfilled its full duty to exercise the same degree of care towards the preservation of the plaintiff's goods as "might reasonably be expected from a skilled storekeeper, acquainted with the risks to be apprehended either

(1) [1923] S.C.R. 235, at 243.
(2) (1930) 66 Ont. L.R. 349.
(3) (1847) 11 Q.B. 347.
(4) [1937] S.C.R. 294.

from the character of the storehouse itself or of its locality." (*Brabant* v. *King* (1)). The remainder of Lord Watson's sentence from which the above is taken has no relevancy to the present appeal.

It was next contended that the circumstances are such as impose liability upon the Steamship company for the spread of the fire. In this connection it must be remembered that the dock was in the process of being constructed. It was impossible to do everything at once and while it appears from the evidence that certain standards are set before prospective builders, by insurance men, as something desirable to be attained, a warehouseman cannot be held liable merely because he did not choose to spend as much money as the adoption of those standards would involve. As to the circumstance that the sprinkler system had been installed but not connected with the water supply, no fault can, I think, be found with the Steamship company because of the time that had elapsed. In fact, on these questions and also with respect to the other matters of complaint, I agree so thoroughly with the view of the learned trial judge that I am content to adopt his conclusions. I might add but one word as to Foot, who was a watchman for the company that had the contract to construct the dock and who was not called as a witness. It does not appear whether he was alive but, in view of all the evidence and of the fact that the trial was held eight years after the fire, one would not be surprised if he were not available or if he had nothing to add to the testimony of the Steamship company's watchman. As to the objection that various other superior officials of the Steamship company were not called, it is sufficient to point out that some of them were examined for discovery at length and there is nothing to indicate that they could have added to the knowledge obtained by the Court from the evidence before it.

A question as to the scale and quantum of costs payable to the defendants was raised before the Court of Appeal, all the members of which agreed in that respect with the plaintiff's contention and directed a variation of the judgment. The defendants gave notice of cross-appeal to this Court upon that question. Such a matter is more

(1) [1895] A.C. 632 at 640.

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properly disposed of by the Judges in the Court of Appeal and I would not interfere with the conclusion at which they arrived.

The appeal and cross-appeal should be dismissed with costs.

Kerwin J.

HUDSON J.—I agree that this appeal and the cross-appeal should be dismissed with costs.

The learned trial judge found as a fact that the loss of the plaintiff's goods was not due to any negligence on the part of the defendants. This view was confirmed by the Court of Appeal and a review of the evidence does not lead me to any different conclusion. On the questions of law involved, I have nothing to add to what has been said by my brothers Davis and Kerwin.

Appeal and cross-appeal dismissed with costs.

Solicitors for the appellants: *Bourne & DesBrisay.*

Solicitor for the respondents: *A. R. MacLeod.*

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* March 27.
* April 4.

KELLOGG COMPANY (PLAINTIFF) .....APPELLANT;

AND

HELEN L. KELLOGG (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Pleadings—Conflicting applications for patent—Proceedings in Exchequer Court under s. 44 (8) of The Patent Act, 1935 (Dom., c. 32)—Plaintiff pleading alternatively that alleged invention relied on by defendant was made in course of inventor's employment by plaintiff and that, by virtue of employment contract and circumstances under which invention was made, plaintiff was entitled to benefit of it, and was owner of it—Right to raise such issue in the proceedings—Patent Act, 1935, s. 44 (8) (iv); Exchequer Court Act (as amended in 1928, c. 23, s. 3), s. 22 (c)—Plea struck out in Exchequer Court—Appeal to Supreme Court of Canada—Jurisdiction to hear appeal—Exchequer Court Act, s. 82.

There were two conflicting applications for patent pending in the patent office, one made by appellant's assignors and the other by the administratrix of the estate of K., under whom, by mesne assignments, respondent claimed. The Commissioner of Patents decided that, upon the material before him, K. was the prior inventor. Appellant then, as provided for in s. 44 (8) of *The Patent Act, 1935*

* PRESENT:—Rinfret, Crocket, Kerwin, Hudson and Taschereau JJ.

(Dom., c. 32), commenced proceedings in the Exchequer Court for the determination of the respective rights of the parties. Appellant in its statement of claim alleged that its assignors were in fact the first inventors and that appellant was entitled as against respondent to the issue of patent, and asked that it be so adjudged; and alternatively, by par. 8, in the event that the Court should find that K. was the first inventor, it alleged that K. had been employed in appellant's experimental department and if K. made any invention he made it in the course of such employment and when he was carrying out work which he was instructed to do on appellant's behalf; that by virtue of the contract of employment and the circumstances under which the invention was made, K. became and was a trustee of the invention for appellant which was entitled to the benefit of it; that K. was by reason of his being such a trustee unable to transfer any right, title or interest in the invention to any other party and appellant was now the owner of it; and asked that it be so adjudged and that respondent be ordered to execute an assignment to appellant of the entire right, title and interest in and to the invention and the application relating to it.

On motion by respondent in the Exchequer Court, said par. 8 and the prayers based thereon were struck out, it being held that appellant was not entitled to raise the issue pleaded by par. 8 in proceedings originating under s. 44 of said Act.

Appellant appealed to this Court. Respondent objected that this Court had no jurisdiction to hear the appeal. Argument was heard both on that point and on the merits of the appeal.

Held: This Court had jurisdiction to hear the appeal. That point stands to be decided, not under the provisions of the *Supreme Court Act,* but under the provisions of the *Exchequer Court Act* and of the *Patent Act* (*British American Brewing Co. Ltd.* v. *The King,* [1935] S.C.R. 568, at 570). The requirements of s. 82 of the *Exchequer Court Act* (R.S.C., 1927, c. 34) existed. The judgment appealed from was a "judgment upon a demurrer or point of law raised by the pleadings" and, that being so, the conditions of jurisdiction are complied with if the right immediately involved in the action or cause in which the demurrer or point of law was raised exceeds in value $500—it is not required that there should be at stake a pecuniary sum exceeding $500. (*Massie & Renwick Ltd.* v. *Underwriters' Survey Bureau Ltd.,* [1937] S.C.R. 265, at 266; *Sun Life Assce. Co. of Canada* v. *Superintendent of Insurance,* [1930] S.C.R. 612; *Burt Business Forms Ltd.* v. *Johnson,* [1933] S.C.R. 128, cited).

Held, also: The appeal should be allowed and the parts of appellant's statement of claim in question restored. Although the occasion for appellant's action was the Commissioner's decision that the applications were in conflict and that he would allow the claims to respondent, yet under the express enactment in s. 44 (8) (iv) of the *Patent Act, 1935,* the Exchequer Court could decide "that one of the applicants was entitled as against the other to the issue of a patent including the claims in conflict as applied for by him"; and, for the determination of that point, there is nothing in the Act or in the law which could prevent appellant from urging any fact or contention necessary or useful for the purpose of enabling the Court to decide between the parties. The allegations in said

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par. 8, if true, and the conclusions based thereon, if legally correct, would be a reason for a declaration in appellant's favour in the terms of s. 44 (8) (iv), and the point so raised would properly lead to the remedies prayed for by appellant; and these remedies would be within the jurisdiction of the Exchequer Court as being covered by said s. 44 (8) (iv). It is true that the Exchequer Court has no jurisdiction to determine an issue purely and simply concerning a contract between subject and subject (*The King and Hume and Consolidated Distilleries Ltd. and Consolidated Exporters Corpn. Ltd.*, [1930] S.C.R. 531); but here the subject-matter of appellant's allegation only incidentally refers to the contract of employment; the allegation primarily concerns the invention, of which appellant claims to be the owner as a result of the contract and other alleged facts. A further reason why the Exchequer Court should exercise jurisdiction upon the point is the enactment in s. 22 (*c*) (as enacted in 1928, c. 23, s. 3) of the *Exchequer Court Act*, which gives that court jurisdiction between subject and subject in all cases where a "remedy is sought under the authority of any Act of the Parliament of Canada or at Common Law or in Equity, respecting any patent of invention * * *." The remedy sought by appellant, as a result of said par. 8, is a remedy in equity respecting a patent of invention.

(The Court pointed out that its judgment was limited to the interpretation of the statutory enactments, no question having been raised as to their constitutionality).

APPEAL by the plaintiff from the order of Maclean J., President of the Exchequer Court of Canada (1), striking out a certain paragraph of the plaintiff's statement of claim and certain sub-paragraphs of the claims in said statement of claim. The parts in question of the statement of claim, the nature of the action or proceedings, and the questions for determination, including an objection against this Court's jurisdiction to hear the appeal, are sufficiently stated in the reasons for judgment now reported. The appeal was allowed and the parts in question of the statement of claim restored.

O. M. Biggar K.C. and *M. B. Gordon* for the appellant.

S. M. Clark K.C. for the respondent.

The judgment of the Court was delivered by

RINFRET J.—Two applications for a patent of an invention relating to Prepared Food and Process of Gun-Puffing the same were pending in the Patent Office. One of them was made by the appellant's assignors, McKay & Penty;

(1) [1941] 1 D.L.R. 766.

and the other by the administratrix of the estate of John L. Kellogg, Jr., under whom by various mesne assignments the respondent claims.

The Commissioner of Patents decided that, upon the material before him, the respondent's husband was, as between the parties, the first to make the invention. He notified the appellant accordingly; and, thereupon, the appellant commenced proceedings in the Exchequer Court of Canada for the determination of the respective rights of the parties.

Under such circumstances, the Commissioner must suspend further action on the applications in conflict until in such action it has been determined either

(i) that there is in fact no conflict between the claims in question, or

(ii) that none of the applicants is entitled to the issue of a patent containing the claims in conflict as applied for by him, or

(iii) that a patent or patents, including substitute claims approved by the Court, may issue to one or more of the applicants, or

(iv) that one of the applicants is entitled as against the others to the issue of a patent including the claims in conflict as applied for by him. (Subs. 8 of s. 44 of the *Patent Act, 1935*).

The statement of claim of the appellant asserted that the latter was the owner by assignment of the invention in question; that it had been advised by the Commissioner of Patents that its application was in conflict with another application assigned to the respondent by New Foods Incorporated, to which the rights to the alleged invention had been assigned by John L. Kellogg, Sr., who was himself the assignee of the original applicant, the administratrix of the estate of John L. Kellogg, Jr.

The appellant further alleged that McKay & Penty, and not the said John L. Kellogg, Jr., were in fact the inventors of the subject-matter covered by both of the aforesaid applications and that, therefore, the appellant was entitled, as against the respondent, to the issue of the patent.

And, as an alternative claim, the appellant further stated:

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8. In the event that the Court should find as a fact that the said John L. Kellogg, Jr., was the first inventor of the subject-matter of the said application serial No. 450,047, then the plaintiff alleges

(*a*) That the late John L. Kellogg, Jr., was employed in the Experimental Department of the Kellogg Company from October 15, 1936, until December 19, 1936;

(*b*) If any invention was made by the said John L. Kellogg, Jr., which is not admitted but denied, it was made during and in the course of his employment by the plaintiff and when he was carrying out work which he was instructed to do on the plaintiff's behalf. By virtue of the contract of employment and the circumstances under which the invention was made the said John L. Kellogg, Jr., became and was a trustee of the invention for the company which was and is entitled to the benefit of it.

(*c*) The said John L. Kellogg, Jr., was by reason of his being such a trustee unable to transfer any right, title or interest in the invention to any other party and the plaintiff is now the owner of any invention covered by the application serial No. 450,047.

The conclusions of the appellant's action were for an order that Messrs. McKay & Penty were, in fact, the first inventors of the subject-matter of the applications and that, as between the parties, the appellant was entitled to the issue of the patent, including the claims in conflict, which are all the claims of both the applications; but, following the allegation that, if John L. Kellogg, Jr., was the first inventor, his invention was made during and in the course of his employment by the appellant and that he had, thereby, become and was a trustee of the invention for the company, the appellant alternatively prayed that it should be adjudged that the appellant was the owner of the invention made by the late John L. Kellogg, Jr., and that the respondent should be directed to execute an assignment to the appellant of the entire right, title and interest in and to the invention and the application relating to it.

The respondent moved for an order striking out paragraph eight above reproduced of the appellant's statement of claim (and consequently that part of the conclusions based upon it) on the ground that the Exchequer Court of Canada had no jurisdiction to hear and determine the allegations and issues therein contained, and that the said paragraph was impertinent or irrelevant and might tend to prejudice, embarrass or delay the fair trial of the action.

The judgment appealed from allowed the motion upon the ground that the jurisdiction of the Exchequer Court, if any, was to be found within s. 44 of the *Patent Act*, as

otherwise the appellant's claim, in paragraph 8, was one which dealt with property and civil rights and which fell within the jurisdiction of the provincial courts.

In the view of the learned President, who delivered the judgment, what the Court was required to determine under s. 44 related to the claims in conflict, and nothing else. The appellant was not entitled, therefore, to raise the issue pleaded by paragraph 8 in proceedings originating under s. 44 of the Act. Furthermore, the material pleaded in that paragraph appeared to be one of contract between subject and subject; and it was to be doubted if the Court had jurisdiction to determine such an issue which would appear to be an issue to be determined by the provincial courts.

The appellant then appealed to this Court and was met by the objection that this Court had no jurisdiction to hear the appeal.

That preliminary question stands to be decided, not under the provisions of the *Supreme Court Act*, but under the provisions of the *Exchequer Court Act* and of the *Patent Act* (*British American Brewing Company Limited* v. *His Majesty the King* (1)).

The *Exchequer Court Act* (s. 82) gives the right of appeal to this Court to

> any party to any action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars, who is dissatisfied with any final judgment, or with any judgment upon any demurrer or point of law raised by the pleadings.

The judgment appealed from is clearly a "judgment upon a demurrer or point of law raised by the pleadings." Moreover, the judgment *a quo*, being in the nature of a judgment on demurrer, it would seem that "notwithstanding the unfortunate wording of section 82 of the *Exchequer Court Act*," it is not necessary that the "actual amount in controversy" in the appeal should exceed the sum of five hundred dollars (*Massie & Renwick, Limited* v. *Underwriters' Survey Bureau Limited* (2)), provided the action, suit or cause in which the demurrer or point of law was raised is itself for an amount or value exceeding five hundred dollars. The conditions of jurisdiction are complied with if the right immediately involved in the action or cause amounts to the value of five hundred dollars; and it

(1) [1935] S.C.R. 568, at 570. (2) [1937] S.C.R. 265, at 266.

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is not required that there should be at stake a pecuniary sum of more than five hundred dollars (*The Sun Life Assurance Company of Canada* v. *The Superintendent of Insurance* (1); *Burt Business Forms Limited* v. *Johnson* (2)). We are of opinion that the requirements of s. 82 of the *Exchequer Court Act* existed in this case and that we should, therefore, proceed to render judgment on the merits of the appeal.

Although the occasion for the appellant's action was the decision of the Commissioner that the respective applications of the appellant and of the respondent were in conflict and that he would allow the claims to the respondent, the appellant, in bringing suit against the respondent, was not limited to an action for the purpose of having it determined either that there was no conflict between the claims in question, or that none of the applicants was entitled to the issue of a patent containing the claims in conflict, or that a patent or patents (including substitute claims approved by the Court) may issue to one or more of the applicants; but the Exchequer Court could also decide that one of the applicants was entitled, as against the other, to the issue of a patent including the claims in conflict, as applied for by him. We have already seen that such was the express enactment of subs. 8 of s. 44 of the *Patent Act, 1935.*

And, for the determination of the latter point, we see nothing in the Act or in the law which could prevent the appellant from urging any fact or contention necessary or useful for the purpose of enabling the Court to decide between the parties.

It may be contended that an applicant, bringing an action before the Court as a result of a decision made by the Commissioner that there exists a conflict and that he will allow the claims to the conflicting applicant, is not necessarily limited to one or more of the four remedies provided for by subs. 8 of s. 44, and that he may, in addition, put forward facts and contentions of a nature to justify a different or an additional remedy. It is sufficient, for the purposes of the present case, to say that the allegations contained in paragraph 8 of the appellant's statement of claim, and the conclusions based thereon, come within the wording of paragraph (iv) of subs. (8), for if it be

(1) [1930] S.C.R. 612.

(2) [1933] S.C.R. 28.

true—as must be assumed for the purposes of deciding the point of jurisdiction—that the appellant is entitled to the benefit of the invention because John L. Kellogg, Jr., at the time when he is alleged to have made it, was in the employ of the appellant and then carrying out work which he was instructed to do on the plaintiff's behalf, and that, by virtue of his contract of employment and the circumstances under which the invention was made, he became and is a trustee of the invention for the company; if it be true further that, by reason of his being such a trustee, he was unable to transfer any right, title, or interest in the invention to any other party, and that the plaintiff is now the owner of any invention so made by John L. Kellogg, Jr., this would be one of the reasons why the appellant should be declared entitled, as against the respondent, to the issue of a patent including the claims in conflict as applied for by it, and, therefore, the point so raised would properly lead to the remedies prayed for by the appellant; and these remedies would be within the jurisdiction of the Exchequer Court, as being covered by paragraph (iv) of subs. 8 of sec. 44 of the *Patent Act*.

It should not be forgotten that we are dealing only with a judgment declaring that the Exchequer Court had no jurisdiction to hear and determine a point of that kind. The question whether the facts alleged by the appellant in paragraph (8) of the statement of claim give rise to the conclusions based upon them is a different matter which the Exchequer Court will have to decide when its jurisdiction to do so has been established.

It is undoubtedly true, as stated by the learned President, that the Exchequer Court has no jurisdiction to determine an issue purely and simply concerning a contract between subject and subject (*His Majesty the King and Hume and Consolidated Distilleries Limited and Consolidated Exporters Corporation Limited* (1)); but here the subject-matter of the appellant's allegation only incidentally refers to the contract of employment between John L. Kellogg, Jr., and the appellant. The allegation primarily concerns the invention alleged to have been made by him and of which the appellant claims to be the owner as a result of the contract and of the other facts set forth in the allegation. The contract and the claims based

(1) [1930] S.C.R. 531.

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thereon are advanced for the purpose of establishing that the appellant is entitled both to the rights deriving from the invention and to the issue of a patent in its own name. That is precisely the remedy which the Exchequer Court of Canada has the power to grant under paragraph (iv) of subs. 8 of sec. 44 of the *Patent Act*.

In our view, there exists a further reason why the Exchequer Court should exercise jurisdiction upon the point raised by the appellant in its statement of claim, and that is the enactment contained in sec. 22, subs. (*c*), of the *Exchequer Court Act* (as amended by s. 3 of c. 23 of the Statutes of Canada of 1928). That subsection gives the Court

> jurisdiction as well between subject and subject as otherwise, * * * *
> (*c*) in all other cases in which a remedy is sought under the authority of any Act of the Parliament of Canada or at Common Law or in Equity, respecting any patent of invention, copyright, trade mark, or industrial design.

It will be noticed that subsection (*c*) deals with the "remedy" which is sought. And it enacts that the Exchequer Court shall have jurisdiction between subject and subject in all cases where a "remedy is sought" "respecting any patent of invention" "under the authority of any Act of the Parliament of Canada or at Common Law or in Equity." The remedy sought by the appellant, as a result of paragraph 8 of its statement of claim, is evidently a remedy in Equity respecting a patent of invention. The appellant claims that remedy as a consequence of the facts alleged in its paragraph 8. It claims the remedy as owner deriving its title from the same alleged inventor of whom the respondent claims to be the assignee, through other assignors. In such a case, the invention or the right to the patent for the invention is primarily the subject-matter of the appellant's claim, and the remedy sought for is clearly "respecting any patent of invention." And this is covered by subsection (*c*) of section 22 of the *Exchequer Court Act,* as it stands at present.

No question was raised before us or before the Exchequer Court as to the constitutionality either of paragraph (iv) of subsection 8 of s. 44 of the *Patent Act,* or the constitutionality of subs. (*c*) of s. 22 of the *Exchequer Court Act.* No proceedings were directed to that issue. No notices to the Attorney-General of Canada, or to the Provincial

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Attorneys-General, were given of any intention to raise such a point. We are limiting our judgment to the interpretation of the relevant sections of the *Exchequer Court Act* and of the *Patent Act* as we find them in the statutes.

Upon the construction of these sections, we are of opinion that the Exchequer Court has jurisdiction to hear and determine the issue raised by paragraph 8 of the appellant's statement of claim and by sub-paragraphs (*c*) and (*d*) of the conclusions.

Accordingly the appeal is allowed and the parts of the statement of claim in question are restored. The appellant is entitled to its costs here and below.

Appeal allowed with costs.

Solicitors for the appellant: *Smart & Biggar.*

Solicitors for the respondent: *Clark, Robertson, Macdonald & Connolly.*

CHARLES W. COX (DEFENDANT).....APPELLANT;

AND

GEORGE F. HOURIGAN (PLAINTIFF)...RESPONDENT.

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* Dec. 2, 3.

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* Feb. 4.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Evidence—Action to recover for alleged failure to return plant and equipment in accordance with agreement under seal—Long lapse of time since said alleged breach—Subsequent occurrences and course of conduct—Alleged oral settlement as discharging cause of action by accord and satisfaction—Corroboration under s. 11 of The Evidence Act, R.S.O., 1937, c. 119.

In an action for the value of plant and equipment alleged by plaintiff to have been loaned to defendant and not returned in accordance with an agreement under seal, and for damages for the alleged failure to return the same, this Court restored the judgment of the trial judge (which had been reversed by the Court of Appeal for Ontario) dismissing the action, in view of the many years which had elapsed since the alleged breach of contract, the subsequent occurrences and course of conduct, and the defendant's evidence, accepted by the trial judge, as to an oral agreement of settlement, fulfilled by him, of which evidence there were circumstances in support.

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

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Per Crocket and Kerwin JJ.: A cause of action arising from the breach of a contract may be discharged by accord and satisfaction, which need not be in writing or under seal even where the original contract was under seal (*Blake's Case* (1605) 6 Co. Rep. 43B; *Steeds* v. *Steeds*, 22 Q.B.D. 537).

Corroboration within the meaning of s. 11 of *The Evidence Act*, R.S.O., 1937, c. 119, must be evidence of a material character supporting the case to be proved but it may be afforded by circumstances (*McDonald* v. *McDonald*, 33 Can. S.C.R. 145; *Thompson* v. *Coulter*, 34 Can. S.C.R. 261).

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario reversing the judgment of Urquhart J. dismissing the action in which the plaintiff claimed for the value of plant and equipment alleged to have been loaned to defendant and not returned in accordance with a certain agreement under seal dated December 27th, 1919, and for damages for the alleged failure to return the same. The original plaintiff in the action, which was begun on October 18, 1927, was James Horrigan Company Ltd. (sometimes in the reasons for judgment referred to as the respondent company), and after certain proceedings, transactions and events, the action was, by order to proceed made on March 10, 1937, continued at the suit of the present plaintiff (respondent). The material facts and circumstances of the case are sufficiently stated in the reasons for judgment in this Court now reported. The appeal was allowed and the judgment of Urquhart J. restored with costs throughout.

A. W. Roebuck K.C. and *H. F. Parkinson K.C.* for the appellant.

Hamilton Cassels K.C. and *Arthur Kearns* for the respondent.

THE CHIEF JUSTICE—I concur in the result.

The judgment of Crocket and Kerwin JJ. was delivered by

KERWIN J.—The writ of summons in this action was issued at the suit of James Horrigan Company, Limited, against Charles W. Cox on October 18th, 1927. The action was based upon an agreement, under seal, between the Company and Cox, dated December 27th, 1919, and was brought to recover the sum of $4,030.20, alleged to be due

under the terms of that agreement, and interest thereon, and also the value (claimed to be in excess of $10,000) of certain lumbering plant and equipment stated to have been delivered by the Company to Cox and which, contrary to his covenant contained in the agreement, it was alleged that Cox had failed to return. The action was not tried until May, 1939.

In the interval, many events had occurred to some of which it is necessary to refer. For some unexplained reason Cox allowed default judgment to be signed and a writ of *fieri facias* to be issued but these were soon set aside, pleadings delivered, and the action ready for trial in December, 1927. However, an arrangement for the adjournment of the trial was made whereby Cox paid to the Company, or for its benefit, sums totalling approximately $3,930, or almost the amount of the item of $4,030.20 claimed in the action,—without any allowance for interest. (It might here be stated that we agree with the trial judge and the Court of Appeal that these sums must be taken as payment of the item referred to and interest,—leaving outstanding merely the claim for the plant and equipment.) It was also part of the arrangement for the adjournment of the trial that the Company should assign its claim to John O. Hourigan, the principal shareholder in the Company, and an agreement dated December 12th, 1927 (known as the arbitration agreement) was entered into between John O. Hourigan and Cox wherein, after reciting the Company's intention to assign the claim, provision was made for an arbitration if the parties were unable to settle the claim within six months.

On March 7th, 1928, the Company purported to assign the claim to John O. Hourigan, such claim then being, as indicated above, merely with reference to the plant and equipment. John O. Hourigan died intestate December 5th, 1930, leaving as his next of kin two sisters and two brothers, of whom George F. Hourigan was one. He and the Royal Trust Company were appointed administrators and on September 9th, 1933, they assigned to George F. Hourigan all the "unrealized or non-liquid assets" of the estate. While a schedule was attached to that assignment, the claim against Cox is not listed, and while the assignment contains a clause providing that nothing in the

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schedule should limit the generality of the words "unrealized or non-liquid assets," the omission is significant and will be adverted to later. At the same time it has not been overlooked that George F. Hourigan already had a transfer of his surviving brother's one-quarter interest in the estate and that so far as his sisters were concerned, he was merely a trustee for their share of any of the unrealized assets. No argument has been addressed to us as to the efficacy of these assignments and the appeal has proceeded as if George F. Hourigan would be entitled to secure judgment against Cox if the liability of the latter under the original agreement of December 27th, 1919, were established.

Various steps were taken by George F. Hourigan to nominate an arbitrator under the arbitration agreement but the only importance in connection therewith is that December 24th, 1935, being the approximate date when a notice was served on George F. Hourigan's behalf on Cox, was the first time in about eight years that any demand had been made on Cox by anyone for any claim under the original agreement of December 27th, 1919. In that demand, notice was given of the assignment by John O. Hourigan's administrators. The attempted arbitration proving abortive, George F. Hourigan, on September 26th, 1936, commenced a new action in his own name against Cox, advancing similar claims to those made in the present action. Upon Cox's application, proceedings in the new action were stayed and by an order to proceed, dated March 10th, 1937, the present action was continued at the suit of George F. Hourigan as party plaintiff.

The pleadings were amended and in the amended statement of defence Cox set up that there had been an accord and satisfaction of the claim for the plant and equipment. At the trial Cox's evidence in chief was that an oral agreement had been made between himself and John O. Hourigan subsequent to the date of the arbitration agreement of December 12th, 1927, whereby in consideration of Cox agreeing to purchase supplies for his future lumbering operations from Marks & Co., in which John O. Hourigan was substantially interested, the claim under the agreement of December 27th, 1919, was satisfied. Cox also testified that he accordingly made all his purchases from Marks & Co. until it sold out its business to another con-

cern about a year before the death of John O. Hourigan.

In cross-examination, counsel for the plaintiff put to Cox Question 10 on the latter's cross-examination on an affidavit filed on one of the motions in this action:—

Mr. McCOMBER: I want to read question 10:

"Q. After the date of that agreement, Exhibit 1 made between you and Mr. John O. Hourigan, December 12th, 1927, did you and Mr. Hourigan ever come to a settlement?

A. We discussed it at various times, but there was never a definite settlement made."

Is that answer correct?

A. If it is there, that is correct, yes; it is correct, substantially correct.

After some discussion between counsel, the cross-examination continued:—

By Mr. McCOMBER:

Q. Now, you told us many times, yesterday, Mr. Cox, that you had discussed with John O. Hourigan, that you had discussions with John O. Hourigan in which there was an understanding that this action would not be gone on with. The fact of the matter is that there was no agreement to that effect; isn't that correct? A. No agreement?

Q. Will you just answer the question; you have just said that the answer is no; the answer which I have just read: "We discussed it at various times, but there was never a definite settlement made."

Now is that correct, that there was no definite settlement made?

A. Well, there was no formal document drawn up; there was a definite understanding.

Q. There was a definite understanding, but no definite settlement made; what do you mean by "no definite settlement made"?

A. Well, there was no cash transaction, immediate cash transaction involved, and my paying anything to John Hourigan, but there was a clear-cut and definite understanding, but no formal document drawn up.

Q. What is the meaning of this: "There was never a definite settlement made"?

A. That is what I mean by that, there was no formal document, nothing of that character; there was a definite understanding.

Q. But, you say, there was a definite understanding.

A. Very definite.

Q. But it didn't amount to a settlement?

A. Well, absolutely, yes. The understanding was the settlement.

Q. So that when you answered "We discussed it at various times, but there was never a definite settlement made," you didn't mean just what that implies?

A. Well, it means just what it implies, depending on the interpretation; there was no document drawn up, but there was a definite understanding.

Q. Was the action dismissed? A. The Court action?

Q. Was the action that was then pending when you were having those discussions with Hourigan, that is, after the arbitration agreement was drawn, was the action ever dismissed?

A. Well, that was a part of the understanding, and Hourigan and I got together before the arbitration in order that we could make some disposition of the case, then on the understanding that it would be withdrawn from Court.

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On this all important point, the trial judge found that the arrangement was made as testified to by Cox in the witness box, saying in the course of his judgment, delivered immediately after the trial:—

> Now, in this examination, in 1937, Cox made this statement: It is to be found on page 2, question 10 of this examination, that the date of the agreement between him and John O. Hourigan, was on December 12th, 1927; the question was asked, "Did you and Mr. Hourigan ever make a settlement," or words to that effect, and Cox said, "We discussed it at various times, but there never was a definite settlement made." Cox was pressed on that, and he said in his evidence something to this effect, that what he meant by that, (and this was in cross-examination, I think) was that no formal document was ever drawn up; but that there was a clear-cut understanding or agreement. On the evidence I find that there was that understanding between Cox and Hourigan;

The Court of Appeal took the view that this finding was not justified but this was peculiarly a matter of the credibility of Cox and one as to which the trial judge was in the best position to decide. This Court had to consider the duty of an appellate court in dealing with findings of a trial judge in *Lawrence* v. *Tew* (1), where the most recent cases upon the subject are considered.

It appears that in addition to referring to Cox's examination-in-chief and that part of his cross-examination mentioned above, the Court of Appeal relied on two affidavits made by Cox, for use on a motion by him in the second action brought by George F. Hourigan, proceedings in which had been stayed. Mr. Justice Fisher states that "all affidavits and cross-examinations were filed as exhibits at the trial." The question as to whether this was an error was discussed at bar, and after Mr. Cassels, who had not been at the trial, had telephoned to Mr. McComber, we determined, after a very complete argument, that the affidavits referred to were not put in as evidence at the trial, that they were not in point of law before the Court of Appeal, and that they could not be used. It appears advisable to indicate the reasons for this conclusion.

Mr. W. F. Langworthy was called as a witness for the plaintiff. He had acted as solicitor for George F. Hourigan in connection with the attempted arbitration and had issued the writ in the second action. He testified:—

> Q. Well then, what was the next step that you took on behalf of the Plaintiff?

(1) [1939] 3 D.L.R. 273.

A. The next step was I issued a writ on the 26th of September, 1936, at the suit of George F. Hourigan against Charles W. Cox.

Q. And what became of that action?

A. I dropped out of it then; I don't know what happened after that.

Q. This is the writ you referred to?

A. That is the original writ, affidavit of service, and so on.

His LORDSHIP: That will be Exhibit No. 28.

Exhibit No. 28: Writ, affidavit of service and so on.

Q. And do you know anything more about this matter? A. No, I don't know anything more; I dropped out then.

Mr. PARKINSON: No questions.

The only importance of Mr. Langworthy's evidence at that point was that the writ in the second action was issued on September 26th, 1936, and notwithstanding the words "and so on" the registrar of the trial court, in making up the list of exhibits, listed as Exhibit 28 merely "Original writ and Proof of Service September 26, 1936," and that is all that was marked as Exhibit 28. Near the conclusion of the plaintiff's case, the following discussion occurred:—

Mr. MCCOMBER: Now, my lord, I would like to read from the examination of the defendant on his affidavit, sworn to on the 22nd of March, 1937.

Mr. PARKINSON: My lord, cross-examination on an affidavit is not examination for discovery on file, and is not admissible as part of my friend's case.

Mr. MCCOMBER: I have heard of it being read.

His LORDSHIP: You have to read the whole document.

Mr. MCCOMBER: Pardon, my lord.

His LORDSHIP: You will have to read the whole document.

Mr. MCCOMBER: Well, then, I will file the whole document. This was the regular court reporter, Miss McBrady, who takes all the evidence here, my lord.

His LORDSHIP: I suppose she is still here.

Mr. MCCOMBER: Well, she is not here today.

His LORDSHIP: You see, it can only go in as admissions that he made, and someone that heard him make the admissions would have to come and swear that they heard them.

Mr. MCCOMBER: Mr. Cox is going to take the witness box.

Mr. PARKINSON: I know, but I don't want to be left in that position.

His LORDSHIP: You said there was no examination for discovery.

Mr. MCCOMBER: Yes, just a few weeks ago.

His LORDSHIP: Well, isn't that here?

Mr. MCCOMBER: Yes, it is here.

His LORDSHIP: Well, doesn't that cover the points in his affidavit?

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Mr. McCOMBER: No. This examination I refer to was held in March, 1937.

His LORDSHIP: Well, show me the rule that says you can use it.

Mr. McCOMBER: I would like to be understood to be anxious to file it, or to read it into the record.

His LORDSHIP: But that is not the point.

Mr. ROEBUCK: You can read it as soon as Mr. Cox goes in the box.

When the defendant was in the box that part of his cross-examination on his affidavit, sworn to March 22nd, 1937, referred to, was read to him. No other cross-examination or affidavit was referred to and now that the matter has been fully investigated, it is clear that the affidavits which must have been sent to the Registrar of the Court of Appeal in error were never part of the evidence at the trial.

A cause of action arising from the breach of a contract may be discharged by accord and satisfaction and this need not be in writing or under seal even where the original contract was under seal. *Blake's Case* (1); *Steeds* v. *Steeds* (2). It has been held by the Court of Appeal in England in *British Russian Gazette and Trade Outlook Ltd.* v. *Associated Newspapers Ltd.* (3), that where accord and satisfaction consisted in mutual promises there would be "satisfaction" in law even if the party who was to be released did not fulfil his promise. It is not here necessary to express any opinion upon that point, as Cox not only made the promise but executed it. Accord and satisfaction having been proved by testimony which the trial judge believed, we can find no ground upon which that finding may be set aside.

It was urged, however, that Cox's evidence required corroboration under section 11 of *The Evidence Act*, R.S.O., 1937, chapter 119:—

> In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment, or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

George F. Hourigan being treated as explained above, as having secured by assignment from the administrators of John O. Hourigan the right to sue, he is an assign within the meaning of the section. In *McDonald* v. *McDonald*

(1) (1605) 6 Co. Rep. 43 B. (2) (1889) 22 Q.B.D. 537.
(3) [1933] 2 K.B. 616.

(1) and *Thompson* v. *Coulter* (2), this Court established that corroboration must be evidence of a material character supporting the case to be proved but it may be afforded by circumstances. The working out of this rule is exemplified in the numerous cases in Ontario, to which our attention has been called.

In the present case, John O. Hourigan took no steps to arbitrate the claim after the six months' period mentioned in the arbitration agreement had expired; he made no demand of any kind upon Cox; his administrators made no claim; the assignment by the administrators (of whom George F. Hourigan was one) of what is described as non-liquid assets, made no reference to it and it was only in 1935 that George F. Hourigan presented a claim; W. T. McEachern, a former president of James Horrigan Company, Limited, whose evidence was taken *de bene esse* on behalf of the plaintiff, testified on cross-examination that John O. Hourigan had been anxious to retain Cox's business with Marks & Co.; and the respondent himself testified that Cox did continue to deal with Marks & Co. as long as it continued in business. In these facts and circumstances is found ample corroboration of the defendant's testimony that the arrangement he pleads was actually made and his promise fulfilled.

The appeal will be allowed and the judgment at the trial restored, with costs throughout.

The judgment of Davis and Hudson JJ. was delivered by

DAVIS J.—On December 27th, 1919, the appellant entered into an agreement under seal with the respondent company whereby he acquired the right to cut pulpwood on the company's timber limits near Port Arthur, Ont., during the cutting season 1919-1920. The appellant did in fact cut and remove a large quantity of the standing timber under the terms of the agreement but nothing turns on this appeal upon the pulpwood end of the agreement. The said agreement, however, had provided that the company would allow the appellant the use, free of any rental charge, of any part of its plant and equipment usually used in cutting and towing operations. Such plant and equipment as was taken was to be returned to the com-

(1) (1903) 33 Can. S.C.R. 145. (2) (1903) 34 Can. S.C.R. 261.

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pany on or before June 16th, 1920, in the same condition and state of repair as the same was on the 1st day of September, 1919, less ordinary wear and tear; except that the booms and boom chains were to be returned as soon as the appellant had no further use for them in connection with his operations for the season 1919-1920. The plant and machinery was checked by the parties and an inventory thereof was made and attached to the agreement. Some 2,500 or more separate articles were listed in the inventory. The appellant admits that he took some but not a substantial portion of the plant and equipment and says he returned in due course that which he took, except a portion thereof which he was prohibited from returning by a notice served upon him by the Department of Lands and Forests of Ontario which made some claim at the time against the respondent company in respect of its Crown timber licences. The respondents say that the appellant took all the plant and equipment and did not return any of it.

The writ in this action, whereby the respondent company sought damages for the alleged failure of the appellant to return the plant and equipment, was not issued until October 18th, 1927. The claim became assigned by the company to John O. Hourigan on March 7th, 1928, and the latter died intestate on December 5th, 1930. The respondent George F. Hourigan, a brother of John O. Hourigan then deceased, as next of kin and as assignee of the other next of kin (a brother and two sisters), obtained on March 6th, 1937, an order of revival to proceed in his own name with the action. The action finally got down to trial in May, 1939. Urquhart J., the trial judge, dismissed the action with costs. On appeal the Court of Appeal for Ontario on February 16th, 1940, set aside the judgment at the trial and directed a reference to the Local Master at Port Arthur to take an account "of what, if anything, is due" to the respondent in respect of the claim for breach of contract to return the plant and equipment. The present appellant (defendant) then appealed to this Court.

If this appeal is dismissed it means that the Local Master at Port Arthur will be required to commence an inquiry to ascertain, (1) what part or parts of the said plant and equipment were taken by the appellant during

the cutting season 1919-1920; (2) what part or parts so taken were not returned to the company on or before June 16th, 1920, except as to the booms and boom chains, and as to those, what booms and boom chains that were taken were not returned as soon as the appellant had no further use for them in connection with his operations for the season 1919-1920; (3) the value of the part or parts taken and not so returned as the same stood on September 1st, 1919, less ordinary wear and tear.

What an inquiry this would be after so many years! I pick at random a few of the articles listed in the inventory merely to indicate the nature of such an inquiry: 9 sets of heavy team harness, 2 sets of driving harness, 17 horse collars, 17 sets of heavy log sleighs, 613 boom chains, 219 pairs of blankets, 26 lanterns, 28 lamps, 26 snow shovels, 1 blacksmith outfit (44 pieces), 107 granite plates, 106 granite tea cups, 6 enamel pails, 16 galvanized pails, 16 bread pans, 142 knives, 135 forks, 114 table spoons, 128 large spoons, 69 tea spoons, 16 wash basins, 19 milk jugs, 21 single bitted axes, 34 double bitted axes.

The law is well employed when it puts an end to such an inquiry being commenced after the lapse of over 21 years. Had the reference been directed at the trial, as the Court of Appeal thought it should have been, that was 19 years after the alleged breach. The appellant testified that he had settled the action years ago with the deceased Hourigan, and this evidence was accepted by the learned trial judge, who accordingly dismissed the action. While laches may not be a defence to a common law action, such delay as occurred here, taken with the numerous facts and circumstances related at the trial, tends in itself to make very probable the statement of the appellant that he had settled the claim with Hourigan years ago.

I should allow the appeal and restore the trial judgment dismissing the action, with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Roebuck, Bagwell, McFarlane, Walkinshaw & Armstrong.*

Solicitors for the respondent: *McComber & McComber.*

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* Feb. 5, 6.
* April 22.

LOUIS GONZY AND REMO BACEDA (PLAINTIFFS) ..... } APPELLANTS;

AND

JAMES LEES (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Automobile—Negligence—Collision—Minor son of owner driving car—Solely responsible for accident—Statutory liability of owner—"Living with and as a member of the family of the owner" in section 74A (1) of the Motor Vehicles Act—Meaning of "living with"—Owner temporarily absent from home in another province—Son forbidden to drive by the father—Liability as owner under section 74A different from responsibility of parent or guardian under section 45—Motor Vehicle Act, R.S.B.C., 1936, c. 195, section 45, and section 74A as enacted by B.C. statutes, 1937, c. 54, s. 11.

In an automobile collision, the son of the owner of one of the cars was driving it, and the trial judge held that he was solely responsible for the accident, which finding of facts was concurred in by the appellate court. The son, about seventeen years of age, was living with his parents on their farm, and he had no driver's licence. About one month prior to the accident the father went to Alberta on business and did not return until after the accident; and, before leaving, he gave instructions to his son not to use his automobile outside of the farm. In an action for damages the occupants of the other car recovered judgment against the father, the respondent; but the Court of Appeal dismissed the action on the ground that, during the father's absence, his son, the driver, was not "living with and as a member of the family of" the respondent within the meaning of section 74 (*a*) of the *Motor Vehicle Act* of British Columbia.

Held, reversing the judgment of the Court of Appeal (55 B.C.R. 350; [1940] 3 W.W.R. 81), that the father, respondent, was liable: during the latter's temporary absence from his home, his son had not ceased to live "with and as a member of" his family within the meaning of the above section. In such case, the driver is deemed to be the agent of the owner and the consent of the latter is immaterial.

As to the respondent's contention that section 45 of the Act (enacted before section 74A) makes the parent or guardian liable only when the automobile has been *entrusted* to the minor by the parent or guardian,

Held that the liability of the respondent as *owner* under section 74A does not disappear because all the conditions of section 45 do not exist. If the automobile had been entrusted to the son by his father, the respondent would then be liable as father under section 45 and as owner under section 74A. In the present case, the respondent is liable not because he is a father who has entrusted *an* automobile to a minor child, but because *his* automobile was driven by a "person * * * living with and as a member of" his family.

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

Section 74A deals with the liability of an owner, an entirely different thing from the responsibility of a parent or guardian, irrespective of ownership, which is dealt with in section 45.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Murphy J. and dismissing the appellants' action for damages arising out of an automobile collision.

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

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

C. W. Hodgson for the respondent.

The judgment of the Chief Justice and of Rinfret and Taschereau JJ. was delivered by

TASCHEREAU J.—The appellants brought action against the respondent as a result of an automobile accident which happened on the highway between Vancouver and Chilliwack on September 30th, 1939. The Supreme Court of British Columbia maintained the action, but the Court of Appeal (1) held that the defendant who is the respondent before this Court could not be held liable for the negligence of his minor son, George, who was driving one of the automobiles, and allowed the appeal, dismissing the action.

There can be no doubt that the sole and determining cause of the accident was the negligence of George Lees, son of the defendant, in attempting to pass a motor car by driving on the wrong side of the road, when the appellants' oncoming car was so close that a collision was inevitable.

The trial judge adopted these views which have not been found erroneous by the Court of Appeal (1), and I see no valid reasons why this finding of facts should be set aside.

The learned judges of the Court of Appeal dismissed the action on the ground that George Lees at the time of the accident was not "living with and as a member of the

(1) (1940) 55 B.C.R. 350; [1940] 3 W.W.R. 81; [1940] 4 D.L.R. 330.

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family of the defendant." They based their contention on section 74A of the *Motor Vehicle Act* which reads as follows:—

74A. (1) In an action for the recovery of loss or damage sustained by any person by reason of a motor-vehicle on any highway, every person driving or operating the motor-vehicle who is living with and as a member of the family of the owner of the motor-vehicle, and every person driving or operating the motor-vehicle who acquired possession of it with the consent, express or implied, of the owner of the motor-vehicle, shall be deemed to be the agent or servant of that owner and to be employed as such, and shall be deemed to be driving and operating the motor-vehicle in the course of his employment; but nothing in this section shall relieve any person deemed to be the agent or servant of the owner and to be driving or operating the motor-vehicle in the course of his employment from the liability for such loss or damage.

This section which was enacted in 1937 clearly stipulates that the owner cannot escape liability when the person driving the automobile "is living with and as a member of the family of the owner." In such a case, the driver is deemed to be the agent of the owner and the consent of the latter is immaterial. This consent to the possession of the automobile by the driver is a necessary element to create liability, only when such driver is the person mentioned in the second part of the section.

The evidence reveals that at the time of the accident the respondent had gone to Alberta on a business trip where he expected to spend a few months, and the Court of Appeal held that during this absence, his son, George Lees, the driver, was not living with and as a member of the family of the respondent within the meaning of section 74A.

With respect, I cannot agree with these views and I cannot come to the conclusion that during the period of the temporary absence of the defendant from his home, the wife and son of the defendant had ceased to live with and as members of his family. On this ground, the contention of the respondent cannot prevail, and I fail to see how he can escape liability.

But the respondent now invokes section 45 of the *Motor-Vehicle Act,* which says:—

45. In case a minor is living with or as a member of the family of his parent or guardian, the parent or guardian shall be civilly liable for loss or damage sustained by any person through the negligence or improper conduct of the minor in driving or operating on any highway a motor-vehicle entrusted to the minor by the parent or guardian; but nothing in this section shall relieve the minor from liability therefor.

In every action brought against the parent or guardian of a minor in respect of any cause of action otherwise within the scope of this section, the burden of proving that the motor-vehicle so driven or operated by the minor was not entrusted to the minor by the parent or guardian shall be on the defendant. 1935, c. 50, s. 45.

The respondent's contention is that this section makes the parent or guardian liable only when the automobile has been *entrusted* to the minor by the parent or guardian. It is true, and there is evidence that the respondent before leaving for Alberta had given instructions to his son not to use his automobile, and it is argued that such being the case, the automobile had not been entrusted to the minor son.

Section 45 was enacted before section 74A and until the latter was introduced in the Act, there was no text of law imposing a liability upon the owner of an automobile driven by another person. This liability attached by section 45 to the parent or guardian is irrespective of *ownership,* and exists when the automobile is entrusted by one of them to the minor. If the respondent had not been the owner of the car, section 45 could be of some help to him but such is not the case. The responsibility created by section 74A enacted in 1937, has its very foundation on ownership. This section covers a much wider field than section 45, and applies to every person even to the parent or guardian when they happen to be owners of automobiles and when the driver lives with and as a member of the family.

In the present case, the respondent is liable not because he is a father who has entrusted *an* automobile to a minor child, but because *his* automobile was driven by a person living with and as a member of his family.

If the automobile had been entrusted to George Lees by his father, the respondent would then be liable as father under section 45, and as owner under section 74A, but it cannot be said that the liability as owner under section 74A disappears because all the conditions of section 45 do not exist.

It would be strange if it were otherwise, and if we were to construe these two sections as suggested by the respondent. As pointed out by Mr. Farris K.C. for the appellant, a father owner of an automobile would not be liable for the negligence of his minor son of twenty years of age, living with or as a member of his family, unless the

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car were entrusted to the son by the father, but the following year, when the son has reached the age of majority, such liability would exist. This is surely not the letter nor the spirit of the law.

For these reasons, I am of opinion that the appeal should be allowed, and that the judgment of the trial judge should be restored with costs throughout.

KERWIN J.—On September 30th, 1939, while in a motor car on a highway in British Columbia, the appellants were injured, and the motor car in which they were driving was damaged, by coming into collision with a motor car driven by George Lees. George Lees was a young man seventeen years of age, who did not have a permit to drive but who, at the time, was driving a motor car owned by his father, James Lees, the respondent in this appeal. The accident was found by the trial judge to be due to the negligence of George Lees and judgment was given for the appellants against the respondent. On appeal, the finding of negligence was confirmed but the three members of the Court of Appeal being of opinion that no liability attached to the respondent, set aside the judgment and dismissed the action.

The question as to the respondent's liability depends upon the construction of subsection 1 of section 74A of the British Columbia *Motor Vehicle Act,* R.S.B.C., 1936, chapter 195, as enacted by section 11 of chapter 54 of the statutes of 1937, which subsection reads as follows:—

> In an action for the recovery of loss or damage sustained by any person by reason of a motor-vehicle on any highway, every person driving or operating the motor-vehicle who is living with and as a member of the family of the owner of the motor-vehicle, and every person driving or operating the motor-vehicle who acquired possession of it with the consent, express or implied, of the owner of the motor-vehicle, shall be deemed to be the agent or servant of that owner and to be employed as such, and shall be deemed to be driving and operating the motor-vehicle in the course of his employment; but nothing in this section shall relieve any person deemed to be the agent or servant of the owner and to be driving or operating the motor-vehicle in the course of his employment from the liability for such loss or damage.

Our attention was not called to any provision in the earlier Motor Vehicles Acts of the province imposing civil liability upon the owner of a motor vehicle, such liability apparently depending upon the general law. By section

12 of chapter 44 of the 1926-27 Statutes, section 18A was added to the then Act (R.S.B.C., 1924, c. 177). This section is as follows:—

> So long as a minor is living with or as a member of the family of his parent or guardian, the parent or guardian shall be civilly liable for loss or damage sustained by any person through the negligence or improper conduct of the minor in driving or operating a motor-vehicle on any highway; but nothing in this section shall relieve the minor from liability therefor.

In 1929, by section 7 of chapter 44, this section was amended by striking out the words "a motor vehicle on any highway" and substituting therefor "on any highway a motor vehicle entrusted to the minor by the parent or guardian."

As thus amended this provision in substance is now found as section 45 in the Revised Statutes of 1936. This section seems to impose a liability upon a parent or guardian under the conditions therein set forth, irrespective of whether or not the appellant or guardian was the owner. Section 74 deals with the responsibility of the owner for any violation of the Act, etc., by any person entrusted by the owner with the possession of a motor vehicle. Then, in 1937, came section 74A, subsection 1 of which is quoted above. This subsection deals with the responsibility of the owner for the acts of "every person driving or operating the motor vehicle, who is living with and as a member of the family of the owner of the motor vehicle, and every person driving or operating the motor vehicle who acquires possession of it with the consent, express or implied, of the owner."

In my view, the legislature, by its latest enactment, was dealing with the responsibility of an owner, an entirely different thing from the responsibility of a parent or guardian irrespective of ownership. Even if that were not so, I would be disposed to think that the 1937 legislation treats alike every person living with and as a member of the family of the owner of a motor vehicle, whether that person was or was not a minor.

In the present case, George Lees was certainly living as a member of his father's family in British Columbia and in my view he was also living with his father even though the latter was absent for a short time in Alberta. It is undoubted that the father resided in British Columbia and

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Kerwin J.

that his home was with the members of his family. With respect I consider that he was living with them, and that his son was living with him, notwithstanding his temporary absence. The fact that the father prohibited the son from driving or operating the car on the highway is immaterial as the acquiring possession of it, with the consent, express or implied, of the owner, does not apply to one who was living with and as a member of the family of the owner.

I would not interfere with the finding of negligence by the trial judge, concurred in by the Court of Appeal and the appeal should therefore be allowed and the judgment at the trial restored with costs throughout.

HUDSON J.—This action was brought for damages for personal injuries sustained by the plaintiffs in an automobile accident. A motor car driven by a son of the defendant, George Lees, collided with the car driven by the plaintiffs. It was alleged that George Lees was the agent or servant of the defendant and, further, that the defendant

> was the owner of the motor car driven by the said George Lees and that the said George Lees was then living with and as part of the family of the said defendant and had acquired possession of the said motor car with the consent of the defendant.

The trial judge held that the accident was due to the negligence of George Lees and that the car was the property of the defendant and that George Lees, his son, was then living with and as part of his family.

It appeared from the evidence that George Lees was driving the car without the consent of his father and probably against his express wishes. The trial judge gave judgment to the plaintiffs, holding that the defendant was liable under the provisions of section 74A of the *Motor Vehicle Act,* R.S.B.C., 1936, as amended by 1937, chapter 54, section 11.

On appeal the Court of Appeal reversed this decision and held that the defendant was not liable under the section which reads as follows:—

> In an action for the recovery of loss or damage sustained by any person by reason of a motor vehicle on any highway, every person driving or operating the motor vehicle who is living with and as a member of the family of the owner of the motor vehicle, and every person driving or operating the motor vehicle who acquired possession of it with the consent, express or implied, of the owner of the motor

vehicle, shall be deemed to be the agent or servant of that owner and to be employed as such, and shall be deemed to be driving and operating the motor vehicle in the course of his employment; but nothing in this section shall relieve any person deemed to be the agent or servant of the owner and to be driving or operating the motor vehicle in the course of his employment from the liability for such loss or damage.

It is no longer in question that the plaintiffs suffered loss or damage by reason of a motor vehicle on a highway, that such motor vehicle was owned by the defendant and driven by his son and that the accident was caused by the son's negligence. Nor is it open to doubt that the defendant's son was a member of his family.

Two of the learned judges in appeal thought the son was not living with the defendant within the meaning of the statute and, for that reason, excused him. With respect, I cannot agree with this view.

It is unnecessary for me to repeat the evidence which has already been set out by the other members of the court, but I think that any reasonable interpretation of the language "living with" would bring the defendant's son and the defendant within the provisions of this section. It was the family home where father, mother and children all normally resided and mere temporary absences did not in my opinion alter the situation.

There is another point which raises a more difficult question. In the *Motor-Vehicle Act* which is incorporated in the Revised Statutes of British Columbia, 1936, there is a section 45 which reads as follows:—

In case a minor is living with or as a member of the family of his parent or guardian, the parent or guardian shall be civilly liable for loss or damage sustained by any person through the negligence or improper conduct of the minor in driving or operating on any highway a motor vehicle entrusted to the minor by the parent or guardian; but nothing in this section shall relieve the minor from liability therefor. In every action brought against the parent or guardian of a minor in respect of any cause of action otherwise within the scope of this section, the burden of proving that the motor vehicle so driven or operated by the minor was not entrusted to the minor by the parent or guardian shall be on the defendant.

and this section has not been specifically repealed.

It is argued that section 45, dealing with a particular and more limited class, shoud be construed as if still applying to cases like the present and be thereby excluded from the provisions of 74A, which was introduced into the Act at a later date.

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Hudson J.

It should be noted that section 74A deals with the liability of owners and that 45 deals with the liability of parents, whether they be owners or not. Section 45 creates a liability where the motor vehicle has been "entrusted" by the parent to the person driving at the time of the accident. Section 74A is not inconsistent with 45 but more comprehensive, enlarging the liability, and it should be noted too that in the latter part of the section it deals with entrustment, and such entrustment is to persons other than a child or person living with the possessor.

In my opinion section 74A covers the case and the defendant is liable. I would reverse the decision of the Court of Appeal and restore the judgment at trial, with costs throughout.

Appeal allowed with costs.

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

Solicitors for the respondent: *Sullivan & McQuarrie.*

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* March 26.
* April 22.

HIS MAJESTY THE KING.....APPELLANT;

AND

ROBERT A. BRADLEY .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Crown—Alleged use by Crown of patented invention—Right of patentee to compensation—Patent Act, 1935 (Dom., c. 32), s. 19—Right of patentee to a reference by the Crown to Commissioner of Patents to fix compensation—Procedure by Petition of Right to enforce rights—Exchequer Court Act (R.S.C., 1927, c. 34), ss. 18, 37; Petition of Right Act (R.S.C., 1927, c. 158), ss. 2 (c), 10—Nature of relief granted—Form of judgment.

If a patentee has a valid patent and his invention has been used by the Crown within the meaning of s. 19 of the *Patent Act, 1935* (Dom., c. 32), then he has a legal right under s. 19 to be paid by the Crown reasonable compensation, as ascertained and reported by the Commissioner of Patents, subject to the appeal provided for; also, by necessary implication under s. 19, the patentee has the right to have the question of the compensation referred by the Crown to the Commissioner. A petition of right lies in the Exchequer Court to enforce these rights (*Exchequer Court Act*, R.S.C., 1927,

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

c. 34, ss. 18, 37, and *Petition of Right Act*, R.S.C., 1927, c. 158, ss. 2 (*c*), 10, considered). A claim for a declaration of the patentee's rights as above (supported by sufficient allegations of facts), is a claim for "relief" within the meaning of s. 2 (*c*) of the *Petition of Right Act* (defining "relief") and of s. 18 of the *Exchequer Court Act*. The relief granted (on establishment of the necessary facts) would be a declaration of said rights (*Attorney-General of Victoria* v. *Ettershank*, L.R. 6 P.C. 354; *Dominion Bldg. Corp.* v. *The King* [1933] A.C. 533, at 548; *Attorney-General* v. *De Keyser's Royal Hotel*, [1920] A.C. 508, cited). Judgment granting such relief is not a mere declaratory judgment in any pertinent sense; it is a judgment establishing the right to appropriate relief in the only form in which that can be done in a judgment against the Crown.

Rights of the Crown, if any, under s. 46 of the *Patent Act, 1935*, should be taken into account in passing on the patentee's claim to relief.

Judgment of Maclean J., [1941] Ex. C.R. 1, affirmed (with a variation of the order in the Exchequer Court, so as to make clearer the suppliant's rights).

APPEAL by the Crown from the judgment of Maclean J., President of the Exchequer Court of Canada (1), deciding certain points of law in favour of the suppliant.

The suppliant's petition of right alleged that there had been granted to him and he was the owner of certain Canadian Letters Patent (described); that since the date of issue thereof the Crown had constructed and used in Canada the improvements embodying the invention described therein, without compensating the suppliant; that the suppliant had made requests for admission of such use and payment of compensation therefor, but the Crown denied liability; that the suppliant had applied to the Commissioner of Patents to fix compensation under s. 19 of the *Patent Act*, and the Commissioner refused to fix compensation until use of the device was first established either by admission by the Crown or by judgment of the Court; that by reason of the acts of the Crown the suppliant had suffered loss of proper compensation; and, by paragraph 6, prayed as follows:

(*a*) A declaration that the respondent has constructed and used the subject-matter of the Letters Patent No. 361,335 aforesaid.

(*b*) A declaration that the hereinbefore recited Letters Patent are good, valid and subsisting Letters Patent.

(*c*) That the Commissioner of Patents be directed under section 19 of the Patent Act, being Chapter 32 of the Statutes of 1935, to ascertain and report what shall be a reasonable compensation to the suppliant by the respondent for its said use of the said invention.

(1) [1941] Ex. C.R. 1; [1940] 4 D.L.R. 49.

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(*d*) That the respondent be condemned to pay to your suppliant the amount of compensation so found to be reasonable for the use thereof, by the Commissioner of Patents.

(*e*) Such further and other relief as the nature of the case may require and to the Court shall seem just.

(*f*) Costs.

The Crown in its statement of defence admitted receipt of communications with reference to the alleged use of certain Letters Patent; admitted applications by the suppliant to the Commissioner to fix compensation and the latter's refusal to do so until use of the device had been established by admission of the Department involved or by means of a court action; disputed the suppliant's other allegations; denied liability for compensation; alleged that any grant to the suppliant of such Letters Patent for the alleged invention was invalid for reasons set out; and raised certain other defences. It also submitted that the petition of right was insufficient and bad in substance and in law in that it did not claim any relief against the Crown or allege any facts giving rise to any liability for which the Crown was bound or might be adjudged to respond, and, moreover, that if any relief were claimed in the petition of right it was not relief for which under the law and practice a petition of right would lie.

Upon motion of the suppliant, an order was made in the Exchequer Court for hearing and disposal before trial of the following questions, as questions of law arising from the pleadings, namely:

(1) Assuming the patent in suit to be valid and the invention covered thereby to have been used by the respondent, is the suppliant entitled in law to any of the remedies claimed against the respondent in respect of the use by the respondent of the patented invention, and

(2) If so, does a Petition of Right lie to enforce such remedy or remedies?

Maclean J. held that the law points submitted for decision must be determined in the affirmative. The formal order provided:

THIS COURT DOTH ORDER AND ADJUDGE that the first question of law as above set out be answered in the affirmative with respect to the remedies claimed in sub-paragraphs (*a*) and (*b*) of paragraph 6 of the Petition of Right herein.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the second question of law as above set out be and the same is hereby answered in the affirmative.

Leave to appeal to the Supreme Court of Canada was granted to the Crown by a Judge of this Court.

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

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

The judgment of the Court was delivered by

THE CHIEF JUSTICE—This appeal raises two questions, a question of substantive law and a question of procedure. The question of law concerns the construction and effect of section 19 of the *Patent Act,* which is in these terms:—

> The Government of Canada may, at any time, use any patented invention, paying to the patentee such sum as the Commissioner reports to be a reasonable compensation for the use thereof, and any decision of the Commissioner under this section shall be subject to appeal to the Exchequer Court.

On behalf of the Crown it is contended that payment under this section is a payment *ex gratia* and that the patentee has no legal right to demand it. It is no disparagement of the argument of counsel on behalf of the Crown to say that, in my opinion, it is very clear that the words "paying to the patentee such sum as the Commissioner reports to be a reasonable compensation for the use thereof" vest in the patentee a legal right.

In my view of section 19, if the conditions under which the section comes into operation are fulfilled, that is to say, if the patentee has a valid patent and his invention has been used by the Crown in the sense of the section, if these conditions subsist then the patentee has the right to be paid by the Crown reasonable compensation, as ascertained and reported by the Commissioner, subject, of course, to the appeal provided for. This involves necessarily the right to have such compensation ascertained and reported. I think, moreover, that the section contemplates a reference of the question of compensation by the Crown to the Commissioner and, accordingly, by necessary implication, that he has the right to have that question referred. I have come to this conclusion apart from the contention of Mr. Fox that under the patent law of Canada a patentee becomes invested with the right to use by himself and his licensees his invention to the exclusion of the Crown, as well as of others. That contention raises a very important question and, I very humbly think, a question of some

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Duff C.J.

difficulty, upon which it seems inadvisable to express any opinion until a case arises in which it appears to be necessary to decide it.

So much for the respondent's substantive rights. I have no doubt that a Petition of Right lies in the Exchequer Court to enforce these rights. The sections with which we are immediately concerned are sections 18 and 37 of the *Exchequer Court Act*, and sections 2 (*c*) and 10 of the *Petition of Right Act*, chap. 158, R.S.C., 1927. They are as follows:—

The Exchequer Court Act

18. The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown.

37. Any claim against the Crown may be prosecuted by petition of right, or may be referred to the Court by the head of the department in connection with the administration of which the claim arises.

2. If any such claim is so referred no *fiat* shall be given on any petition of right in respect thereof.

The Petition of Right Act

2. (*c*) "relief" includes every species of relief claimed or prayed for in a petition of right, whether a restitution of any incorporeal right or a return of lands or chattels, or payment of money, or damages, or otherwise.

10. The judgment on every petition of right shall be that the suppliant is not entitled to any portion, or that he is entitled to the whole or to some specified portion of the relief sought by his petition, or to such other relief, and upon such terms and conditions, if any, as are just.

Section 18 is very broadly expressed. It may be of historical interest to notice that in the form in which it first appeared (section 75 (2) of chap. 135, of the Consolidated Statutes of 1886) the words were

in all cases in which demand is made or relief sought in respect of any matter which might, in England, have been the subject of a suit or action in the Court of Exchequer on its revenue side against the Crown.

It was in the Statute of 1887 that the present section 18 assumed its present form as section 15 of that Statute, and section 37 as section 23. These sections simplify the procedure in the Exchequer Court in relation to petitions of right. Section 18 extends the jurisdiction of the Court

to all those cases in which, the interests of the Crown being directly concerned, a bill could be filed, pursuant to a *fiat*, in the Court of Chancery as well as in the Exchequer, against the Attorney-General as representing the Crown, or in which he could be made a party. The jurisdiction and practice of the Court of Chancery in this respect did not differ from the equity jurisdiction and practice of the Court of Exchequer, as is fully explained by Lord Buckmaster in his judgment in *Esquimalt and Nanaimo Railway Co.* v. *Wilson* (1) in the Judicial Committee.

I must not be understood as intimating an opinion that section 18 gives the Exchequer Court jurisdiction to entertain a proceeding such as that in *Dyson* v. *Attorney-General* (2), where an action was brought against the Attorney-General in the ordinary way without a *fiat* and the claim was only for a declaration that the plaintiff was under no obligation to comply with the provisions of a notice issued by the Commissioners of Inland Revenue; and no relief in respect of money, or property, or incorporeal right was claimed against the Crown. I shall refer more particularly to this class of action presently.

I do not think there is any real processual difficulty in the way of the suppliant in respect of the relief which this petition of right claims in substance. When the whole of paragraph 6 is read, the relief claimed in substance is a declaration that the respondent is entitled to be paid reasonable compensation for the use of his invention under section 19 of the *Patent Act*. There is a prayer for further and other relief and the facts alleged are sufficient to support such a claim. Amendment of paragraph 6 could only be in point of form and I think it unnecessary. If it were necessary, it should be made. Such a claim, I have no doubt, is a claim for "relief" within the meaning of the definition of relief quoted above from the *Petition of Right Act* and within the meaning of section 18 of the *Exchequer Court Act*. In the nature of things the Court does not and cannot make a mandatory order against the Crown; but the Court can and does declare the rights of the suppliant as between the suppliant and the Crown in cases of specific performance. This is well illustrated in *The Attorney-General of Victoria*

(1) [1920] A.C. 358. (2) [1911] 1 K.B. 410.

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v. *Ettershank* (1), where the claim to relief was based upon a statutory provision which gave to the lessees of Crown lands the right on certain conditions to acquire a title in fee simple to their allotments. The Crown had contended that the lease was forfeited, and judgment was given on the petition of right declaring that the suppliant was entitled to the benefit of the lease and to the right of purchasing the fee simple of the land, provided he paid the rent due within three months. The statutory provision was treated as introducing a statutory term into the lease. Such a judgment is a declaration that the suppliant is entitled to the relief of specific performance. The subject's right to relief is declared by the Court in full assurance that the Crown will give effect to the right so declared. In the Judicial Committee Sir Montague Smith in *Attorney-General of Victoria* v. *Ettershank* (1) referred to a judgment as a decree for specific performance. Lord Tomlin's observations to a similar effect in *Dominion Bldg. Corp.* v. *The King* (2) merely stated the settled and well understood practice.

This, of course, is a vastly different thing from a judgment such as that in *Dyson* v. *Attorney-General* (3) (*supra*), which does not declare or decide that the subject is entitled to have something done in order to give effect to his legal rights as against the Crown, or that he is entitled to property or some interest therein, or to the possession thereof. The proceeding by petition of right is not applicable to such a claim as that in question in *Dyson* v. *Attorney-General* (3). Such a proceeding is only competent where a petition of right does not lie. (*Esquimalt and Nanaimo Rly. Co.* v. *Wilson* (4)). It should not be overlooked that the Board in that case gave only a limited approval to the decision in *Dyson's* case (3); as to one incidental point.

The validity, in my view of the effect of section 19, of the suppliant's claims in substance, on the facts stated, is conclusively established by the *Attorney-General* v. *De Keyser's Royal Hotel* (5). In that case, as Lord Moulton said at p. 551, the acquisition having been made under the *Defence Act, 1842,* "the suppliants are entitled

(1) (1875) L.R. 6 P.C. 354.
(2) [1933] A.C. 533, at 548.
(3) [1911] 1 K.B. 410.
(4) [1920] A.C. 358, at 364, 365, 367, and 368.
(5) [1920] A.C. 508.

to the compensation provided by that Act." Lord Parmoor explained at p. 580 that in an ordinary case, under the Lands Clauses Acts, when promoters enter into possession of lands in conformity with their statutory rights, and delay or refuse to put in force the necessary procedure for the assessment of compensation in default of agreement, the remedy is by mandamus. That remedy, as he observed, would not be applicable against the Crown; and, as Lord Dunedin says at p. 531, Petition of Right does no more than enable the subject to sue the Crown in such a case. The declaration of the Court of Appeal, to which no exception was taken, was in these words:—

> And this Court doth declare that the Suppliants are entitled to a fair rent for use and occupation of De Keyser's Royal Hotel on the Thames Embankment in the City of London by way of compensation under the Defence Act, 1842.

The respondent is, assuming the invention has been used within the meaning of section 19 and his patent is a valid patent, entitled to reasonable compensation, pursuant to the terms of that section, and if the facts are established he is entitled to judgment to that effect. Such a judgment is not a mere declaratory judgment in any pertinent sense. It is a judgment establishing his right to appropriate relief in the only form in which that can be done in a judgment against the Crown.

I find myself in difficulty, however, with regard to the formal order made in the Court below. It seems to decide that the respondent could be entitled and only entitled to a judgment in the sense of sub-paragraphs (*a*) and (*b*) of clause 6 of the Petition of Right. A Petition of Right plainly would not lie for claims limited to paragraph 6 (*a*) and (*b*) which claim no relief. I think there must have been some mistake in drawing up the order. Under such an order the suppliant is not entitled to relief in any form. It does not deal with the substance of the controversy as to his rights, which is whether, on the one hand, he has a legal right to payment on establishing the facts, or, on the other, as the Crown contends, the enactment only authorizes a payment *ex gratia*. It leaves, moreover, untouched his right to have his compensation determined in the manner prescribed, which ought to be declared, as I have explained.

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If the order as it is expressed denies him relief in respect of these matters, then it ought to be made clear that such is not its effect and that they will be dealt with at a later stage of these proceedings.

I should dismiss the appeal, subject, however, to a variation of the order of the learned trial judge, making it clear that the suppliant's right to relief under section 19 of the *Patent Act* and his right to have his claim in that respect disposed of in this action are not prejudiced by the judgment appealed from, and that the remaining questions in controversy are reserved to be disposed of later.

What I have said does not touch upon the rights of the Crown under section 46 of the *Patent Act*. In passing on the respondent's claim to relief, these rights, if any, will, of course, be taken into account.

The appeal should be dismissed with costs, subject to the reservation explained.

Appeal dismissed with costs.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitor for the respondent: *Harold G. Fox.*

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* Nov. 20, 21
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* April 4.

LEONARD LOCKHART, SUING BY HIS NEXT FRIEND, JOSEPH LOCKHART, AND THE SAID JOSEPH LOCKHART (PLAINTIFFS) ..... } APPELLANTS;

AND

R. STINSON (DEFENDANT);

AND

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Master and servant—Negligence—Servant's negligence causing injury to third person—Liability of master—Question whether servant at time of such negligence was acting in the course of his employment—Judgments—Judgment at trial for plaintiff against servant but not against master—Question whether entry of judgment and certain proceedings precluded plaintiff from recovering against master on appeal—Pleadings—Jury awarding damages exceeding amount claimed—Amendment of pleadings after verdict.

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

S., a general repair man in respondent's employ, and whose duties took him to various premises of respondent, had made a key in respondent's shops in West Toronto and was instructed by his foreman to take it to respondent's premises in North Toronto to try it in the lock for which it was intended. S. was entitled to be paid for the time occupied in such an errand. Means of transport were available for his use—vehicles which could be run on respondent's railway, and street-cars for which respondent would provide tickets. On the occasion in question no instruction was given by the foreman to S. as to mode of transportation. Notices had been given by the respondent to its employees (and brought to S.'s attention) forbidding use of privately owned automobiles in connection with respondent's business unless the owner carried insurance against public liability and property damage risks. In taking the key as aforesaid, S. drove his own automobile, in respect of which he did not have insurance, and on his way he negligently (as found by the jury at trial) struck and injured appellant. The chief question on the present appeal (treated by the trial judge as a question of law, and as to which no questions were referred to the jury) was as to respondent's liability to appellant.

Held: Respondent was liable. The question whether a master is liable for injuries caused to third persons by his servant's negligence depends upon whether under all the circumstances the servant at the time of the negligence was acting in the course of his employment, and, if he was so acting, liability attaches to the master even though the servant was doing something forbidden by the master. Upon the circumstances and facts in evidence, it must be held that S. at the time of the negligence was acting in the course of his employment within the meaning and application of the above rule.

Cases reviewed.

Judgment of the Court of Appeal for Ontario, [1940] O.R. 140 (affirming judgment of Rose, C.J.H.C., [1939] O.R. 517) reversed.

Held, further, that the facts that judgment had been entered against S. on appellant's behalf, and on behalf of his father, by whom as next friend appellant, an infant, had sued, and that his father had, in his personal capacity, taken proceedings to secure by way of attachment part of his own damages awarded against S., did not operate to end appellant's cause of action against respondent so as to nullify appellant's right of appeal.

Held, further, that though the amount of damages claimed on appellant's behalf in the statement of claim was $5,000, and no amendment was applied for until after the jury's verdict, when the trial judge allowed an amendment to cover the sum awarded, namely, $10,000, the judgment for the sum awarded should not be disturbed.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Ontario (1) dismissing their appeal from the judgment of Rose, C.J.H.C. (2) dismissing, as against the defendant Canadian Pacific Railway Com-

(1) [1940] O.R. 140; [1940] 1 D.L.R. 23.
(2) [1939] O.R. 517; [1939] 3 D.L.R. 596.

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pany, their action for damages by reason of injuries caused to the infant plaintiff when he was struck by an automobile being driven by the defendant Stinson, who was an employee of the defendant company.

At trial, before Rose, C.J.H.C., and a jury, the jury, in answer to questions submitted to them, found that the infant plaintiff's injuries were caused by negligence of Stinson, and judgment was given against Stinson for the amounts of damages found by the jury. No appeal was taken by Stinson. No question as to liability of the defendant company was left to the jury, as the trial judge considered that the facts upon which the question turned were not in dispute and that the question was one of law. He later gave judgment dismissing the action as against the company. An appeal by the plaintiffs from this judgment was dismissed by the Court of Appeal (McTague J.A. dissenting). The plaintiffs appealed to this Court.

The plaintiffs were Leonard Lockhart, an infant, suing by his next friend (his father) Joseph Lockhart, and the said Joseph Lockhart. The latter claimed on his own behalf for expenses incurred, and his damages found by the jury at the trial were $500. As this was less than the statutory amount for appeal to this Court, and as he had not obtained leave to appeal, the dismissal of his claim as against the defendant company by the trial judge, affirmed by the Court of Appeal, stands.

The material facts and circumstances of the case, with regard to the questions before this Court on the appeal, are sufficiently stated in the reasons for judgment now reported. The appeal was allowed and the infant plaintiff was given judgment against the defendant company for the amount of the jury's verdict (as of July 12, 1939, the date of the judgment of the trial judge dismissing the action as against the defendant company), with costs throughout.

D. J. Walker and *C. M. Milton* for the appellants.

W. N. Tilley K.C. and *J. Q. Maunsell K.C.* for the respondent.

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

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THE CHIEF JUSTICE—This appeal raises a question concerning the application to the facts of the case of the principle governing the responsibility of a master for the negligence of his servant.

The servant was one Stinson who was an employee of the Canadian Pacific Railway Company and who had been in the service of the Company for something like twenty-five years. He was a carpenter and his duties consisted mainly in doing repairs on the buildings and cars of the Company in Toronto and in its neighbourhood. On the day when the accident happened he had a key which, on the instructions of McLeod, his immediate superior (who is described as a bridge and building foreman), he had made for use in a lock at the premises of the Company in North Toronto. His usual place of work was at the Company's station in West Toronto and he had made the key in the shops there. He informed the foreman that it was necessary to take the key to North Toronto in order to try it in the lock, and the foreman instructed him to do so. On his way to North Toronto, driving his own automobile, he ran down the infant plaintiff, and the action was instituted by the infant and the infant's father against Stinson and the Railway Company, charging Stinson with negligence.

In the course of his duties Stinson was obliged at times to go to places in and outside of Toronto. Means of transport, it is said, were available for his use in such cases. There were vehicles which could be run on the respondent's railway and there were the street-cars by which he could travel when it was more convenient to do so. He was forbidden, it is said, to use his own car in the Company's business unless it was insured; and in any case, it is argued, he was not employed to drive an automobile and his negligence in the course of doing so was not negligence in the course of his employment.

The question is one of considerable difficulty. The best statement of the general principle is, I think, in the passages quoted from Story and adopted by Lord Macnaghten in *Lloyd* v. *Grace, Smith & Co.* (1). Lord Macnaghten's opinion is expressely concurred in by Lords Atkinson and Shaw.

I venture to quote Story's opinion, not only because it is the considered opinion of a most distinguished lawyer, but also because it is

(1) [1912] A.C. 716, at 736-737.

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cited apparently with approval in the Court of Queen's Bench, consisting of Cockburn C.J., Blackburn, Mellor, and Lush JJ., by Blackburn J. himself in a case which occurred in the interval between the date of *Barwick's* case (1) and the decision in *Houldsworth* v. *City of Glasgow Bank* (2). The passage in the judgment of Blackburn J. as reported in *McGowan & Co.* v. *Dyer* (3) is as follows: "In Story on Agency, the learned author states, in s. 452, the general rule that the principal is liable to third persons in a civil suit 'for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent *in the course of his employment,* although the principal did not authorize, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them.' He then proceeds, in s. 456: 'But although the principal is thus liable for the torts and negligences of his agent, yet we are to understand the doctrine with its just limitations, that the tort or negligence occurs in the course of the agency. For the principal is not liable for the torts or negligences of his agent in any matters beyond the scope of the agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use and benefit.'"

It does not follow that the act of the servant which is the subject of complaint is not within the class of acts for which the master is responsible because, as between the master and the servant, it constitutes a breach of the master's orders or is a "breach of authority" as defined by such orders. As Willes J. said in *Bayley* v. *Manchester* (4), the master "has his remedy against the servant for misconduct and breach of authority as between them," although a third person has his remedy against both of them. In *Whitfield* v. *Turner* (5), Knox C.J., in a judgment in which the other members of the High Court of Australia concurred, said:

> The fact that Spinney's authority to light a fire was only given to him in case of a certain emergency happening is nothing to the point. Lighting a fire was an act of a class which he had authority to do under certain circumstances. Whether the circumstances did or did not exist might be very relevant as between Spinney and his employer, but is not relevant as between his employer and the plaintiff.

In *Hamlyn* v. *Houston* (6), Collins M.R. said:

> The principal having delegated the performance of a certain class of acts to the agent, it is not unjust that he, being the person who has appointed the agent, and who will have the benefit of his efforts if successful, should bear the risk of his exceeding his authority in matters incidental to the doing of the acts the performance of which has been delegated to him.

(1) *Barwick* v. *English Joint Stock Bank,* (1867) L.R. 2 Ex. 259.
(2) (1880) 5 App. Cas. 317.
(3) (1873) L.R. 8 Q.B. 141, at p. 145.
(4) (1872) L.R. 7 C.P. 415, at 419.
(5) (1920) 28 C.L.R. 97, at 100.
(6) [1903] 1 K.B. 81, at 85-86.

In *Lloyd* v. *Grace, Smith & Co.* (1), the question to be determined was the responsibility of a solicitor for a clerk who was in charge of the conveyancing department of the solicitor's business. It was held that the solicitor was responsible for frauds involving forgery and theft committed by the servant by professing as clerk of the firm to transact business for a client. It is, of course, the essence of a solicitor's duty to his clients not only to act honestly but to act diligently in protecting the interests of his clients in the business committed to him, and loyally and faithfully in the fulfilment of any trust reposed in him. It was of the essence of the nature of the clerk's employment, who was the manager of the conveyancing branch of Mr. Smith's business and who was left by Mr. Smith in charge of that branch of the business, to observe these duties towards the clients of the firm, and this, of course, he well knew.

Instead of acting honestly and faithfully in the protection of the client's interest, he formed a design to steal the client's money and by a series of acts purporting to be in his capacity of representative of the firm as the client's solicitors he successfully executed that design.

In these circumstances it was held by the learned trial judge, and his findings were affirmed by the House of Lords, that the clerk was, in the pertinent sense of the words, acting within the scope of his employment and in the course of his agency. In point of fact the acts by which he wronged the client, although purporting to be in the course of his agency, were, as appears from what has been said, inconsistent and indeed incompatible with the essential nature of his employment; and, of course, as between himself and his principal a "breach of authority," in the phrase of Willes J.

Lloyd v. *Grace, Smith & Co.* (1) was applied by the Court of Appeal to a case in which the managing clerk dealt with persons who were not clients of the firm, with the same result. The case was held to be "precisely covered" by the earlier decision. (*Uxbridge Permanent Benefit Building Society* v. *Pickard* (2)).

If the servant commits the wrongful act, in respect of which the master is charged, within the scope and in the course of his agency (in the sense in which these words

(1) [1912] A.C. 716. (2) [1939] 2 K.B. 248.

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are used and understood in the law), then it is immaterial that he is acting, in fact, against his master's interests and for his own convenience and benefit. This is the proposition settled by the decision of the House of Lords in *Lloyd* v. *Grace, Smith & Co.* (1).

It is quite true that the servant while engaged in executing the duties of his employment may at the same time perform an act which has no relation to his employment, or to his master's business; an act of such a character that in doing it he divests "himself of his character as servant," to employ the words of Blackburn J. in *Ward* v. *General Omnibus Co.* (2), or in those of Collins M.R., which are to the same effect, in *Cheshire* v. *Bailey* (3), "in committing it he severed his connection with his master and became a stranger"; such acts, not purporting to be acts in furtherance of his employment, are not contemplated by the principle of responsibility now under consideration.

Of course, such phrases as those just quoted must be applied not as if embodied in a text of law but rather as indicating points of view from which the facts may usefully be considered. As Lord Macnaghten observed in *Lloyd* v. *Grace, Smith & Co.* (4), what is meant by such expressions as "acting in the course of his employment," "acting within the scope of his agency," is not easy to define with exactitude; and Sir Montagu Smith, speaking for the Privy Council in *Mackay* v. *The Commercial Bank of New Brunswick* (5), in a passage quoted by Lord Macnaghten in *Lloyd* v. *Grace, Smith & Co.* (6), said "it is not easy to define with precision the extent to which this liability has been carried." As Lord Macnaghten observes in the same judgment, whichever of the various expressions may be most suitable to the particular case it must be construed liberally; but as a rule where the servant purports to be acting in the course of his service it is immaterial that, to repeat Story's words, "the principal did not authorize or justify or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them."

(1) [1912] A.C. 716.
(2) (1873) 42 L.J.C.P. 265, at 266.
(3) [1905] 1 K.B. 237, at 241.
(4) [1912] A.C. 716, at 736.
(5) (1874) L.R. 5 P.C. 394, at 411.
(6) [1912] A.C. 716, at 733.

I agree with Mr. Winfield who, in his book on Torts at p. 130, says that the question whether or not the servant's conduct is in the course of his employment raises an issue of fact for the jury, subject to a proper direction by the judge as to general principles. He cites a number of cases (*Whatman* v. *Pearson* (1); *Mitchell* v. *Crassweller* (2); *Lloyd* v. *Grace, Smith & Co.* (3); *Baker* v. *Snell* (4)). These instances might be supplemented by scores of others.

Turning now to the facts. It is admitted that the servant was, at the time he committed the negligent act, engaged in his master's business. He was in the execution of his duty taking a key he had made to fit in the lock for which it was intended. I think it is useful to consider the facts from the point of view suggested by the phrases quoted above from Blackburn J. and Collins M.R.

This is one of those cases—it should be noticed—in which the facts pertinent to the issue of responsibility are peculiarly within the knowledge of the respondents and their servants. The circumstance that such is commonly the case where responsibility is in issue is adverted to by Willes J. and Byles J. in *Limpus* v. *London General Omnibus Co.* (5) as one reason why "secret" instructions should be disregarded. "The law is not so futile," says Willes J., "as to allow a master, by giving secret instructions to his servant, to discharge himself from liability." "Secret" instructions here seem to be instructions which in the ordinary course would be known only to the master and his employees. Byles J. says:

> And that this direction is right seems to me to be proved from another consideration. If we were to hold that this direction was wrong, a change, of course, at Nisi Prius would follow, and the consequence would be that in almost every case a driver would come forward and exaggerate his own negligence or misconduct, he not being worth one farthing, and say, "I did it wilfully and unnecessarily," and so the master would be absolved.

The onus in respect of this issue is, of course, on the plaintiff, but in such circumstances very little evidence may suffice for a *prima facie* case and to shift the burden of proof in the sense of going on with the evidence. The only witnesses possessing any knowledge on the point

(1) (1868) L.R. 3 C.P. 422.
(2) (1853) 13 C.B. 237.
(3) [1912] A.C. 716.
(4) [1908] 2 K.B. 825, 828.
(5) (1862) 32 L.J. Exch. N.S. 34; 1 H. & C. 526.

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were two servants of the Company. They were Stinson, whose act of negligence was in question, and the foreman McLeod, to whose orders Stinson was subject. McLeod, who describes himself as a bridge and building foreman, was called for the plaintiffs. It was upon the evidence of these two witnesses that the plaintiffs were compelled to rely.

McLeod identified two notices, the terms of which are important and I give them in full.

CANADIAN PACIFIC RAILWAY COMPANY

Bruce Division

TORONTO, December 28, 1937.

ALL CONCERNED:

The use by employees of their own cars in connection with the Company's business has been forcibly brought to our attention by possible heavy claims against the Company in recent accidents, and, after a check-up of the situation it develops that a large number of such employees do not carry public liability or property damage insurance. As a continuance of this practice is likely to seriously involve the Company, privately owned automobiles are not to be used in connection with the Company's business unless the owner carries insurance against public liability and property damage risks.

Please be governed accordingly.

S. W. CRABBE,
Superintendent.

CANADIAN PACIFIC RAILWAY COMPANY

Bruce Division

TORONTO, March 21st, 1938.

ALL CONCERNED:

Referring to my circular letter of December 28th, 1937, regarding the use of privately owned automobiles not covered by insurance in the execution of Company's business.

Since then, several instances have come to notice where employees had used unprotected automobiles contrary to the instructions. In one case, a telegraph messenger undertook to use an automobile while his bicycle was undergoing repairs, and had the misfortune to strike and injure a prominent citizen. As a result, a heavy claim has been preferred against the Company on the grounds that the messenger was transacting Company's business at the time.

It is a serious matter to involve the Company in expenditures of this nature, and all concerned must clearly understand that automobiles not adequately protected by insurance must not be used in the execution of Company's business.

Will you kindly take whatever steps are necessary to see that the instructions in this regard are being adhered to.

S. W. CRABBE,
Superintendent.

These notices indicate that before the date of the first of them employees in the Bruce Division had been using their own cars (uninsured) when engaged in the business of the Company; and the circumstance should be emphasized that these notices do not require the discontinuance of this practice. The order is that such cars shall not be used in the Company's business unless properly insured. The second notice shews clearly enough that the first had been disregarded to such an extent as to make necessary a second. As to the results of the second, one has only the evidence of the two witnesses mentioned, and they naturally speak only as to facts within their own limited observation; and I think there was sufficient evidence to cast upon the Company the burden of explanation. McLeod, a bridge and building foreman for a territory not defined, having his headquarters at West Toronto and a number (not stated) of men under his orders, received these orders for communication to these men. He says he read them to the men and posted them up and (a fact not to be overlooked) explained them. Both McLeod and Stinson say they understood the effect of them to be that an employee was permitted to use his car if it was insured.

McLeod says explicitly he took no steps to see that the rule was observed, beyond reading the orders and explaining them to the men; and the effect of McLeod's evidence seems to be that he did not until after the date of the accident know that Stinson's car was not insured; and Stinson says explicitly that no inquiry was addressed to him to ascertain whether his car was insured.

The respondents adduced no evidence to show that a breach of the rule was in any way penalized, even in the case of repeated breaches of it, by dismissal or by deduction from the offending employee's wages in respect of the time spent in driving his car, or that any other disciplinary measure was taken.

McLeod says there were available to Stinson several permissible ways to get to the North Toronto Station. Two of these were by use of vehicles to be run on the railway, another was by the use of street-cars. There is no evidence that Stinson had ever used any of these methods of travelling from one part of Toronto to another on the Company's business. Stinson, when asked whether he had used his automobile before the occasion in question

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on the Company's business, answered "once or twice." McLeod says that this had occurred "once and probably twice" before the occasion that gave rise to the litigation.

On the facts mentioned, in the absence of explanation, it was open to a jury to find that no steps were taken to ascertain whether or not the rule was being observed; in other words, that it was left to each employee himself to observe the rule as one of the duties of his employment and that in driving his car (though uninsured) he was regarded by the Company, in the words of the notice, as still using it (though improperly) "in the execution of the Company's business"; and that Stinson had no idea that he was severing his relationship with the Company in doing so.

There was evidence, therefore, upon which the jury might have found, in respect of this issue, a verdict in favour of the appellant; but I do not think it necessary to consider whether the appellant would be entitled to a new trial, or whether the Court in the exercise of its discretion ought to direct a new trial, in view of the course of proceedings at the trial, in the Court of Appeal, and before us.

The learned Chief Justice of the High Court of Justice, before whom the case was tried, took the view that there was no issue of fact for the jury and held that the question of responsibility was a question of law only and that the legal result, on the uncontradicted evidence as he interpreted it, was that the driver Stinson was not acting within the scope or in the course of his employment in driving his car. Their Lordships, the Judges of the Court of Appeal, seem to have treated the question as a mixed question of law and fact and the appeal was argued before us on that footing.

We cannot, I think, treat the conclusion of the trial judge and the Court of Appeal as relieving us from the responsibility of considering the effect of the evidence. The learned trial judge treated the question as one of law, as I have already observed; I think he did not reserve it to himself in the exercise of a discretion, but decided it as a point of law; the learned Judges of the Court of Appeal were largely influenced by their view of the effect of the decisions cited in their judgments, some of which will be discussed later.

I repeat that in my judgment there was, on the facts outlined above, evidence constituting a *prima facie* case for the appellant. My view of the result of the evidence is that Stinson, in using his automobile in the Company's service on the occasion in question, had no idea that he was not acting in the Company's service, and, moreover, when the terms of the notices are considered in light of the circumstances already mentioned, I think that such was not the Company's view of the effect of the use by an employee of his automobile in disobedience of the order.

Some stress was laid upon an interview which is said to have taken place between Stinson and McLeod which, I shall assume, took place before the accident. As regards that incident, I think the effect of the evidence is that McLeod did not know that Stinson's automobile was uninsured and that in substance the incident amounted to little, if any more, than the fact that McLeod called Stinson's attention to the order. I have finished with the topic, discussed above, touching the sufficiency of the evidence to support a verdict on this issue in favour of the appellant, and I merely observe, in passing, that the appraisal of the testimony of McLeod and Stinson as to this incident was peculiarly matter for the jury. In any view of it, it adds nothing to the formal notices.

The evidence afforded by the formal notices of the use by employees of their cars uninsured in the Company's business, the explicit statement by McLeod that he took no steps to see that the directions were carried out beyond reading the notices to the men and explaining them to them, the explicit statement by Stinson that nobody on behalf of the Company did "check up" on him "to see" whether his car was insured, taken together with Stinson's conduct in disregarding the notices and the absence of any evidence that Stinson ever used any of the alternative methods of conveyance which are said to have been available to him, and the absence of any definite evidence as to the extent of the actual use of these alternative methods of conveyance. and the absence of any evidence by any officer of the Company but McLeod as to steps taken to see that the order was observed, all point to the conclusion that the Company's officers were indifferent to the observance of the order.

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Having regard to the circumstances, I think it is a reasonable view of Stinson's conduct that in using his automobile for the purpose of transporting himself to North Toronto on the Company's business he was not doing an act which was, in the pertinent sense, wholly outside his employment.

The respondents indeed did not make any attempt to shew that the order was generally observed; which is not surprising, in view of Stinson's statement that no inquiry was addressed to him as to insurance. The defence of the respondents was really rested upon the order; and it was upon this point—the intentional disregard of the order by Stinson's use of his automobile uninsured—that the judgments at the trial and in the Court of Appeal proceeded.

I have already mentioned the judgment of Knox C.J. in *Whitfield* v. *Turner* (1) in which it was held that where a servant has authority to do a given act in a state of circumstances or on conditions defined by his instructions, then, as between the master and a third person, it is, generally speaking, not material that the emergency defined in the instructions to the servant has not in fact arisen. In *Goh Choon Seng* v. *Lee Kim Soo* (2), it is said:—

> The principle is well laid down in some of the cases cited by the Chief Justice, which decide that "when a servant does an act which he is authorized by his employment to do under certain circumstances and under certain conditions, and he does them under circumstances or in a manner which are unauthorized and improper, in such cases the employer is liable for the wrongful act."

and further,

> Under head (3) come cases like the present, where the servant is doing some work which he is appointed to do, but does it in a way which his master has not authorized and would not have authorized, had he known of it. In these cases the master is, nevertheless, responsible.

Goh Choon Seng v. *Lee Kim Soo* (3), *Whitfield* v. *Turner* (4), as well as *Bugge* v. *Brown* (5), mentioned in the judgments in the Court of Appeal, were fire cases. *Bugge* v. *Brown* (5) was cited as an illustrative case in the judgment of this Court in *Port Coquitlam* v. *Wilson* (6), which was also a fire case. Decisions in fire cases

(1) (1920) 28 C.L.R. 97.
(2) [1925] A.C. 550, at 554-555.
(3) [1925] A.C. 550.
(4) (1920) 28 C.L.R. 97.
(5) (1919) 26 C.L.R. 110.
(6) [1923] S.C.R. 235.

ought to be applied cautiously. If there is authority from the proprietor of land in prescribed conditions to set fires, the proprietor may be responsible where the fire has escaped and caused damage through want of proper precautions, quite independently of *respondeat superior*. In *Black* v. *Christchurch Finance Co.* (1), the proprietor was held liable for the escape of a fire due to the negligence of an independent contractor. There are some observations by Higgins J. upon this topic in *Bugge* v. *Brown* (2). *Goh Choon Seng* v. *Lee Kim Soo* (3), although a fire case in one sense, was not concerned with the responsibility of a proprietor for a fire kindled upon his own land. The fire in that case was kindled by the employees of the appellant on the land of the Crown and the application of the principle of *respondeat superior* consequently arose.

The principle enunciated in the last paragraph quoted from Lord Phillimore's judgment is applicable here.

In the circumstances of this case the disregard of the order was immaterial because the servant's disobedience was an act in violation of one of the duties of his employment. As Willes J. said in *Limpus* v. *The London General Omnibus Co.* (4):—

> I beg to say, in my opinion, those instructions were perfectly immaterial. If they were disregarded, the law casts upon the master the liability for the acts of his servants in the course of his employment.

Stinson's disregard of the order in using his automobile to transport himself to North Toronto (which it was his duty by some means to do) was an act in the course of his employment in the sense of this observation.

It has been suggested that Lord Macnaghten's judgment in *Lloyd* v. *Grace, Smith & Co.* (5) has undermined the authority of *Limpus* v. *The London General Omnibus Co.* (6). But a careful reading of the judgment of Willes J. in the Law Journal report leaves the conviction that the first part of that judgment is not based upon the assumption that the servant might have been seeking to promote his master's interest. "It was," says Willes J., "a case of improper driving," and the liability is put on the ground set forth in the two sentences just quoted, a ground upon

(1) [1894] A.C. 48.
(2) (1919) 26 C.L.R. 110 at 130 and 131.
(3) [1925] A.C. 550.
(4) (1862) 32 L.J. Exch. N.S. 34, at 40.
(5) [1912] A.C. 716.
(6) (1862) 32 L.J. Exch. N.S. 34; 1 H. & C. 526.

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which, I think, the appellant's claim can be supported here. It was left to him to see that his automobile was insured. Neglect in this was neglect in the duties of his employment, for which the master is responsible. I repeat, neither he nor the respondents considered that he was thereby divesting himself of his character of servant, nor was he, in my view, doing so in fact.

It was argued that Stinson, by his improper use of his automobile, put himself beyond the control of his master and that, therefore, on general principles, the situation was not such as to attract responsibility to the respondents for his negligent act.

In *Williams* v. *Jones* (1), Blackburn J. (as he then was) says:—

> In such a case it may seem hard that the master should be responsible, yet he no doubt is if he be his master within the definition stated by Parke B. in *Quarman* v. *Barnett* (2), that the person is liable "who stood in the relation of master to the wrongdoer—he who had selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey."

It is not the master's physical control over the conduct of his servant that gives rise to liability; it is the circumstance that he has selected the servant, who is bound to receive and obey his orders. For disobedience either in misconduct or in "breach of authority," to use the words of Willes J. in *Bayley's* case (3), already quoted, and for "exceeding his authority in matters incidental" to his employment, in the words of Collins M.R. (4), also quoted above, the master, as between himself and the servant, has his remedy by dismissal or otherwise, while third persons wrongfully injured by the servant's act have their remedy against both master and servant.

I should like to say, with respect, that I entirely agree with Mr. Justice Masten in the caution he utters as to the cases decided under the Workmen's Compensation Acts. Under these Acts the question is always a question between the employee, or his representatives, and the master, and an order, the disregard of which in such a case might be an answer to any claim by the servant and might give the master a remedy against the servant by

(1) (1865) 3 H. & C. 602, at 609, 610.
(2) (1840) 6 M. & W. 499, 509.
(3) (1872) L.R. 7 C.P. 415, at 419.
(4) *Hamlyn* v. *Houston,* [1903] 1 K.B. 81, at 85-86.

way of dismissal, or penalty, or by an action for damages, may, nevertheless, be immaterial in a question between a third person and the master; and I think it ought to be noticed that the observation of Lord Dunedin in *Plumb's* case (1) was not directed to any question of responsibility to third persons. An order that might properly be held to define "the course of employment" for the purposes of the Workmen's Compensation Acts or generally as between the master and the servant, may, as between the master and the third person, merely impose upon the servant a duty, for default in the discharge of which the master is responsible to such persons.

Three cases were relied on, upon which some comment, I think, is advisable. I shall refer first to *Williams* v. *Jones* (2). The plaintiff was the owner of a building which the defendant had the liberty of using with his servants as a carpentry shop. One of the defendant's servants, while engaged in his duties as a carpenter and in the course of his master's business, in lighting his pipe carelessly set fire to some shavings and the shop was burned. The Court of Exchequer Chamber by a majority of three to two, Blackburn J. and Mellor J. constituting the minority, held that on the admitted facts the defendant was not responsible for the negligence of his servant, because the negligent conduct was not in a matter which had anything to do with his employment. It is sought to apply that decision to the present case by the contention that Stinson was not employed to drive a motorcar, and that in view of the order and the fact that Stinson's car was uninsured his act in driving his car must be held to be something wholly unconnected with his employment.

The analogy between *Williams* v. *Jones* (2) and the present case entirely fails in my view. The act of the offending carpenter in that case in negligently handling the light he was using was something which, in the view of the majority, was wholly unconnected with the performance of his service, or with any duty connected therewith or incidental thereto. Here Stinson was not only engaged in his master's service at the time he was driving his motorcar, he was performing a duty of the service in getting himself conveyed to the place where it was his duty to go.

(1) *Plumb* v. *Cobden Flour Mills Co.*, [1941] A.C. 62.

(2) (1865) 3 H. & C. 602.

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He was on his master's business in conveying himself there by his car, unless the respondent's contention is sound that by reason of the order and of the absence of insurance his act in driving his car on the Company's business was of such a character, as already observed, as to sever the relationship of service. That I have dealt with.

Another case relied on is *Rand* v. *Craig* (1). The defendant was a carman and contractor and he was sued upon a charge of trespass committed by his servant who had removed certain refuse from the premises of a third party and deposited it upon the plaintiff's vacant land. The defendant employed certain men to act as carters. They were employed by the day and were paid at the end of the day for the day's work. They went in the morning with their carts to specified premises to load rubbish, which they took to some other premises that were defined and described, particulars of which were given to the carmen, and in respect of each load a ticket was given them which had cost the defendant 6d. They were to go with their load of rubbish and the ticket to the premises of the person who issued the ticket, and by virtue of the ticket they had a right to shoot their load of rubbish on the premises owned or occupied by that person. The learned trial judge held that the carters who tipped the rubbish on the plaintiff's land were not acting within the scope of their employment. Only a stray carter here and there, the learned trial judge found, did this unauthorized tipping.

The trial judge and the Court of Appeal treated the question as a question of fact and it was held the finding of the learned trial judge that the acts of the trespassing carters were not acts within the scope of their employment ought not to be disturbed.

Here again the analogy fails. The employment, both ostensible and actual, was evidenced by the ticket placed in the carter's hands, as well as by the conduct pursued by the general body of carters who, as the learned trial judge found, with an odd exception here and there, followed their instructions. His employment so evidenced was not to get rid of rubbish generally. It was to take it to the designated place where it could rightfully be left. In dumping the rubbish on the plaintiff's premises

(1) [1919] 1 Ch. 1.

the carter was not acting in pursuit of the course of employment indicated by his ticket and followed by the other carters engaged in the same business. On the contrary, his act constituted an abandonment of his service as that service was known and practised by those engaged in it. Again in *Rand* v. *Craig* (1) there was a finding by the proper tribunal of fact that in point of fact the servant was not, in committing the trespass, acting in the course of his employment.

The third case which was greatly relied upon by the respondents at the trial is *Goodman* v. *Kennell* (2). The facts appear in the report in 1 Moore and Payne, at p. 241. The plaintiff had been knocked down and run over by a horse ridden by one Cocking and he sued the defendant, alleging him to be liable for Cocking's negligence.

Cocking was not a regular servant of the defendant, but was occasionally employed by him and others in the neighbourhood. On the day mentioned in the declaration the defendant had sent Cocking to take a book from his house at Vauxhall to Furnival's Inn, for which he had given him a shilling. Cocking had taken the horse from a stable occupied jointly by the defendant and the owner of the horse, which he was in the habit of exercising and occasionally attending to. On the day in question Cocking had no order of either the defendant or the owner to take the horse. The owner stated in evidence that he had expressly ordered Cocking not to ride the horse to town. Cocking in evidence stated that he had taken the horse without the knowledge or consent of the defendant or of the owner.

Best C.J. and Park J. agreed that there was, on the admitted facts, a *prima facie* case of implied assent by the defendant and that it was for the jury to judge of the value of the evidence of Cocking and the owner of the horse denying assent.

Best C.J. said:

> It was proved, that Cocking was the servant of the defendant; that the horse was in his stable; and that, on the day the accident happened, Cocking was going on the defendant's business or employment. The proof of these three facts was sufficient to raise a strong presumption, that Cocking was using the horse with the defendant's consent; * * * and left the plaintiff a *prima facie* case, and unanswered.

(1) [1919] 1 Ch. 1. (2) (1828) 1 M. & P. 241.

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Burrough and Gaselee JJ. agreed that the "case was properly left to the jury."

The servant in this case was employed as a messenger to take a book from one place to another. Two features of the case should be noticed.

First: The servant was employed to do a single act of service and was in no sense the general servant of the defendant. There could be no question of a practice, and the learned Judges of the Common Pleas, obviously taking the view that this service for the consideration of one shilling did not in itself imply the use of a horse, thought, therefore, that the plaintiff was obliged to prove assent by the defendant to the use of a horse, or to adduce facts from which the jury might infer such assent.

Second: Such assent having been inferred by the jury, notwithstanding the express denial of the servant, that was sufficient to support a finding that the servant's reckless riding was conduct in the defendant's service, for which the defendant was responsible.

The servant was employed as a messenger, but, given assent to the use of the horse, the servant's dangerous riding, being conduct in a matter incidental to his employment, was that of the master. This seems to answer the contention advanced by the respondents that even if Stinson's car had been insured his negligent driving would not be negligence in the service of the respondents. The case admirably illustrates the function of a jury in such cases as this.

Another question arises. It is argued that in this view the respondent, the Canadian Pacific Railway Company, is jointly liable with Stinson and, judgment having been entered against Stinson, the appellant's cause of action against the Railway Company has disappeared, because *transit in rem judicatam.*

I am unable to agree that the doctrine of *Brimsmead* v. *Harrison* (1) contemplates such a case as this. I think the rights of the parties in the present situation must be the same as they would have been if judgment had been given by the learned Chief Justice at the conclusion of the trial and judgment had been entered in favour of the plaintiffs against Stinson and in favour of the Railway Company as against the plaintiffs. As Willes J. said in

(1) (1872) L.R. 7 C.P. 547.

the Court of Common Pleas (1), the rule in that case is, in the broad sense, a rule of procedure, and I do not think this rule of procedure can operate in such a way as to nullify the plaintiff's right of appeal.

In the result the appeal should be allowed and the appellant should have judgment for the amount of the verdict against the Railway Company, with costs throughout.

The judgment of Rinfret and Kerwin JJ. was delivered by

KERWIN J.—While on Marlborough Avenue in the City of Toronto, Leonard Lockhart, a six-year-old boy, was injured by a motor car owned and driven by R. Stinson. An action was brought against Stinson and the Canadian Pacific Railway Company by the boy, suing by his father, Joseph Lockhart, as next friend, for damages for injuries sustained by the infant, and by the father himself for the accompanying expenses. Stinson was a servant of the Company and it was his duty, as stated by the trial judge, "to make repairs of many kinds to the Company's property, movable and immovable." His headquarters were at the Company's shops in West Toronto where the Company kept, for the use of its employees in connection with their work, a "speeder," a "track motor" and a "hand-car," all of which ran on the Company rails, and sometimes an employee was instructed, or permitted, to travel by street-car. It was also known to the Company that many employees owned automobiles which from time to time were used by its employees on its business. This is made quite clear by two notices which it issued under the signature of its Divisional Superintendent wherein reference is found to this practice and to the possibility of claims being made against the Company for damages occasioned by the use of these automobiles in the Company's business, and such use was prohibited "unless the owner carries insurance against public liability and property damage." Stinson owned a car which was not insured but, according to his evidence and the evidence of the foreman, he had used it on the Company's business once or twice before the time in question. Stinson knew of the notices and on the prior occasion or occasions had

(1) (1871) L.R. 6 C.P. 584.

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been warned by the foreman not to use the car again unless the terms of the notices were complied with, i.e., that he should carry the coverage mentioned. No amount of insurance was prescribed either by notice or warning.

Stinson made, at the West Toronto shops, a key for use in a lock in the Company's premises at North Toronto and he was authorized, or instructed, by the foreman to go to North Toronto to try the key in the lock. He was given no directions as to the means of transportation that he should use in going there. He was not told not to use a motor car; the foreman testified that he thought Stinson would use the "track motor." Stinson used his automobile to take the key to the North Toronto station and it was while he was on his journey there that the accident happened. He was entitled to be paid by the Company as well for the time required in going from one place to another as for the time spent by him in making the key.

The trial took place before Chief Justice Rose and a jury. In answer to specific questions, the jury found that the boy's injuries were caused by Stinson's negligence, which they itemized as

A. Stinson was not paying proper attention.

B. By driving too close to north curb.

C. We find that Stinson had ample room to see anybody crossing from north side to south side behind parked truck.

and they assessed the damages at $10,000 for the boy and $500 for the father. The Chief Justice on these findings directed judgment to be entered against Stinson for these amounts but reserved the question of the Company's liability. He considered that all the relevant circumstances upon that issue were undisputed and therefore left no question to the jury with reference to it. He decided against the plaintiffs and upon appeal the majority of the Court of Appeal agreed with him. No appeal was taken by Stinson from the judgment at the trial against him, and, the father's damages being less than the statutory amount and no leave to appeal having been granted, the dismissal of the father's claim against the Company by the trial judge, concurred in by the Court of Appeal, stands.

The infant, however, appeals to this Court against the dismissal of his claim against the Company, and I have come to the conclusion that his appeal should be allowed.

We have not to consider the point that was decided in *Bright* v. *Kerr* (1), because Stinson was undoubtedly a servant of the Company. Neither is it a question whether he was acting within the scope of his authority, but was he acting in the course of his employment. This was pointed out by Anglin J., as he then was, in *Curley* v. *Latreille* (2). That was a case which depended upon the application of article 1054 of the Quebec *Civil Code*, but Mr. Justice Anglin considered the existing position of the common law upon the problem that confronts us. At page 153 he says:—

> Since the decision in *Limpus* v. *The London General Omnibus Co.* (3), as pointed out by Fletcher Moulton L.J. in *Smith* v. *Martin and Kingston-upon-Hull Corporation* (4):
>
> "The real question is whether it was an act done in the course of the (servant's) employment and not whether it was within the scope of the authority given to her."
>
> The question is not one of authority: *Smith* v. *North Metropolitan Tramways Co.* (5).

Nor is the difficulty that which arises in England under the *Workmen's Compensation Act* as to whether as between an employer and employee an accident arose out of and in the course of the employment. *Dallas* v. *Home Oil Distributors Ltd.* (6). Once a person is found to be a servant, the question whether the master is liable to a third person, for injuries caused the latter by the servant's negligence, depends upon whether under all the circumstances the servant was acting in the course of his employment, and liability attaches even though the servant may be doing an act prohibited by the master. *Limpus* v. *London General Omnibus Co.* (3).

The master may protect himself by limiting the scope of his servant's employment but not merely by prescribing conduct within the sphere of the employment. It has therefore been decided that a person employed as a conductor cannot impose liability upon a master by his negligence in driving a bus, *Beard* v. *London General Omnibus Co.* (7), but an employer is responsible for damage caused by the negligent act of his servant in carrying out work which he is employed to do, even if the act incidentally involves a trespass which the employer has not authorized. *Goh Choon Seng* v. *Lee Kim Soo* (8).

(1) [1939] S.C.R. 63.
(2) (1920) 60 Can. S.C.R. 131.
(3) (1862) 1 H. & C. 526.
(4) [1911] 2 K.B. 775, at 782.
(5) (1891) 55 J.P. 630.
(6) [1938] S.C.R. 244.
(7) [1900] 2 Q.B. 530.
(8) [1925] A.C. 550.

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While I do not know that the division there made by Lord Phillimore, speaking for the Judicial Committee, is to be regarded as exhaustive, I would, if obliged, place the present case under head 3 * and, with respect, not under head 2 * as did Masten J.A. with the concurrence of Middleton J.A. Stinson was employed not merely to make a key but to go to North Toronto to fit it in a lock,—one was as much part of his functions as the other. He was entitled to be paid for the time so spent. The use of automobiles was not prohibited,—in fact it was impliedly, if not explicitly, approved. The only restriction upon that use was that he should carry "insurance against public liability and property damage" and even then, as I have already pointed out, the amount of coverage was not prescribed. It is perhaps needless to add that Stinson had not placed himself outside the scope of his employment by going off on a frolic of his own, as happened in many well-known cases.

The learned trial judge relied to a considerable extent upon a statement of Park J. in *Goodman* v. *Kennell* (1), where the defendant occupied a house jointly with another, which latter kept a horse in a stable behind a house where the defendant had previously kept one but, according to the report, had not one at the relevant time. One day the defendant sent one Corkin, an occasional servant, with a book into Holborn and gave him a shilling for his trouble before he went. Corkin, who had been in the habit of exercising the horse, went to the stable and took it (without any orders from his master and without communicating either to him or to the owner of the horse what he was about to do) and rode it to Holborn and was on his way back when an accident occurred causing injury to the plaintiff. Upon Sergeant Wilde, for the plaintiff, arguing, on the question as to whether Corkin was in the course of his employment by the defendant, that the defendant was liable whether Corkin chose to go on horseback or on foot, Park J. made the statement relied on:—

* Head 3. Where the servant is doing some work which he is appointed to do, but does it in a way which his master has not authorized and would not have authorized had he known of it.

Head 2. Where the servant is employed only to do a particular work or a particular class of work, and he does something out of the scope of his employment.

(1) (1827) 3 C. & P. 167.

I cannot bring myself to go the length of supposing, that if a man sends his servant on an errand, without providing him with a horse, and he meets a friend who has one, who permits him to ride, and an injury happens in consequence, the master is responsible for that act. If it were so, every master might be ruined by acts done by his servant without his knowledge or authority.

Park J. then left to the jury the contradictory evidence as to the ownership of the horse and the question as to any implied authority from the defendant to Corkin to use it, and the jury found a verdict for the plaintiff. Upon motion to set aside the verdict on the ground that there was no evidence to go to the jury as to the defendant's ownership of the horse, or his assent to his servant's using it, the Court refused a rule, expressing their concurrence with the summing up and that the whole of the case had been properly put to the jury.

This case is also reported in 1 M. & P. 241, where the judgments of the judges in the Common Pleas are noted. Mr. Justice Park stated:—

A master would not, certainly, be liable for an act done by his servant whilst riding the horse of another, without his knowledge, or against his consent.

Lord Chief Justice Best remarked:—

It has been truly said, that a servant's riding the horse of another, without the assent or authority of his master, cannot render the latter answerable for his acts.

However, each pointed out that the question was whether there was sufficient evidence to show that Corkin (Cocking as he is called in 1 M. & P.) was riding the horse with the defendant's assent and on his business. Considering the final result and the trend of modern authority, it is unnecessary to express any opinion upon the remarks attributed to Mr. Justice Park and Lord Chief Justice Best.

This case was referred to in *Stretton* v. *City of Toronto* (1), and it in turn in *Boyd* v. *Smith* (2). These decisions may be taken as correct under the circumstances that there existed. While Chief Justice Rose considered these cases not "for the purpose of narrowing or enlarging the limits of the rule" as to the master's responsibility but for their value as illustrations, I am, with respect, unable to agree that they are of such a character as to place the present case beyond the pale.

(1) (1887) 13 Ont. R. 139. (2) [1931] O.R. 361.

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The difficulty of deciding in any particular case was clearly envisaged by the Chief Justice, as he referred also to two other decisions that are generally compared, *Williams* v. *Jones* (1), and *Jefferson* v. *Derbyshire Farmers Ltd.* (2). In Salmond's Law of Torts, 9th edition, page 105, it is stated that while in the earlier case the servant was negligent *during* his performance of his master's business, he was not negligent *in* his performance thereof and that "the distinction may be one which is sometimes difficult of application to the fact, but it seems to be real and logical." But in Pollock's Law of Torts, 14th edition, page 72, in referring in a foot-note to the *Williams* case (1), it is stated: "Diss. Mellor and Blackburn JJ., who thought, perhaps rightly, that the course of employment included ordinary care not to set the shed on fire." And in *The Governor and Company of Gentlemen Adventurers of England* v. *Vaillancourt* (3), Duff J., as he then was, pointed out that "Blackburn J.'s difference with his colleagues 'was as to the proper inference as from the facts' and his is the view which in a similar case would probably now be accepted," quoting *Jefferson* v. *Derbyshire* (4).

I agree with the statement in Salmond (9th edition), page 99, that the decision in *Lloyd* v. *Grace, Smith & Co.* (5), "must be interpreted in the light of the facts." Winfield in his text book on the Law of Torts, in discussing the decision, suggests (p. 135), that "the defendants were held liable because they had unwittingly put a rogue in their place and clothed him with their authority." He continues:—

> But other decisions show that where the master has neither been negligent in the selection or supervision of his servant, nor has expressly or impliedly held out his servant as having authority to do the act, he will not be responsible for the servant's crime.

I mention the decision merely to show that it has not been overlooked, but I think it has no relevancy to the matter presently under discussion.

In an admirable judgment in *Bugge* v. *Brown* (6), Isaacs J., at page 118, states the limit of the rule in terms that I believe correctly set forth the modern view:—

> when the servant so acts as to be in effect a stranger in relation to his employer with respect to the act he has committed, so that the act is in law the unauthorized act of a stranger,

(1) (1865) 3 H. & C. 602.
(2) [1921] 2 K.B. 281.
(3) [1923] S.C.R. 414, at 417.
(4) [1921] 2 K.B. 281, at 290.
(5) [1912] A.C. 716.
(6) (1919) 26 C.L.R. 110.

and this statement was quoted with approval by the present Chief Justice of this Court in *Port Coquitlam* v. *Wilson* (1). This also appears to be the conclusion reached in the fourth and subsequent editions of Salmond on Torts; see, for example, page 95 of the 9th edition:—

> * * * if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment, but has gone outside of it. He can no longer be said to be doing, although in a wrong and unauthorized way, what he was authorized to do; he is doing what he was not authorized to do at all.

All the facts are before us as they were before the trial judge and the Court of Appeal, and in view of the course of the proceedings throughout, we are entitled to draw all proper inferences. One of these is that Stinson had not severed his relations with his employer, the railway company.

It is said in the Company's factum (and the point was elaborated in argument), that "the manner in which the defendant Stinson chose to exercise his right as a citizen to use a public highway was in no way subject to the respondent's control." Now, in the first place, Stinson was not exercising his right as a citizen but was performing his duty to his master in going to North Toronto. He was using a conveyance of a kind at least impliedly authorized and was acting within the scope of his employment. Counsel recognized that the test was not the Company's actual control but its right to control (see *Dallas* v. *Home Oil Distributors Ltd.* (2)), but argued that the respondent had no right to dictate the speed of the car or the distance from the curb at which Stinson should travel or otherwise to direct his movements on the highway. Stinson being about his master's business, the Company possessed the very rights that its counsel disputes and this contention fails.

It is contended that even should this result be reached, the Company is not liable because, as between it and the infant, the trial judge's charge to the jury was defective on the question of Stinson's negligence. As regards Stinson himself, the owner and driver of the automobile, section 48 (1) of the Ontario *Highway Traffic Act*, R.S.O., 1937, c. 288, clearly applied and the onus was upon Stinson to

(1) [1923] S.C.R. 235, at 247-248. (2) [1938] S.C.R. 244 at 248.

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show that the accident did not arise through his negligence or improper conduct. The jury were so instructed. It had been previously held by the Ontario Court of Appeal in *Ross* v. *Gray Coach Lines Ltd.* (1), that in actions against the driver of an automobile, the jury should be asked whether the defendant had satisfied the onus and that it was not proper to ask the jury to describe the negligence. This principle was reaffirmed in *Newell* v. *Acme Farmers' Dairy Ltd.* (2). No doubt the learned Chief Justice was familiar with these decisions and, while counsel were unable to agree as to what transpired in the Chief Justice's chambers in connection with the drafting of the questions to be submitted to the jury, it is, I think, apparent that the point now raised was present to the Chief Justice's mind, because at one point in his charge, after referring to the onus section, he says:—

> That is the only importance of the statutory provision; it is not applicable where you think, after hearing all the evidence, that you know whose fault it was. If, after hearing all the evidence, you think that you know that the fault was the fault of the driver, then of course you do not need to invoke the statute. If, on the other hand, after hearing all the evidence, you think that you know that the fault was not the fault of the driver, then the statute has no application. But when you are left feeling that without the aid of the statute you cannot decide one way or the other, then the statute comes to your aid and tells you how you are to decide.

Later he told the jury:—

> As in other cases of the sort, you are going to be asked not to render a general verdict, but to answer written questions, and the first question is: Were the injuries suffered by the plaintiff Leonard Lockhart caused by the negligence of the defendant Stinson? Well, as I have said to you, the statute seems to require you to say Yes unless the evidence satisfies you that you can say No.
>
> The second question: If so, in what did such negligence consist? Now, it is conceivable that you could answer the first question Yes without being able to answer the second question at all but it is unlikely. That is to say, if you were answering the first question Yes simply because of the statute, without having made up your minds that in fact Stinson did something that was wrong and that you knew what that was, then you could answer the first question Yes and be unable to answer the second, but it is quite unlikely. The probability is that if you answer the first question Yes it will be because you think you know what Stinson did that was wrong, and, if you do, then proceed to answer the second question, and answer it quite fully.

My own view is that, if a driver of a motor car on a highway is found by a jury not to have satisfied the onus, liability attaches to the driver's master, if the driving

(1) (1929) 64 Ont. L.R. 178. (2) [1939] O.R. 36.

occurred in the course of the servant's employment. In the case at bar, however, even if that be not so, no objection was taken by counsel for the Company to the charge and it was too late to raise the point upon appeal.

It was also objected that, judgment having been taken out by the infant against Stinson, and proceedings having been taken by the father in his personal capacity to secure by way of attachment part of the damages awarded him against Stinson, the Company's liability was ended. In my opinion, the point is not well taken. Whether or not in the case of a tort by a servant in the course of his employment the liability of the master and servant be joint, it is not alternative and the decision in *Morel* v. *Westmoreland* (1) has no application. A similar question arose in *Bright* v. *Kerr* (2) where it was not necessary for me to deal with it. In the present case, it is necessary and, having given it some consideration, I approve the judgment of the Ontario Divisional Court in *Sheppard Publishing Co. Ltd.* v. *Press Publishing Co. Ltd.* (3). This was followed by Chief Justice Rowell in the Court of Appeal in *Kerr* v. *Bright* (4), and in that case, "in the special circumstances," the Chief Justice of this Court agreed with Chief Justice Rowell.

A question was raised as to the assessment of damages. The infant claimed $5,000 in the statement of claim; the jury awarded $10,000. It does not appear that the jury were told the amount of damages claimed, or that they had the record with them. Chief Justice Rose considered that he had a discretion to allow the amendment; McTague J.A. and Gillanders J.A. were of the same opinion, and in a previous case an amendment had been permitted and allowed by the Court of Appeal, *White v. Proctor* (5). I agree that the Chief Justice had a discretion and that it has not been shown that it was improperly exercised.

The appeal should be allowed, the judgment at the trial set aside and in lieu thereof there should be judgment (1) for the appellant against the Company for $10,000 and his costs of the action, (2) reserving to the Company its right to apply to the Supreme Court of Ontario for judgment in the third party issue between the Company and Stinson. In order to overcome any difficulty as to

(1) [1904] A.C. 11.
(2) [1939] S.C.R. 63.
(3) (1905) 10 Ont. L.R. 243.
(4) [1937] O.R. 205.
(5) [1937] O.R. 647.

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interest, that judgment should be dated July 12th, 1939, the date of the judgment of Chief Justice Rose dismissing the action as against the Company. The appellant is entitled as against the Company to his costs of the appeal to the Court of Appeal and of the appeal to this Court.

CROCKET J.—The principal question in this appeal concerns the liability of the respondent railway for the serious injury of the infant plaintiff by the negligence of its servant Stinson, with whom it was jointly sued, while driving his uninsured automobile from the respondent's railway workshops at West Toronto to its station at North Toronto some four miles distant, for the purpose of fitting a key he had made for a doorlock in the North Toronto station building.

The accident happened on July 18th, 1938, and the action was tried before Rose, C.J.H.C., and a jury, which found that the injury claimed for was entirely caused by Stinson's negligence, and assessed the damages at $10,000. The learned Chief Justice directed the entry of judgment against Stinson for this amount with costs, and reserved the question of the respondent's liability. Subsequently he directed the dismissal of the action against the respondent on the ground that the driving of a privately owned and uninsured motor car was not an act falling within the class of acts which Stinson was authorized to perform, and therefore that his negligence in the handling of such a car, even at a time when he was engaged in his master's business, does not bring his master under liability. On an appeal by the plaintiffs the Court of Appeal affirmed this judgment, McTague, J.A., dissenting.

There is no dispute as to the facts upon which the majority in the Court of Appeal obviously proceeded in affirming the trial judgment, so that the question involved, as the learned trial judge himself distinctly held, is purely a question of law.

Stinson had been regularly employed in the respondent's bridge and building department at its West Toronto workshops as a general repair man for many years and as such was subject to the directions of the foreman of that department. His duties necessarily included his travelling to the respondent's buildings in the Toronto district in connection with any repair work which should be required

and entrusted to him. On the day of the accident, which gave rise to the plaintiff's action, he had been instructed by the foreman at the West Toronto works to make a key for a doorlock at the North Toronto station, and, having made the key in the shop at West Toronto, told the foreman he would have to take it to the North Toronto station to try it in the doorlock. For this purpose Stinson used his private automobile, which at the time was uninsured, though nothing was said by the foreman that he might do so or as to whether he was to proceed there over the respondent's railway track by a gasolene track motor or handcar, which employees sometimes used to travel from the workshops to this and other buildings of the respondent along the railway line in the course of their employment, or by a street tramcar, for which it was the practice of the railway to provide tram tickets when that means of transportation was desired. The foreman swore he did not know that Stinson was going in his own car, and thought he was going by the track motor. He admitted that he knew of at least one previous occasion "or probably two," when Stinson had used his own car on similar jobs, and told the court that when he learned this he told Stinson that he must not use his car on the company's business in the company's working hours, to which he added the qualification, "unless it was insured." At this time he had received a circular letter from the district superintendent, dated December 28th, 1937, prohibiting the use of privately owned automobiles "in connection with the Company's business unless the owner carries insurance against public liability and property damage risks." Later he received a second circular letter under date of March 21st, 1938, from the district superintendent, "referring to (his) circular letter of December 28th, 1937, regarding the use of privately owned automobiles not covered by insurance in the execution of Company's business," advising him that several instances had since come to notice "where employees had used unprotected automobiles contrary to the instructions," stating that "all concerned must clearly understand that automobiles not adequately protected by insurance must not be used in the execution of Company's business," and requesting him to take "whatever steps are necessary to see that the instructions in this regard are being adhered

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to." The foreman testified that he read these circular letters to Stinson and that they were posted up on the shop door at West Toronto.

It is not disputed that at the time of the accident Stinson was using his automobile for the purpose of performing a duty appertaining to his master's business, viz: going to the North Toronto station for the purpose of trying the key he had made in the doorlock there; nor is it disputed that in using his car for this purpose he was disregarding his master's instructions and thus exceeding the limits of his authority as his master's servant. We are, therefore, squarely faced with the problem whether the former or the latter fact determines the question of the respondent's liability for the injury. The learned trial judge in dismissing the action against the respondent plainly proceeded on the latter consideration, and in this, as stated, he was upheld by the Court of Appeal.

With great respect, I am of opinion that both courts were in error in this regard. While they both apparently fully appreciated that the true criterion of the liability of the master for injury or damage sustained by third persons through the negligence of his servant is the scope or sphere of the employment for which the servant is hired, their decisions are clearly based on the ground that the district superintendent's instructions regarding the use of uninsured cars "in connection with" or, as the second circular letter put it, "in the execution of" the company's business, placed Stinson beyond the scope of his employment at the time of the negligence claimed for, or, in other words, that this restriction of his authority as to the use of his own or any automobile in the performance of his work necessarily limited the scope of his employment. None of the cases, to which we have been referred, to my mind justify such a conclusion.

It is true, as was pointed out by Collins, L.J., in *Whitehead* v. *Reader* (1), in the English Court of Appeal, that in some cases it is necessary to get back to the orders emanating from the master to see what is the sphere of employment of the workman, and some of these cases were, no doubt, decided upon the workman's authority as determined from his master's instructions, but *Whitehead* v. *Reader* (1) itself decided that the disobedience

(1) [1901] 2 K.B. 48.

of the master's order did not of itself prevent the act of the workman from being an act done "in the course of his employment," and was therefore not conclusive upon the question of the sphere or scope of the servant's employment or the master's responsibility. Collins, L.J., himself said:

> I agree * * * that it is not every breach of a master's orders that would have the effect *of terminating the servant's employment* so as to excuse the master from the consequences of the breach of his orders.

A. L. Smith, M.R., put it in this way:

> Does disobedience to this order cause the man not to have been injured in the course of his employment? I think not. It cannot be said that every disobedience of an order *terminates a man's employment.*

Romer, L.J., used these words:

> At the time of the accident the workman was employed on his master's business. He was not idling or doing something which *was clearly beyond the scope of his employment.*

The dictum of Collins, L.J., in this case was adopted by Lord Dunedin as President of the Scottish Court of Sessions in *Conway* v. *Pumpherston Oil Co.* (1), and affirmed again by him in delivering his judgment in the House of Lords in *Plumb* v. *Cobden Flour Mills Co.* (2), with the concurrence of Viscount Haldane, L.C., and Lords Kinnear and Atkinson. In the last mentioned case Lord Dunedin said:

> There are prohibitions which limit the sphere of employment and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere.

These cases accord precisely with the principle enunciated in 1862 by Willes, Byles and Blackburn JJ., in the leading case of *Limpus* v. *London General Omnibus Co.* (3), and, in my opinion, show the irrelevancy of a servant's disobedience of his master's orders in the prosecution of his master's business unless the prohibitive orders are of such a character as to place him entirely beyond the scope of his employment.

As far back as 1869, Cockburn, C.J., in *Storey* v. *Ashton* (4), laid it down that

(1) 1910-11 S.C. 660.
(2) [1914] A.C. 62.
(3) (1862) 1 H. & C. 526.
(4) (1869) L.R. 4 Q.B. 476.

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> the true rule [for determining the liability of the master for the negligence of his servant] is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant.

This is the fundamental principle, which has been consistently recognized by this Court in many cases. See *Halparin* v. *Bulling* (1); *Curley* v. *Latreille* (2); *Battistoni* v. *Thomas* (3); *Moreau* v. *Labelle* (4); and *Jarry* v. *Pelletier* (5).

In *Halparin* v. *Bulling* (1), although the court held that the master there was not liable for the negligence of his chauffeur, Davies J. based his judgment on the fact that the chauffeur was using his master's automobile "*on his own business and pleasure and not on any business of his master.*" Duff J., with whom Anglin J. concurred, expressly adopted the dictum of Cockburn, C.J., in *Storey* v. *Ashton* (6), already quoted, and held that the Court of Appeal of Manitoba was right in finding on the evidence in that case that the chauffeur was not "engaged in the doing of anything *appertaining to the course of his employment* as the respondent's servant." The decisive question, he said, was "Was the chauffeur *about his master's business* when he ran down the unfortunate victim of his carelessness or was he making use of the respondent's car in *an independent excursion of his own?*" Brodeur J. said that the jurisprudence under the English common law is that the master is not liable for the negligence of his servant while the latter is engaged in some act "*beyond the scope of his employment for his own purpose.*"

In the *Latreille* case (7) Anglin J. reviewed all the important English and French cases regarding the master's liability for the negligence of his servant, in the course of which he pointed out that the decisive question in such cases was, not whether the servant's act was within the authority given by the master, but whether it was within the course of his employment, quoting the dictum of Fletcher-Moulton, L.J., in *Smith* v. *Martin and Kingston-upon-Hull Corporation* (8), and citing *Smith* v. *North Metropolitan Tramways Co.* (9).

(1) (1914) 50 Can. S.C.R. 471.
(2) (1920) 60 Can. S.C.R. 131.
(3) [1932] S.C.R. 144.
(4) [1933] S.C.R. 201; [1934] 1 D.L.R. 137.
(5) [1938] S.C.R. 296; [1938] 2 D.L.R. 645.
(6) (1869) L.R. 4 Q.B. 476.
(7) (1920) 60 Can. S.C.R. 131.
(8) [1911] 2 K.B. 775, at 782.
(9) (1891) 55 J.P. 630.

In *Battistoni* v. *Thomas* (1), Lamont J., who delivered the judgment of the court, said:

> In cases of this kind the law is well settled. A master is responsible for the consequences of his servant's negligent act only while the servant is *on his master's business.*

He quoted the dicta of Jervis, C.J., and Maule J., in *Mitchell v. Crassweller* (2), as well as the dictum of Lord Atkinson in *St. Helen's Colliery* v. *Hewitson* (3), to that effect, and approved the following statement of the law by Salmond on Torts, 7th ed., p. 115:

> On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment, but has gone outside of it. He can no longer be said to be doing, although in a wrong and unauthorized way, what he was authorized to do; he is doing what he was not authorized to do at all.

In *Moreau* v. *Labelle* (4), Rinfret, J., speaking for the Court, quoted the passage already reproduced from Lord Dunedin's speech in delivering judgment in the House of Lords in *Plumb* v. *Cobden Flour Mills Co.* (5), as laying down the proper test for determining whether a master's instructions to his servant do or do not limit the sphere of his servant's employment.

In *Jarry* v. *Pelletier* (6), Cannon, J., also delivering the unanimous judgment of the court, repeated Lord Dunedin's dictum as laying down the true test.

The result of the cases in this Court, I think, is to make it clear that the recognized criterion of the liability of a master for the negligence of his servant is, not whether the servant's act was within the authority given by the master, but whether it was within the sphere or scope of his employment as servant.

There is another Canadian case, that of *Read* v. *McGivney* (7), which, though not cited before us, I think I should mention, inasmuch as it illustrates and actually applies the principle referred to in circumstances which seem to me to more closely resemble in their effect those of the present case than do those in the majority of the numerous cases to which we have been referred. In that

(1) [1932] S.C.R. 144.
(2) (1853) 22 L.J. C.P. 100.
(3) [1924] A.C. 59.
(4) [1933] S.C.R. 201; [1934] 1 D.L.R. 137.
(5) [1914] A.C. 62, at 67.
(6) [1938] S.C.R. 296; [1938] 2 D.L.R. 645.
(7) (1904) 36 N.B. Reports, 513.

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case an action had been brought to recover damages for the destruction of a portion of the plaintiff's woodland lot by the spreading of a fire set by the defendant's servant to a pile of brush and refuse in connection with land clearing work on the defendant's land, contrary to the defendant's express instructions that he must not do so that day. The cases of *Limpus* v. *London General Omnibus Co.* (1); *Bayley* v. *Manchester, etc., Ry. Co.* (2); *Dyer* v. *Munday* (3); *Storey* v. *Ashton* (4), and *Mitchell* v. *Crassweller* (5), all of which were relied upon in the present appeal, were among the cases cited in the argument before the New Brunswick court. Hannington J., in delivering the judgment of the court (Tuck, C.J., Hannington, Landry, Barker, McLeod and Gregory, JJ.) said:

> I need not refer to the cases cited; but the authorities are perfectly clear that such instructions will not save the employer from responsibility from the careless or illegal act of his servant within the scope of his employment. The principle is well illustrated by the case of *Limpus* v. *London General Omnibus Co.* (1). The principle that governs is this: If a person sends another to do his work, or to work for him, and in pursuance of the work the other, within the scope of his employment, does an act whereby an injury is caused to a third party, then the employer is liable.

The Judicial Committee of the Privy Council in *Goh Choon Seng* v. *Lee Kim Soo* (6), distinctly recognized the principle that the fact of a servant doing an unauthorized act does not excuse the master from responsibility if the unauthorized act be committed in the performance of the master's business. That was an appeal from the judgment of the Court of Appeal of The Straits Settlements (Singapore), affirming the judgment of the trial judge in an action brought to recover damages caused by the negligence of the defendant's servants in kindling fires for the purpose of burning branches, jungle trees and other rubbish. The evidence proved that the fires were kindled, not on the defendant's land, but on adjacent Crown land, from which the flames spread to the plaintiff's land and destroyed his pottery works, and the trial judge so found and directed a reference for the assessment of damages. Counsel for the appellant, founding on *Storey* v. *Ashton* (7), argued that the kindling of the fires beyond the appel-

(1) (1862) 1 H. & C. 526.
(2) (1872) L.R. 7 C.P. 415.
(3) [1895] 1 Q.B. 742.
(4) (1869) L.R. 4 Q.B. 476.
(5) (1853) 22 L.J.C.P. 100.
(6) [1925] A.C. 550.
(7) (1869) L.R. 4 Q.B. 476.

lant's boundary was an act done by his servants for their own convenience and benefit, and was therefore outside the scope of their employment. Lord Phillimore, in delivering the judgment of the Board, dismissing the appeal, said:

> The principle is well laid down in some of the cases cited by the Chief Justice, which decide that "when a servant does an act which he is authorized by his employment to do under certain circumstances and under certain conditions, and he does them under circumstances or in a manner which are unauthorized and improper, in such cases the employer is liable for the wrongful act."
>
> As the learned Chief Justice says, the manager of the plantation was authorized by his employment to burn the weeds, and that he did it in a manner and at a place which were not authorized by his employer, makes no difference. Time and place are only circumstances or incidents.

His Lordship then pointed out that all the cases, which had been brought to the Board's notice in the course of the argument, fell under one or other of three heads: (1) the servant was using his master's time or his master's place or his master's horses, vehicles, machinery or tools for his own purposes; (2) cases where the servant is employed only to do a particular work or a particular class of work, and he does something out of the scope of his employment; (3) "cases like the present, where the servant is doing some work which he is appointed to do, but does it *in a way which his master has not authorized and would not have authorized had he known of it.*" In the first two classes of cases, he said, the master is not responsible, but under head (3) he is.

In their reasons for judgment in the Appeal Court, Masten, Fisher and Gillanders, JJ.A., all referred to the *Goh Choon Seng* case (1) and sought to distinguish it from the case at bar. Middleton, J.A., I should state, concurred with Masten, J.A., on this branch of the appeal, though his reasons indicate that he would have dismissed the plaintiff's appeal on the ground that garnishee proceedings taken by the plaintiff against Stinson after the entry of judgment against him and the recovery thereby of a portion of the damages precluded his right to proceed further against Stinson's co-defendant. Masten, J.A., simply said that that case seemed to be distinguishable in its facts and that he referred to it only for the purpose of quoting Lord Phillimore's dictum as to the classification of cases bearing on the responsibility of the master under the three heads above mentioned. He thought the

(1) [1925] A.C. 550.

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present case fell under head 2, and not under head 3, "because when Stinson entered on his journey on the day of the accident in his prohibited uninsured car, he stepped outside the limit which bounded the sphere of his employment." Fisher, J.A., thought the general law laid down in the *Goh Choon Seng* case (1) was not applicable because the injury here did not occur "in the actual performance of his particular duties by doing his work in a manner the master had not authorized." "It is here," he said, "that the facts in the case at bar differ from the facts and the general law laid down in *Goh Choon Seng* v. *Lee Kim Soo* (1)." Gillanders, J.A., said that the servant in the *Goh Choon Seng* case (1) was, in lighting fires, and burning rubbish, doing what he was authorized to do, and "it was immaterial to the master's liability that it was done on Crown lands, adjacent to those of the defendant, and at an unauthorized time."

With the utmost deference, I am unable to follow these distinctions. It seems to me that the clear effect of the Privy Council's decision was that, while the defendant appellant's servants in that case were authorized to light fires and burn brush on their master's land in the course of their employment, they were not authorized to light fires and burn brush on the adjacent Crown land, and that the fact of their having made use of the Crown land for the purpose of and in connection with the work they were authorized to do for their master was immaterial to the master's liability for the reason that it did not place the servants' unauthorized and improper act beyond the scope of their employment. In other words, the Privy Council decision strikingly reaffirms the fundamental principle laid down in the *Limpus* case (2) that a master is responsible for his servant's negligence while engaged in his master's business, and that the fact that the negligent act of the servant was committed while he was doing something he was not authorized to do as such servant cannot avail to free the master from liability therefor.

The *Goh Choon Seng* case (3) bears a striking resemblance to that of *Read* v. *McGivney* (4), from which it differs in its material features only in the fact that the fire which destroyed the plaintiff's property was kindled

(1) [1925] A.C. 550.
(2) (1862) 1 H. & C. 526.
(3) [1925] A.C. 550.
(4) (1904) 36 N.B. Rep. 513.

beyond the boundary of the defendant's land, and that there was no definite instruction not to set any fire that day in connection with the work the servant was doing. The reasons for the Privy Council decision make it clear that these circumstances would make no difference.

The question before the Court of Appeal and before this Court, however, is, as already pointed out, not whether Stinson, in making use of his uninsured car for the purpose of his master's business, contrary to the instructions of the respondent's district superintendent, was doing an unauthorized and improper act—that, as I say, is undisputed and plainly implied by the learned trial judge's finding—but whether the fact of his disobeying those instructions placed Stinson outside the scope of his employment altogether while making use of his car for the purpose mentioned. The very statement of the problem seems to me to embody a manifest contradiction and to furnish its own inevitable answer. For how can it possibly be said, if Stinson was engaged in his master's business while driving his motor car, as admittedly he was, that his act in doing so contrary to his master's instructions, was of such a nature as to completely dissociate him during that particular journey from his employment as his respondent master's servant? He was either engaged in the business of his master or he was not. That is the governing factor. This, of course, does not mean that it is not competent to a master at any time to limit the scope of the particular employment for which the servant was hired, as clearly appears from some of the cases above mentioned, but it does mean that, once it is determined that a servant is doing something for his master in the course of his employment as his master's servant, the master cannot escape responsibility for the consequences of the servant's negligence while so acting upon the ground that he has prohibited him from doing any particular act unless the prohibition is such as to sever the relation of master and servant during the critical time.

If the question were not concluded by the undisputed and indeed the admitted fact that Stinson was using his car in journeying to the North Toronto station in connection with and in furtherance of his master's business, I should have thought that the only possible inference from the district superintendent's circular letters, on which the judgment *a quo* is entirely based, was that he and all

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other employees in the Toronto district were thereby authorized to use their own or any other privately owned cars in connection with their master's business, provided that they were insured against public liability and property damage. It was thus in no sense a definite prohibition against the use of motor cars in connection with the respondent's business, but a purely conditional or contingent prohibition, apparently made for no other purpose that that of transferring from the master to the automobile insurance companies the obligation of paying for injuries resulting to third persons from the negligence of its servants while engaged in the prosecution of its business, and one which clearly recognized the right of the respondent's employees to use motor cars so insured for that purpose. I should have had no hesitation in holding that a prohibition of such a character could not, under the law as recognized by this court in accordance with the principles laid down by the House of Lords and the Judicial Committee of the Privy Council, have the effect of so curtailing the scope of Stinson's employment, in the capacity of a permanent general repairs man, as to transform his act in using his uninsured car solely for the purpose of his master's business on the occasion in question into an act undertaken wholly for his own personal gratification (1) the servant was using his master's time or his master's servant. As McTague, J.A., concisely put it in his dissenting judgment,

> it seems perfectly clear that in transporting the key from West Toronto to North Toronto Stinson was about his master's business. Did he, because of the mode of transportation which he used, divest himself of tthe character of servant and become a stranger to his employer? I do not think so. If in the course of his trip he had gone off on a venture of his own and injured someone, it might well be said that in doing that he had lost his character of servant.

As to Mr. Tilley's objection that the appellants had lost their right to proceed further against the respondent by the garnishee proceedings they had instituted against Stinson, I also agree with McTague, J.A. There is one other objection, viz.: that the statement of claim fixed the damages asked on behalf of the infant plaintiff at $5,000 and that no amendment was applied for till after the jury had returned its verdict, when the learned Chief Justice allowed an amendment to cover the amount awarded. It was contended that he had no right to order the amendment after the jury had announced its verdict.

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The learned Chief Justice overruled the objection and expressed the opinion that in view of the circumstances disclosed by the evidence, the assessment was not excessive. In the Appeal Court, Gillanders and McTague, JJ.A., were of the opinion that in the circumstances the jury's assessment of damages should not be disturbed. I am of the same opinion.

For these reasons, I would allow the appeal with costs here and in the Court of Appeal and direct that the judgment be entered against both defendants alike for the amount assessed by the jury, in favour of the infant plaintiff, viz.: $10,000; this amount to be paid into court to the latter's credit and to be paid out to him on attaining the age of twenty-one years and subject to further order meanwhile, as directed in the formal judgment of the trial court against Stinson, with a further order that both defendants pay to the plaintiff in his capacity as next friend of the infant plaintiff, his costs of action in that behalf.

Appeal of the infant plaintiff allowed with costs.

Solicitor for the appellants: *David J. Walker.*

Solicitor for the respondent: *John D. Spence.*

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* Feb. 6.
* April 22.

COMMISSIONER OF PROVINCIAL POLICE (DEFENDANT) ..... APPELLANT;

AND

HIS MAJESTY THE KING ON THE PROSECUTION OF PASCAL DUMONT (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Automobile—Mandamus—Judgment for costs only against person holding automobile licenses—Power of Commissioner of Provincial Police to suspend licenses on failure to satisfy judgment—Whether such judgment within meaning of section 84 (1) of Motor Vehicle Act—Capacity in which Commissioner acts under said section—Motor-Vehicle Act, R.S.B.C., 1936, c. 195, s. 84.

The respondent Dumont brought action against one Bollons for damages resulting from an automobile accident, and Bollons counterclaimed for damages in the sum of $59.35. Both claim and counter-claim

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

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were dismissed with costs. No damages therefore were recovered by either party. After taxation, the respondent Dumont's costs of the counterclaim being set off against Bollon's costs of the action, the result was that the respondent Dumont became liable under the judgment to pay to Bollons the balance of the costs, i.e., $466.25. This sum not having been paid within 30 days and no appeal having been taken, the Commissioner of Provincial Police suspended the respondent Dumont's driver's and owner's licenses under section 84 of the *Motor-Vehicle Act*. The respondent Dumont then launched *mandamus* proceedings directed against the Commissioner to compel him to return the said licenses. The trial judge dismissed the application; but, on appeal to the Court of Appeal, that judgment was reversed and *mandamus* was granted. After the judgment of the appellate court, the Commissioner of Police complied with the order and delivered up the licenses and number plates to the respondent Dumont.

Held, affirming the judgment of the Court of Appeal (55 B.C.R. 298), that the facts of this case do not bring the appellant's action, suspending the respondent's licenses, within the authority of the Commissioners under the statute. The judgment against the respondent Dumont for costs in an action brought by himself in which no amount was recovered for damages, either in respect of personal injury or in respect of damage to property and in which no claim was made against Dumont for damages in excess of $100, does not bring the power of the Commissioner under section 84 (1) into operation.

Held, also, that, the appeal on the question of the construction of the statute being entirely without merit and owing to the acquiescence of the Commissioner in the judgment of the appellate court, this appeal had no practical object; but it may be stated that there is no doubt that the Commissioner's authority is vested in him as the agent of the statute and that *mandamus* would lie to compel him to perform his statutory duty; but it is unnecessary for the court to decide whether in the circumstances of this case *mandamus* was the proper procedure.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Morrison C.J.S.C., which judgment had discharged an order *nisi* for a *mandamus* to compel the Commissioner of Police to return a driver's and owner's licenses which were alleged to have been wrongly suspended in purported pursuance of section 84 (1) of the *Motor-Vehicle Act*.

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

(1) (1940) 55 B.C.R. 298; [1940] 3 W.W.R. 39; [1940] 4 D.L.R. 721.

H. Castillou for the appellant.

P. S. Marsden for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—A brief sketch of the facts leading up to this litigation is necessary. The respondent Dumont is a retail dealer in Vancouver, using in connection with his business a delivery truck, for which he had a British Columbia license. He also held a driver's license. In November, 1937, a motor vehicle driven by Dumont was in collision with a motor vehicle driven by one Bollons. Dumont instituted, subsequently, as plaintiff, an action in the Supreme Court of British Columbia against Bollons as defendant, claiming damages for personal injuries and for injury to his motor vehicle. Bollons defended the action and entered a counterclaim against Dumont for the sum of $59.35 for damages to his automobile. At the trial Dumont's claim was dismissed with costs, which were subsequently taxed at $675.45, and Bollons' counterclaim was dismissed with costs, subsequently taxed at $209.40, Dumont's costs of the counterclaim being set off against Bollons' costs of the action, in the result Dumont became liable under the judgment to pay to Bollons the balance of costs. No damages were recovered by either party.

On the first of April, 1940, the judgment for costs not being paid, the Commissioner of Provincial Police, purporting to act under section 84 (1) of the *Motor-Vehicle Act,* suspended the truck license mentioned above and Dumont's driver's license, and on the 2nd of April, 1940, the licenses were delivered by Dumont to the Commissioner in response to his demand. On or about the 6th day of April, 1940, Dumont consulted his solicitor, who wrote a letter to the Commissioner setting out the facts and requesting the Commissioner to rescind the purported suspension of Dumont's licenses. By letter dated April 9th, 1940, and addressed to Mr. P. S. Marsden, Dumont's solicitor, the Commissioner refused this request. Thereupon, on the 16th day of April, 1940, Dumont, through his solicitor, commenced proceedings by notice of motion for a writ of *mandamus,* directed to the Commissioner of Provincial Police requiring him to return to Dumont the licenses and number plates.

The learned Chief Justice of the Supreme Court of British Columbia dismissed the application for *mandamus*

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and on appeal this judgment was reversed and *mandamus* was granted. The learned judges of the Court of Appeal unanimously held that the Commissioner had no authority under subsection (1) of section 84 of the *Motor Vehicles Act*, R.S.B.C., 1936, chap. 135, under which he had purported to act, to suspend the respondent's licenses. I agree with this view. The suspension of a driver's license and the owner's licenses in respect of motor vehicles may be a very serious matter and, while the legislation under consideration was enacted no doubt for cogent reasons as affecting the public interest, it must be assumed that the language which the legislature employed to express its meaning does express it; and a public official, named in such a statute as the official to exercise the authority thereby conferred, is, in exercising that authority, within the "iron framework" of the enactment to which he is professing to give effect.

As I have said, I have no doubt that the facts of the present case do not bring the Commissioner's action within the authority of the Commissioner under the statute. It is quite plain that the judgment against Dumont for costs in an action brought by himself in which no amount was recovered for damages, either in respect of personal injury or in respect of damage to property and in which no claim was made against Dumont for damages in excess of one hundred dollars, does not bring the power of the Commissioner under section 84 (1) into operation. This is so clear that, in my opinion, there is no room for argument upon it.

After the judgment of the Court of Appeal allowing the appeal, the Commissioner of Police very properly complied with the order and delivered up the licenses and number plates. The argument on behalf of the appellant in support of the Commissioner's authority being, as I have said, quite without substance, I think a reasonable interpretation of what occurred is that the Commissioner acquiesced in the judgment of the Court that the suspension was invalid and that he was not entitled to retain the licenses and number plates. From that point of view the appeal had no practical object. Even if the appellant's technical objection to the proceeding by way of *mandamus* had been well founded, the licenses and number plates would still remain in the hands of the respondent; the purported suspension would still remain a void act and the

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only question for discussion on the appeal would be the academic technical question with regard to the propriety of proceeding by *mandamus* and the question of costs.

If an application had been made to quash the appeal at the outset we should have been compelled to say that, the appeal on the question as to the effect of this statute being entirely without merit and the judgment on that point having been acquiesced in, the sub-stratum of the litigation had disappeared and the appellant could not be allowed to prosecute the appeal for the purpose of raising a technical question which had become entirely academic and the question of costs.

I do not mean to throw any doubt upon the decision of the Court of Appeal touching the technical point of procedure and I have no doubt that the Commissioner's authority is vested in him as the agent of the statute and that *mandamus* will lie to compel him to perform his duty. It is unnecessary to decide whether in the circumstances of this case *mandamus* was the proper procedure, but it must be understood that on that point we are not dissenting from the view of the Court of Appeal.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *H. Castillou.*

Solicitor for the respondent: *P. S. Marsden.*

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* March 31.
* April 22.

DAVID COWEN AND NEWS PUBLISHING COMPANY, LIMITED (DEFENDANTS) ..... } APPELLANTS;

AND

THE ATTORNEY-GENERAL FOR BRITISH COLUMBIA EX REL. COLLEGE OF DENTAL SURGEONS FOR BRITISH COLUMBIA (PLAINTIFF).. } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law—Dentistry Act—Section 63 enacting prohibitions affecting unregistered dentists—Validity—Whether intra vires as to foreign

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

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dentists—Prohibitory advertisement by the latter in the province—Holding out "as being qualified or entitled" to practice—Injunction—Section 63 of the Dentistry Act, R.S.B.C., 1936, c. 72, as enacted in the statute of 1939, c. 11, s. 3.

Subsection (2) of section 63 of the *Dentistry Act*, R.S.B.C., 1936, c. 72, added thereto by 1939, c. 11, s. 3, which provides that "no person "not registered under this Act shall * * * hold himself out as "being qualified or entitled to practise the profession of dentistry "either within the province or elsewhere, * * * or circulate or "make public anything designed or tending to induce the public to "engage or employ as a dentist any person not registered under this "Act," is *intra vires* the powers of the legislature.

Prima facie this legislation is within the provincial legislative sphere and there is no circumstance in this case which would have the effect of rebutting this *prima facie* conclusion. The statute does not profess to prohibit people going beyond the limits of the province for the purpose of getting the benefit of the services of a dentist, or to regulate their conduct in doing so; nor does it prohibit the sending into the province from abroad of newspapers and journals containing the advertising cards of practising dentists; nor does it prohibit any communication with the province from abroad.

Union Colliery Company of British Columbia v. *Bryden*, [1889] A.C. 580 dist.

Judgment of the Court of Appeal (55 B.C.R. 506) affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Murphy J. (2) and maintaining an action for an injunction to prevent publication of advertisements in the daily paper of the appellant, the News Publishing Company, Limited, at Nelson, B.C., on behalf of and by the authority of the appellant Cowen, who is not a member of the College of Dental Surgeons, holding him out as a dentist practising in the city of Spokane, in the State of Washington, U.S.A.

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

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

The judgment of the Court was delivered by

THE CHIEF JUSTICE—This appeal raises the question of the validity of an amendment to the British Columbia *Dentistry Act*, R.S.B.C., 1936, chap. 72, s. 63, which was enacted in 1939 by chap. 11, s. 3, of the statutes of that year. The section as amended reads as follows:—

(1) (1940) 55 B.C.R. 506; [1941] 1 W.W.R. 9; [1941] 1 D.L.R. 565.
(2) (1940) 55 B.C.R. 370; [1940] 3 W.W.R. 242; [1940] 4 D.L.R. 755.

No person not registered under this Act shall, within the Province, directly or indirectly offer to practise, or hold himself out as being qualified to practise, the profession of dentistry either within the Province or elsewhere, and no person shall, within the Province, directly or indirectly, hold out or represent any other person not registered under this Act as practising or as qualified or entitled or willing to practise the profession of dentistry in the Province or elsewhere, or circulate or make public anything designed or tending to induce the public to engage or employ as a dentist any person not registered under this Act.

Prior to the passing of this amendment the *Dentistry Act* had established certain prohibitions affecting persons not registered under the statute in respect of the practice of dentistry in British Columbia. In effect, it forbade such persons to offer to practise dentistry in British Columbia, and prohibited anybody from holding out any such person as entitled or qualified to practise dentistry in that province.

The result of the amendment is to bring under the ban of these prohibitions cases where the offer to practise or the holding out, relates to the practice of dentistry outside the province, and the capacity of a provincial legislature to pass such legislation is challenged by the appeal.

The decisive consideration, in my opinion, is that the prohibitions are directed against acts done within the province. *Prima facie* the legislation is within the provincial legislative sphere. Nor do I think (subject to an observation to be made upon one feature of the amending statute) there is any circumstance present here which has the effect of rebutting this *prima facie* conclusion. The statute does not profess to prohibit people going beyond the limits of British Columbia for the purpose of getting the benefit of the services of a dentist, or to regulate their conduct in doing so; nor does it prohibit the sending into British Columbia from abroad of newspapers and journals containing the advertising cards of practising dentists; nor does it prohibit any communication with British Columbia from abroad. Such prohibitions would present an entirely different question.

There is one feature of the statute to which it is desirable to advert. By section 63 of the principal Act, which is now section 63, subsection (1), there is a definition of "practising the profession of dentistry within the meaning of this Act." By section 2 of the amending Act of

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1939, section 63 is amended by bringing within the category of persons who are deemed to be practising dentistry within the meaning of the Act

> any person * * * who supplies or offers to supply to the public artificial teeth, dentures or repairs therefor.

It would seem to be at least arguable that the statute as amended in 1939 prohibits the publication in British Columbia by persons carrying on business outside the Province of advertisements stating that they are manufacturers of or dealers in dental supplies of the description or descriptions mentioned. It is unnecessary to consider this aspect of the amendments of 1939. It might be argued, not without plausibility, that any prohibition of the publication in British Columbia of such advertisements in respect of articles of commerce is legislation in relation to a matter that is not a local British Columbia matter, within the contemplation of sections 91 and 92 of the *British North America Act*. Assuming the amending legislation to be *pro tanto* invalid by reason of this particular feature of it, the offending parts seem to be plainly severable; and no such question is raised by the advertisements before us.

The argument of Mr. Farris was largely based upon *Bryden's* case (1). There it was held that the statute (having regard to its necessary effect) invaded the legislative field assigned exclusively to the Dominion by section 91 (25) "naturalization and aliens." Subject to what has just been said, the principle of the judgment in that case does not apply here.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

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

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

(1) [1899] A.C. 580.

INTERNATIONAL HARVESTER COMPANY OF CANADA, LIMITED..... APPELLANT;

AND

THE PROVINCIAL TAX COMMISSION, THE COMMISSIONER OF INCOME TAX, THE PROVINCIAL TREASURER, AND THE ATTORNEY-GENERAL FOR SASKATCHEWAN. RESPONDENTS.

1940
* Oct. 15, 16, 17, 18.

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* April 22.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Income tax—Companies—Constitutional law—Extra-provincial company selling some of its products within the province—Assessment of company by the province for income tax—Income tax on "the net profit or gain arising" from business in the province—Company not keeping separate profit and loss account in respect of business done in the province—Statute authorizing regulations for determining a company's income within the province where such income cannot be ascertained—Regulation providing that such income shall be taken to be such percentage of company's income "as the sales within the province bear to the total sales"—Constitutionality of statute and regulation—Validity of regulation and assessment, having regard to the statute—Error in assessment in not allowing for deduction in respect of reserve for bad debts—Right of appeal in respect of assessments for income tax in Saskatchewan—Saskatchewan statutes: The Income Tax Act, 1932, c. 9, and amending Acts; The Income Tax Act, 1936 c. 15, and amending Acts; 1934-35, c. 6 (amending The Treasury Department Act); The Treasury Department Act, 1938, c. 8, and amending Acts.

Appellant company had its head office and central management and control at Hamilton in the province of Ontario. It had branch offices in the province of Saskatchewan. It manufactured agricultural implements, the manufacture being wholly outside of Saskatchewan. It sold its products in Saskatchewan and elsewhere. All moneys received in Saskatchewan, for sales or in payment of debts, were deposited in separate bank accounts and remitted in full to the head office in Hamilton. It kept no separate profit and loss account in respect of the business done in Saskatchewan; it kept at its head office in Hamilton a profit and loss account of its entire business.

By statute of Saskatchewan, every corporation and joint stock company "residing or ordinarily resident or carrying on business within the province" must pay a tax upon its income during the preceding year. "Income" was defined (in part) as "the annual net profit or gain * * * as being profits * * * received by a person * * * from any trade, manufacture or business * * * whether derived from sources within Saskatchewan or elsewhere." Profits earned by a corporation or joint stock company (other than a personal corporation) "in that part of its business carried on at a branch or agency outside of Saskatchewan" were not liable to

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

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taxation. The income liable to taxation of every person (including any body corporate and politic) residing outside of Saskatchewan, who was carrying on business in Saskatchewan, "shall be the net profit or gain arising from the business of such person in Saskatchewan" (*Income Tax Act, 1932, s. 21a; Income Tax Act, 1936, s. 23*). Where the Minister was unable to determine or to obtain the information required to ascertain the income within the province of any corporation or joint stock company or of any class of corporations or joint stock companies, the Lieutenant-Governor in Council might make regulations for determining such income within the province or might fix or determine the tax to be paid by a corporation or joint stock company liable to taxation. Regulations were issued "covering such cases where the Minister is unable to determine or obtain information required to ascertain the income within the Province of a corporation or joint stock company carrying on a trade or business within and without the Province." A regulation (applied in the present case) provided that the income liable to taxation "shall be taken to be such percentage of * * * the income as the sales within the Province bear to the total sales"; the sales being measured by the gross amount received from sales and other sources (certain kinds of receipts being excluded). Provision was made for a taxpayer objecting as to the application of such method to his business and for re-determining the taxable income by some other method of allocation and apportionment as the Commissioner might decide.

On August 23, 1938, the Commissioner of Income Tax made assessments upon appellant in respect of its income for each of the years 1934, 1935, and 1936, applying the regulation above quoted. Appellant appealed unsuccessfully from the assessments, first to the Board of Revenue Commissioners and then to Anderson J. ([1939] 3 W.W.R. 129). It then appealed to the Court of Appeal for Saskatchewan, which held ([1940] 2 W.W.R. 49) that, on consideration of the relevant statutes, there was no right of appeal to it in respect of the assessment for 1934, and the appeal as to that assessment should be dismissed for want of jurisdiction; but that there was a right of appeal in respect of the assessments for 1935 and 1936; and that the assessments for 1935 and 1936 were defective in that they did not provide for allowance for deduction in respect of a reserve for bad debts, and should be set aside, and in making new assessments the question of such reserve should be reconsidered in the light of the reasons for judgment of the Court of Appeal; but that all other objections to the assessments failed. On appeal and cross-appeal to this Court:

Held (*per* Rinfret, Crocket, Kerwin and Hudson JJ.): (1) There was a right of appeal to the Court of Appeal with respect to the assessments for 1935 and 1936, as held by the Court of Appeal; but there was also a right of appeal to the Court of Appeal with respect to the assessment for 1934. (Provisions of the following Saskatchewan Acts considered: *The Income Tax Act, 1932, c. 9,* and amending Act, 1934-35, c. 16; *An Act to amend The Treasury Department Act,* 1934-35, c. 6; *The Income Tax Act, 1936, c. 15;* and amending Acts, 1937, c. 8; 1938, c. 91 (s. 2); 1939, c. 9; *The Treasury Department Act, 1938, c. 8;* and amending Acts, 1940, c. 5, c. 6).

(2) The application of the above quoted regulation was validly adopted in the method of assessment. The regulation, and the authorizing statutory enactment, were *intra vires*. Their purpose was to reach by taxation only the income arising from the business in Saskatchewan, of non-resident companies which carry on business in Saskatchewan, and the purpose of their application in the present case was to reach by taxation only the income arising from appellant's business in Saskatchewan. And the adoption of such method was proper under the circumstances, as being the best available means to ascertain that income. (*Bank of Toronto* v. *Lambe*, 12 App. Cas. 575; *Attorney-General* v. *Till*, [1910] A.C. 50, at 72, cited).

(3) The holding of the Court of Appeal that the assessments for 1935 and 1936 were defective as aforesaid and should be set aside, and the direction for reconsideration of the question of a reserve for bad debts, should be affirmed; but the same holding and direction should be applied in respect of the assessment for 1934.

Per the Chief Justice and Davis and Taschereau JJ. (dissenting): The assessments were invalid because the regulation pursuant to which they purported to be made either did not apply to appellant or was beyond the powers of the Lieutenant-Governor in Council. The essence of appellant's profit making business is a series of operations as a whole (including manufacturing, etc.). Though that part of the proceeds of appellant's sales in Saskatchewan which is profit is received in Saskatchewan, yet it cannot be said that the whole of such profit "arises from" that part of its business which is carried on there within the contemplation of s. 21*a* (above quoted, of the Act of 1932—the same as s. 23 of the Act of 1936). The effect of the words "net profit or gain arising from the business of such person in Saskatchewan" in s. 21*a* is, for the purpose of s. 21*a*, to delete from the definition of "income" above quoted the words "or elsewhere." The policy of the Act, as shown by s. 21*a*, along with other provisions, is that the profits taxable under s. 21*a* as "arising from the business" of a non-resident "in Saskatchewan" are that part of the profits which is earned therein, and to remove from the incidence of income tax profits earned elsewhere, without regard to the place where those profits may have been received. (*Commissioners of Taxation* v. *Kirk*, [1900] A.C. 588, referred to as helpful in the elucidation of the Act now in question). In the present case the method of determination adopted, as put in the regulation, was to ascertain the ratio of the sales in Saskatchewan to the total sales and then apply that ratio to the income (profits). As determined by this method, the subject of taxation is a percentage of the sales in Saskatchewan, a percentage which is identical with the ratio between total profits and total sales. Under the regulation applied, the subject of income tax is that part of the sales in Saskatchewan which is profit; that is to say, the whole of the profit received in Saskatchewan. This is a procedure wholly inadmissible under the Act. Nowhere does the Act authorize the Province to tax a manufacturing company, situated as appellant is, in respect of the whole of the profits received by the company in Saskatchewan. It is not the profits received in Saskatchewan that are taxable; it is the profits arising from its business in Saskatchewan; not the profits arising from its manufacturing business in Ontario and from its operations in Saskatchewan taken together, but the profits arising

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from its operations in Saskatchewan. The enactment authorizing the making of regulations limits the authority to making regulations "for determining such income within the province"; "such income" being the income contemplated by the taxing provisions of the Act as the subject of income tax; i.e., in the case of non-resident companies, the profits arising out of that part of their business that is carried on in Saskatchewan. Consequently, the regulation in question, if it applied to non-resident companies such as appellant, was not competently made, because its aim was not within the purpose for which the statutory authority was given. The aim of the regulation was to determine the profits received by such companies in Saskatchewan; the authority was to make regulations for determining the net profits as limited and defined by s. 21*a*.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1) in so far as it dismissed the present appellant's appeals from the judgment of Anderson J. (2) dismissing its appeals from the decision of the Board of Revenue Commissioners of Saskatchewan dismissing its appeals from three assessments, all bearing date August 23, 1938, for income tax in respect of the years 1934, 1935, and of the period of ten months ending October 31st, 1936, respectively.

The formal judgment of the Court of Appeal was in part as follows:

* * * and this Court having held that there is no appeal from the decision of the said Judge in Chambers in respect of the said assessment for the taxation year 1934, but that the said assessments for the taxation years 1935 and 1936 should be set aside because they are defective in so far as a reserve for bad debts is concerned, and this Court having awarded the appellant two-thirds of its costs incurred in this Court and below, and having held that on all other grounds the said appeals fail;

1. THIS COURT DOTH HEREBY ORDER AND ADJUDGE that there is no appeal from the decision of the said Judge in Chambers under the *Income Tax Act of 1932,* and that therefore the said appeal in respect of the said assessment for the taxation year 1934 be and the same is hereby dismissed on the ground that this Court has no jurisdiction to entertain the same.

2. THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the said assessments for the taxation years 1935 and 1936 respectively are defective in that they do not make provision for the appellant being allowed any deduction in respect of a reserve for bad debts, and that the said assessments for the said years 1935 and 1936 be and the same are hereby set aside.

3. AND THIS COURT DOTH FURTHER ORDER that the Commissioner in making new assessments for the said years 1935 and 1936 shall reconsider the question of a reserve for bad debts in the light of the

(1) [1940] 2 W.W.R. 49; [1940] 2 D.L.R. 646.
(2) [1939] 3 W.W.R. 129.

reasons for judgment of this Honourable Court delivered this day, and shall exercise the discretion vested in him by section 6 (*d*) of the *Income Tax Act, 1936,* upon sound principles.

4. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the respondents do pay to the appellant two-thirds of the appellant's costs of and incidental to its said appeals to this Court and its said appeals to a Judge of the Court of King's Bench, such costs to be taxed on the King's Bench scale.

Special leave to appeal to the Supreme Court of Canada was granted to the appellant by the Court of Appeal for Saskatchewan. Appellant's notice of appeal (following in effect the provisions of the order granting special leave) limited its appeal to complaint against

clause 1 of the formal judgment or order of the Court of Appeal and the judgment or decision of the said Court that on all other grounds, except with respect to the deduction in respect of a reserve for bad debts, as ordered in clauses 2 and 3 of the formal judgment or order of the Court of Appeal, the appellant's appeals fail, and including among the part complained of the disallowance by the said Court (in clause 4 of the formal judgment or order) of one-third of the appellant's costs of its appeals to this Court and to a Judge of the Court of King's Bench.

The respondents cross-appealed, contending that the Court of Appeal should have held that there was no appeal from the decision of the Board of Revenue Commissioners with respect to the assessments for the taxation years 1935 and 1936 respectively; or, if it be held that the Court of Appeal had jurisdiction to hear the appeals with respect to said assessments, then it erred in holding that the Commissioner of Income Tax, in making an allowance for bad debts, made a mistake in law in arriving at the amounts to be assessed; and that the Court of Appeal erred in its award as to costs; and asked for variations in the judgment of the Court of Appeal accordingly.

The material facts of the case, the statutes involved, and the questions in dispute are sufficiently stated in the reasons for judgment in this Court now reported.

The appeal to this Court was allowed in part. The assessment for the taxation year 1934 was set aside and the same directions were given to the Provincial Tax Commissioner in reconsidering the question of a reserve for bad debts as the directions contained in paragraph 3 of the order of the Court of Appeal with respect to the taxation years 1935 and 1936. Appellant was to have one-half of its costs of its appeal. The cross-appeal was

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dismissed with costs. The Chief Justice and Davis and Taschereau JJ. would allow the appeal and quash the assessments.

Frank L. Bastedo K.C. for the appellant.

Samuel Quigg K.C. for the respondents.

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

THE CHIEF JUSTICE—The appellant company carries on the business of manufacturing and selling agricultural machinery and parts thereof. The Company is incorporated under the *Companies Act* of Ontario and is registered in Saskatchewan under the *Companies Act* of that province.

Its head office is at Hamilton, Ontario. Its manufacturing business is carried on wholly outside Saskatchewan. The Company sells its products in Saskatchewan, as well as in other parts of Canada. It is admitted that the central management and control of the Company are at the head office in Hamilton.

On the 23rd of August, 1938, the Commissioner of Income Tax for Saskatchewan made assessments upon the Company in respect of its income for each of the years 1934 to 1936 inclusive. The subject of the tax, the taxable income of the Company for those years, was "determined" by the Commissioner in professed exercise of his authority under regulations approved by Order in Council of the 23rd of November, 1933; which regulations purport to derive their authority from sec. 7 (4) of the *Income Tax Act* of 1932, chap. 9 of the Statutes of that year.

These assessments are, in my opinion, invalid for the reason that the regulation pursuant to which they purport to be made either does not apply to the appellant company, or was beyond the powers of the Lieutenant-Governor in Council.

The special provision governing the appellant company in respect of income tax is sec. 21*a* of the Statute of 1932, which is in these words:—

> The income liable to taxation under this Act of every person residing outside of Saskatchewan, who is carrying on business in Saskatchewan, either directly or through or in the name of any other person, shall be the net profit or gain arising from the business of such person in Saskatchewan.

The appellant company is admittedly resident outside of Saskatchewan, within the meaning of this provision; and the business of the Company in Saskatchewan is limited to making contracts of sale by its agents and by them receiving the proceeds of such sales. The profits of the Company are derived from a series of operations, including the purchase of raw material or partly manufactured articles, completely manufacturing its products and transporting and selling them, and receiving the proceeds of such sales. The essence of its profit making business is a series of operations as a whole. That part of the proceeds of sales in Saskatchewan which is profits is received in Saskatchewan, but it does not follow, of course, that the whole of such profit "arises from" that part of the Company's business which is carried on there within the contemplation of section 21*a;* and I think such a conclusion is negatived when the language of this section is contrasted with that of other sections of the Act.

By section 3, income is defined; and income of the kind we are considering, profits of a business, is "profits * * * received by a person * * * from any trade, manufacture or business * * * whether derived from sources within Saskatchewan or elsewhere."

It is clear, I think, that the effect of the words "net profit or gain arising from the business of such person in Saskatchewan" in section 21*a* is, for the purpose of that section, to delete from the definition of income in section 3 the words "or elsewhere."

This view of section 21*a* is fortified by the language of other provisions. In section 4 it is enacted:—

> The following incomes shall not be liable to taxation hereunder:
> * * *
> (*m*) profits earned by a corporation or joint stock company * * * in that part of its business carried on at a branch or agency outside of Saskatchewan.

"Branch or agency" seems to point to companies having their principal place of business in Saskatchewan and it is, perhaps, to such companies that the subsection is primarily directed. The word "agency" may be comprehensive enough to extend to any establishment of the Company, even at the place of its head office; but it is sufficient to point out that even in the case of companies whose seat of business is in Saskatchewan, the policy of

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the Statute is to remove from the incidence of income tax profits "earned" at "branches or agencies" elsewhere, without regard to the place where those profits may have been received.

The language of sections 23 and 24 seems also to give support to the view that the profits taxable under section 21*a* as "arising from the business" of a non-resident "in Saskatchewan" are that part of such profits as is "earned" therein.

Mr. Bastedo relied upon *Commissioners of Taxation* v. *Kirk* (1), and I think, with respect, that the judgment of Lord Davey, speaking for the Judicial Committee, is helpful in the elucidation of the Statute before us.

The income in question was in part derived from ore extracted from land in New South Wales and from the conversion there of this ore into a merchantable product. The Income Tax Statute of New South Wales charged within income tax income "derived from lands of the Crown held under lease or licence" in New South Wales, and income "arising or accruing" from "any other source" in New South Wales. The Statute provided that "no tax shall be payable in respect of income earned" outside New South Wales. The company whose income came into question in that case was a mining company owning and working mines in New South Wales, the crude ore being there converted for the most part into concentrates. Almost the whole of the ore so treated was sold and the contracts for sale were made outside New South Wales. The Supreme Court of New South Wales held, following a previous decision, *In re Tindal* (2), that the whole of the income included in the proceeds of sales was earned and arose at the place where the sales were made and the proceeds of the sales received, and that, consequently, no part of such proceeds was taxable as income in New South Wales.

This judgment was reversed by the Judicial Committee. Their Lordships said at pp. 592 and 593:—

> Their Lordships attach no special meaning to the word "derived," which they treat as synonymous with arising or accruing. It appears to their Lordships that there are four processes in the earning or production of this income: (1) the extraction of the ore from the soil; (2) the conversion of the crude ore into a merchantable product, which is a

(1) [1900] A.C. 588. (2) (1897) 18 N.S. W.L.R. 378.

manufacturing process; (3) the sale of the merchantable product; (4) the receipt of the moneys arising from the sale. All these processes are necessary stages which terminate in money, and the income is the money resulting less the expenses attendant on all the stages. The first process seems to their Lordships clearly within sub-s. 3, and the second or manufacturing process, if not within the meaning of "trade" in sub-s. 1, is certainly included in the words "any other source whatever" in sub-s. 4.

So far as relates to these two processes, therefore, their Lordships think that the income was earned and arising and accruing in New South Wales. * * * This point was, if possible, more plainly brought out in *Tindal's* case (1). * * * The question in that case, as here, should have been what income was arising or accruing to Tindal from the business operations carried on by him in the Colony.

The fallacy of the judgment of the Supreme Court in this and in *Tindal's* case (1) is in leaving out of sight the initial stages, and fastening their attention exclusively on the final stage in the production of the income.

The distinction under the Statute there in question between "income received" and "income earned" is signalized by their Lordships in these observations at p. 592:—

Nor is it material whether the income is received in the Colony or not if it is earned outside the Colony. The Supreme Court have thought in *Tindal's* case (1) and in these cases that the income was not earned in New South Wales because the finished products were sold exclusively outside the Colony.

The Deputy Attorney-General in his able argument contended that by sec. 21*a* of the Saskatchewan Act all profits received in Saskatchewan by a company having its residence outside Saskatchewan are taxable as profits "arising out" of that part of the company's business carried on in Saskatchewan. Sufficient has been said to indicate the grounds upon which, I think, considerations on which their Lordships in the Judicial Committee proceeded in *Kirk's* case (2) are pertinent here, and lead to the conclusion that this contention of the Crown ought not to be accepted.

I now turn to the regulation, the pertinent parts of which are as follows:—

Covering such cases where the Minister is unable to determine or obtain information required to ascertain the income within the Province of a corporation or joint stock company carrying on a trade or business within and without the Province.

1. Interest, dividends, rents and royalties less their proportionate share of deductions allowed shall be separately determined or ascertained, and if they are received in connection with the trade or business of the taxpayer in the Province, shall be income liable to taxation.

(1) (1897) 18 N.S.W.L.R. 378. (2) [1900] A.C. 588.

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2. The income referred to in regulation 1 having been separately determined and ascertained, the remainder of the income of the taxpayer liable to taxation shall be taken to be such percentage of the remainder of the income as the sales within the Province bear to the total sales.

The income with which we are concerned is that dealt with in paragraph two. The method of determination, as it is put in the regulation, is to ascertain the ratio of the sales within the province to the total sales of the company and then apply that ratio to the income. Income, for our present purpose, of course, means profits. I think, perhaps, I can explain my way of looking at the regulation more clearly by calling attention to the fact that the subject of taxation, as determined by this method, is a percentage of the sales in Saskatchewan, a percentage which is identical with the ratio between total profits and total sales. Assume, for example, that the total sales amount to one hundred units of money and the total profits to twelve units of money and the sales in Saskatchewan to fifteen units of money. Then the subject of taxation is twelve per cent. of fifteen, an expression which, of course, is arithmetically identical with the expression fifteen per cent. of twelve, the form in which it is put in the regulation. In other words, under the regulation the subject of income tax is that part of the sales in Saskatchewan which is profit; that is to say, the whole of the profit received in Saskatchewan. This view of the effect of the regulation was not disputed by Mr. Quigg, who, as above intimated, supported it in argument as a proper application of the statutory provisions. I humbly think that this is a procedure wholly inadmissible under the Statute. Nowhere does the Statute authorize the Province of Saskatchewan to tax a manufacturing company, situated as the appellant company is, in respect of the whole of the profits received by the company in Saskatchewan. It is not the profits received in Saskatchewan that are taxable; it is the profits arising from its business in Saskatchewan, not the profits arising from the company's manufacturing business in Ontario and from the company's operations in Saskatchewan taken together, but the profits arising from the company's operations in Saskatchewan.

Section 7 (4), which is the enactment under which the Lieutenant-Governor in Council receives his authority to make regulations, limits that authority to making regula-

tions "for determining such income within the province"; "such income" being (it cannot be anything else) the income contemplated by the taxing provisions of the Statute as the subject of income tax; that is to say, in the case of companies not resident in Saskatchewan, the profits arising out of that part of their business that is carried on in Saskatchewan. The regulation, consequently, if it applies to non-resident companies such as the appellant company, is not competently made, because the aim of it is not within the purpose for which the statutory authority is given to the Lieutenant-Governor in Council. The aim of the regulation is to determine the profits received by such companies in Saskatchewan. The authority is to make regulations for determining the net profits as limited and defined by section 21*a*.

The appeal should be allowed and the assessments set aside. The appellant company should have its costs throughout.

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

RINFRET J.—The appellant is a company incorporated under the *Companies Act* of the Province of Ontario, having its head office in the city of Hamilton, in that province. It is registered under the provisions of the Saskatchewan *Companies Act*.

The business of the appellant is the manufacture and sale of agricultural implements and parts thereof and business incidental thereto. The manufacture of these implements and parts is carried on by the appellant entirely outside the province of Saskatchewan. The sale is carried on partly in the province of Saskatchewan and partly in other provinces of Canada and in other countries.

All sales made in Saskatchewan of the appellant's goods are made by the agents of the appellant, at its various branch offices in Saskatchewan; and the sale contracts in respect of such goods are made and executed in Saskatchewan.

All moneys received by the appellant in Saskatchewan, whether in respect of sales or as payments on debts owing to the appellant, are deposited in separate bank accounts and remitted in full to the head office of the appellant in Hamilton, Ontario.

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There are no directors of the appellant resident in Saskatchewan and no meetings of the Board of Directors of the appellant are held in that province. The central management and control of the appellant are held in the province of Ontario.

The appellant keeps no separate profit and loss account in respect of the business it carries on in the province of Saskatchewan. It only keeps at its head office a profit and loss account of its entire business carried on in Canada and elsewhere.

The province of Saskatchewan levies a tax upon incomes authorized by *The Income Tax Act, 1932*, which later was followed by a new Act (practically a consolidation of the former Act and its amendments) assented to on April 1st, 1936. This Act of 1936 replaced the Act of 1932 which it repealed, except in certain respects, of which more will have to be said later.

Under the Act of 1932, every person liable to taxation shall on or before the thirty-first day of May in each year deliver to the Minister a return in such form as the Minister may prescribe of any total income during the last preceding year.

The Minister here means the Provincial Treasurer.

"Person" is defined in the Act, s. 2 (8):

> An individual, and includes a guardian, trustee, executor, administrator, agent, receiver or any other individual, firm or corporation, acting in a fiduciary capacity, and the heirs, executors, administrators, successors and assigns of such person.

For the purpose of the Act, "Income" is defined:

> The annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be, whether derived from sources within Saskatchewan or elsewhere; and includes the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source [sec. 3].

It is stated that "any other source" includes:

> (*a*) the income from, but not the value of, property acquired by gift, bequest, devise or descent; and

(*b*) the income from but not the proceeds of life insurance policies
* * *

(*c*) the salaries, indemnities or other remuneration of all persons whatsoever, whether the said salaries, indemnities or remuneration are paid out of the revenue of His Majesty in respect of his Government of Canada, or of any province thereof, or by any person, except as herein otherwise provided; and

(*d*) all other gains or profits of any kind derived from any source within or without the province whether received in money or its equivalent.

The Act then provides (sec. 4) for certain exemptions and deductions, of which only subs. (*m*) need be quoted:

(*m*) profits earned by a corporation or joint stock company, other than a personal corporation, in that part of its business carried on at a branch or agency outside of Saskatchewan.

It should merely be mentioned that the appellant is not a "personal corporation" within the definition of the Act (s. 2, subs. 9).

The liability to tax is imposed upon corporations and joint stock companies, no matter how created or organized, carrying on business within the province, at the rate applicable thereto set forth in the first schedule of the Act, upon income during the preceding year exceeding one thousand dollars (s. 7, subs. 3).

After examination of the taxpayer's return, already referred to and provided for by sec. 29, the Minister must send a notice of assessment to the taxpayer verifying or altering the amount of the tax as estimated by him in his return; and any additional tax found due over the amount already paid by the taxpayer in accordance with sec. 44 (which provides for the payment of not less than one-quarter of the amount of the tax at the time when the return of the income is made) must then be paid within one month from the date of the mailing of the notice of assessment (s. 51).

The Act then authorizes an appeal to the Minister by any person, corporation or joint stock company who or which objects to the amount at which he or it is assessed, or considers that he or it is not liable to taxation (sec. 53).

Upon receipt of the notice of appeal, the Minister considers the same and is empowered to affirm or amend the assessment appealed against.

An appeal lies from the decision of the Minister to a Judge of the Court of King's Bench (s. 54).

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At the hearing of the appeal, the Judge hears and considers the cause upon the material filed by the Minister, and upon any further evidence which the appellant or the Crown may produce at the discretion of the Judge. The Judge may affirm, amend or disallow the assessment and it is enacted that "his decision shall be final in all matters relating to the appeal, and there shall be no appeal therefrom."

By an Act to amend the Act of 1932 (which came into force on April 7th, 1934) "person" was declared to include "any body corporate and politic and any association or other body, and the heirs, * * *." (subs. 2 of s. 2 of ch. 5 of the Statutes of 1934).

The administration of the Act and the control and the management of the collection of the taxes imposed thereby was entrusted to the Provincial Treasurer (s. 61); but it was provided that the Minister could authorize the Commissioner of Income Tax, appointed pursuant to the provisions of the Act, to exercise such of the powers conferred by the Act upon the Minister as may, in the opinion of the Minister, be conveniently exercised by the Commissioner (s. 61 (2)).

In 1935 (c. 16 of the Statutes of 1934-1935), the Act of 1932 was amended by providing for an appeal to the Board of Revenue Commissioners in lieu of the appeal to the Minister, and by striking out the word "Minister" wherever it occurred in matters relating to the appeal and substituting for it the word "Board."

Then the *Income Tax Act, 1936,* came into force on April 1st of that year (c. 15 of the Statutes of 1936). The scheme of this new Act is practically the same as that of the Act of 1932, including the amendments already mentioned, but with some differences which will be mentioned shortly.

On the 28th May, 1935, the appellant filed with the Commissioner of Income Tax its return of income for the taxation year 1934.

On the 2nd day of June, 1936, the appellant filed its return for the year 1935.

On the 26th of May, 1937, the appellant filed its return of income for the period of ten months ending the 31st October, 1936.

Prior to assessing the appellant's income for the years 1934, 1935 and 1936, the Commissioner of Income Tax asked for certain information from the appellant. The appellant gave the information on the 6th day of June, 1938. The Commissioner asked for further information, which was given on the 8th of July, 1938.

The Commissioner did not request any further information, nor did the appellant supply any.

On the 23rd August, 1938, the Commissioner made an assessment in the sum of $4,382.07 in respect of the income of the appellant for the taxation year 1934, an assessment in the sum of $11,341.07 in respect of the income of the appellant for the taxation year 1935, and an assessment in the sum of $10,136.60 in respect of the income for the period of ten months ending on the 31st October, 1936.

There was an appeal to the Board of Revenue Commissioners in respect of the assessment for each of the years 1934, 1935 and 1936.

The Board dismissed the three appeals and affirmed the three assessments.

Again there was an appeal from the Board to a King's Bench judge. The latter (Anderson J.) again dismissed the three appeals and confirmed the decision of the Board of Revenue Commissioners.

The matter was then carried to the Court of Appeal of Saskatchewan, which adjudged that there was no right of appeal from the decision of the judge in chambers in respect of the assessment for the taxation year 1934. The appeal in regard to it was accordingly dismissed on the ground that the Court of Appeal had no jurisdiction to entertain the same.

The Court adjudged, however, that it had jurisdiction to entertain the appeals against the assessments for the taxation years 1935 and 1936. It held that they were defective in that they did not make provision for the appellant being allowed any deduction in respect of a reserve for bad debts. It ordered, therefore, that the said assessments be set aside; that the Commissioner, in making new assessments for the years 1935 and 1936, should reconsider the question of a reserve for bad debts in the light of the reasons for judgment of that Court and should exercise the discretion vested in him by s. 6 (*d*) of the *Income Tax Act, 1936,* upon sound principles.

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By special leave of the Court of Appeal for Saskatchewan, the Company now appeals from the judgment of that Court

except that part of the said judgment or order setting aside the said assessments for the taxation years 1935 and 1936 because they are defective in so far as a reserve for bad debts is concerned, as ordered in clauses 2 and 3 of the formal judgment, the part of the judgment or order of the Court of Appeal appealed from being clause 1 of the formal judgment or order of this Court and the judgment or decision of this Court that on all other grounds, except with respect to the deduction in respect of a reserve for bad debts, the appellant's appeals fail and including the disallowance by this Court of one-third of the appellant's costs of its appeals to this Court and a Judge of the Court of King's Bench.

The first point to be considered is whether, as the Court of Appeal has decided, there was a right of appeal to it with respect to the taxation years 1935 and 1936; and the second point is whether there also existed a right of appeal to that Court in respect of the taxation year 1934. As pointed out in the Court of Appeal, these questions of its jurisdiction are not without difficulty. The numerous amendments to the Acts of 1932 and 1936 are not clear and are not made clearer by the introduction of certain other provisions in the successive Treasury Department Acts (c. 6 of the Statutes of 1934-1935; c. 8 of the Statutes of 1938; c. 5 of the Statutes of 1939, and c. 5 and c. 6 of the Statutes of 1940).

It has already been mentioned that, under the scheme of the Act of 1932, there was a right of appeal to the Minister from the assessment originally made upon the return of a person liable to taxation under the Act; and a further right of appeal from the decision of the Minister to a Judge of the Court of King's Bench, who could affirm, amend, or disallow the assessment and whose decision was declared to be final in all matters relating to the appeal and from whom it was enacted that "there shall be no appeal" (s. 54 (5)).

We have also seen that in 1935, for purposes of appeal under s. 53 of the 1932 Act, the Board of Revenue Commissioners was substituted to the Minister.

This Board had been created by *An Act to amend The Treasury Department Act* (c. 6 of the Statutes of 1934-35, assented to February 21st, 1935).

By sec. 2 of the *Act to amend The Treasury Department Act,* the Lieutenant-Governor in Council was given the authority to appoint a Board of Revenue Commissioners consisting of three members, with power to hear appeals respecting the payment of taxes or other moneys due to the Crown; and its decisions thereon were declared to be final and not subject to further appeals, unless otherwise provided for in any revenue Act.

It is common ground that the taxes respecting which the Board was given power to hear appeals would include taxes levied under the *Income Tax Act* of 1932 or 1936. It was further conceded that the words "in any revenue Act" would include the *Income Tax Act.*

After the creation in 1935, as above mentioned, of the Board of Revenue Commissioners, there came into force the new *Income Tax Act* of 1936, which provided for returns to the Commissioner to be made by every person liable to taxation under the Act, for an assessment to be made by the Commissioner after examination of the return made by the taxpayer, and for an appeal to the Board of Revenue Commissioners, apointed under the provisions of *The Treasury Department Act,* by any person who objected to the amount at which he was assessed or who considered that he was not liable to taxation.

The 1936 *Income Tax Act* empowered the Board to duly consider the appeal and to affirm or amend the assessment appealed against (s. 57). An appeal was provided from the decision of the Board to a Judge of the Court of King's Bench (s. 58); and the Act of 1936, as it stood at first, empowered the Judge to affirm, amend or disallow the assessment; but it enacted that his decision should be final in all matters relating to the appeal and that there should be no appeal therefrom.

However, in 1937, the *Income Tax Act, 1936,* was amended by c. 8 of the Statutes of 1937, which came into force on April 16th of that year, and therein (s. 6) the Commissioner or any other interested person was given the right of appeal from the decision of the Judge to the Court of Appeal, as if such decision were a judgment in an action between subject and subject, with the proviso that there should be no further or other appeal.

Then in 1939 (c. 9 of the Statutes of 1939), it was further provided that the appeal from the decision of the

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Board and any further appeal should be subject to and governed by the provisions of secs. 41 and 42 of the *Treasury Department Act, 1938* (s. 16 of c. 9 of the Statutes of 1939).

And if we now turn to sections 41 and 42 of the *Treasury Department Act, 1938,* referred to in sec. 16 of the statute just mentioned, we find that, under those sections 41 and 42, an appeal shall lie to a Judge of the Court of King's Bench from a decision of the Board on a question of law arising in an appeal to it under clause (*a*) of subsec. 8 of sec. 40 (N.B.: Clause (*a*) of subs. 8 of s. 40 empowers the Board to hear appeals respecting the payment of taxes or other moneys due to the Crown). As for s. 42 of the *Treasury Department Act, 1938,* it enacts that the Provincial Tax Commission, with the consent of the Attorney-General, or any other interested person may appeal from the decision of the Judge to the Court of Appeal as if such decision were a judgment between subject and subject, but that there shall be no further or other appeal.

And again, in 1940, by *An Act to amend The Treasury Department Act, 1938* (No. 1), being c. 5 of the Statutes of 1940, it was provided that the appeal from the decision of the Judge may be made

> in the same manner as an appeal may be taken in any action or cause in the Court of King's Bench to which His Majesty is a party, and the practice and procedure relating to appeals shall apply to such appeal, provided that where an appeal has been taken to the Court of Appeal there shall be no further or other appeal except in cases where the constitutional validity of any statute of the province or regulations made thereunder is brought into question.

And it was further provided that the right of appeal already given by the *Treasury Department Act* of 1938 (c. 8 of the Statutes of 1938, secs. 41 and 42) shall not apply

> where provision is made by any revenue Act for an appeal from the decision of the Board differing in character from the appeal herein provided for

(Sec. 3 of c. 5 of the Statutes of 1940). And it was enacted that, upon an appeal to a judge of the Court of King's Bench, the proceedings would thereupon become a cause in that court,

provided that in all cases the facts shall be regarded as having been conclusively established by the findings of the Board except where a question is raised on the appeal that the finding of any particular fact or facts has been made by the Board upon evidence which does not warrant such finding.

The same chapter 5 of the Statutes of 1940 (s. 4 (2)) finally enacts that the sections which provide that the proceeding shall become a cause

shall be applicable to any judgment of the Court of Appeal delivered subsequently to the coming into force of this Act notwithstanding that the appeal to that Court was taken and heard prior hereto.

A further amendment must be mentioned to the *Treasury Department Act, 1938*. That amendment was introduced by chapter 6 of the Statutes of 1940, assented to on March 16th of that year. It provides that upon the appeal to a Judge of the Court of King's Bench, the latter may refer the matter of assessment back to the Provincial Tax Commission for further consideration; and likewise the Court of Appeal, upon an appeal to it, may refer the matter of assessment back to the Provincial Tax Commission for further consideration; and the Act "shall be read and construed as if the foregoing amendments had always been included therein."

On this extremely complicated legislation the Court of Appeal held they had no jurisdiction to entertain the appeal from the assessment with respect to the income for 1934 but that it was competent to hear and decide the appeals from the assessments with respect to the income for 1935 and 1936. I do not repeat the reasons of the learned Chief Justice of Saskatchewan (concurred in by MacKenzie and Gordon JJ.A.) for maintaining the jurisdiction of the Court of Appeal respecting the assessments for 1935 and 1936; they are expressed to my satisfaction and I have nothing to add to them. As for the assessment for 1934, the following observations lead me to the conclusion that an appeal with respect to it could equally be brought before the Court of Appeal.

When the appellant was called upon to deliver his return for the taxation year 1934, the Act of 1932 applied both to the income showed in that return and to the assessment thereafter to be made upon such income. As the law then stood, the Board of Revenue Commissioners, appointed under the provisions of the *Treasury Depart-*

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ment Act (as amended by c. 6 of the Statutes of 1934-5, assented to February 21st, 1935), had been created a few months before. The right of appeal provided for by s. 53 of the Act of 1932, which had heretofore to be brought before the Provincial Treasurer, had been transferred to the Board empowered to "hear appeals respecting the payment of taxes or other moneys due to the Crown" (s. 20 (*a*) of the *Treasury Department Act* as amended by c. 6 of the Statutes of 1934-1935). Admittedly, that would include taxes upon income. It was, however, enacted in the *Treasury Department Act* that the decision of the Board "shall be final and not subject to further appeal unless otherwise provided for in any revenue Act." In view of such proviso, the appeal to a Judge of the Court of King's Bench (s. 54 of the Act of 1932) was preserved under the *Income Tax Act, 1932,* it being a "revenue Act." And as the legislation then stood, the Judge of the Court of King's Bench could affirm, amend or disallow the assessment; and his decision was to be final in all matters relating to the appeal; and there could be no appeal therefrom (subs. 5 of s. 54 of the Act of 1932).

However, the assessment on the return made by the appellant for 1934 was completed and notified to the taxpayer only on the 23rd August, 1938. In the meantime, the legislation relating to appeals in such matters had undergone a very important change. In most instances, the Commissioner of Income Tax had replaced the Provincial Treasurer for the purposes of the administration of the Act, and the Board of Revenue Commissioners had been substituted to the Minister in several other instances, more particularly with regard to appeals.

By the *Treasury Department Act, 1938* (ch. 8 of the Statutes of 1938, assented to March 23rd, 1938), new provisions with regard to appeals had been introduced in the Saskatchewan legislation "respecting the payment of taxes or other moneys due to the Crown" (subs. 8 (*a*) of s. 40 of the *Treasury Department Act, 1938*). Under these new provisions, a right of appeal was provided first to "a Judge of the Court of King's Bench from the decision of the Board on a question of law arising in an appeal to it" (s. 41 (1)); and a further appeal was authorized "from the decision of the Judge to the Court of Appeal

as if such decision was a judgment in an action between subject and subject, but there shall be no further or other appeal" (s. 42).

Moreover, the *Income Tax Act, 1936,* had come into force and therein was provided a right of appeal from the assessment, 1°, to "the Board of Revenue Commissioners appointed under the provisions of *The Treasury Department Act*" (s. 57); 2°, to a Judge of the Court of King's Bench (s. 58); and 3°, to the Court of Appeal (s. 58*a* inserted by section 6 of c. 8 of the Statutes of 1937, assented to April 16th, 1937).

No doubt, on March 23rd, 1938, by the *Statute Law Amendment Act* (c. 91 of 1938), sections 58 and 58*a* of the *Income Tax Act, 1936,* were repealed; but on the same day the *Treasury Department Act, 1938,* was assented to and it provided, as we have seen above, for the appeal to a Judge of the Court of King's Bench and from the decision of that Judge to the Court of Appeal. The inference is reasonable and logical, to the point of it being obvious, that the reason for repealing secs. 58 and 58*a* of the *Income Tax Act, 1936,* was precisely because similar provisions, on the same day, came into force under sections 41 and 42 of the *Treasury Department Act, 1938.* This inference is strengthened by the insertion in the *Income Tax Act, 1936,* of a new sec. 58 reading as follows:

> 58. An appeal from a decision of the Board and any further appeal shall be subject to and governed by the provisions of sections 41 and 42 of *The Treasury Department Act, 1938.* [Sec. 16 of c. 9 of the Statutes of 1939].

In my view, it is apparent that, even prior to the date when the return of 1934 was due to be filed by the taxpayer, the legislature had set out a new machinery covering the whole question of appeals from assessments in taxation matters, including the income tax; and, in this case, there was, in fact, an appeal asserted to the Board of Revenue Commissioners which had been substituted to the Minister, without there being any objection forthcoming from either the Provincial Tax Commission or the Commissioner of Income Tax or the Provincial Treasurer, or the Attorney-General for Saskatchewan. Indeed, everybody appears to have taken for granted that the appeal from the assessment of 1934 had to be brought before the Board, instead of before the Minister. That it was so will

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be still more apparent if we are to take the statement made at bar before this Court that the only revenue Act in Saskatchewan providing for a right of appeal at all was the *Income Tax Act*.

Under those circumstances, it seems to me that from the moment the Board of Revenue Commissioners was created, the intention of the Legislature in the *Treasury Department Act* was to cover the whole field of appeals in taxation matters. Without it the legislation was incapable of proper operation.

The effect of the coming into force of the *Treasury Department Act* and its subsequent amendments was impliedly to repeal the provisions concerning appeals contained in the *Income Tax Act* which became inconsistent or repugnant. "The latest expression of the will of Parliament must always prevail" (Maxwell on the Interpretation of Statutes, 8th ed., p. 139; Craies on Statute Law, 4th ed., p. 310, and cases cited).

Of course, the respondent points to sections 73 and 74 of the *Income Tax Act, 1936,* whereby it is enacted that the Act of 1936

> shall apply to incomes earned or received in the year 1935 and to incomes in respect of fiscal years ending subsequently to the thirty-first day of August, 1935.

and that

> the following enactments are hereby repealed:
>
> 22 George V, 1932, c. 9;
> 23 George V, 1933, c. 9;
> 24 George V, 1934, c. 5;
> 25 George V, 1934-35, c. 16.

with the following proviso:

> (2) Notwithstanding the repeal of the enactments mentioned in subsection (1), the said enactments shall continue to apply to incomes earned or received in the years 1931, 1932, 1933 and 1934 and to incomes in respect of fiscal years ending prior to the first day of September, 1935, to the same extent as if the said enactments had not been repealed.

But the answer to the respondent's objection is that, by the very terms of the proviso, the enactments of the Act of 1932 and its amendments continue to apply to incomes of 1934 only, of course, in so far as they were still in force previous to the repeal of the 1932 Act by the Act of 1936; and, as explained above, in matters of appeal, these enactments were no longer applicable because of the provisions inconsistent thereto contained in the *Treasury Department Act*.

A further answer to the respondent's contention appears to be that, despite the repeal of the 1932 Act and amendments by the 1936 Act, the Act of 1932 continued to apply to incomes earned or received in the year 1934, that is to say, to incomes as such; but, for the purposes of assessment and of appeals therefrom the Act of 1936 would prevail. This is the more likely since, in the meantime, the scheme of assessment and of appeals had been changed and taken away from the Provincial Treasurer to the Commissioner and to the Board of Revenue Commissioners; and it should not be forgotten that, in this case, so far as the 1934 return is concerned, we are dealing with an assessment made only on the 23rd day of August, 1938, and "under the provisions of *The Income Tax Act, 1936.*"

My conclusion, therefore, is that the appellant had a right of appeal to the Court of Appeal even from the assessment for the taxation year 1934. To that extent, the appeal from the judgment of the Court of Appeal should be allowed and that judgment varied accordingly.

The other points raised in this appeal concern the alleged errors in law in the judgment of the Court of Appeal with regard to the method of assessment adopted by the Commissioner of Income Tax and approved successively by the Board of Revenue Commissioners, by the Judge of the Court of King's Bench and by the Court of Appeal; and concern the manner in which the Court of Appeal disposed of the question pertaining to the "reserve for bad debts."

Dealing first with the method of assessment, the point comes up in this way. Under the *Income Tax Act, 1932,* regulations were issued

> covering such cases where the Minister is unable to determine or obtain information required to ascertain the income within the province of a corporation or joint stock company carrying on a trade or business within and without the province.

These regulations provide as follows:

> 1. Interest, dividends, rents and royalties less their proportionate share of deduction allowed shall be separately determined or ascertained, and if they are received in connection with the trade or business of the taxpayer in the Province, shall be income liable to taxation.
>
> 2. The income referred to in regulation 1 having been separately determined and ascertained, the remainder of the income of the taxpayer liable to taxation shall be taken to be such percentage of the remainder of the income as the sales within the Province bear to the total sales.

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The sales of the taxpayer shall be measured by the gross amount which the taxpayer has received during the preceding year from sales and other sources in connection with the said business, excluding, however, receipts from the sale or exchange of capital, assets and property not sold in the regular course of business and also receipts from interest, dividends, rents and royalties the income of which has been separately determined or ascertained under the provisions of regulation 1.

* * *

4. If a taxpayer believes that the method of allocation and apportionment herein prescribed or as determined and as applied to his business, has operated or will so operate as to subject him to taxation on a greater portion of his income than is reasonably attributable to business or sources within the Province, he shall be entitled to file with the Commissioner a statement of his objections and of such alternative method of allocation and apportionment as he believes to be proper under the circumstances, with such details and proof and within such time as the Commissioner may reasonably prescribe, and if the Commissioner shall conclude that the method of allocation and apportionment heretofore employed is in fact not applicable or equitable, he shall re-determine the taxable income by such other method of allocation and apportionment as seems best calculated to assign to the Province for taxation the portion of the income reasonably attributable to business and sources within the Province.

5. These regulations shall not be applied to determine the income within the Province of a corporation or joint stock company carrying on a trade or business within and without the Province where

(*a*) the method or system of accounting used by the taxpayer enables the Commissioner to determine or to obtain the information required to ascertain the income of the taxpayer liable to taxation.

(*b*) the income of the taxpayer liable to taxation can be determined or ascertained by allowing the exemption provided by paragraph (*m*) of section 4 of the *Income Tax Act, 1932.*

It is conceded that, although these regulations were issued under the Act of 1932, they have continued in force and are applicable under the Act of 1936. Paragraph (*m*) of s. 4, referred to in the regulations, is to the effect that "profits earned by a corporation or joint stock company, other than a personal corporation, in that part of its business carried on at a branch or agency outside of Saskatchewan," shall not be considered as income liable to taxation under the Act.

The regulations were made pursuant to subsection 4 of section 7 of the Act of 1932 (a similar provision is contained in the Act of 1936, subsection 4 of section 9). These subsections, both in the Act of 1932 and in the Act of 1936, read as follows:

Where the minister is unable to determine or to obtain the information required to ascertain the income within the province of any corporation or joint stock company or of any class of corporations or joint

stock companies, the Lieutenant-Governor in Council may, on the recommendation of the minister, make regulations for determining such income within the province or may fix or determine the tax to be paid by a corporation or joint stock company liable to taxation.

It was contended by the appellant that the regulations did not apply to the appellant's returns in the present case, because the Act apparently provides for a special regulation for the purpose of determining a special income in each particular case of persons or corporations liable to taxation; but the statute does not seem to be incapable of being construed as authorizing the Lieutenant-Governor in Council to make regulations, such as those we have before us, to apply in all cases "where the minister is unable to determine or to obtain the information required to ascertain the income."

Indeed it would seem that such construction is more reasonable and equitable because the effect would then be to put on an equal footing all cases where that situation obtains, instead of being limited to empowering the Lieutenant-Governor in Council to make for each case different regulations which might operate in a way to discriminate between the several taxpayers.

The regulations as made by the Lieutenant-Governor in Council, in the premises, avoid this possible objection and would appear, therefore, to be more within the purpose of the Act.

A further objection to the application of the regulations in this case was put forward by counsel for the appellant. He says that, both by virtue of the Act and of the regulations themselves, the latter may be applied only "where the Minister is unable to determine or to obtain the information required to ascertain the income within the province"; but it should be remembered that the right of appeal to this Court, as well as to the Court of Appeal, is strictly limited to "a question of law arising in the appeal." The question whether the proper method of fixing or determining the tax was adopted by the Commissioner, consistently with the Act and the regulations, is, no doubt, a question of law; but the question whether the condition precedent existed as a result of which resort could be had to the special method of allocation provided for by the Act and by the regulations, i.e., whether the Minister was "unable to determine or to obtain the

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information required to ascertain the income within the province," while it may be a decision strictly within the Minister's discretion, is, at all events, a pure question of fact with which this Court cannot concern itself.

It may be added that there was here almost superfluous evidence in support of the contention that the condition precedent existed. Such was the finding, not only of the Commissioner, but also of the Board of Revenue Commissioners, the Judge of the Court of King's Bench and the Court of Appeal. Had we had authority to entertain the objection, it would have been hopeless for the appellant to expect that this Court would interfere. In fact, in all its returns, the appellant itself resorted to the method of allocation and apportionment; and, in its return of 1935, it admitted that it was "necessary, therefore, to ascertain its net income in Saskatchewan by an allocation method."

This objection cannot seriously be envisaged.

But the appellant then contends that the effect of the regulations is to go beyond the powers conferred by the statute and that they are *ultra vires* and unconstitutional, because, first, they are not authorized in their present form by the Acts of 1932 or 1936; and, second, the result is to tax property outside of Saskatchewan and, as a consequence, to encroach upon the powers exclusively reserved to the Dominion Parliament under the *B.N.A. Act.*

In order to decide these two objections of the appellant it becomes necessary to return to a consideration of the statutes and regulations. The Acts specify that

> The income liable to taxation under this Act of every person residing outside of Saskatchewan, who is carrying on business in Saskatchewan, either directly or through or in the name of any other person, shall be the net profit or gain arising from the business of such person in Saskatchewan.

The regulations limit their application to

> Interest, dividends, rents and royalties * * * received in connection with the trade or business of the taxpayer in the Province,

and they stipulate that

> the remainder of the income of the taxpayer liable to taxation shall be taken to be such percentage of the remainder of the income as the sales within the Province bear to the total sales,

thus indicating the intention to tax only the income arising from the business within the province.

The same intention appears in Regulation No. 4, where it is stated that the method of allocation and apportionment therein prescribed is for the purpose of determining the income "reasonably attributable to business and sources within the Province."

Regulation No. 5 expressly states that "these regulations shall not be applied to determine the income within the Province of a corporation or joint stock company" where the method or system of accounting enables the Commissioner to obtain the information required to ascertain the income of the taxpayer liable to taxation or where the income of the taxpayer can be determined or ascertained by allowing the exemption provided by paragraph (*m*) of section 4 of the Act of 1932.

As we have already seen, that paragraph (*m*) exempts from taxation all "profits earned by a corporation or joint stock company * * * in that part of its business carried on at a branch or agency outside of Saskatchewan."

Accordingly, the aim of the 1932 and 1936 Acts, with respect to non-resident companies which carry on business in Saskatchewan, is to reach by taxation only the income arising from the business in the province. As a consequence, these Acts are well within sub-head 2 of section 92 of the *B.N.A. Act* (*Bank of Toronto* v. *Lambe* (1)).

By the Acts, the tax is upon income arising from the business in the province. In my humble opinion, the regulations do exactly the same thing. On this branch of the case, it should be pointed out that the amount to be taxed under the regulations is a percentage of the sales in Saskatchewan, and that percentage is identical with the ratio between the total profits and total sales. With respect, the amount so to be taxed does not necessarily exceed the amount of the net profit or gain arising from the business in Saskatchewan.

It was next argued that, even if the Acts are constitutional or the regulations are *intra vires,* yet in their operation in the present case they have the effect of taxing profits or gains which did not arise from the business of the appellant in Saskatchewan.

At the outset, the appellant is met by the difficulty that the question whether profits or gains arose within or without Saskatchewan is really a question of fact already

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

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decided against it by the Commissioner of Income Tax, the Board of Revenue Commissioners and the Judge of the Court of King's Bench. In an endeavour to transform that objection into a question of law, appellant's counsel stresses the point to the extent of saying that the application of the regulations necessarily includes in the assessment manufacturing profits said to have arisen exclusively outside Saskatchewan, i.e., at the head office of the appellant in Hamilton, Ontario, where the central management and control of the appellant abide (*De Beers Consolidated Mines* v. *Howe* (1); *Commissioners of Taxation* v. *Kirk* (2)).

Such, in my view, was not the purpose of the Acts of Saskatchewan or of the regulations made thereunder and applied in the present case. The Commissioner, in making each assessment, intended to tax exclusively the profits and gains arising from the business of the appellant in Saskatchewan. Neither the Commissioner of Income Tax nor the Board of Revenue Commissioners meant to reach anything but the profits or gains arising from the business of the appellant in Saskatchewan; and the method adopted by them to obtain that object—a method which was rendered necessary as a result of the fact that the appellant does not keep separate profit and loss accounts for the business it carries on in the Province of Saskatchewan, but keeps at its head office in Hamilton an account of its entire net profit and loss account for the business it carries on in Saskatchewan and elsewhere—was nothing else than the adoption of the best available means to ascertain the income of the appellant arising from its business in Saskatchewan, and nothing more.

The appellant should be reminded of the words of Lord Shaw in the House of Lords in *Attorney-General* v. *Till* (3):

> Such powers are inserted in the Act simply because, in addition to all kinds of penalties, the Board of Inland Revenue must ingather taxation; and if the taxpayer will not furnish the information himself, some means must be provided of recovering the duty, and these powers are given to enable the Board to proceed with the best available estimate.

The appellant referred the Court to a great number of decisions on several statutes which may or may not, upon close examination, be found to contain provisions

(1) [1906] A.C. 455 (H.L.). (2) [1900] A.C. 588 (P.C.).
(3) [1910] A.C. 50, at 72.

similar to the Acts of 1932 and 1936. The fallacy of attempting to apply these decisions to the present case is stated by Lord Davey, delivering the judgment of the Privy Council, in *Commissioners of Taxation* v. *Kirk* (1), and it is that these other Acts "in language, and to some extent in aim, differ from the Acts now before" this Court. As already pointed out, the appellant itself was driven to the admission that its exact and precise income arising from its business in Saskatchewan could not be ascertained, owing to its method of book-keeping and of keeping its profit and loss account. Under the circumstances, it was clearly necessary that the method of allocation and apportionment prescribed by the regulations should be resorted to by the Commissioner of Income Tax. It was the only method available to ascertain the income liable to taxation; and, like the Board of Revenue Commissioners and the other judges who have already passed upon this case, I think the appellant cannot complain.

There remains to discuss the point about bad debts.

In the order granting special leave to appeal to this Court, leave was granted to the appellant on all grounds decided by the Court of Appeal for Saskatchewan,

> except that part of the said judgment or order setting aside the said assessments for the taxation years 1935 and 1936 because they are defective in so far as a reserve for bad debts is concerned, as ordered in clauses 2 and 3 of the formal judgment.

It follows that, of course, so far as the appellant was concerned, the decision of the Court of Appeal on this question in respect of the taxation years 1935 and 1936 was not open before this Court. Indeed, the appellant had no interest in getting leave to appeal from that part of the decision, since it had been rendered favourably to its contention. The question of the reserve for bad debts in the assessment for the taxation year 1934 (not decided by the Court of Appeal on account of its holding that it had no jurisdiction in respect of that particular year) was properly before this Court under the order granting special leave.

The legal points concerning that question are exactly the same as those discussed by the Court of Appeal with regard to the assessments of 1935 and 1936; and, there-

(1) [1900] A.C. 588, at 593.

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fore, this Court had to hear argument which, although confined in its effect to the 1934 assessment revenue, embraced exactly the same legal points as applied to the assessments for 1935 and 1936 decided by the Court of Appeal.

Dealing with such reserve for bad debts, the law of Saskatchewan is as follows (s. 6 (*d*) of the Acts of 1932 and of 1936):

> In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of:
>
> * * *
>
> (*d*) amounts transferred or credited to a reserve, contingent account or sinking fund, except such an amount for bad debts as the Commissioner may allow and except as otherwise provided in this Act.

As will be seen, the matter is, therefore, left somewhat to the discretion of the Commissioner "except as otherwise provided in this Act"; but, of course, the discretion must be exercised within legal grounds.

It was not suggested on either side that it was "otherwise provided in this Act," so far, at least, as this case is concerned.

By virtue of the second paragraph of regulation No. 2 "the sales of the taxpayer shall be measured by the gross amount which the taxpayer has received during the preceding year from sales." If taken by themselves, these words might be construed to mean "money received," but these regulations cover cases where the Minister is unable to determine or obtain information required to ascertain the income, within the province, of a corporation carrying on business within and without the province; and the income under section 23 is "the net profit or gain arising from the business * * * in Saskatchewan." The appellant company, following the well-established practice, included in its statement not only money received but also receivables such as notes, book debts, etc. The Commissioner dealt with the present case upon that basis, and, therefore, what is to be compared under the regulations is the sales within the province with the total sales. They are to be measured by the contract prices in the year of charge, less that part thereof as has been shown to be uncollectable in that year and less an allowance for such other part that might turn out to be bad in the future.

The result is that, in estimating the amount to be allowed for bad debts, the Commissioner must, first: allow for debts actually proven to have lost part or all of their original value; second: allow a reserve for losses which may eventually occur; but in the latter case he is bound by the provisions of sec. 6 (*d*) of the Act.

The taxpayer may deduct the amount of any debt found to have been bad in the year in which it is incurred; and, in addition, he may set aside from his profits whatever the Commissioner allows for the reserve.

In this instance, the Commissioner has allowed for all debts allegedly bad since the year 1931 and the following years; but he has allowed no provision for the reserve.

As pointed out by the Chief Justice of Saskatchewan, the allowance may be reasonable, but it is not warranted by law. In effect, it re-opens assessments for each year since 1931; and it operates practically as a refund, which is not authorized by the Income Tax Acts.

It is clear that the Commissioner should have allowed a reserve. He did not do so because of his interpretation of the law that he could provide for debts turning out to be bad in years subsequent to that of their being incurred. The statutes, however, did not allow him to do that.

For that reason, the assessments of 1935 and 1936 were found defective by the Court of Appeal and they were returned back to the Commissioner to exercise his discretion for the allowance of a reserve under sec. 6 (*d*) of the Act, "upon sound principles."

Although, no doubt, the matter was left to the discretion of the Commissioner, in so doing the Commissioner was performing a duty of a quasi-judicial character, and the discretion had to be exercised on proper legal principles. (*Pioneer Laundry & Dry Cleaners Ltd.* v. *Minister of National Revenue* (1)).

The conclusion come to by the Court of Appeal, upon which their decision on that point was reached, and which was fully warranted by the evidence, was that the Commissioner did not apply his mind to this question in conformity with the law applicable thereto.

No satisfactory reason was put before this Court by the respondent as to why the grounds upon which this

(1) [1940] A.C. 127 (P.C.).

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matter was decided by the Court of Appeal for the years 1935 and 1936 should not equally apply to the assessment made for the year 1934.

As a consequence, the appeal should be allowed. The assessment for the year 1934 should be set aside and referred back to the Commissioner for the same purpose as the assessments for 1935 and 1936 have already been referred back by the Court of Appeal. I say nothing as to the right of the respondent to cross-appeal because, in any event, that cross-appeal fails.

The appellant succeeds to the extent of securing the same order with respect to the assessment for 1934 as it had with respect to the assessments for 1935 and 1936. Under the circumstances and without disturbing the allocation of costs already made in the Court below, the appellant shall have one-half of its costs of the appeal to this Court, and the cross-appeal should be dismissed with costs.

HUDSON J.—This appeal concerns assessments of the appellant company in respect of income taxes imposed by the Province of Saskatchewan for the years 1934, 1935 and 1936. The statute applicable to the assessments for 1934 was a statute passed in 1932, and in respect of 1935 and 1936 a new Act passed in 1936, but, as the provisions of these two Acts, to which I wish to refer, are identical, for convenience I shall quote only the sections of the 1936 Act. That statute is chapter 15 of the Statutes of Saskatchewan. The charging section is section 9, of which subsections 3 and 4 must first be considered in this case. They are as follows:

9. (3) Save as herein otherwise provided, every corporation and joint stock company, no matter how created or organized, residing or ordinarily resident or carrying on business within the province, shall pay a tax, at the rate applicable thereto set forth in the first schedule to this Act, upon its income during the preceding year.

(4) Where the commissioner is unable to determine or to obtain the information required to ascertain the income within the province of any corporation or joint stock company or of any class of corporations or joint stock companies, the Lieutenant-Governor in Council may, on the recommendation of the commissioner, make regulations for determining such income within the province or may fix or determine the tax to be paid by a corporation or joint stock company liable to taxation. 1932, c. 9, s. 7; 1934-35, c. 16, ss. 6 and 12; amended.

These provisions must be read with section 23 of the Act which provides:

The income liable to taxation under this Act of every person residing outside of Saskatchewan, who is carrying on business in Saskatchewan, either directly or through or in the name of any other person, shall be the net profit or gain arising from the business of such person in Saskatchewan. 1932, c. 9, s. 21*a*.

Under a provision in the 1932 Act, corresponding to subsection 4 of section 9, the Lieutenant-Governor in Council passed regulations to provide for determining income as prescribed. These regulations continued in force under the Act of 1936 by virtue of section 40 of the *Interpretation Act,* chapter 1, R.S.S., 1930, which is as follows:

Whenever an Act is repealed wholly or in part and other provisions are substituted, all by-laws, orders, regulations and rules made under the repealed Act shall continue good and valid in so far as they are not inconsistent with the substituted Act, enactment or provision until they are annulled or others made in their stead.

The regulations are as follows:

1. Interest, dividends, rents and royalties less their proportionate share of deductions allowed shall be separately determined or ascertained, and if they are received in connection with the trade or business of the taxpayer in the Province, shall be income liable to taxation.

2. The income referred to in regulation 1 having been separately determined and ascertained, the remainder of the income of the taxpayer liable to taxation shall be taken to be such percentage of the remainder of the income as the sales within the Province bear to the total sales.

The sales of the taxpayer shall be measured by the gross amount which the taxpayer has received during the preceding year from sales and other sources in connection with the said business, excluding, however, receipts from the sale or exchange of capital, assets and property not sold in the regular course of business and also receipts from interest, dividends, rents and royalties the income of which has been separately determined or ascertained under the provisions of regulation 1.

3. If for any reason the portion of income attributable to business within the Province cannot be determined under the provisions of regulation 2, the income referred to in regulation 1 shall first be separately ascertained or determined and for the purpose of ascertaining or determining the proportion of the remainder of the income of the taxpayer, such remainder of income shall be specifically allocated or apportioned within and without the Province by the Commissioner.

4. If a taxpayer believes that the method of allocation and apportionment herein prescribed or as determined and as applied to his business, has operated or will so operate as to subject him to taxation on a greater portion of his income than is reasonably attributable to business or sources within the Province, he shall be entitled to file with the Commissioner

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a statement of his objections and of such alternative method of allocation and apportionment as he believes to be proper under the circumstances, with such details and proof and within such time as the Commissioner may reasonably prescribe, and if the Commissioner shall conclude that the method of allocation and apportionment heretofore employed is in fact not applicable or equitable, he shall re-determine the taxable income by such other method of allocation and apportionment as seems best calculated to assign to the Province for taxation the portion of the income reasonably attributable to business and sources within the Province.

5. These regulations shall not be applied to determine the income within the Province of a corporation or joint stock company carrying on a trade or business within and without the Province where

(*a*) the method or system of accounting used by the taxpayer enables the Commissioner to determine or to obtain the information required to ascertain the income of the taxpayer liable to taxation.

(*b*) the income of the taxpayer liable to taxation can be determined or ascertained by allowing the exemption provided by paragraph (*m*) of section 4 of the *Income Tax Act, 1932.*

The Commissioner in making his assessments applied Regulations 1, 2 and 3.

The appellant company did not take advantage of the provisions of Regulation No. 4 and, instead, appealed to the Board of Revenue Commissioners, a body created under the authority of the *Treasury Department Act,* as amended by chapter 6 of 1934-1935. Under this statute the Board was given power to hear appeals respecting the payment of taxes or other moneys due to the Crown and "its decisions thereon shall be final and not subject to further appeal unless otherwise provided for in any revenue Act." The Board had power to adjudicate on facts as well as on law.

On the hearing before the Board, the appellants presented an alternative method of allocation of income and, in support of their case, evidence was adduced and heard by the Board. In a very fully considered judgment the Board confirmed the assessments made by the Commissioner of Income Tax.

There was no claim put forward for deduction on account of payment to another province, as provided for in section 7 of the Act which reads:

7. (1) A taxpayer shall be entitled to deduct from the amount of tax which would otherwise be payable under this Act, the amount paid to any other province for income tax in respect of the income of the taxpayer derived from sources therein, if such province allows a similar credit to persons in receipt of income derived from sources within Saskatchewan.

(2) The deduction shall not at any time exceed the amount of tax which would otherwise be payable under this Act in respect of the said income derived from sources within such other province.

(3) A deduction shall be allowed only if the taxpayer furnishes evidence, satisfactory to the commissioner, showing the amount of tax paid and the particulars of income derived from sources within that province. 1933, c. 9, s. 4; 1934-35, c. 16, s. 12.

It should be said, however, that it does not appear whether in this case such a claim was available.

On a further appeal to Mr. Justice Anderson, who had jurisdiction to consider facts as well as law, the appellants' appeal was again dismissed. And on a further appeal to the Court of Appeal for Saskatchewan, which court had jurisdiction only in questions of law and not of fact, the appellants' appeal was again dismissed on this question, although allowed in respect of an allowance for bad debts.

Before this Court a question was raised as to the power of the Legislature to pass the *Income Tax Act*, particularly section 9 (4). The contention of counsel for the appellants, as I understood it, was that if subsection 4 was so construed as to authorize the inclusion in the amount assumed to be earnings of a particular sum which might be considered as an external earning, then the subsection was invalid.

There can be no doubt about the power of the Legislature to impose a tax on a company found doing business within the Province. That was settled in the case of *Bank of Toronto* v. *Lambe* (1), and I think it follows that the Legislature in settling the income tax may adopt any yardstick which they may deem suitable, providing, of course, the tax is being levied "in order to the raising of a revenue for provincial purposes" and not done to achieve any ulterior purpose beyond the proper legislative jurisdiction of the Province: see *Bank of Toronto* v. *Lambe* (1) (*supra*), and *Attorney-General for Alberta* v. *Attorney-General for Canada* (2), referring particularly to the judgment dealing with the taxation of banks.

Next it was argued that the regulations are *ultra vires* of the Lieutenant-Governor in Council.

Under section 9 (4) the regulations apply only when the Commissioner is unable to determine or obtain the information required to ascertain the income within the

(1) (1887) 12 App. Cas. 575. (2) [1939] A.C. 117.

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Province. Therefore, the amount to be fixed under subsection 4 must normally be an assumed amount, to take the place of a figure which it is impossible to ascertain. For the purpose of fixing this assumed or estimated amount, the Lieutenant-Governor in Council is authorized to make regulations or to themselves fix or determine the tax.

The regulations first provide a general formula which would, no doubt, apply without objection to a very large number of cases but, recognizing that it might work hardship in some cases, provision was made in Regulation 4, enabling the taxpayer to present his objections and any alternative method of allocation or apportionment which he believes to be proper under the circumstances. The Commissioner then has the right to determine the taxable income as seems best calculated to assign to the Province for taxation the portion of the income reasonably attributable to business and sources within the Province.

After much consideration, I cannot say that these regulations exceed the power vested in the Lieutenant-Governor in Council under the authority of subsection 4. They seem to me to be generally well calculated to work out equitably the intention of the Legislature. The making of the estimate is not a purely arbitrary act on the part of an official but is open to review by an independent Board and by a Judge of the Court of King's Bench. Procedure somewhat similar to this is found in other jurisdictions, for example, in England: Halsbury's Laws of England, 2nd Edition, vol. 17, page 174:

> 360. Where the true profits of a non-resident person chargeable to tax in the name of a resident person cannot be readily ascertained, the Commissioners may charge the non-resident person on a percentage of the turnover of the business done by the non-resident person through or with the resident person.
>
> The percentage is determined, having regard to the nature of the business, by the Commissioners by whom the assessment is made, subject, where the assessment is made by the additional Commissioners, to appeal to the General or Special Commissioners, and subject to the right of the resident or non-resident to require the question to be referred to the Board of Referees, whose decision is final.

It is further to be noted that the mode of allocation included in the regulations was not new. It had been in force in Saskatchewan for a number of years prior to the assessments in question and prior to the *Income Tax Act* of 1936. Moreover, it also appears from the state-

ment of the Board of Revenue Commissioners that the appellants themselves in previous years had adopted the mode of allocation prescribed by the regulations.

The position of the Board, as I understand it, is this: "We have investigated the business giving rise to these assessments, we have heard the appellants' evidence, we have considered their own proposed method of allocation and we cannot find that such method would produce a result more reliable than the formula prescribed by the regulations. Under all the circumstances, we doubt if it is possible for anybody to frame a better formula."

On appeal, Mr. Justice Anderson, who also had jurisdiction to deal with facts, agreed with the Board.

Now it is claimed that the mode of allocation prescribed in the regulations, in its application to the assessments here, fails to take into account manufacturing profits which may have been earned by the appellants outside of Saskatchewan. This claim was made before the Board and, although it does not seem to have received as much consideration there as it did before us, it was considered by them. Apparently the Board thought that, while it was a factor to be considered, it formed only one of a group of imponderables, incapable of separate evaluation with any degree of certitude.

The question then is whether we, a tribunal having jurisdiction only to decide on questions of law, would be justified in setting aside the assessments. I do not think that this should be done unless we can say that no assessment under subsection 4 of section 9 is valid, if it can be shown that in any degree earnings outside of Saskatchewan may have been included in the estimate of the total figure deemed to be earnings within the Province. I am not prepared to go that far.

If it could be said that the Commissioner and the Board and Mr. Justice Anderson had misconstrued the statute or the regulations, or failed to direct their minds to the questions involved, then the Court would be justified in sending it back for reconsideration. We have no information as to what was considered by the Commissioner, but the judgment of the Board of Revenue Commissioners indicates that the members of that body gave some consideration to all of the arguments and have not necessarily misconstrued either the statute or the regulations.

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On the other points involved in this appeal, I agree with the conclusions of my brother Rinfret and also with the disposition of the appeal which is proposed by him.

Appeal allowed in part, with one-half costs of appeal. Cross-appeal dismissed with costs.

Solicitors for the appellant: *Thom, Bastedo, Ward & McDougall.*

Solicitor for the respondents: *Alex. Blackwood.*

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* May 30.

ARTHUR SAYERS AND JOE HALL....APPELLANTS;

AND

HIS MAJESTY THE KING .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Charge of conspiracy to steal—Option by accused for trial before a judge without a jury—Speedy trial—Bill of indictment later signed by the Attorney-General for trial before a jury—Whether this procedure was a sufficient compliance with section 825 (5) Cr. C. Question of jurisdiction of trial court ought to have been raised as special plea before arraignment.

The appellants, charged with conspiracy to commit the crime of stealing, made the option to be tried by a judge, without the intervention of a jury, under the provisions of section 827 of the Criminal Code. But, as such offence was punishable with imprisonment for a period exceeding five years, the Attorney-General could "require" that the charge be tried by a jury, under the provisions of subsection 5 of section 825 of the Criminal Code. After the election made by the appellants for a speedy trial, the Attorney-General preferred a bill of indictment over his own signature for a trial before a jury. Such trial took place and the appellants were found guilty. The ground of appeal was that, under section 825 (5) Cr. C., there must be a definite statement in writing by the Attorney-General that he "required" that the charge be tried by a jury and that the mere signature of the Attorney-General on a bill of indictment did not constitute sufficient compliance with that section.

Held that the preferment of a bill of indictment by the Attorney-General over his own signature for a trial before a jury was a sufficient compliance with section 825 (5) of the Criminal Code. There are no form or words specified to indicate that the Attorney-General "requires" the charge to be tried by a jury. In the present case, it must be assumed that the Attorney-General had knowledge of

* PRESENT:—Rinfret, Crocket, Davis, Hudson and Taschereau JJ.

the facts in respect to the election made by the appellants, which were of public record, and that, when he intervened by preferring an indictment over his own signature for trial before a jury, he did so for the purpose of complying with section 825 (5) Cr. C. and of exercising the right conferred upon him by that section. Moreover, it is no longer open to the appellants to question before this Court the jurisdiction of the trial court; that was a matter for special plea before arraignment and before pleading the general issue. The appellants, by not having raised then the question of jurisdiction, have waived any right to put forward such a contention, even if the preferment under the signature of the Attorney-General had not been otherwise sufficient and effective under section 825 (5) Cr. C.

Minguy v. *The King* (61 Can. S.C.R. 263); *Collins* v. *The King* (62 Can. S.C.R. 154), and *Giroux* v. *The King* (56 Can. S.C.R. 63) discussed.

APPEAL from the judgment of the Court of Appeal for British Columbia affirming the conviction of the appellants on a charge of conspiracy to steal, after trial by a jury.

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

R. A. Hughes for the appellant.

W. L. Scott K.C. for the respondent.

The judgment of the Court was delivered by

RINFRET J.—In this case, the appellants had made the option to be tried by a judge, without the intervention of a jury (s. 827 Cr. C.). But, as the offence charged was punishable with imprisonment for a period exceeding five years, the Attorney-General could require that the charge be tried by a jury, notwithstanding the consent of the appellants to be tried by a judge alone (s. 825, ss. 5 Cr. C.): "Thereupon," so it is enacted, "the judge shall have no jurisdiction to try or sentence the accused under this Part" (i.e., under Part XVIII, Speedy trial of indictable offences).

After the election made by the appellants for a speedy trial, the Attorney-General preferred a bill of indictment over his own signature for trial before a jury.

The question is whether this was a sufficient compliance with s. 825 (5) of the Criminal Code.

In the Court of Appeal, the Chief Justice of British Columbia decided that it was sufficient, and McQuarrie

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and McDonald JJ.AA. agreed with him, thus forming the majority of the Court. Sloan and O'Halloran JJ.AA. dissented.

It was argued before us that the form in which the indictment was signed by the Attorney-General was nothing more than the form adopted under the practice in British Columbia, where the indictment is usually preferred by the Attorney-General; and it was said that the appellants could not be deprived of the benefit of the election they had made, except by a requirement couched by the Attorney-General in terms which unmistakably implied action under subs. 5 of s. 825 Cr. C.

It so happens that this Court has not so far given a final decision on the point so raised. In *Minguy* v. *The King* (1), the indictment had been signed by the Crown Prosecutors on behalf of the Attorney-General, but in addition to this the indictment carried the following endorsement:

> Le présent acte d'accusation (indictment) est porté devant le grand jury par ordre du soussigné procureur général de la province de Québec.
> (Signé) L. A. Taschereau,
> Proc. Général de la prov. de Québec.

Sir Louis Davies C.J. and Duff J., as he then was, held that the "requirement" signed by the Attorney-General was in compliance with section 825 Cr. C. Of the other members of the Court, Anglin, Brodeur and Mignault JJ. did not find it necessary to decide the point, because they were of opinion that the election for a speedy trial made by the accused before a District Magistrate was not valid. Idington J. dissented on the ground that the election made by the accused was valid and "any irregularity could not affect the appellant's right." There was, therefore, no majority decision on the question whether the endorsement signed by the Attorney-General of Quebec in the form above reproduced could be held to comply with sec. 825 (5) Cr. C., the appeal having been dismissed on a different point in respect to which the majority of the Court was in agreement.

In *Collins* v. *The King* (2), the accused was held not to have elected for a speedy trial. The indictment was preferred before the Grand Jury by the Crown Attorneys, who had signed it in the following way:

(1) (1920) 61 Can. S.C.R. 263. (2) (1921) 62 Can. S.C.R. 154.

L. A. Taschereau, by Aimé Marchand, Lucien Cannon, duly authorized.

And the endorsement found upon it was:

This indictment is preferred by the undersigned, the Attorney-General for the Province of Quebec.

L. A. Taschereau,
Attorney-General for the Province of Quebec

Duff J., as he then was, and Brodeur J. held that the right of the appellant to elect to be tried summarily had been taken away by the "requirement" made by the Attorney-General for a jury trial, the preferment of the indictment by the Attorney-General under s. 873 Cr. C. constituting such requirement within the meaning of sec. 825 (5) Cr. C. But Idington J. was of the opinion that the accused, having previously renounced any desire for a speedy trial and having later pleaded to the indictment without raising any objection, had waived any right he had for a speedy trial. Anglin and Mignault JJ. found that the application made on behalf of the accused for a postponement of the trial to permit him to re-elect was not an election for a speedy trial. In the result, the appeal was dismissed, but as will be seen, again there was no majority decision on the point whether the preferment of the indictment in the form above stated was a sufficient compliance with sec. 825 (5) Cr. C.

In the *Collins* case (1), however, there are to be noted the following statements made by the respective members of the Court:

By Idington J.:

The accused, having been charged before the magistrate, expressly renounced any desire for speedy trial without jury and later notwithstanding pleaded to the indictment without raising any sort of objection thereto, in my opinion, had waived any legal right he had up to that time to elect for a speedy trial.

He further referred to *Giroux* v. *The King* (2), another decision of this Court, where Sir Charles Fitzpatrick C.J. observed (p. 67):

To sum up. Both courts had jurisdiction to try the offence. Assuming that the prisoner had by his plea to the indictment selected his forum and acquired the right to be tried by a jury, it was open to him to waive that choice and he was free to forego the privilege of a trial by a jury. Consent cannot confer jurisdiction, but a privilege defeating jurisdiction may always be waived if the trial court has jurisdiction over the subject-matter.

(1) (1921) 62 Can. S.C.R. 154. (2) (1917) 56 Can. S.C.R. 63.

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I venture to say that to set aside the proceedings below would in the circumstances of this case amount to a travesty of justice.

Reverting to the *Collins* case (1), the present Chief Justice of this Court said:

In *Minguy* v. *The King* (2), I concurred in the opinion of the Chief Justice of this Court that where the Attorney-General prefers a bill of indictment under sec. 873 or where the bill of indictment is, by the special direction of the Attorney-General, so preferred, that, in itself, constitutes a requirement that the case should be tried by a jury within the meaning of section 825, ss. 5.

I am not at all impressed by the argument that the power given by section 873 is a different power from that given by ss. 5 of sec. 825. They are not the same power, no doubt; but it does not follow that each must be exercised by an independent proceeding. A proceeding under sec. 873 may and *prima facie* does import a determination that the accused shall be tried by jury, a determination negativing his right to be tried without a jury and at all events, in the absence of some qualifying declarations, it is an exercise of the authority given by sec. 825, ss. 5.

Brodeur J., in the same case, said (p. 163):

Il me semble que la signature du procureur-général sur l'acte d'accusation constitue cette demande dont parle l'article 825-5 du code criminel. Je serais enclin à croire d'un autre côté également que du moment que le procureur-général, sous l'article 873, porte devant le grand jury une accusation, qu'il y ait eu enquête préliminaire ou non, dès ce moment là la cour du Banc du Roi est dûment saisie de la cause et qu'elle peut la juger et en disposer. Nous n'avons pas à examiner ce qui s'est passé antérieurement; et si l'accusé, comme il l'a fait dans le cas actuel, demande un procès expéditif, la cour a parfaitement le droit de lui refuser ce privilège et de procéder à faire juger la cause par un jury.

Dans le cas actuel, je considère que l'action du procureur-général en signant lui-même l'acte d'accusation démontre d'une manière explicite qu'il requérait que la cause fût jugée par un jury.

It is to be further noted that Mr. Justice Brodeur was one of the judges who sat in the *Minguy* case (2), and it follows that if he had found himself called upon to decide that case on the question whether the requirement there signed by the Attorney-General was in compliance with section 825, he would evidently have come to the same conclusion as that reached by him in the *Collins* case (1), which would have meant a majority decision on that point in the *Minguy* case (2).

It will, therefore, appear from the several pronouncements made in this Court on the matter under discussion that, so far, three judges: Sir Louis Davies C.J., the present Chief Justice, and Brodeur J., have expressed the opinion

(1) (1921) 62 Can. S.C.R. 154. (2) (1920) 61 Can. S.C.R. 263.

that the endorsement signed by the Attorney-General in *Minguy* (1) and in *Collins* (2) was a sufficient requirement that the charge be tried by a jury; and no contrary opinion has been, so far, expressed by any judge in this Court; in each instance, the judges who took part in the decisions having proceeded upon different grounds.

As stated by the Chief Justice of British Columbia, no form or words are specified to indicate that the Attorney-General requires the charge to be tried by a jury.

In the present case, it must be assumed that the Attorney-General had knowledge of the facts in respect to the election made by the appellants, which were of public record, and that, when he intervened by preferring an indictment over his own signature for trial before a jury, he did so for the purpose of complying with sec. 825 (5) Cr. C. and of exercising the right conferred upon him by that section.

We can see no distinction in the pertinent sense between the endorsements signed by the Attorney-General in the cases of *Minguy* (1) and of *Collins* (2), and the indictment preferred by the Attorney-General in the present case under his own signature.

Moreover, it is not open to the appellants now to question the jurisdiction of the trial court. That was a matter for special plea before arraignment and before pleading the general issue (*The King* v. *Komiensky No. 1* (3); *Rex* v. *County Judge's Criminal Court, Re Walsh* (4); *Rex* v. *Selock* (5), in the Appellate Division of the Supreme Court of Alberta).

Here, the trial court had jurisdiction over the subject-matter. The preferment of the indictment under the signature of the Attorney-General was effective for the purpose of requiring that the charge be tried by a jury; and it did, in fact, bring the charge before the jury. At the opening of the trial at the Assize Court, the accused, assisted by counsel, stood mute, pleaded upon the arraignment, went to trial, examined and cross-examined witnesses, called their defence and addressed the jury. They were content to raise no question of jurisdiction, but rather permit the trial to take its course, in the hope that the

(1) (1920) 61 Can. S.C.R. 263.
(2) (1921) 62 Can. S.C.R. 154.
(3) (1903) 6 Can. Cr. C. 524.
(4) (1914) 23 Can. Cr. C. 7, at 13 and 14.
(5) (1931) 56 Can. Cr. C. 243.

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jury might acquit them; but since the jury did not do so, they now say that the Court had no jurisdiction, and they ask to be sent to another court in order that they may have another opportunity of being acquitted. We are of opinion that, by what they did, they have waived any right to put forward such a contention, even if the preferment under the signature of the Attorney-General had not been otherwise sufficient and effective under sec. 825 Cr. C. This is not a case of a consent conferring jurisdiction upon a court which otherwise has not jurisdiction. In the words of Sir Charles Fitzpatrick C.J. in the *Giroux case* (1): It is merely the waiver of a privilege which might have defeated the jurisdiction of the trial court which had jurisdiction over the subject-matter. As stated in the judgment of the Privy Council in *Nadan* v. *The King* (2),

> There can be here no possible question of a disregard of the forms of legal process or the violation of any principle of natural justice.

For these reasons, the appeals are dismissed.

Appeal dismissed.

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* Feb. 17.
* June 2.

IN RE ESTATE OF HANNAH MAILMAN, DECEASED

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

Joint bank account—Husband and wife—Deposit by wife in joint names of herself and husband—Signing of a printed agreement form required by the bank—Death of the wife—Whether husband is entitled to ownership of balance of money deposited—Construction of agreement—Evidence.

A wife deposited her own money in the joint names of herself and her husband, and both signed an agreement with the bank authorizing the latter to accept cheques drawn by either, the death of one "in no way (to) affect the right of" the survivor to withdraw all moneys deposited in the account. The wife kept the bank book and she alone drew on the account during her lifetime. A short time before her death when leaving for the hospital the wife handed the bank book to her husband saying "This is yours." The Registrar of Probate held that the money standing to the credit of the joint account at the time of the death of the wife intestate was vested in the husband (now appellant) as his own property, but this judg-

(1) (1917) 56 Can. S.C.R. 63. (2) [1926] A.C. 482, at 496.

* PRESENT:—Crocket, Davis, Kerwin, Hudson and Taschereau JJ.

ment was reversed by the appellate court on the appeal of the wife's sister (now respondent), where it was held that the husband, who had been duly appointed administrator of the estate, must render account and that the Registrar of Probate must accordingly add the amount to the inventory of the estate.

Held, affirming the judgment of the Supreme Court of Nova Scotia *in banco* (15 M.P.R. 169), Davis and Hudson JJ. dissenting, that, neither the agreement nor the evidence indicated any intention on the part of the wife to create a joint tenancy, in the money deposited, in favour of her husband.

Per Crocket, Kerwin and Taschereau JJ.—There is a legal presumption that, when the wife opened the deposit account in the names of her husband and herself and signed the agreement with the bank, there was no intention on her part to divest herself of her exclusive ownership and control of the deposit money and make her husband a joint tenant thereof. This presumption is a rebuttable presumption, which may always be overborne by the owner's previous or contemporaneous oral statements or any other relevant facts or circumstances from which his or her real purpose in making the investment or opening the account in that form may reasonably be inferred to have been otherwise. In the absence, however, of any such evidence to the contrary the presumption of law must prevail. In the present case, such evidence cannot be found to have been established from the only two sources available, viz.: the signed bank deposit agreement form and the appellant's own deposition before the Registrar of Probate.

Per Davis J. dissenting—The document signed by the wife and her husband cannot be treated merely as a direction to the bank to pay, but it evidences an agreement between them and must be construed as evidencing the creation of a joint estate in the moneys in her husband. It is quite impossible to hold on the document that the wife merely created a trust in her husband resulting to her own benefit and did not create, or intend to create, a present joint interest in the moneys in him. Therefore, the husband as survivor was entitled in his own right to what remained in the account on the death of his wife.

Per Hudson J. dissenting—If the agreement were taken by itself and without extrinsic evidence, the deposit of moneys in the bank must be treated as a joint one to which the survivor was entitled; and the evidence does not contradict such interpretation.

APPEAL from the judgment of the Supreme Court of Nova Scotia *in banco* (1), reversing the decision of the Registrar of Probate for the county of Lunenburg, the appeal to the appellate court having been brought direct to that court by consent of parties and special order.

The matter in controversy arises in connection with a joint account in the Bank of Nova Scotia at Caledonia, N.S., in the name of the deceased, Hannah Mailman, and

(1) (1940) 15 M.P.R. 169; [1940] 2 D.L.R. 721.

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her husband, the present appellant, George Mailman. The deceased died intestate and administration was granted by the Court of Probate to her husband. The husband appeared before that court on April 20th, 1939, on the return of a citation for the closing of the estate. The inventory, for which he proposed to account, showed only bills receivable $33.70 and personal property $46. It appeared from the evidence that there was, at the time of the death of Hannah Mailman, the joint account above referred to amounting to approximately $5,000. One Mary Veniot, one of the next of kin, the present respondent, claimed that the amount of this joint account should be added to the inventory and accounted for by the administrator as part of the estate of the deceased. The Registrar of Probate decided against this contention, and his decision was reversed on appeal.

V. L. Pearson and *J. L. Kemp* for the appellant.

C. R. Coughlan for the respondent.

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

CROCKET J.—The appellant, George B. Mailman, and the deceased, both of whom the appellant's factum states were elderly people at the time, were married on October 27th, 1934. On September 30th, 1935, Mrs. Mailman, accompanied by her husband, opened a joint account in the Caledonia, N.S., branch of the Bank of Nova Scotia, in the name of herself and her husband with a deposit of $5,118.40, which admittedly belonged to her. Upon making this deposit they both signed a printed joint deposit account agreement form, as required by the bank on the opening of such an account. This agreement was as follows:

Agreement
Joint Deposit Accounts

To the Bank of Nova Scotia,
Caledonia, Queens Co., N.S.

The undersigned, having opened a deposit account with you in their joint names, hereby agree with you and with each other that, except only in the case of some other lawful claim before repayment, all moneys from time to time deposited to the said account and interest, may be withdrawn by any one of the undersigned, or his or her attorney or agent, and each of the undersigned hereby irrevocably authorizes the

said bank to accept from time to time as a sufficient acquittance for any amounts withdrawn from said account, any receipt, cheque, or other document signed by any one of the undersigned, his or her agent, without any further signature or consent.

The death of one or more of the undersigned shall in no way affect the right of the survivors, or any one of them, to withdraw all moneys deposited in the said account, as aforesaid.

Dated at Caledonia, Queens Co., N.S., this 30th day of September, 1935.

Witness(es)

L. G. Irving — Hannah Mailman.
L. G. Irving — George B. Mailman.

In October, 1936, Mrs. Mailman suffered an illness, which necessitated her removal from her home to an hospital. She died intestate on May 22nd, 1937, leaving surviving her besides her husband as her next of kin one sister and five brothers. At the time of her death, apart from a balance of $4,648.23, which stood to the credit of the joint bank account above mentioned, the only property she owned consisted of some household furniture and personal effects.

The appellant made no application for letters of administration until he was cited by the Probate Court of Lunenburg County on the petition of his deceased wife's surviving sister to show cause why an administrator of the estate should not be appointed, when he filed a petition for his own appointment as such, upon the hearing of which he was appointed administrator of the estate on October 15th, 1938. In his petition for appointment as administrator he alleged that the value of the property, of which the deceased died possessed, was under $400. An inventory filed on October 18th after the appointment of appraisers appraised the entire value of her personal property, including household furniture and effects, wearing apparel and a radio at $46. The dependability of this inventory and appraisement may perhaps best be judged by the fact that the radio, for which the deceased had paid $60 two or three years before, according to the appellant's evidence, was listed at $3, and that, when the intestate's goods and chattels were subsequently sold at public auction they realized $124.85. On April 18th, 1939, the appellant petitioned the Probate Court for the passing of accounts and final settlement of the estate, and after due service of the citation upon the next of kin, a hearing took place before the Registrar of Probate thereupon, at which the deceased's sister was represented by counsel.

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In re ESTATE OF HANNAH MAILMAN, DECEASED.

Crocket J.

No other evidence than that of the appellant administrator himself was taken on this hearing. From this it appeared that after his wife's death and months before his appointment as administrator he had paid bills for medical attendance upon his deceased wife, and her hospital and funeral expenses amounting to a little over $200 as well as a bill of $40 for a monument with money withdrawn by him from the joint bank account after the intestate's death; that he himself had drawn no cheques upon the bank account during his wife's lifetime but that his wife herself had drawn upon it from time to time for household expenses; that when the account was opened at the bank the passbook was given to her and that she retained possession of it until October, 1936, when, just before leaving for the hospital she asked a lady friend to bring it to her, and that afterwards she passed it to him with the remark, "That is yours." He gave no evidence of any conversation between himself and his wife in reference to the opening of the joint bank account, other than the following statements which appear in the Registrar's record of his cross-examination by Mr. Coughlin, counsel for the intestate's sister:

> When joint account was opened we talked it over between us and she was agreed. I do not know as I did suggest it. I do not think I did. I am swearing she was the one that suggested opening it at that time. I had a bank account. I did not make it a joint account with my wife * * * I was at bank with wife when she entered the joint account. I knew I could draw money. I could draw money any time. This money in joint account was not in inventory because it was mine * * * Wife was in good health when she gave me the passbook (that was according to his previous statement in October, 1936, just before she was leaving for the hospital). I never saw her in the insane asylum. Heard she was there.

Mr. Coughlan contended that the appellant was not entitled to charge the estate with the bills he had paid before his appointment as administrator for medical services, funeral expenses, etc., and that the balance standing to the credit of the joint bank account at the time of the intestate's death formed part of the intestate's estate and should be added to the inventory. The Registrar rejected both these contentions. With respect to the money standing to the credit of the joint account at the time of the intestate's death, he held that it thereupon vested in the appellant as his own property.

The deceased wife's sister appealed from this judgment to the Supreme Court of Nova Scotia *en banc,* which allowed the appeal upon the question of the ownership of the balance standing to the credit of the joint bank account, and held (*per* Doull, Hall and Graham JJ., Sir Joseph Chisholm C.J. and Archibald J. dissenting), that Mailman must account for this as administrator of his deceased wife's estate. The formal judgment accordingly directed the Registrar of Probate to add the amount thereof to the inventory of the estate.

It is from this judgment that Mailman now appeals.

It appears from the opposing factums and from both the majority and dissenting judgments in the court below that the appellant there sought to support his claim, not only on the ground that his wife had made him a joint tenant with her of the deposit money by depositing it in the names of both and signing the bank's agreement form on September 30th, 1935, but on the alternative grounds that in October, 1936, she had transferred the whole to him, either as a gift *inter vivos* or *donatio mortis causa,* by handing over to him the bank passbook with the remark, "That is yours" in the circumstances disclosed in his wholly uncorroborated evidence before the Registrar of Probate. The majority judgment, of course, overruled all these grounds, while the learned Chief Justice in his reasons therefor makes it clear that the dissenting judgment is founded solely on the ground that a joint tenancy was created by the opening of the deposit account and the signing of the bank joint deposit account agreement form on September 30th, 1935, in pursuance of some antecedent oral agreement, which he felt in the circumstances he must assume to have taken place between the two signatories. If this be the correct view and Mrs. Mailman had thus effectually renounced her exclusive ownership of the deposit money at that time, it necessarily negatives the alternative claim that her delivery to her husband more than a year afterwards of the bank passbook in the circumstances alleged constituted either an independent gift *inter vivos* or a *donatio mortis causa* of the whole. The one proposition is clearly contradictory of the other in the absence of any evidence from which it could reasonably be inferred that the joint tenancy had in the meantime been revoked and the exclusive ownership of the deposit money revested

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in Mrs. Mailman, as the learned Chief Justice himself points out. The minority judgment, though distinctly dissenting from the majority judgment on the question of the creation of a joint tenancy, clearly concurs, so far as the alternative grounds are concerned, in the conclusion of the majority judgment that they must fail.

Apart from this, however, the appellant's counsel in his oral argument here did not insist, as he had done in his factum, upon any error in the judgment of the court below as to the insufficiency of the evidence to establish the necessary elements of a valid *donatio mortis causa* or an effective gift other than that of a joint ownership of the joint deposit account fund. He chose to rely upon the one ground which had been accepted by the minority judgment rather than upon the others which had been unanimously rejected by the court *en banc* and took the position that the appellant's right on his wife's death to treat the money as his own depended entirely on the construction of the signed bank deposit agreement form, in the light, of course, of the facts disclosed by the parol evidence. This, we think, is the only basis on which the appeal can possibly be supported. It clearly recognizes the deposit agreement as the central feature of the case, upon which the appellant must rely to displace the adverse legal presumption that there was no intention on the part of Mrs. Mailman to divest herself of her exclusive ownership and control of the deposit money and make her husband a joint tenant thereof when she opened the deposit account in the names of both.

That both law and equity interpose such a presumption against an intention to create a joint tenancy, except where a father makes an investment or bank deposit in the names of himself and a natural or adopted child or a husband does so in the names of himself and his wife, is now too firmly settled to admit of any controversy. This presumption, of course, is a rebuttable presumption, which may always be overborne by the owner's previous or contemporaneous oral statements or any other relevant facts or circumstances from which his or her real purpose in making the investment or opening the account in that form may reasonably be inferred to have been otherwise. In the absence, however, of any such evidence to the contrary the presumption of law must prevail. That is the

clear result of such leading English cases as *Dyer* v. *Dyer* (1); *Fowkes* v. *Pascoe* (2); *Marshall* v. *Crutwell* (3); *In re Eykyn's Trusts* (4); *Bennet* v. *Bennet* (5), and *Standing* v. *Bowring* (6). This principle has been uniformly recognized in Canada wherever the courts have been required to adjudicate upon claims depending upon the creation of a joint tenancy or gift of a joint interest when the owner of the money involved has made investments or bank deposits in his own and another's names. There have been many such cases, particularly in Ontario and New Brunswick. Some of these involved disputes between the executor or administrator of a deceased father and a surviving son or daughter, and others disputes between the executor or administrator of a deceased husband and his surviving widow, where the presumption is in favour of a joint tenancy or a gift of a joint interest for the benefit of the child or of the wife, as the case may be. The decisions of course have varied according to the facts and circumstances of the particular cases, but it will be found on examination of the various judgments that the courts of both provinces alike in reaching their decisions have never failed to keep in mind the legal presumption and to decide the cases upon the basis of the sufficiency or insufficiency of the evidence to displace such presumption, whether it lies on one side or the other. Perhaps I should refer in this connection to two Ontario cases, viz.: those of *Re Hodgson* (7) and *Re Reid* (8), in consequence of the special references made by Middleton J. at pp. 533 and 534 to the English cases of *Dyer* v. *Dyer* (1); *Fowkes* v. *Pascoe* (2) and *Marshall* v. *Crutwell* (3), and those of Meredith C.J. at pp. 598 and 599 to the necessity of such presumption being rebutted and his adoption of the opinion of Cotton L.J. in *Standing* v. *Bowring* (6); and also to two earlier New Brunswick cases—those of *DeBury* v. *DeBury* (9) and *Vanwart* v. *The Diocesan Synod of Fredericton* (10), because of Barker J.'s statement of the law in this regard at p. 353 of the former case, as founded upon

(1) (1785) 2 W. & T.'s Leading Cases, 8th ed. 820.
(2) (1875) 10 Ch. App. 343.
(3) (1875) L.R. 20 Eq. 328.
(4) (1877) 6 Ch. D. 115.
(5) (1879) 10 Ch. D. 474.
(6) (1885) 31 Ch. D. 282.
(7) (1921) 50 O.L.R. 531.
(8) (1921) 50 O.L.R. 595.
(9) (1902) 2 N.B. Eq. 348.
(10) (1912) 42 N.B. R. 1.

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Drew v. *Martin* (1); *In re Eykyn's Trusts* (2), *Fowkes* v. *Pascoe* (3), and *Marshall* v. *Crutwell* (4), and of McLeod J.'s approaching his consideration of the latter case as well upon the doctrine laid down *In re Eykyn's Trusts* (2), as affirmed by *DeBury* v. *DeBury* (5), as will be seen at page 11, and of his reference to *Marshall* v. *Crutwell* (4) at pp. 15 and 16.

The deposit money having admittedly been owned by Mrs. Mailman when it was placed in the joint account, and the presumption of law unquestionably being that she did not intend to create a joint tenancy in favour of her husband, the decisive question is: Is there evidence upon which it can reasonably be held that her intention was other than that which the law presumes it to have been?

It is obvious that if there is any such evidence there are but two sources in which it can be sought, viz.: the signed bank deposit agreement form and the appellant's own deposition before the Registrar of Probate.

As to the agreement itself, it is to be observed in the first place that it is in the form of a letter addressed to the bank on a closely printed form, which apparently was intended for general use without alteration in the various branches of the bank on the opening of any and every joint deposit account, whether in the name of two or three or more persons and regardless of any private agreement which may have taken place between the parties named in any particular deposit account. It contains no reference, express or implied, to the ownership of the money when deposited or to any previous agreement having been entered into between the parties concerning the opening of the account. It begins merely with the statement that

> The undersigned, having opened a deposit account with you in their joint names, *hereby agree with you and with each other that,* etc.

For my part I cannot see how these words can be taken as necessarily implying that there was or had been any other agreement with the bank or between the signatories than that which is embodied in the document itself. It does not even indicate the relationship of the parties to the account. Its sole purpose and effect, as I read it, is

(1) (1864) 2 H. & M. 130.
(2) (1877) 6 Ch. D. 115.
(3) (1875) 10 Ch. App. 343.
(4) (1875) L.R. 20 Eq. 328.
(5) (1902) 2 N.B. Eq. 348.

to authorize the bank to accept from time to time as a sufficient acquittance for any amounts withdrawn from the deposit account any receipt, cheque or document signed by either. That it was intended to have no particular reference to any private arrangement or understanding between the two signatories seems to me to be conclusively shown by the last paragraph, viz.:

> That the death of one *or more* of the undersigned shall in no way affect the right of the *survivors,* or any one of them to withdraw all moneys deposited in said account as aforesaid.

It is this particular paragraph upon which the appellant's counsel chiefly relied to support his claim that Mrs. Mailman intended to create a joint tenancy in favour of her husband. It will be noticed, however, that the paragraph merely provides that the death of one of the signatories shall not affect *the right* of the survivors or any one of them to *withdraw* the moneys deposited in the account, and that it in no way purports to provide that if and when the surviving signatory does withdraw such moneys he or she shall be deemed to do so as sole owner thereof. It merely preserves the right of either party, in the event of the death of the other, to withdraw all moneys deposited in the account in the same way as he or she might have done during the lifetime of both. No doubt had the letter of instructions to the bank not contained this provision, the appellant's right to withdraw any money from the deposit account would have ended with his wife's death. In that event the bank could not safely have accepted any cheque or order made by the appellant against the deposit moneys in its hands without proof that he was entitled to receive the outstanding balance, either as administrator of his intestate wife's estate or in his own right. That seems to me to be the only consistent explanation of the inclusion in the bank's general printed form of joint deposit account agreements of the particular provision relied on by the appellant, i.e., that it is a provision inserted in all its joint deposit agreements for the bank's own protection and convenience, and having no reference to the rights of the parties named as between themselves other than the right of each to draw upon the deposit account in the manner stated. Looking at the whole agreement form, as signed by Mrs. Mailman and her husband, I cannot see how it can well be regarded as other than

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a mere compliance with the usual requirements of the bank for the opening of any joint deposit account. Even if one were disposed to regard it as an agreement between the parties themselves as to their respective rights concerning the deposit fund, those rights, as already appears, are definitely restricted to the authority of each to withdraw money from the account in the manner stated in the first paragraph. This does not itself necessarily imply the right of the appellant to take the money as his own. Otherwise there could be no joint bank account to which any presumption of law could apply one way or the other, in view of the fact that such authority to withdraw is a necessary incident of the establishment of every joint bank account. We must take it, I think, to start with at least, that the right to withdraw the money as provided in the first paragraph of this supposed agreement between the parties did not *per se* create a joint tenancy. If it did not, how can the provision of the last paragraph that the death of one of the signatories *shall in no way affect* the right of the survivor, or as it puts it, "the survivors or any one of them," to withdraw the money as aforesaid. logically be construed as doing so? Clearly to my mind it leaves the implication precisely where the first paragraph does, so far as Mrs. Mailman's intention to create a joint tenancy is concerned. As Graham J. points out in his judgment in the court *en banc,* if a joint tenancy had been intended, there was no need of a special provision that the survivor could withdraw the outstanding balance of the joint account in the event of the death of one of the two signatories. That would have followed as a necessary consequence of Mrs. Mailman's death vesting the money in her husband as its sole and absolute owner in virtue of the joint tenancy itself, had she in fact on the opening of the deposit account made him a joint tenant with her. The signed joint bank deposit agreement form, therefore, is no more indicative of Mrs. Mailman's intention to make her husband a joint tenant with her of the deposit moneys than the deposit account itself.

As to the parol evidence, it consists entirely, as I have said, of the appellant's own deposition before the Registrar of Probate, which the Registrar himself describes as vague and of little use. All he says in connection with the opening of the account is that when the account was opened

we talked it over between us and she was agreed. I do not know as I did suggest it. I don't think I did. I am swearing she was the one who suggested it * * * I know I could draw money. I could draw money any time.

He gave no details of any conversation with her either before or at the time the money was deposited, from which any inference could be drawn that she intended to renounce her exclusive ownership of the deposit money and give him such a joint ownership thereof as would entitle him upon her death to take the outstanding balance as her survivor. The most that can be said of this evidence is that he understood from what his wife said when they talked it over that he could draw money from the account any time. It adds nothing in this respect to what the formal bank agreement, which they both signed, itself says. It is true that he later alleged in connection with his wife's handing him the passbook more than a year after the opening of the account:

It was for me to take care of me. She used it during her lifetime, and when she was gone I would go and get it.

This latter statement apparently was intended as an addition or qualification to his wife's remark, "That is yours," which was so strongly relied upon in the court below in support of the contradictory theory of an intended subsequent gift *inter vivos* or *mortis causa*. Even if it were taken as applying to the alleged conversation relating to the opening of the deposit account, the statement that when she was gone "I would go and get it" obviously adds nothing to the right to withdraw the money in the event of her death, as provided by the bank's printed agreement form. On the other hand, if his later statement is taken as his understanding of what took place in connection with the alleged delivery of the bank passbook in October, 1936, as I think it must be, it plainly shows that, if his wife more than a year before had really intended to put him in the same position as herself with respect to the ownership of the deposit money, she had forgotten all about it. This evidence and the admitted fact that she kept the passbook in her own possession for a period of more than a year after the opening of the account seems to me to point to but one conclusion, viz.: that, if the appellant himself understood that his wife, when she opened the account, intended to make the fund

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joint property with right of sole ownership and property to the survivor, she herself had no such understanding or intention. And it is, of course, her intention, and not his understanding, which must be regarded as the determining factor.

Having regard to the strikingly vague and equivocal character of the appellant's testimony, and to the admitted fact that at the time of the opening of the joint account in question he had a bank account of his own, which he took care to keep in his own name, I have been unable to find, either in the deposit agreement itself, as I construe it, or in the deposition of the appellant himself any evidence, which can reasonably be held to rebut the presumption of law that Mrs. Mailman had no intention of giving the deposit moneys to her husband to the exclusion of her own next of kin.

I would therefore dismiss the appeal with costs.

DAVIS J. (dissenting)—This appeal arises out of a joint bank account of husband and wife. The wife died intestate leaving as next of kin her husband and several brothers and a sister; the husband as survivor of the joint depositors drew out the balance that remained in the bank account at the date of his wife's death and claims the money as his own property; the wife's sister seeks in these proceedings, commenced in the Court of Probate for the County of Lunenburg, in the Province of Nova Scotia, to have the moneys treated as part of the deceased's estate.

George and Hannah Mailman, apparently middle aged people, were married on October 27th, 1934. The joint deposit of the moneys was made by them on September 30th, 1935. The wife died on May 22nd, 1937. The amount deposited at the opening of the joint bank account was $5,118.40; at the date of the wife's death there was a balance of $4,648.23. It is admitted that the moneys prior to the joint deposit had been separate estate of the wife and had been on deposit in the same bank to the credit of her personal account. Husband and wife went together to the bank; the wife closed out her private account; and together they deposited the proceeds in a new account—a joint account.

Apart from the production of the document, to which I shall presently refer more particularly, which both of them signed at the bank when the joint account was opened, there are really no other material facts disclosed. There is no evidence that the account was opened merely for the convenience of the wife and no evidence that it was in an attempt on the part of the wife to make a testamentary disposition. And it is not the case of a mere deposit receipt or a pass-book entry. Both husband and wife were contracting parties with the bank and they signed a document at the time. That document is evidence of an agreement between them and the proper decision in the case turns upon the terms of that document. It is as follows:—

Agreement
Joint Deposit Accounts

To the Bank of Nova Scotia,
Caledonia, Queens Co., N.S.

The undersigned, having opened a deposit account with you in their joint names, hereby agree with you and with each other that, except only in the case of some other lawful claim before repayment, all moneys from time to time deposited to the said account and interest, may be withdrawn by any one of the undersigned, or his or her attorney or agent, and each of the undersigned hereby irrevocably authorizes the said Bank to accept from time to time as a sufficient acquittance for any amounts withdrawn from said account, any receipt, cheque or other document signed by any one of the undersigned, his or her agent, without any further signature or consent.

The death of one or more of the undersigned shall in no way affect the right of the survivors or any one of them, to withdraw all moneys deposited in the said account, as aforesaid.

Dated at Caledonia, Queens Co., N.S., this 30th day of September, 1935.

Witness(es)
L. G. Irving — Hannah Mailman.
L. G. Irving — George Mailman.

It is to be observed that husband and wife state that they, "the undersigned," have opened a deposit account in their joint names and that they "hereby agree," not only with the Bank, but "with each other that * * *." Further, they agree that the death of one "shall in no way affect the right of" the survivor to withdraw all moneys deposited in the said account. The document cannot in my opinion be treated merely as a direction to the Bank to pay.

It is not a question of some presumption of law; it is a question of the construction of the document. The

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document clearly evidences an agreement between the wife and her husband and must be construed, in my opinion, as evidencing the creation of a joint estate in the moneys in her husband. In the face of such a document and in the absence of any other material facts, the source of the money becomes immaterial. I find it quite impossible myself to say on the document that the wife merely created a trust in her husband resulting to her own benefit and did not create, or intend to create, a present joint interest in the moneys in him.

The husband as survivor was entitled in his own right to what remained in the account on the death of his wife. I would allow the appeal and restore the decision of the Registrar of Probate, with costs throughout.

HUDSON J. (dissenting)—This is a very close case. The Registrar of Probate by whom the case was tried decided that the appellant was entitled to the fund in question.

On appeal, Chief Justice Chisholm and Mr. Justice Archibald took the same view, but Doull, Hall and Graham, JJ. took the opposite view, holding that the fund in question should be treated as part of the estate of the deceased Hannah Mailman.

The agreement signed when the deposit was made recognizes that the deposit was made by both George Mailman and his wife. It was to be in their joint names and they agreed not only with the bank but with each other that all moneys from time to time deposited in the account might be withdrawn by either one of them and, furthermore, provided that the death of one or more should in no way affect the right of the survivor to withdraw money deposited in this account. If this agreement were taken by itself and without extrinsic evidence, I think that there should be little hesitation in treating the deposit as a joint one to which the survivor was entitled. As stated by Chief Justice Chisholm:

> When we turn to the agreement we find it stated by the parties that they have agreed to open the account in their joint names, in other words, a joint account, that either of them might make withdrawals and that the death of one of them should not in any way affect the right of the survivor to withdraw all the moneys remaining on deposit in the account. Does not such an agreement express the purpose of creating a joint ownership? Would not such language satisfy both parties that it sufficiently expressed an intention that there should be joint ownership? The signatories were lay people, not versed in the niceties of exact legal

expression, and they would naturally believe that the document expressed the oral agreement which we must assume preceded the signing and was effective to enable the survivor to withdraw the money in the account as his or her own by right of survivorship.

From the evidence it appears that before the money was deposited it belonged to Mrs. Mailman, that no moneys of Mailman himself were deposited in the account and none drawn out by him during the life time of Mrs. Mailman. On the other hand, Mrs. Mailman did draw out various sums herself, but it appears that these sums were drawn out for the purpose of assisting in carrying on the home, that is, for the benefit of both husband and wife. The bank book was held by Mrs. Mailman until a few months before her death when it was handed over to her husband.

Mailman himself had an account in some bank or other in his own name. What this amounted to is not in evidence. Beyond this the evidence adds nothing.

It appears that the parties were in modest circumstances and, although there is no presumption in favour of gift by a wife to her husband, it seems to me that the circumstances here do not render a gift of the character recognized by the written agreement improbable or unreasonable.

The matter is not at all certain but I incline to the conclusion reached by the Registrar and the minority in the Court of Appeal. I would allow the appeal and restore the Registrar's order.

Appeal dismissed with costs.

Solicitor for the appellant: *V. L. Pearson.*

Solicitor for the respondent: *C. R. Coughlan.*

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* March 20, 21.
* June 2.

FRANK HANES, CARL HANES AND WILLIAM HANES (DEFENDANTS) .. } APPELLANTS;

AND

THOMAS W. J. KENNEDY, AN INFANT SUING BY HIS NEXT FRIEND, T. J. KENNEDY, AND THE SAID T. J. KENNEDY (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Injury to customer in store by the exhibiting and discharging therein by another person of an air-pistol—Liability of person using the pistol, of person in charge of store, and of owner of store business—Non-interference by Supreme Court of Canada with reduction by Court of Appeal of amount of general damages awarded by trial judge.

The action was for damages for injury to the infant plaintiff, a boy 12 years old, caused by his being hit by a bullet discharged from an air-pistol in the hands of the defendant C. H., a boy 16 years old, in the store occupied by the defendant W. H. for his business. W. H. was not in the store at the time, it being in charge of his brother and employee, the defendant F. H. The said C. H. (a nephew of the other defendants but not employed in the store) had been exhibiting the pistol to a customer in the store, charging it with air and discharging it, and, after the infant plaintiff had entered to make a purchase, C. H. exhibited the pistol to him, pointing it towards him and discharging it, when the accident occurred. The trial judge, Urquhart J. ([1940] O.R. 461), held all defendants liable, and awarded $10,000 general damages to the infant plaintiff. His judgment was affirmed by the Court of Appeal for Ontario (*ibid*), except that said damages were reduced to $5,000. Defendants appealed; and plaintiffs cross-appealed, asking for restoration of the amount of damages awarded at trial.

Held: The appeal and cross-appeal should be dismissed.

The trial judge's finding that C. H. was negligent should not be disturbed, there being ample evidence to warrant it. F. H. (who, on the trial judge's finding, knew that the pistol was a very dangerous weapon), as the person in charge of the store, who negligently allowed C. H. to remain on the premises in possession of the dangerous article and to use it, must also be held liable. W. H. was the occupier of the store, as he was the proprietor of the business being carried on therein. A customer is entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger of which the occupier knows or ought to know (*Indermaur* v. *Dames*, L.R. 1 C.P. 274). W. H. failed in his duty to the infant plaintiff (who had entered the store as a customer) to exercise that care when his employee, F. H., was guilty of negligence; and must also be held liable.

* PRESENT:—Rinfret, Crocket, Kerwin, Hudson and Taschereau JJ.

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Where general damages fixed by a trial judge sitting without a jury have been reduced by the Court of Appeal under circumstances such as those in the present case, this Court, as a general rule, will not interfere. (*Ross* v. *Dunstall,* 62 Can. S.C.R. 393; *Pratt* v. *Beamen,* [1930] S.C.R. 284). No error in principle was made by the Court of Appeal. (*McHugh* v. *Union Bank of Canada,* [1913] A.C. 299, discussed and distinguished; *Warren* v. *Gray Goose Stage Ltd.,* [1938] S.C.R. 52, at 57, referred to).

APPEAL by the defendants from the judgment of the Court of Appeal for Ontario (1) dismissing (but with a reduction of the amount of damages awarded) their appeal from the judgment of Urquhart J. (1) in favour of the plaintiffs for damages by reason of an injury suffered by the infant plaintiff.

The injury occurred in a store. The defendant William Hanes was the proprietor of the business carried on therein. On the occasion in question he was not in the store, his brother and employee, the defendant Frank Hanes, being in charge of it. The defendant Carl Hanes, a boy 16 years old, who was a nephew of the other defendants and lived with them, but was not employed in the store, had, a few weeks before the accident, purchased an air-pistol, and on the occasion in question he was exhibiting it, charging it with air and discharging it, in the store. He had been thus displaying it to a customer, a girl 13 years old, when the infant plaintiff, a boy 12 years old, entered the store to make a purchase. The defendant Carl Hanes, in exhibiting the pistol to the infant plaintiff, pointed it towards him and pressed the trigger, and a bullet struck the infant plaintiff in the eye, destroying it. It was not known how it happened that the bullet was in the pistol.

The trial judge found that the air-pistol was a highly dangerous weapon; that in pointing it at the infant plaintiff, the defendant Carl Hanes was guilty of assault and negligence; that the air-pistol in his hands was an unusual danger in the store; that the defendant Frank Hanes, in charge of the store at the time, knew or should have known of such danger, because he knew that the pistol was a very dangerous weapon, and he owed a duty to the infant plaintiff, a customer in the store, to have seen that the danger was removed; and was liable in

(1) [1940] O.R. 461; [1940] 3 D.L.R. 500.

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negligence for the consequences of allowing the danger to remain upon the premises; that the defendant William Hanes was liable for the negligence of his employee, Frank Hanes; and gave judgment against all the defendants for $10,000 general damages in favour of the infant plaintiff, and $406 damages, for expenses incurred or to be incurred, in favour of his father, the adult plaintiff.

On appeal by the defendants, the Court of Appeal for Ontario reduced from $10,000 to $5,000 the amount of damages awarded to the infant plaintiff, but in all other respects dismissed the appeals. Fisher J.A., dissenting, would have allowed the appeals and dismissed the action.

The defendants appealed to the Supreme Court of Canada (special leave so to appeal from the judgment in favour of the adult plaintiff was granted by the Court of Appeal for Ontario). There was a cross-appeal asking that the damages fixed by the trial judge should be restored. By the judgment of this Court now reported, the appeals and cross-appeal were dismissed with costs.

T. F. Forestell K.C. for the appellant Carl Hanes.

R. B. Law K.C. for the appellants Frank Hanes and William Hanes.

J. R. Cartwright K.C. and *O. M. Walsh K.C.* for the respondents.

The judgment of the Court was delivered by

KERWIN J.—The appeals should be dismissed with costs. The trial judge has found that Carl Hanes was negligent. There was ample evidence to warrant this finding and we agree with the Court of Appeal that it cannot be disturbed.

The trial judge also found Frank Hanes to have been negligent, as appears from the following extract from his judgment:—

> So it comes down to this as I see it. William Hanes is the owner of the store; Frank Hanes, his brother, was his employee in charge of it that day; the infant defendant was in the store armed with a highly dangerous weapon; both the uncles, particularly Frank Hanes, knew its qualities and propensities and that it was a very dangerous weapon; to the knowledge of Frank Hanes the infant defendant was charging it with air and discharging it in the store; Frank Hanes allowed him to do this and did not see that he did not flourish the weapon around in the store in the direction of customers; he allowed him to remain in the store; the infant plaintiff entered the store as an invitee; the infant defendant charged the pistol with air, cocked it (to say the least), took aim at the infant plaintiff and pressed the trigger, causing serious injury.

As the person in charge of the store, who negligently allowed Carl Hanes to remain on the premises in possession of the dangerous article and to use it, Frank Hanes must be held responsible.

William Hanes was the occupier of the store as he was the proprietor of the business being carried on therein. The infant plaintiff had entered the store as a customer. As pointed out by Willes J. in *Indermaur* v. *Dames* (1), a customer is entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger of which the occupier knows or ought to know. William Hanes failed in his duty to the infant plaintiff to exercise that care when his employee, Frank Hanes, was guilty of negligence, and William Hanes must also be held liable in damages.

The trial judge awarded the infant plaintiff ten thousand dollars damages. The Court of Appeal, while agreeing with all the considerations which the trial judge stated moved him to fix that amount, thought there were other matters which had not been sufficiently taken into account by him and reduced the damages to five thousand dollars. The plaintiffs cross-appeal.

Where general damages fixed by a trial judge sitting without a jury have been reduced by a Court of Appeal under circumstances such as we find here, this Court, as a general rule, will not interfere: *Ross* v. *Dunstall* (2); *Pratt* v. *Beaman* (3). Mr. Cartwright referred to *McHugh* v. *Union Bank of Canada* (4). That, however, was a case where the Court of Appeal of Alberta determined that there was no evidence upon which the trial judge could assess damages but granted the plaintiff the option to have the matter referred to the Clerk of the Court to take an account of what damages, if any, the plaintiff had suffered by the negligence of the defendants but gave directions which would limit such damages. That decision was affirmed by the Supreme Court of Canada with an alteration in the direction as to the method of assessment. The Judicial Committee, agreeing with the minority opinion that had been expressed in this Court, decided (p. 309) that there was evidence to warrant a determination by the trial judge as to the quantum of damages and that there

(1) (1866) L.R. 1 C.P. 274.
(2) (1921) 62 Can. S.C.R. 393.
(3) [1930] S.C.R. 284.
(4) [1913] A.C. 299, at 309.

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was nothing to justify a conclusion that his assessment was erroneous. I think there was nothing more involved in that decision on the question of damages, and the judgment delivered on behalf of the majority of this Court in *Warren* v. *Gray Goose Stage Ltd.* (1) does not indicate that any wider construction was put by them upon the words of their Lordships in the *McHugh* case (2). It was pointed out, at page 57, that the course adopted by the Privy Council "undoubtedly would not have been taken had the Privy Council not concluded that the two appellate courts below had erred in principle in interfering with the assessment made by the trial judge." No error in principle was made by the Court of Appeal in this case, and the cross-appeal should, therefore, be dismissed, with costs.

Appeals and cross-appeal dismissed with costs.

Solicitor for the appellants: *T. F. Forestell.*

Solicitors for the respondents: *Walsh & Evans.*

1941
* May 6.
* June 2.

INTERNATIONAL LADIES GARMENT WORKERS UNION AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

CHARLES ROTHMAN (DEFENDANT) .... RESPONDENT.

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

Practice and procedure—Trade unions and other similar associations—Not incorporated and not possessing otherwise collective civil personality—Capacity to be sued as such—Whether capacity to bring suit also as plaintiffs—"An Act to facilitate the exercise of certain rights" Quebec statute, 1938, 2 Geo. VI, c. 96.

The Quebec statute of 1938 (2 Geo. VI, c. 96), enacted to facilitate the exercise of certain rights, allows the *summoning,* before the courts of the province, of any group of persons associated for the carrying out in common of purposes or advantages of an industrial, commercial or professional nature in that province, such group not possessing a collective civil personality recognized by law and not being partner-

(1) [1938] S.C.R. 52. (2) [1913] A.C. 299.

* PRESENT:—Rinfret, Crocket, Kerwin, Hudson and Taschereau JJ.

ships within the meaning of the Civil Code; but that statute does not confer on these groups (in this case trade unions) the right to bring suit, i.e., the right to *ester en justice* as plaintiffs.

Society Brand Clothes Limited v. *Amalgamated Clothing Workers of America* ([1931] S.C.R. 321) disc.

Judgment of the appellate court (Q.R. 69 K.B. 154) affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Surveyer J., maintaining the respondent's exception to the form and dismissing the present action in so far as it concerned three of the appellants, viz., the International Ladies Garment Workers Union, and the Dressmakers Union Local 262 and the Dress Cutters Union Local 205, both local unions of the first-mentioned union.

J. J. Spector for the appellants.

Henry Weinfield K.C. for the respondent.

The judgment of the court was delivered by

RINFRET J.—In the writ of summons, the appellants are described as follows:

> The International Ladies Workers Union and the Dress Makers Union Local 262 of the said International Ladies Garment Workers Union and The Dress Cutters Union Local 205 of the said International Ladies Garment Workers Union, all of the city and district of Montreal, and being voluntary associations consisting of groups of persons associated for the carrying out in common in the city and district of Montreal, of purposes and advantages of an industrial nature and not possessing in the province of Quebec a collective civil personality recognized by law and not being partnerships within the meaning of the Civil Code but competent to *ester en justice* in virtue of the *Act to facilitate the Exercise of Certain Rights*, 2 Geo. VI, statutes of Quebec, chapter 96.

The appellants joined with seventy-six individual plaintiffs in an action whereby, praying act of their readiness and willingness to fulfill their obligations and to continue at all times in the employment of the respondent upon the rates of salary and the terms and conditions provided for in four agreements between The Montreal Dress Manufacturing Guild, the International Ladies Garment Union and the Dressmakers Union Local 262, or with the Dress Cutters Union Local 205, and for the term therein stipulated, they prayed that judgment be rendered against the

(1) (1940) Q.R. 69 K.B. 154.

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respondent in the sum of $122,360, payable to the individual plaintiffs respectively in divers sums therein mentioned; under reserve of all other rights of the plaintiffs, and especially without prejudice to the plaintiffs' rights to seek an injunction restraining the respondent from further violation of the said agreements, and without prejudice to such other employees of the respondent who have not been joined in the present suit, or without prejudice to their rights to take individual suits, if they so desire; and, further, and, in so far as it may be necessary at law, that the said agreements be declared resiliated and set aside and be annulled "à toutes fins que de droit" as regards the plaintiffs and the respondent herein; and that the mis-en-cause be summoned "pour voir dire et déclarer," in so far as its rights are affected and without prejudice to the rights of the plaintiffs against any other member of the said "mis-en-cause" other than the respondent, the whole with costs against the respondent, and without costs for the mis-en-cause, unless it contests.

The action, in so far as the appellants were concerned, was met by an exception to the form alleging that the statute of Quebec 2 Geo. VI, c. 96, invoked by the appellants, did not confer on them the right to sue as in the present action, that they were not legal personalities having in law the capacity to institute actions before the courts of the province of Quebec; and that the action should be dismissed with regard to the three appellants.

The Superior Court (Fabre Surveyer J.) maintained the exception to the form.

The Court of King's Bench (appeal side) unanimously confirmed that judgment.

The appellants appealed to this Court and were met by a motion to quash the appeal for want of jurisdiction.

The motion was adjourned so as to be considered together with the merits of the appeal; and, having heard the appeal, we are of opinion that it should be dismissed, but that the motion to quash should also be dismissed.

The jurisdiction of this Court depends upon the nature and the conclusions of the action. These conclusions, amongst other things, pray for the resiliation, the setting aside and the annulment of four agreements one of the effects of which is that the seventy-six plaintiffs ask the payment to them of a sum of $122,360; and they further

pray for an injunction restraining the respondent from further violating, so it is alleged, the agreements in question. Under the circumstances, the jurisdiction of this Court is clear; and the motion to quash should be dismissed with costs against the respondent.

As for the merits involved in the appeal, our starting point must be the judgment of this Court in *Society Brand Clothes Limited* v. *Amalgamated Clothing Workers of America* (1).

In that case, the Amalgamated Clothing Workers of America, having its principal place of business in the city of New York, was described in the proceedings as "an unincorporated association"; the other respondents were also described as unincorporated bodies having their head offices and principal place of business in the city of Montreal. They were defendants in the case, had filed an appearance by counsel and had pleaded to the merits of the action. At the trial, counsel for the respondents raised orally for the first time the point that, not being legal entities, they were not suable. It was held that they could not be legally sued. Mr. Justice Cannon, delivering the judgment of the majority of the Court, stated that

> an unincorporated labour union has no legal existence and cannot be considered in law as an entity distinct from its individual members and is not suable in the common name.

The Court should *proprio motu* take notice that an aggregate voluntary body, though having a name, cannot appear in court as a corporation when, in reality, it is not incorporated. A body such as this is not, according to law, a judicial person in the pertinent sense.

As a consequence, this Court decided that these bodies could not as such appear before the courts and that their officers had no capacity to represent them before the tribunals of the province of Quebec where "nul ne plaide au nom d'autrui." (C.C.P. art 81.)

That judgment was delivered in this Court on December 23rd, 1930; and our inquiry, therefore, may be limited to the question whether, since then, the province of Quebec has legislated to give legal existence to, or recourse against,

(1) [1931] S.C.R. 321.

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these unincorporated bodies in such a way that they may be regarded as entities distinct from their individual members, and as having the right to *ester en justice.*

It will be remembered that, in the writ of summons, the appellants claimed to be authorized in that respect in virtue of the Act to facilitate the exercise of certain rights, being chapter 96 of the statute of Quebec, 2 Geo. VI, assented to on April 12th, 1938; and, in their factum, the appellants stated that

> the issue resolves itself into an interpretation of that statute * * * and to a definition of the capacity of the appellant-Unions in the light of such statute.

But they also referred to the

> collateral and ancillary legislation enacted in connection with industrial and labour matters in the province of Quebec since 1930.

It should not be denied that this is a matter of prime importance, affecting as it does the power of organized labour to come into court in order to maintain their rights before the tribunals of the province of Quebec.

It was stated in this Court that the pith and substance of the appeal consisted in the decision of the question whether or not the right to sue is co-relative, reciprocal and complementary with the right to be sued, so far as concerns the appellants; and whether these groups of persons, associated for the carrying on of their common purposes, were endowed with sufficient capacity to *ester en justice* "en demandant" as well as "en défendant."

The statute 2 Geo. VI, c. 96, is as follows:

> 1. Every group of persons associated for the carrying out in common of any purpose or advantage of an industrial, commercial or professional nature in this province, which does not possess therein a collective civil personality recognized by law and is not a partnership within the meaning of the Civil Code, is subjected to the provisions of section 2 of this Act.
>
> 2. The summoning of such group before the courts of this province, in any recourse provided by the laws of the province, may be effected by summoning one of the officers thereof at the ordinary or recognized office of such group or by summoning such group collectively under the name by which it designates itself or is commonly designated or known.
>
> The summoning by either method contemplated in the precedent paragraph, shall avail against all the members of such group and the judgments rendered in the cause may be executed against all the moveable or immoveable property of such group.

The appellants contended that, since a group may be summoned collectively as defendant under the name by which it designates itself, it may likewise bring suit under that name.

We agree with the learned trial judge and with the Court of King's Bench that such interpretation is contrary to the text of the statute. The words are precise and unambiguous, and they must be read in their ordinary and natural sense (*Salomon* v. *Salomon* (1)).

That statute allows the summoning of groups of the nature of the appellants before the courts of the province of Quebec, either by summoning one of their officers, or by summoning the group collectively under the name by which it is designated; but it does not permit them to bring an action before the courts. The word "summoning" is well known in the procedure of the province and it connotes the manner in which an action at law is brought against a defendant. The enactment is couched in express terms and does not admit of any possible doubt.

Indeed, it may be said that the very wording of the statute implies that, up to its adoption by the Legislature, groups like the appellants could not be summoned or sued before the courts in the province of Quebec, that, henceforth, actions may be instituted against them under the name by which they designate themselves; but the wording excludes the capacity for these groups to enter actions into court in that name on their own behalf (*Inclusio unius fit exclusio alterius*).

Prior to the enactment of the statute in question, trade unions, associations, or groups of persons envisaged by this statute were immune from legal proceedings as associations or groups. In order to bring action against them as defendants, it was necessary to implead every member of such association or group.

It was evidently to remedy that situation and, no doubt, as a consequence of the decisions of the courts on this point, to enable the practical exercise of legal recourse against the unincorporated bodies, that the statute in question was enacted.

The statute does not purport to incorporate the groups or persons therein described, nor does it purport to confer upon them a collective legal personality. It does exclusively what is therein stated: It allows persons who have claims against them to summon them in the name of one

(1) [1897] A.C., at p. 29.

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of the officers thereof, at the ordinary or recognized office of the group, or collectively under the name by which they are commonly designated or known.

The appellants might have acquired the necessary status as an association or professional syndicate under a Quebec statute known as *The Professional Syndicate Act,* ch. 255, R.S.Q., 1925; or, by registering in accordance with the provisions of the *Trade Unions Act of Canada* (R.S.C., 1927, c. 202), the members of the appellant trade unions might have acquired certain legal capacity and legal existence, in the name of such unions, within the limits of the last mentioned Act.

The appellants have not availed themselves of either enactment. And while they are invoking only the statute 2 Geo. VI, c. 96, they are subject to the provisions of s. 2 of that statute; and the consequence is that they may be sued in their collective name, but they are not authorized to sue as a group and in that name.

The appellants have referred the Court to an *Act respecting Limiting of Working Hours* (Statute of Quebec 23 Geo. V, c. 40), the *Collective Labour Agreement Extension Act* (24-25 Geo. V, c. 56), replaced by *The Collective Labour Agreements Act* (1 Geo. VI, c. 49) amended by 2 Geo. VI, c. 52, and replaced by *The Collective Agreement Act* (4 Geo. VI, c. 38), assented to on June 22nd, 1940.

They have also turned our attention to *The Fair Wage Act* (1 Geo. VI, c. 50), replacing *The Women's Minimum Wage Act,* and in turn replaced by the *Minimum Wage Act* (4 Geo. VI, c. 39).

Under sec. 7 of the *Collective Agreements Extension Act* (24 Geo. V, c. 56), it was provided that parties to a collective labour agreement should form a joint committee charged with the supervising and assuring the carrying out of such agreements and this joint committee, through its delegates, was entitled.

to exercise for the benefit of each of the employees all rights of action arising in their favour from a collective agreement made obligatory, without having to prove an assignment of claim from the person concerned.

And by subs. 4 of s. 7, it was enacted that

the joint committee formed under the Act shall constitute a corporation and shall possess the powers of an ordinary corporation for the carrying out of this Act.

Similar provisions were carried through the subsequent Acts; but it will be noticed that the juridical personality, in the contemplation of the law, was given, not to the union, association or group of persons, but to the joint committee formed under the Acts. These several statutes are not susceptible of a construction favourable to the appellants' contention. None of them has the effect of qualifying the clear and express meaning of the statute of 1938 (2 Geo. VI, c. 96); and not only can it be said that, in making a union capable of being summoned as defendant in a law suit, the Legislature has not endowed it with all inherent, ancillary and supplementary powers enabling it to initiate an action at law; but the contrary intention of the Legislature evidently appears from the very wording of the enactment.

The question whether the appellant unions are proper and necessary parties in the present case has nothing to do with the point now under discussion. On the respondent's exception to the form, we are concerned exclusively with the question whether they could be made plaintiffs in the case in the name by which they are designated or commonly known—and nothing more. The appellants are not denied the right to institute proceedings; still less, as suggested by the appellants, are they denied their day in court. This judgment is not intended to go any further than to say that they could not institute the present proceedings and become plaintiffs in the case merely by designating themselves in the writ of summons under the name which they have adopted in the premises.

Under the circumstances, the appeal should be dismissed with costs.

We do not think the Court of King's Bench was in error in granting costs of appeal against the appellants. In the *Society Brand* case (1), the appeal was dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Bercovitch & Spector.*

Solicitors for the respondent: *Weinfield & Rudenko.*

(1) [1931] S.C.R. 321.

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*Feb. 26, 27.
*April 22.

THE PROVINCIAL SECRETARY OF THE PROVINCE OF PRINCE EDWARD ISLAND ON BEHALF OF HIS MAJESTY THE KING..... APPELLANT;

AND

MICHAEL EGAN..... RESPONDENT;

AND

THE ATTORNEY-GENERAL OF PRINCE EDWARD ISLAND..... INTERVENANT.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND EN BANC

Motor vehicles — Appeal — Constitutional law — Criminal law — Highway Traffic Act, P.E.I., 1936, c. 2, ss. 84 (1) (a) (c), 8 (7)—Criminal Code (R.S.C., 1927, c. 36, as amended), s. 285 (4) (7)—Conviction under s. 285 (4), Cr. Code, of driving while intoxicated—Automatic suspension of driving licence under s. 84 (1) (a) of said provincial Act—Refusal to grant licence to convicted person during period fixed by said s. 84 (1) (a)—Appeal asserted under s. 8 (7) to County Court Judge from such refusal—Whether right to so appeal—Whether right of appeal from County Court Judge to Supreme Court, P.E.I.—Constitutional validity of s. 285 (7), Cr. Code—Constitutional validity of s. 84 (1) (a) (c) of said provincial Act, in view of s. 285 (7), Cr. Code.

By s. 84 (1) of *The Highway Traffic Act, 1936,* (c. 2), of Prince Edward Island, the licence (to operate a motor vehicle) of a person who is convicted of driving a motor vehicle while under the influence of intoxicating liquor or drugs, "shall forthwith upon, and automatically with such conviction, be suspended" for (*a*) 12 months for the first offence; and (s. 84 (1) (*c*)) "the Provincial Secretary shall not issue a licence to any person during the period for which his licence has been cancelled or suspended under this section."

By s. 285 (7) of the *Criminal Code* of Canada (as amended by 3 Geo. VI, c. 30, s. 6), where a person is convicted, under s. 285 (4), of driving a motor vehicle while intoxicated, the court or justice may, in addition to any other punishment provided, prohibit him from driving a motor vehicle anywhere in Canada during any period not exceeding three years.

The respondent, who had a licence to operate a motor vehicle, good until February 28, 1940, was, on November 20, 1939, convicted under said s. 285 (4) of the *Cr. Code.* On May 28, 1940, he applied for an operator's licence. His application was refused pursuant to said s. 84 (1) (*c*) of the *Highway Traffic Act,* as the period of automatic cancellation, under s. 84 (1) (*a*) upon said conviction, had not expired. From such refusal, respondent, asserting a right of appeal under s. 8 (7) of said *Highway Traffic Act,* appealed to a County Court Judge, who allowed the appeal and ordered issuance of a licence. The Provincial Secretary appealed to the Supreme Court of

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

Prince Edward Island *en banc,* which (15 M.P.R. 271) dismissed the appeal, holding that the County Court Judge had jurisdiction to make the order and that there was no appeal therefrom, and holding further that, by reason of the enactment of said s. 285 (7) of the *Cr. Code,* s. 84 (1) of said provincial Act had become *ultra vires.* The Provincial Secretary appealed (leave to do so being granted by said Supreme Court *en banc*) to this Court.

Held: The appeal should be allowed and the order of the County Court Judge set aside.

There was no right of appeal to the County Court Judge from the refusal of the Provincial Secretary to grant a licence to respondent. Said s. 8 (7) of the *Highway Traffic Act* did not apply. The right of appeal given by s. 8 (7) is to a person aggrieved by refusal to grant a licence or by revocation of a licence under s. 8. The refusal in question was not a refusal under s. 8; nor was there revocation of licence under s. 8. The law itself, s. 84 (1) of the Act, said that respondent, in the premises, was not entitled to a licence. The Provincial Secretary was merely carrying out the law, and had no discretion. There was no provision authorizing an appeal to the County Court Judge under such circumstances; and his order was made without jurisdiction. The Supreme Court *en banc* should have so held, and set aside the order. It was not legally seized of the question whether s. 84 (1) of the *Highway Traffic Act* was *ultra vires.*

Upon said constitutional question, this Court expressed opinion as follows: The field of s. 285 (7) *Cr. Code,* and that of s. 84 (1) of said provincial Act are not co-extensive. The Dominion, in enacting s. 285 (4) (7), has not invaded the whole field in such a way as to exclude all provincial jurisdiction. It cannot have superseded the provincial enactment, which was obviously made from the provincial aspect of defining the right to use the highways in the province and intended to operate in a purely provincial field. The provincial enactment does not impose an additional penalty for a violation of, or interfere with, the criminal law; it provides, in the way of civil regulation of the use of highways and vehicles, for a civil disability arising out of a conviction for a criminal offence; and that does not make it legislation in relation to criminal law. The undisputed authority of the province to issue licences or permits for the right to drive motor vehicles on its highways, carries with it the authority to suspend or cancel them upon the happening of certain conditions. Said s. 84 (1) deals purely with certain civil rights in the province, and is not *ultra vires.* (*Bédard* v. *Dawson,* [1923] S.C.R. 681; *Lymburn* v. *Mayland,* [1932] A.C. 318, referred to).

Per the Chief Justice: Primarily, responsibility for the regulation of highway traffic, including authority to prescribe the conditions and the manner of the use of motor vehicles on highways and the operation of a system of licences for the purpose of securing the observance of regulations respecting these matters in the interest of the public generally, is committed to the local legislatures. S. 84 (1) (*a*) (*c*) of said provincial Act is concerned with the subject of licensing, over which it is essential that the Province should primarily have control; and so long as the purpose of the provincial legislation and its immediate effect are exclusively to prescribe the conditions under which licences are granted, forfeited or suspended, it is not, speaking

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generally, necessarily impeachable as repugnant to s. 285 (7), *Cr. Code*, in the sense that it is so related to the substance of the Dominion enactment as to be brought within the scope of criminal law in the sense of s. 91 of the *B.N.A. Act* by force of the last paragraph of s. 91. There is no adequate ground for the conclusion that the provincial enactments in question are in their true character attempts to prescribe penalties for the offences dealt with by the *Cr. Code*, rather than enactments in regulation of licences.

S. 285 (7) *Cr. Code*, is *intra vires*.

S. 1 of c. 5, Acts of 1940, P.E.I., gives *prima facie* an appeal to the Supreme Court, P.E.I., from any decree, judgment, order or conviction by a Judge of a County Court who is acting in a judicial capacity, though *persona designata* and not as the County Court, under the authority of a Provincial Act. The fact that the Judge has acted without jurisdiction does not affect this right of appeal. Questions of jurisdiction are within the scope of the appeal.

APPEAL by the Provincial Secretary of the Province of Prince Edward Island, and also by the Attorney-General of that Province as intervenant, from the judgment of the Supreme Court of Prince Edward Island *en banc* (1) dismissing the appeal of the Provincial Secretary from the order made by His Honour, C. Gavan Duffy, Judge of the County Court for Queens County in said Province, ordering the Department of the Provincial Secretary, upon application by Michael Egan (the present respondent) in the ordinary way and upon payment of the usual fee and without any certificate of competency (the order recited an admission of competency), to issue to the said Egan a licence to operate motor vehicles in the said province.

The material facts of the case and the questions involved are sufficiently stated in the reasons for judgment in this Court now reported, and are indicated in the above headnote.

Special leave to appeal to this Court was granted by an order of the Supreme Court of Prince Edward Island *en banc;* the order reciting an undertaking by appellant to make no application for costs against respondent. The order also gave leave to the Attorney-General of Prince Edward Island to intervene.

The Attorney-General of Canada and the Attorney-General for Ontario were granted leave to appear before this Court and argue for or against the judgment appealed from, on the point of the constitutionality of the relevant provisions of the *Criminal Code* and of the Prince Edward Island *Highway Traffic Act.*

(1) 15 M.P.R. 271; [1941] 1 D.L.R. 291.

Hon. Thane A. Campbell K.C. for the appellant and for the intervenant.

Hon. Gordon D. Conant K.C. and *C. R. Magone K.C.* for the Attorney-General for Ontario.

F. P. Varcoe K.C. for the Attorney-General of Canada.

THE CHIEF JUSTICE—I think the contention of the appellant is well founded that section (1) of chap. 5 of the P.E.I. Statutes of 1940 gives *prima facie* an appeal to the Supreme Court (P.E.I.) from any decree, judgment, order, or conviction by a Judge of a County Court who is acting in a judicial capacity, though *persona designata* and not as the County Court, under the authority of a Provincial statute. This is not intended to be an exhaustive description, but in such circumstances I think an appeal lies.

The fact that the County Judge has acted without jurisdiction does not, in my opinion, affect this right of appeal. Once the conclusion is reached that the section intends to give an appeal to the Supreme Court, even where the County Court Judge is exercising a special jurisdiction and not as the County Court, I can see no reason for limiting the scope of the appeal in such a way as to exclude questions of jurisdiction. As the Attorney-General observed in the course of his argument, lawyers are more familiar with the practice of dealing with questions of jurisdiction raised by proceedings by way of *certiorari* and prohibition. A tribunal exercising a limited statutory jurisdiction has no authority to give a binding decision upon its own jurisdiction and where it wrongfully assumes jurisdiction it follows, as a general rule, that, since what he has done is null, there is nothing to appeal from. But here we have a statute and this is only pertinent on the point of the meaning and effect of the statute.

It has always seemed to me that the proceeding by way of appeal would be the most convenient way of questioning the judgment of any judicial tribunal whose judgment is alleged to be wrong, whether in point of wrongful assumption of jurisdiction, or otherwise. There is no appeal, of course, except by statute and, I repeat, the question arising upon this point is entirely a question of the scope and effect of this statute. Section 2 of the

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PROVINCIAL SECRETARY OF PRINCE EDWARD ISLAND v. EGAN.

Duff C.J.

Statute, moreover, as the Attorney-General points out, imports the procedure under Part *XV* of the *Criminal Code.*

The point we have to consider is whether, by reason of the enactment of section 285 (7) of the *Criminal Code,* the jurisdiction *prima facie* given to the Province to enact the provisions of section 84 (1) (*a*) and (*c*) of the *Highway Traffic Act* of 1936 is suspended. This section of the *Criminal Code* provides that where a person is convicted of an offence under certain sub-sections of that section, the court or justice may, in addition to any other punishment provided for such offence, make an order prohibiting such person from driving a motor vehicle or automobile anywhere in Canada during any period not exceeding three years. The attack upon the provincial legislation may, perhaps, be put in this way: the effect of section 285 (7) is to bring the matters with which it deals within the subject of the criminal law, which is explicitly assigned to the Dominion as one of the enumerated subjects under section 91; then it is said that the matters so legislated upon are of such a scope that they extend to and include within their ambit the matters dealt with by section 84 (1) of the *Highway Traffic Act* of 1936 and that, consequently, the clause at the end of section 91 comes into play, and that these matters are excluded, so long as the Dominion legislation remains in force, from the jurisdiction of the Province.

As against this it is argued by the Attorney-General of Prince Edward Island that section 285 (7) is *ultra vires;* that the legislative prohibition which is there imposed upon convicted persons against driving a motor vehicle or automobile is not within the ambit of section 91 (27).

I may say at once I cannot agree with this view. I do not think anything is to be gained by discussing the point at large. It appears to me to be quite clear that such prohibitions may be imposed as punishment in exercise of the authority vested in the Dominion to legislate in relation to criminal law and procedure.

A very different question, however, is raised by the contention that the matters legislated upon by the enactments of the Provincial *Highway Traffic Act* in question have, by force of section 285 (7) of the *Criminal Code,* been brought exclusively within the scope of the Dominion

authority in relation to criminal law. We are here on rather delicate ground. We have to consider the effect of legislation by the Dominion creating a crime and imposing punishment for it in effecting the suspension of provincial legislative authority in relation to matters *prima facie* within the provincial jurisdiction. I say we are on delicate ground because the subject of criminal law entrusted to the Parliament of Canada is necessarily an expanding field by reason of the authority of the Parliament to create crimes, impose punishment for such crimes, and to deal with criminal procedure. If there is a conflict between Dominion legislation and Provincial legislation, then nobody doubts that the Dominion legislation prevails. But even where there is no actual conflict, the question often arises as to the effect of Dominion legislation in excluding matters from provincial jurisdiction which would otherwise fall within it. I doubt if any test can be stated with accuracy in general terms for the resolution of such questions. It is important to remember that matters which, from one point of view and for one purpose, fall exclusively within the Dominion authority, may, nevertheless, be proper subjects for legislation by the Province from a different point of view, although this is a principle that must be "applied only with great caution." (*Attorney-General for Canada* v. *Attorney-General for Alberta* (1)).

By section 91 of the *British North America Act*,—

* * * 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; that is to say,— * * * 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters. * * * And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

The effect of the concluding part of section 91 is that the Parliament of Canada may legislate upon matters which are *prima facie* committed exclusively to the Provincial Legislatures by section 92, where such legislation is necessarily incidental to the exercise of the powers conferred upon Parliament in relation to the specified subject

(1) [1916] 1 A.C. 588, at 596.

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"The Criminal Law * * * including the Procedure in Criminal Matters." To the extent, at least, to which matters *prima facie* provincial are regulated by Dominion legislation in exercise of this authority, such matters are excepted from those committed to the provincial legislatures by section 92; and, accordingly, the legislative authority of the provinces in relation to these matters is suspended. The subject is discussed in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1).

In every case where a dispute arises, the precise question must be whether or not the matter of the provincial legislation that is challenged is so related to the substance of the Dominion criminal legislation as to be brought within the scope of criminal law in the sense of section 91. If there is repugnancy between the provincial enactment and the Dominion enactment, the provincial enactment is, of course, inoperative. It would be most unwise, I think, to attempt to lay down any rules for determining repugnancy in this sense. The task of applying the general principles is not made less difficult by reason of the jurisdiction of the provincial legislatures under the fifteenth paragraph of section 92 to create penal offences which may be truly criminal in their essential character. (*The King* v. *Nat. Bell Liquors Ld.* (2), and *Nadan* v. *The King* (3)).

I do not find any difficulty in dealing with the present case. Primarily, responsibility for the regulation of highway traffic, including authority to prescribe the conditions and the manner of the use of motor vehicles on highways and the operation of a system of licences for the purpose of securing the observance of regulations respecting these matters in the interest of the public generally, is committed to the local legislatures.

Sections 84 (1) (*a*) and (*c*) are enactments dealing with licences. The legislature has thought fit to regard convictions of the classes specified as a proper ground for suspending the licence of the convict. Such legislation, I think, is concerned with the subject of licensing, over which it is essential that the Province should primarily have control. In exercising such control it must, of course, abstain from legislating on matters within the enumerated subjects of section 91. Suspension of a driving licence

(1) [1896] A.C. 348, at 359, 365, 366.
(2) [1922] 2 A.C. 128.
(3) [1926] A.C. 482.

does involve a prohibition against driving; but so long as the purpose of the provincial legislation and its immediate effect are exclusively to prescribe the conditions under which licences are granted, forfeited, or suspended, I do not think, speaking generally, it is necessarily impeachable as repugnant to section 285 (7) of the *Criminal Code* in the sense above mentioned.

It is, of course, beyond dispute that where an offence is created by competent Dominion legislation in exercise of the authority under section 91 (27), the penalty or penalties attached to that offence, as well as the offence itself, become matters within that paragraph of section 91 which are excluded from provincial jurisdiction.

There is, however, no adequate ground for the conclusion that these particular enactments (section 84 (1) (*a*) and (*c*)) are in their true character attempts to prescribe penalties for the offences mentioned, rather than enactments in regulation of licences.

It remains only to add that what I have said is strictly directed to cases in which the controversy is whether or not a given competent enactment of the Parliament of Canada creating a criminal offence has the effect of excluding a given subject-matter from the legislative authority of the province.

I have only to add that I concur with my brother Rinfret.

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

RINFRET J.—On November 20th, 1939, the respondent was convicted by the Stipendiary Magistrate for Queens County, in the Province of Prince Edward Island, for that he "unlawfully did operate a motor vehicle on the public highway whilst intoxicated, contrary to section 285, subsection 4, paragraph (*b*), of the Criminal Code of Canada."

As a result of that conviction, in virtue of section 84 (1) of *The Highway Traffic Act* of Prince Edward Island, 1936, the respondent's licence to operate a motor vehicle, otherwise valid until February 28th, 1940, was automatically cancelled for a period of twelve months.

The relevant part of section 84 reads as follows:

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84. (1) The licence of a person who is convicted of driving a motor vehicle while under the influence of intoxicating liquor or drugs, shall forthwith upon, and automatically with such conviction, be suspended for a period:

(a) of twelve months for the first offence;

* * *

(c) The Provincial Secretary shall not issue a licence to any person during the period for which his licence has been cancelled or suspended under this section.

On May 28th, 1940, the respondent applied for an operator's licence. The application was in the statutory form and contained the following questions and answers, amongst others:—

Has your licence ever been cancelled for any cause; if so in what year? On November 20th, 1939.

And for what reason? For conviction under Criminal Code for driving motor car while intoxicated.

The Acting Deputy Provincial Secretary, in notifying the respondent that his application was refused, wrote to him:

* * * the Provincial Secretary has no alternative but to refuse the same, pursuant to paragraph (c) of sub-section 84 (1) of the said Highway Traffic Act, owing to the fact that on the 20th day of November, A.D. 1939, you were convicted before George J. Tweedy, Esq., K.C., Stipendiary Magistrate for Queens County, on a charge of operating a motor vehicle on the 19th day of November, 1939, while intoxicated, and the period of cancellation fixed by the said section has not yet expired.

From this refusal, the respondent appealed to the Judge of the County Court of Queens County.

His appeal professed to be asserted under sec. 8 (7) of the *Highway Traffic Act,* which reads as follows:

8. (7) If any person is aggrieved by the refusal of the Department to grant a licence or by the revocation of a licence under this section, he may, after giving to the Department notice of his intention to do so, appeal to the County Court Judge of the County Court of the County in which any office where the business of the Department with respect to the granting of licences is carried on is situate and on such appeal the Judge may make such order as he thinks fit and any order so made shall be binding on the Department for the year in which it was made.

The Judge of the County Court of Queens County, after having heard counsel on behalf of the present respondent, as well as for the Provincial Secretary—and counsel for the Provincial Secretary "having admitted the competency of the [respondent] to operate and drive motor vehicles"—allowed the appeal and ordered

that the Department of the Provincial Secretary shall, upon his [the respondent's] application in the ordinary way and upon payment of the

usual fee and without any certificate of competency, issue to the [said] Michael Egan a licence to operate motor vehicles in the Province of Prince Edward Island.

From this order, the appellant appealed to the Supreme Court of Prince Edward Island (sitting *en banc*), which Court dismissed the appeal, but afterwards granted leave to appeal from such dismissal to the Supreme Court of Canada. Leave to intervene was granted the Attorney-General of Prince Edward Island.

The reasons for judgment of the Supreme Court of Prince Edward Island were delivered by Mr. Justice Arsenault. He stated that, under the provisions of the *Criminal Code,* " the Stipendiary Magistrate could have made a further order prohibiting the accused from driving a motor vehicle for a period not exceeding three years." He pointed, however, to the fact that the Magistrate had not done so, but that he certified to the Provincial Secretary that the present respondent had been convicted; that the conviction was made on November 20, 1939, and that, had the licence not been cancelled in pursuance of section 84 of *The Highway Traffic Act* of 1936, the respondent's operator's licence would have expired on February 28, 1940; that the respondent took no further step to have his licence restored but that, six months afterwards, to wit, on 28th May, 1940, he made application on the regular form for an operator's licence. The learned Judge then mentioned what I have already stated: that the Provincial Secretary refused to issue the licence on account of the conviction, that upon appeal to the Judge of the County Court of Queens County, the Department of the Provincial Secretary had been ordered to issue a licence to the respondent as aforesaid, and that the Provincial Secretary now appealed to the Supreme Court (*en banc*) chiefly on the following grounds:

1st. That the County Court Judge had no jurisdiction to make the order;

2nd. That notwithstanding the provisions of sec. 285, subs. 7 of the Code, the Provincial Secretary had a right to refuse to issue the said licence.

The respondent, the judgment appealed from proceeds to say, contended that as the *Criminal Code,* by sec. 285, subs. 7,

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has now made due provisions for the punishment of such an offence and has empowered the convicting magistrate to impose a further penalty by suspension of the offending party's licence, section 84 (1) of the Highway Traffic Act, 1936, has *ipso facto* become *ultra vires*.

Dealing first with the question of the jurisdiction of the Judge of the County Court to make the order complained of, the judgment states the appellant's contention that section 8 (7) of the *Highway Traffic Act*, under which the Judge of the County Court purported to act, did not give him jurisdiction to make the order. The judgment notes

> that the appeal to the Judge of the County Court was not from the order of the Provincial Secretary cancelling the respondent's licence but from the refusal of the Provincial Secretary to issue an operator's licence after the old licence had expired by effluxion of time.

The decision is that the appeal was properly taken under section 8 and subsections of the *Highway Traffic Act* and that the Judge of the County Court had jurisdiction to make the order. It adds that:

> There are no provisions in the Act for any appeal from the County Court Judge's decision. He is *persona designata* under the Act and as such his order is final and not appealable. Sec. 8 (7) seems [so it is stated] to make this clear when it says—"The Judge may make such order as he thinks fit and any order so made shall be binding on the Department for the year in which it was made."

It was accordingly adjudged that the appeal should be dismissed with costs.

But although, in view of the above decision, it was not necessary to consider "the question of the *ultra vires* of sec. 84 (1) of the Highway Traffic Act," it was thought advisable to deal with it and to say

> that since the Criminal Code has invaded the field by enacting sec. 285, subsec. 7, amended by 3 George VI, 1939, ch. 30, sec. 6, it follows that the provisions of the Highway Traffic Act as to cancellation of a licence on a conviction for driving a motor car whilst intoxicated, have become *ultra vires*.

It is from the above judgment that the Provincial Secretary of the Province of Prince Edward Island now appeals, with the intervention of the Attorney-General of the same province, by leave of the Supreme Court (*en banc*). The Attorney-General of Canada and the Attorney-General for Ontario were granted leave to appear before this Court and to argue for or against the judgment appealed from,

on the point of the constitutionality of the relevant sections of the *Criminal Code* and of the *Highway Traffic Act* of Prince Edward Island.

The first question to be examined is whether, as contended by the appellant and the intervenant, the Judge of the County Court of Queens County had no jurisdiction, on appeal from the refusal of the Provincial Secretary of the Province of Prince Edward Island to issue, for the year 1940, a driver's licence to the respondent.

Subsection 7 of section 8 of the *Highway Traffic Act,* under which the respondent contended that his appeal was competently asserted, has already been reproduced. That subsection gives a right of appeal to the County Court Judge to "any person aggrieved by the refusal of the Department to grant a licence or by the revocation of a licence under this section." To my mind, the words "under this section" qualify both the refusal of the Department to grant a licence and the revocation of a licence. It must have been a refusal or a revocation "under this section," to wit, under section 8 of the *Highway Traffic Act.*

Section 8 deals with chauffeurs' and drivers' licences. It enacts that every person shall, before driving a motor vehicle on a highway, in any year, pay a certain fee to the Department and obtain a licence for that year. It states what the licence shall contain, provides for the changes of address and then, in subsections 4, 5 and 6, stipulates that

(4) Every owner of a registered motor vehicle shall be entitled to receive an Operator's Licence free of charge, and shall produce a certificate of qualification to operate a motor vehicle or such other evidence of qualification as shall be satisfactory to the Secretary.

(5) If, from the application or otherwise, it appears that the applicant is not competent to drive or is suffering from any disease or disability, the Department shall refuse to grant the license;

Provided that the applicant, except in the case of diseases and disabilities as may be prescribed, may claim to be subjected to a test as to his competency or as to his fitness or ability to drive a motor vehicle and if he passes the prescribed test and is not otherwise disqualified the licence shall not be refused by reason only of the provisions of this subsection.

(6) If it appears to the Department that there is reason to believe that any person who holds a licence granted by it, is not competent to drive or is suffering from a disease or physical disability likely to cause the driving by him of a motor vehicle to be a source of danger to the public and on inquiry into the matter the Department is satisfied that he is not competent to drive or is suffering from such a disease or dis-

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ability, then whether or not such licensee has previously passed a test under this section, the Department may, after giving him notice of its intention so to do, revoke the licence.

Provided that the licensee may, except in the case of such diseases and disabilities as may be prescribed, claim to be subjected to a test as to his competency or his fitness or ability to drive a motor vehicle and if he passes the prescribed test the licence shall not be revoked.

It is after the above transcribed subsections 4, 5 and 6 that subsection 7 appears in section 8.

It is clear, therefore, that the two cases in which a person aggrieved may appeal to the County Court Judge under section 8 are:

(1) When there has been a refusal of the Department to grant a licence to the owner of a registered motor vehicle, either without being or after he has been subjected to a test as to his competency, his fitness, or his ability to drive such a vehicle;

(2) When there has been a revocation of the licence under subsection 6, where it appeared to the Department that there was reason to believe that the person holding a licence was not competent to drive, or was suffering from a disease or physical disability likely to cause the driving by him to be a source of danger to the public, etc.

Section 8 of the *Highway Traffic Act* contains fifteen other subsections; but they are not material for the purposes of this appeal and they do not affect the application of subsections 4, 5, 6 and 7.

In this case, there was no refusal of the Department to grant a licence, neither was there revocation of a licence, under section 8.

It was not the Department, or the Provincial Secretary of the Province, who refused to grant a licence within the meaning of subsections 4 and 5 of section 8. The licence of the respondent was automatically suspended for a period of twelve months under section 84 (subsection (1) (*a*)) of the *Highway Traffic Act,* on account of the fact that the respondent had been convicted of driving a vehicle while under the influence of intoxicating liquor, and the Act itself prescribes that, in such a case, " the Provincial Secretary shall not issue a licence to any person during the period for which his licence has been cancelled or suspended under this section," i.e., under section 84.

It follows that it was not the Provincial Secretary who refused the issue of a licence to the respondent, within the meaning of section 8; but the law itself said that the

respondent, in the premises, was not entitled to a licence. The Provincial Secretary was not exercising any discretion in withholding a licence from the respondent; he was merely carrying out the provisions of the law, and he had no discretion to exercise. There is no provision in the *Highway Traffic Act* authorizing an appeal to a County Court Judge under such circumstances. Subsection 7 of section 8, invoked by the respondent, has no application in such a case.

There was, therefore, no such right of appeal by the respondent as the latter professed to assert to the Judge of the County Court of Queens County. The order made by the said Judge to the Department of the Provincial Secretary that it should "upon his application in the ordinary way and upon payment of the usual fee and without any certificate of competency issue to the [respondent], Michael Egan, a licence to operate motor vehicles in the Province of Prince Edward Island" was issued without jurisdiction and was absolutely ineffective to compel the Provincial Secretary to issue the licence.

I am, therefore, of the opinion that the Provincial Secretary was right in contending before the Supreme Court of Prince Edward Island that the County Court Judge had no jurisdiction to make the order and that, on that ground, his appeal should have been maintained by the Supreme Court *en banc*.

I agree with the Attorney-General of Prince Edward Island that it would be inconceivable that the Legislature would have intended to grant an appeal from a refusal by the Provincial Secretary in cases where the cancellation is automatic and the refusal of a reissue is imperative.

I must now proceed to state the consequences which flow from the conclusion just reached.

There being no jurisdiction in the County Court Judge of Queens County to hear the appeal of the respondent and to make any order as a result of such appeal, there was no right of appeal, if any, to the Supreme Court *en banc*, except on the question of the jurisdiction of the County Court Judge.

The Supreme Court *en banc* could decide, and in this case should have decided, that the County Court Judge of Queens County was without jurisdiction and that his order was not competently made, but nothing else.

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The appeal of the Provincial Secretary should have been allowed by the Supreme Court *en banc* and the order of the County Court Judge should have been set aside. That would have been the end of the matter; and not only do I agree with the Supreme Court that, in view of the decision, "it was not necessary to consider the question of the *ultra vires* of section 84 (1) of the *Highway Traffic Act*"; but, with respect, my view is that the Supreme Court was not legally seized of that question and it had no jurisdiction to pass upon it in the present case.

The above reasons are sufficient to allow the appeal of the appellant, the Provincial Secretary of the Province of Prince Edward Island, and of the intervenant, the Attorney-General of Prince Edward Island. I have no doubt, so far, that the Supreme Court of Canada has jurisdiction to entertain the appeal on the grounds just mentioned, and that is to say: on the question of the respective jurisdiction of the Supreme Court *en banc* and of the County Court of Queens County.

The present situation is somewhat similar to that which obtained in the case of *The Grand Council of the Canadian Order of Chosen Friends* v. *The Local Government Board and the Town of Humboldt,* which was submitted to this Court (1). In that case, the Grand Council contended that an order of The Local Government Board of Saskatchewan was made by the Board in excess of its powers, and sought to have the order reversed and declared inoperative or set aside. The order had been made by the Local Board pursuant to *The Local Government Board (Special Powers) Act, 1922,* of Saskatchewan. The Grand Council, being dissatisfied with the order, applied to Embury J., one of the learned judges of the Court of King's Bench, for leave to appeal; and, upon the hearing of the application, it was objected by the respondents, the Local Government Board and the Town of Humboldt, that no appeal lay from any order of the Local Government Board and that, consequently, there was no jurisdiction to grant leave in the case. The objection was overruled and leave to appeal was granted. The Grand Council asserted its appeal in pursuance of the leave so granted; but the Local Government Board and the Town of Humboldt also appealed to the Court of Appeal

(1) [1924] S.C.R. 654.

from the order of Embury J. Before the hearing of these appeals, the Grand Council gave notice to the Attorney-General of Saskatchewan that it would bring into question the constitutional validity of the sections of the *Local Government (Special Powers) Act, 1922,* upon which was thought to depend the absence of the right of appeal invoked by the Grand Council of the Order. The two appeals came on for hearing at the same time and the appeal of the Town of Humbolt was allowed upon the ground that the statute gave no right of appeal from the order of the Local Board. The Court held, moreover, that the appeal of the Grand Council from the said order should be dismissed. Thus, both appeals were disposed of unfavourably to the Grand Council. The latter then appealed to the Supreme Court of Canada by leave of the Court of Appeal of Saskatchewan. The conclusion of this Court was in agreement with that reached by the Court of Appeal of Saskatchewan; and, seeing that the latter court had no jurisdiction in the premises, the appeal was dismissed with costs.

In the *Grand Council* case (1), as will have been noticed, leave to appeal to this Court had been granted by the Court of Appeal of Saskatchewan in the same way as, in the present case, leave to appeal has been granted by the Supreme Court *en banc* of Prince Edward Island. It would seem that, even if there was not a right of appeal to this Court upon the question of the jurisdiction of the two courts below, the granting of special leave to appeal would, in itself, be sufficient to establish jurisdiction in this Court, as was asserted in *Grand Council of the Canadian Order of Chosen Friends* v. *The Local Government Board and the Town of Humboldt* (1).

The reasons already stated are sufficient to dispose of the appeal; and, following a wise and well defined tradition, this Court should, no doubt, refrain from expressing an opinion upon any other point not necessary for the decision of the case.

The Supreme Court *en banc,* however, thought it advisable to deal with the question of the constitutionality of section 84 (1) of the *Highway Traffic Act, 1936,* since the *Criminal Code* has enacted sec. 285, subs. 7, amended by sec. 6 of ch. 30 of the Statutes of Canada, 3 Geo. VI

(1) [1924] S.C.R. 654.

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(1939). And that Court declared *ultra vires* the provision of the *Highway Traffic Act* "as to cancellation of a licence on a conviction for driving a motor car whilst intoxicated."

It is because of the declaration on that point that the Attorney-General of Prince Edward Island has carried his appeal to this Court and that the Attorney-General of Canada and the Attorney-General for Ontario have been allowed to intervene. It was represented to us that this declaration has an important and wide consequence and that, while only an *obiter dictum,* it might affect the jurisprudence not only in Prince Edward Island but also in other provinces. It appears desirable, therefore, that this Court should express its opinion upon the matter.

The Criminal Code Amendment Act, 1939, c. 30, s. 6, contains an amendment whereby subs. 7 of sec. 285, as enacted by sec. 16, c. 44, of the Statutes of Canada of 1938, is repealed and the following substituted therefor:

> (7) Where any person is convicted of an offence under the provisions of subsections one, two, four or six of this section the court or justice may, in addition to any other punishment provided for such offence, make an order prohibiting such person from driving a motor vehicle or automobile anywhere in Canada during any period not exceeding three years. In the event of such an order being made the court or justice shall forward a copy thereof to the registrar of motor vehicles for the province wherein a permit or licence to drive a motor vehicle or automobile was issued to such person. Such copy shall be certified under the seal of such court or justice or, if there be no such seal, under the hand of a judge or presiding magistrate of such court or of such justice.

Subsection 4 of section 285, referred to in subsection 7 above reproduced, contains the enactment of the *Criminal Code* covering the case of driving while intoxicated.

It follows that, under subsection 7 as now amended, a person convicted of driving while intoxicated may be prohibited "from driving a motor vehicle or automobile anywhere in Canada during any period not exceeding three years"; while, under section 84 (1) of the *Highway Traffic Act* of Prince Edward Island, the licence of a person so convicted "shall forthwith upon, and automatically with such conviction, be suspended for a period of twelve months for the first offence" and "not less than twelve months and not exceeding two years for the second offence"; and for the third offence he shall be prohibited from holding a licence.

The Supreme Court *en banc* stated that the *Criminal Code* had "invaded the field" and that section 84 of the *Highway Traffic Act* had thereby become *ultra vires.*

In this Court, the Attorney-General of Canada submitted that the subsection of the *Criminal Code* in question was *intra vires,* as being an enactment in relation to the Criminal Law. He argued that this subsection provided an additional punishment for the various offences in connection with the driving of vehicles under the preceding subsections of section 285; that this was not legislation in relation to civil rights, although it may be legistion affecting civil rights, legislation for the punishment of crime being clearly legislation within the competency of the Parliament of Canada.

The Prince Edward Island legislation, it was submitted, was enacted as a punishment measure, rather than to provide for the safety on the highway. Section 84 bans individuals convicted of certain offences from the highways for short periods of time; and it is included in a group of sections under the heading: "Penalties."

It was submitted that, although the provincial provision might otherwise have been valid, since it conflicts with the *Criminal Code,* the latter must now prevail (See Lord Tomlin in *Attorney-General for Canada* v. *Attorney-General for British Columbia* (1)).

The Attorney-General for Ontario contended that, even though it be found that section 285 (7) of the *Criminal Code* is *intra vires* of the Parliament of Canada, it is not in conflict with provincial legislation providing that, upon conviction of a person for driving a motor vehicle while under the influence of intoxicating liquors or drugs, his licence, or permit, to drive shall be suspended. He relied upon *Grand Trunk Railway Company of Canada* v. *Attorney-General of Canada* (2).

He submitted that the control of the roads and highways and the regulation of the traffic thereon are matters within s. 92 of the *B.N.A. Act* assigned exclusively to the legislatures of the provinces: Head 9, " * * * and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes"; Head 13, "Property and Civil Rights in the Province"; Head 16, "Generally all Matters of a merely local or private Nature in the Province."

The words "and other licences" have been held not *ejusdem generis* with "shop, saloon, tavern, auctioneer,"

(1) [1930] A.C. 111, at 118. (2) [1907] A.C. 65, at 68.

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by which Head 9 is introduced. (*Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (1); *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (2); *Shannon* v. *Lower Mainland Dairy Products Board* (3)). In the latter case, Lord Atkin said:

> It cannot, as their Lordships think, be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue.

The Attorney-General of Prince Edward Island also contended that both sections of the *Criminal Code* and of the *Highway Traffic Act* could validly subsist together and that section 285 (7) of the *Criminal Code* had no effect whatever on the validity of the Provincial section 84.

I am respectfully of the opinion that the field of the two enactments is not co-extensive; and it is not, therefore, necessary to pronounce upon the validity of section 285 (7) of the *Criminal Code.*

The Dominion legislation would prevent the offender from operating a motor vehicle throughout Canada "during any period not exceeding three years." It would not prevent him from holding a licence or accompanying a beginner, as provided for by the Prince Edward Island legislation. The Provincial legislation in question in this case is, in pith and substance, within the classes of subjects assigned to the Provincial legislatures; it is licensing legislation confined to the territory of Prince Edward Island. The *Criminal Code* provides for an order prohibiting a person from driving, irrespective of whether a licence has been issued to him or not. The automatic cancellation of the Prince Edward Island licence would not, of itself, prevent the person affected by it from obtaining a driver's licence in other provinces.

It cannot be open to contention for a moment that the imposing of such a penalty for enforcing a law of the competency of Prince Edward Island is an interference with criminal law, under section 91, subs. 27. *Regina* v. *Watson* (4). It is not an additional penalty imposed for a violation of the criminal law. It provides for a civil disability arising out of a conviction for a criminal offence.

(1) (1897) A.C. 231.
(2) [1902] A.C. 73.
(3) [1938] A.C. 708, at 722.
(4) (1890) 17 Ont. A.R. 221, at 249.

The right of building highways and of operating them within a province, whether under direct authority of the Government, or by means of independent companies or municipalities, is wholly within the purview of the province (*O'Brien* v. *Allen* (1)), and so is the right to provide for the safety of circulation and traffic on such highways. The aspect of that field is wholly provincial, from the point of view both of the use of the highway and of the use of the vehicles. It has to do with the civil regulation of the use of highways and personal property, the protection of the persons and property of the citizens, the prevention of nuisances and the suppression of conditions calculated to make circulation and traffic dangerous. Such is, amongst others, the provincial aspect of section 84 of the *Highway Traffic Act*. It has nothing to do with the Dominion aspect of the creation of a crime and its punishment. And it cannot be said that the Dominion, while constituting the criminal offence of driving while intoxicated and providing for certain penalties therefor, has invaded the whole field in such a way as to exclude all provincial jurisdiction. It cannot have superseded section 84, which was obviously made from the provincial aspect of defining the right to use the highways in Prince Edward Island and intended to operate in a purely provincial field.

As to the contention that the Provincial legislation imposes an additional penalty for the punishment of an offence already punished by the *Criminal Code*, the answer, it seems to me, is simply that the Provincial legislation does not do so.

The offender found guilty under the *Criminal Code*, as already pointed out, may be prohibited from driving a motor vehicle or automobile anywhere in Canada during the period mentioned in the Code. The order, if made by the convicting magistrate, will operate quite independently of any licence granted by the Provincial authority. In that sense, it would be allowed to supersede the Provincial legislation. But section 84 of *The Highway Traffic Act* of Prince Edward Island, dealing with the case of its own licensees upon the territory of its own province, provides that a person convicted of driving while intoxicated loses his provincial licence, either for a time or forever (in the case of a third offence). It does not create an offence; it does not add to or vary the punishment already

(1) (1900) 30 Can. S.C.R. 340.

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declared by the *Criminal Code;* it does not change or vary the procedure to be followed in the enforcement of any provision of the *Criminal Code.* It deals purely and simply with certain civil rights in the Province of Prince Edward Island. Such legislation can rely upon the decision, in this Court, of *Bédard* v. *Dawson and the Attorney-General for Quebec* (1). As pointed out in that case by the present Chief Justice,

> The legislation impugned seems to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime. This is an aspect of the subject in respect of which the provinces seem to be free to legislate. I think the legislation is not invalid.

There may be added what was said by Lord Atkin, in *Lymburn* v. *Mayland* (2):

> It was contended on behalf of the Attorney-General for the Dominion that to impose a condition making the bond fall due upon conviction for a criminal offence was to encroach upon the sole right of the Dominion to legislate in respect of the criminal law. It indirectly imposed an additional punishment for a criminal offence. Their Lordships do not consider this objection well founded. If the legislation be otherwise *intra vires,* the imposition of such an ordinary condition in a bond taken to secure good conduct does not appear to invade in any degree the field of criminal law.

It would seem to me beyond doubt that provisions of a provincial statute for the cancellation of licences to carry on certain kinds of business, or creating a disability from holding public offices, or creating any kind of civil disabilities, as a result of a conviction under the *Criminal Code,* does not make such provisions legislation in relation to criminal law; and, hence, they are not *ultra vires* of the provincial legislatures. It never occurred to anybody to dispute the power of the provinces to issue licences, or permits, for the right to drive motor vehicles on the highways of their respective territories. Surely the authority to issue such licences, or permits, carries with it the authority to suspend or cancel them, upon the happening of certain conditions. The provision that a person convicted of driving while intoxicated will lose his licence for a time or forever is, in a certain sense, a condition upon which the licence, or permit, is granted by the province.

I would think, for these reasons, that section 84 of *The Highway Traffic Act* of Prince Edward Island is not unconstitutional.

(1) [1923] S.C.R. 681; 40 C.C.C. 404.

(2) [1932] A.C. 318, at 323.

However, on the ground that the County Court Judge of Queens County had no jurisdiction to make the order in respect of which the appeal has been asserted, I think the appeal should be allowed; but, in view of all the circumstances, there should be no costs to either party in this Court, although the judgment of the Supreme Court *en banc,* dismissing the appeal of the Provincial Secretary with costs, should be reversed, and the judgment of the Judge of the County Court of Queens County should be set aside, without costs to either party in the courts below.

HUDSON J.—The principal question involved here is the constitutional validity of section 84 of the *Highway Traffic Act, 1936,* of the Province of Prince Edward Island.

The Province undoubtedly has the right to regulate highway traffic and, for that purpose, to license persons to use highways. The right to license also involves a right to control and, when necessary, to revoke the licence.

The section in question does not create a new offence but makes provision in regard to the licence which has been issued under the provincial authority. I do not think that this can be regarded as an addition to any punishment or penalty provided for in section 285 of the *Criminal Code.* The situation seems to be analogous to that dealt with by the Judicial Committee in *Lymburn* v. *Mayland* (1).

In my opinion, there is no conflict and the Legislature had a perfect right to pass the section in question. For that reason, I concur in the disposition of this matter proposed by my brother Rinfret.

TASCHEREAU J.—I believe that the County Court Judge of Queens County had no jurisdiction to hear the appeal, and that no order should have been made by him to grant a licence to the respondent. By an imperative section of the law (s. 84 (1) (*c*) of the *Highway Traffic Act*), the Provincial Secretary has no discretion to exercise and he cannot issue a licence to any person during the period for which his licence has been cancelled or suspended under the Act.

In the present case, the respondent's licence had been cancelled under the authority of section 84 of the *High-*

(1) [1932] A.C. 318.

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way Traffic Act, because he had been found guilty of driving an automobile while under the influence of intoxicating liquor. The licence is automatically cancelled by the operation of the law, without the interference of the provincial authorities. In my opinion, the County Court Judge cannot order the Provincial Secretary to do an act which the law imperatively forbids him to do. The jurisdiction of the County Court Judge exists only when the cases mentioned in section 8 of the Act arise, and nowhere do we see that he may do what is complained of in the present case.

With respect, I think that the County Court Judge's order was not authorized by the statute, and that the Supreme Court of Prince Edward Island should have declared it inoperative, and allowed the appeal.

The Supreme Court has also dealt with the question of constitutionality of the section of the Provincial Act with respect to the cancellation of the licence and said:—

> Although in view of the above decision, it is not necessary to consider the question of the *ultra vires* of sec. 84 (1) of the Highway Traffic Act, I think it advisable to deal with it and to say that since the Criminal Code has invaded the field by enacting sec. 285, subsec. 7, amended by 3 George VI (1939), ch. 30, sec. 6, it follows that the provisions of the Highway Traffic Act as to cancellation of a licence on a conviction for driving a motor car whilst intoxicated, have become *ultra vires.*

Although a conclusion on this appeal can be reached without commenting on this pronouncement, I wish to state that I cannot agree with these views. Section 84 of the Provincial statute, which provides for the cancellation of the licence of any person found guilty of driving an automobile while under the influence of intoxicating liquor, is within the competence of the Provincial Legislature. This section merely provides for a civil disability arising out of a conviction for a criminal offence. The field of criminal law is in no degree invaded by this legislation which is aimed at the suppression of a nuisance on highways. There can be no doubt that the control of the roads and highways and the regulation of traffic thereon is assigned by the *B.N.A. Act* to the Legislatures of the Provinces.

This Court and the Judicial Committee of the Privy Council have already expressed their views on this matter, and a reference to *Bédard* v. *Dawson and the Attorney-*

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General of the Province of Quebec (1) and *Lymburn* v. *Mayland* (2) will show that this legislation is *intra vires* of the Prince Edward Island Legislature.

I fully agree with what has been said by my brother Rinfret and I believe that the appeal should be allowed but without costs to either party here and in the Courts below.

Appeal allowed.

Attorney for the appellant: *C. St. Clair Trainor.*

Attorney for the respondent: *J. J. Johnston.*

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* March 19, 20.
* June 24.

O. L. KNUTSON (DEFENDANT).....APPELLANT;

AND

THE BOURKES SYNDICATE AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Money had and received—Demand (in good faith) of further payment than what is owing—Circumstances of practical compulsion —Payment under protest—Right of payer to recover back.

Defendant held certain lands subject to an option and an agreement of sale thereof to plaintiffs. Under the written terms, upon payment of the consideration therein set out, plaintiffs were to get title to the lands freed from a certain interest therein held by another person, which interest defendant had later acquired. Defendant, claiming that there had been an understanding that plaintiffs would assume the discharging of said interest, insisted, when plaintiffs were making payments, upon additional payments being made to him to cover it. Plaintiffs, who had entered into an agreement requiring for its fulfilment a transfer of the lands to a company, and were concerned to protect their position and secure title, made the additional payments, but, so they alleged, under protest; and sued to recover them back.

Held, that defendant had no right to said additional payments; that they were made under protest and under circumstances of practical compulsion; and (even though defendant's demand was made in the belief that he had a right to them) the plaintiffs were entitled to judgment for repayment of them with interest. *Shaw* v. *Woodcock,* 7 B. & C. 73; *Smith* v. *Sleap,* 12 M. & W. 585; *Parker* v.

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

(1) [1923] S.C.R. 681. (2) [1932] A.C. 318.

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Great Western Ry. Co., 7 M. & G. 253; *Wakefield* v. *Newbon*, 6 Q.B. 276; *Close* v. *Phipps*, 7 M. & G. 586; *Fraser* v. *Pendlebury*, 31 L.J., N.S., C.P. 1; *Great Western Ry. Co.* v. *Sutton*, *L.R.* 4 H.L. 226, and *Maskell* v. *Horner*, [1915] 3 K.B. 106, cited.

APPEAL by the defendant Knutson from the judgment of the Court of Appeal for Ontario (1) allowing, as against said defendant, the appeal of the plaintiffs from the judgment of Greene J. dismissing the action. The action was brought to recover repayment of certain sums which plaintiffs claimed had been unlawfully demanded and received by defendant and had been paid by plaintiffs under protest and without prejudice to their rights under certain agreements. In the Court of Appeal it was adjudged that plaintiffs recover the said sums with interest.

The material facts of the case are sufficiently set out in the reasons for judgment in this Court now reported and in the reasons for judgment in the Court of Appeal.

The appeal to this Court was dismissed with costs.

H. F. Parkinson K.C. for the appellant.

J. R. Cartwright K.C. for the respondents.

THE CHIEF JUSTICE—I think the appeal should be dismissed. The law is stated by Willes J. in *Great Western Railway Co.* v. *Sutton* (2):—

> I must say I have always understood that when a man pays more than he is bound to do by law for the performance of a duty which the law says is owed to him for nothing, or for less than he has paid, there is a compulsion or concussion in respect of which he is entitled to recover the excess by *condictio indebiti*, or action for money had and received. This is every day's practice as to excess freight.

I agree that in the circumstances this principle applies.

I prefer to reserve my opinion in respect of the rights of a person who has paid taxes under an invalid assessment. In such cases there may be special considerations to be taken into account which do not arise here.

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

KERWIN J.—This action, brought by all the members, except O. L. Knutson, of Bourkes Syndicate, against Knutson and one Nils Olson, was dismissed by the trial

(1) [1940] Ont. W.N. 442; [1940] 4 D.L.R. 641.
(2) (1869) L.R. 4 H.L. 226, at 249.

judge. The Court of Appeal for Ontario gave judgment for the plaintiffs against Knutson, who now appeals. The action is to recover certain payments made by the Syndicate to Knutson and claimed to have been made under such circumstances that they were not voluntary. As these payments were made to Knutson alone and Olson received no benefit from them, the action as against the latter stands dismissed, and we are not concerned with his position in the matter except as it is necessary to state it for a proper understanding of the point to be determined.

As administrator of an estate, Olson was the registered owner of certain lands recorded in the Office of Land Titles at Haileybury, subject to a caution registered by F. L. Smiley (now His Honour Judge Smiley of the County Court of Carleton), who claimed by the caution to be entitled to a fifteen per cent. interest in the lands. On July 4th, 1936, in consideration of one thousand dollars, Olson granted by an agreement under seal to H. Fred Knutson (a member of the Syndicate and a brother of the defendant O. L. Knutson) an option to purchase these lands free of encumbrance, including the caution. Judge Smiley agreed to this option agreement. H. Fred Knutson was acting on behalf of the members of the Bourkes Syndicate and subsequently executed a declaration of trust to that effect, a syndicate agreement having in the meantime been drawn up and executed.

On September 16th, 1936, an agreement under seal was entered into between Olson, H. Fred Knutson and the Syndicate. That document recites the intention of the Syndicate to sell all its right, title and interest under the option agreement to a company to be formed, the registration of the caution, and that Judge Smiley was entitled thereunder to an undivided fifteen per cent. interest in the lands. In it Olson agreed

> as soon as possible to obtain and deliver to the said Company to be formed a properly executed transfer in fee simple under The Land Titles Act (Ontario) of the lands mentioned in the said option agreement, *together with a withdrawal of the said caution.*

H. Fred Knutson and the Syndicate agreed to pay Olson, upon the delivery of the transfer, the sum of five thousand dollars and to cause to be issued and delivered to him a specified number of shares of the capital stock of the proposed company. It was agreed that until a proper transfer

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should be delivered, the five thousand dollars paid, and the shares issued and delivered, the option agreement should remain in full force and effect.

By an agreement dated April 13th, 1937, Olson sold and the defendant O. L. Knutson bought the same lands subject to the rights of the other parties to the option agreement of July 4th, 1936, and to the agreement of September 16th, 1936. In this document reference is made to the Smiley caution and it is stated that it was understood and agreed that O. L. Knutson was purchasing Olson's interest in the lands subject to any claim of Judge Smiley. On April 26th, 1937, O. L. Knutson secured a transfer to himself of Judge Smiley's interest.

One would have no difficulty, on perusing these documents, in concluding that the Syndicate was entitled to a transfer of the interests of Olson, O. L. Knutson and Judge Smiley in the lands, upon payment to O. L. Knutson (who had purchased Olson's interest) of the sums, and the transfer of the shares, mentioned in the agreement of September 16th, 1936. There is a dispute as to what occurred when that agreement was drawn and executed but there can be no doubt that O. L. Knutson knew that the Syndicate relied upon the written agreement and always took the position that it was entitled to the transfer of the lands from Olson (or O. L. Knutson) without it paying anything to Judge Smiley for his interest.

Notwithstanding the terms of the agreement of April 13th, 1937, between Olson and O. L. Knutson, the latter relied, as he testifies, upon assurances given him by Olson and H. Fred Knutson that the Syndicate would take care of the Smiley fifteen per cent. interest, and he, having become the owner of that interest, insisted upon being paid an additional fifteen per cent. of the amount that was due under the option agreement of July 4th, 1936, and also upon being paid an additional fifteen per cent. of a further sum when the transaction was finally closed. On the first occasion, the solicitor for the Syndicate made a definite protest, which was written and read at the time of the payment. The position taken by the Syndicate continued unaltered to the knowledge of O. L. Knutson who declined, before the last payment was made, to permit the additional fifteen per cent. to be deposited in trust until the

dispute could be settled. In the meantime, again to the knowledge of O. L. Knutson, the Syndicate had agreed to transfer the lands in question to the new company.

The trial judge has given O. L. Knutson a certificate of character, and, as he had the advantage of seeing Knutson in the witness box, I accept that finding. In my view, however, both payments were made under protest and under circumstances of practical compulsion,—the first to preserve the Syndicate's rights under the option agreement, and the second to secure property of which, in equity, the Syndicate had become the owner upon the execution of the agreement of September 16th, 1936, subject only to its carrying out its part of the bargain.

The judgment below is based upon a previous decision of the Court of Appeal in *Pillsworth* v. *Town of Cobourg* (1). That type of case raises a problem which does not here exist and I prefer to postpone dealing with it until the occasion arises. The appeal may be disposed of on the principles deducible from the following authorities.

In the King's Bench, in *Shaw* v. *Woodcock* (2), Bayley J. states:—

> If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other, unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment made by compulsion and may be recovered back. There is no authority to shew that the two things mentioned in argument are required in order to make the payment compulsory. That being the general rule of law it is quite clear that the sum paid to obtain possession of these policies was not a voluntary payment, and that it may be recovered back, unless the assignees had a a right to receive the money.

The two things mentioned in argument and referred to by Bayley J. were, first, that the payment must be made in order to get possession of goods for which the owner has an immediate pressing necessity, and the second was that the claim of lien must be clearly void. Holroyd J. states:—

> Upon the question whether a payment be voluntary or not, the law is quite clear. If a party making the payment is obliged to pay, in order to obtain possession of things to which he is entitled, the money so paid is not a voluntary, but a compulsory payment, and may be recovered back; and if the plaintiff below, therefore, was compelled to make the payment in question in order to get the policies of insurance, whether there was a pressing necessity or not, he has a right to recover it back.

(1) (1930) 65 Ont. L.R. 541. (2) (1827) 7 B. & C. 73.

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In *Skeate* v. *Beale* (1), the Queen's Bench determined that duress of goods was not a ground for avoiding an agreement. In *Smith* v. *Sleap* (2), the Exchequer decided, on February 5th, 1844, that the defendant, who was holding a document and was paid a certain sum without any right to it, could be compelled to repay. On February 12th, 1844, the Common Pleas in *Parker* v. *The Great Western Railway Company* (3), held that certain payments for the carriage of goods, not being voluntary but made in order to induce the railway company to do that which it was bound to do, could be recovered. Then came the decision in the Queen's Bench in *Wakefield* v. *Newbon* (4), which was an action by a mortgagor against the mortgagee's solicitors to recover a sum of money which the defendants had exacted from the plaintiff by refusing to redeliver his title deeds after a reconveyance to him of the mortgaged property on payment of principal and interest, unless the plaintiff would also pay the amount of the defendants' bill of costs. Speaking for the Court, Lord Denman referred to "the principle that money extorted by duress of the plaintiff's goods, and paid by the plaintiff under protest, may be recovered in an action for money had and received" as having been laid down in the Common Pleas, in the Exchequer, and in the Queen's Bench, and stated that the principle must be taken as well-established and generally recognized. Referring to the doctrine in *Skeate* v. *Beale* (1), Lord Denman remarked that "perhaps it was laid down in terms too general and extensive."

On June 4th, 1844, again in the Common Pleas, judgment was delivered in *Close* v. *Phipps* (5), which was a case where the solicitor of a mortgagee, with a power of sale, refused to desist from selling unless the mortgagor would pay expenses with which he was not properly chargeable. Sergeant Talfourd, who was to have supported a rule for a non-suit, admitted that he could not do so after the decision in the *Parker* case (3), and Chief Justice Tindal, speaking for the Court, said that he thought that the instant case was quite as strong as the *Parker* case (3). This decision was followed in *Fraser* v. *Pendlebury* (6), where the action was brought against the mortgagee, and it was held that the payment was not

(1) (1840) 11 A. & E. 983.
(2) (1844) 12 M. & W. 585.
(3) (1844) 7 M. & G. 253.
(4) (1844) 6 Q.B. 276.
(5) (1844) 7 M. & G. 586.
(6) (1861) 31 L.J., N.S., C.P. 1.

voluntary. "There is no difference whether the duress be of goods and chattels or of real property or of the person" (*per* Byles J. at p. 4).

The *Parker* case (1) was approved in *Great Western Railway Co.* v. *Sutton* (2). In *Maskell* v. *Horner* (3), the Court of Appeal determined that a payment under protest made to avoid a distress threatened by a party who can carry the threat into execution is not a voluntary payment and may be recovered if the circumstances justify it in an action for money had and received, as effectively as if the chattels had been in fact seized.

Here the evidence is plain that the payments were made under protest and that they were not voluntary in the sense referred to in the cases mentioned. The circumstance that O. L. Knutson thought that he had a right to insist upon the payments cannot alter the fact that under the agreement of September 16th, 1936, it is clear that he had no such right. In order to protect its position under the option agreement and to secure title to the lands which it was under obligation to transfer to the incorporated company, the Syndicate was under a practical compulsion to make the payments in question and is entitled to their repayment. The appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Parkinson, Gardiner & Willis.*

Solicitor for the respondents: *A. V. Waters.*

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(1) (1844) 7 M. & G. 253. (2) (1869) L.R. 4 H.L. 226.
(3) [1915] 3 K.B. 106.

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* March 27.
* June 24.

IN THE MATTER OF THE ESTATE OF WILLERTON BARTON, DECEASED

MILDRED WHITE AND LOUISA CHARD ..... APPELLANTS;

AND

THOMAS BARTON ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Will—Construction—Gift to grandson "when he shall attain the age of 25 years," with provision for advances from income for maintenance, etc., and provision for gift over—Vesting—Right of grandson to intermediate income on attaining said age.

A testator by his will gave to his grandson the sum of $7,000 "when he shall attain the age of 25 years"; and continued: "Provided that my executor * * * may advance to my said grandson such of the income from the said bequest as may be necessary for his maintenance and education prior to his attaining the age of 25 years"; and later in the will provided that in the event of the death of the grandson "before the period of distribution," then "the share of" the grandson should, if he left no wife or child him surviving, fall into the residue of the estate, and if he left a wife or a wife and child or children him surviving, be divided equally amongst them.

Held: The gift vested in the grandson at the testator's death (subject to be divested if he died before attaining the age of 25 years), so that on his attaining the age of 25 years he would be entitled to receive, in addition to said sum, the intermediate income therefrom (less sums, if any, paid out for his maintenance and education).

APPEAL by the surviving executrices and residuary legatees of the will of Willerton Barton, deceased, from the judgment of the Court of Appeal for Ontario (1) dismissing their appeal from the judgment of Hogg J. upon a motion by the present respondent, Thomas Barton, a grandson and a legatee named in the will of the said deceased, for the opinion and advice of the court in respect to certain matters arising under the will and for an order declaring its construction.

By the will the testator gave to the said Thomas Barton the sum of $7,000 "when he shall attain the age of 25 years," with provisions for advances for maintenance and education and for gift over. The clauses in question of

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

(1) [1940] Ont. W.N. 362; [1940] 4 D.L.R. 115.

the will are set out in the reasons for judgment in this Court, now reported. The questions asked on the motion were:

(i) Who is entitled to the income from the said sum of $7,000?

(ii) Should the executors have set aside and invested the said sum of $7,000 out of the assets of the estate of the said deceased in securities authorized by law for trust funds for the benefit of the said Thomas Barton?

(iii) If the said Thomas Barton is entitled to the said income, to what rate of interest is he entitled in the event of it being shown that the executors have failed to establish a satisfactory trust fund and from what date should said interest commence to run?

The order of Hogg J., affirmed by the Court of Appeal, declared:

that the said Thomas Barton is entitled to receive on his attaining the age of twenty-five years interest upon the bequest to him in the said will contained of $7,000 to be computed at the legal rate of interest and commencing from the date of the death of the testator, the said Willerton Barton, deceased, less such sums, if any, as shall have been paid out in the meantime by the executrices for his maintenance and education.

C. L. Fraser for the appellant.

N. N. Wardlaw for the respondent.

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

DAVIS J.—Willerton Barton, late of the Township of York, in the County of York, gardener, deceased, died on September 30th, 1930. His grandson, Thomas Barton, had been born on June 13th, 1919. By his last will, made April 20th, 1928, Willerton Barton made a bequest to his grandson, Thomas Barton, in the following words:

I give and bequeath to my grandson, Thomas Barton, the sum of Seven thousand dollars, when he shall attain the age of twenty-five years; Provided that my Executor, Executrices and Trustees may advance to my said grandson such of the income from the said bequest as may be necessary for his maintenance and education prior to his attaining the age of twenty-five years.

Later in the will occur these provisions:

Provided that in the event of the death of my said grandson leaving no wife or child or children him surviving, before the period of distribution, then the share of my said grandson shall fall into the residue of my estate.

Provided that in the event of the death of my said grandson before the period of distribution, leaving a wife or a wife and child or children him surviving, then the share of such grandson so dying shall be divided equally amongst the said wife and child or children, if any.

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Davis J.

The grandson, Thomas Barton, is living but will not attain the age of 25 years until June, 1944. The question raised on an application for the construction of the will is whether the gift to him vested on the date of the testator's death, which would involve the accretion of income, or whether the gift is merely a contingent gift, in which case the grandson on attaining 25 years would not be entitled to the intermediate income. I think upon the language of the will itself it is plain that the testator intended the income to go with the legacy. The words providing for maintenance and education out of "such of the income from the said bequest as may be necessary" prior to the grandson attaining the age of 25 years are not to be construed as a separate and distinct gift of maintenance, having no effect on the question of vesting. See the judgment of Sir George Jessel, M.R., in *Fox* v. *Fox* (1).

The reasons for the judgment of the Court of Appeal which were written by Mr. Justice Riddell (2), are quite sufficient in themselves, if I may say so with great respect, to justify the dismissal of this appeal from that judgment. But it may be added that, as a matter of construction, the gift over in the event of the grandson not attaining 25 years of age may in itself indicate an early vesting in view of the judgment of Mr. Justice Farwell in *In re Heath* (3); see 55 Law Notes (1936), p. 89.

KERWIN J.—The will of the testator, Willerton Barton, contained the following clauses:—

> I give and bequeath to my grandson, Thomas Barton, the sum of Seven thousand dollars, when he shall attain the age of twenty-five years; Provided that My Executor, Executrices and Trustees may advance to my said grandson such of the income from the said bequest as may be necessary for his maintenance and education prior to his attaining the age of twenty-five years.
>
> * * *
>
> Provided that in the event of the death of my said grandson leaving no wife or child or children him surviving, before the period of distribution, then the share of my said grandson shall fall into the residue of my estate.
>
> Provided that in the event of the death of my said grandson before the period of distribution, leaving a wife or a wife and child or children him surviving, then the share of such grandson so dying shall be divided equally amongst the said wife and child or children, if any.

(1) (1875) L.R. 19 Eq. 286.
(2) [1940] O.W.N. 362; [1940] 4 D.L.R. 115.
(3) [1936] 1 Ch. 259.

His wife had the use of the residue of the estate, real and personal, for her own use during her life. The question is whether the legacy of $7,000 vested in the grandson at the death of the testator, subject to being divested if he should die before attaining the age of twenty-five, i.e., going to his wife and child or children, or, failing them, falling into the residue of the estate. If this related to real estate, the question is settled by authority, *Phipps* v. *Ackers* (1), and the reason for the rule is stated to be that if there is a gift over upon death under the stated age, the gift over shows that the first devisee is to take whatever interest the person claiming under the devise over is not entitled to, that is to say, the immediate interest. Halsbury, 2nd edition, vol. 34, p. 381.

In *Bickersteth* v. *Shanu* (2), the Judicial Committee saw no reason to doubt

> that the established rule for the guidance of the court in construing devises of real estate is that they are to be held to be vested unless a condition precedent to the vesting is expressed with reasonable clearness.

The same rule, I think, is a proper one to be applied in construing bequests of personal estate.

The rule in *Phipps* v. *Ackers* (1) was held applicable to gifts of both realty and personalty, *Whitter* v. *Bremridge* (3), and I agree with Farwell J. in *In re Heath* (4), that the rule applies to personalty.

The order of the Court of first instance, affirmed by the Court of Appeal, declared:—

> that the said Thomas Barton is entitled to receive on his attaining the age of twenty-five years interest upon the bequest to him in the said Will contained of $7,000 to be computed at the legal rate of interest and commencing from the date of the death of the testator, the said Willerton Barton, deceased, less such sums, if any, as shall have been paid out in the meantime by the executrices for his maintenance and education.

I am satisfied that this is the correct order, and the appeal should be dismissed with costs.

HUDSON J.—I agree with the decision of the Court of Appeal. The language of the will itself makes it clear that it was the testator's intention that his grandson should take a vested interest in the bequest to him and should have the income as well as the principal on his attaining the age of twenty-five years.

(1) (1842) 9 Cl. & F. 583.
(2) [1936] A.C. 290.
(3) (1866) L.R. 2 Eq. 736.
(4) [1936] 1 Ch. 259.

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Hudson J.

There is severance of the legacy from the rest of the estate, there is a reference in the succeeding three paragraphs to "all the residue of my estate," and there is provision that the executors may advance the grandson such of the income "from the said bequest" as may be necessary for his maintenance and education prior to his attaining the age of twenty-five years.

The authorities support this construction: see Halsbury's Laws of England, 2nd edition, vol. 34, page 380; *Phipps* v. *Ackers* (1); and *In re Heath* (2).

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants: *C. Lorne Fraser.*

Solicitor for the respondent: *Norman N. Wardlaw.*

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* April 25.
* June 24.

JAMES ALEXANDER McCAFFRY (PLAINTIFF) ..... APPELLANT;

AND

THE LAW SOCIETY OF ALBERTA (DEFENDANT) ..... RESPONDENT.

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

Solicitor—Barrister—Law Society of Alberta—Hearing of charge of misconduct against a member—Chairman of discipline committee—Power to name investigation committee.

Under rule 55 of the rules and regulations of the Law Society of Alberta, the chairman of the discipline committee is authorized to appoint an investigating committee to hear a charge of conduct unbecoming a barrister or solicitor against a member of the Society.

Harris v. *Law Society of Alberta* ([1936] S.C.R. 88) dist.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (3), affirming the judgment of the trial judge, Shepherd J., and dismissing an

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

(1) (1842) 9 Clark & Finnelly 583 (H.L.).

(2) [1936] Ch. 259.

(3) [1941] 1 D.L.R. 213.

action by the appellant, a disbarred barrister, for a declaration that he was still a member of the respondent Society.

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

R. D. Tighe K.C. for the appellant.

E. W. S. Kane for the respondent.

THE CHIEF JUSTICE—The rule ought to be read and construed with a view to giving effect to the plainly declared intention that an Investigating Committee shall be named. The rule should receive an interpretation reasonably calculated to effect its purpose. I think the construction adopted is an admissible construction and that the appeal should be dismissed.

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

HUDSON J.—In this action the plaintiff alleges that the defendant Society, wrongfully and without legal right, ordered his name to be struck off the rolls of the Society, and he claims a declaration that he is still a member of the Society in good standing and entitled to practise as a solicitor and barrister in Alberta. At the trial before Mr. Justice Shepherd the action was dismissed and this decision was confirmed by the court of appeal, Mr. Justice Lunney dissenting.

The material facts are as follows: The plaintiff was practising as a solicitor and barrister in Alberta. On the 9th May, 1928, a complaint was lodged with the secretary of the Society, charging him with unprofessional conduct. In due course the appellant was notified of this complaint and asked for an explanation. He did send in an explanation which the chairman of the Discipline Committee of the Society thought insufficient and thereupon instructed the secretary of the Society that the matter should go to investigation in the usual way. Thereafter the chairman of the Discipline Committee, by letter dated November 25th, 1928, fixed the 10th December following, at the Court House, Edmonton, as the time and place for the hearing of the complaint, and named an Investigating Committee, composed of three benchers, to hear the same.

The appellant was duly notified of this hearing and on December 10th appeared personally and by counsel on

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further adjourned hearings on December 28th, 1928, and January 2nd, 1929. The appellant was duly notified that the report of the Investigating Committee would be presented to Convocation of the Benchers of the respondent Society at Calgary on 3rd January, and was informed that he had a right to be present or to have counsel or agent present to make such representation as he might deem necessary. A report of the Investigating Committee with the evidence and record of proceedings was duly presented to Convocation on the 3rd of January, and thereafter the following motion was passed unanimously:

> That Convocation having considered the report of the Investigating Committee, the evidence taken before it and the record of proceedings, that the report of the said Committee be received and adopted and that the said James A. McCaffry be found guilty of conduct unbecoming a barrister and solicitor.

and the following resolution was then passed:

> That the name of James A. McCaffry be struck off the roll of the Law Society of Alberta.

The plaintiff was duly notified of this resolution and appealed therefrom to the court of appeal but such appeal was dismissed, apparently on the ground that the Court had no jurisdiction. There is nothing in the case to indicate that the question now under consideration was raised, but I can see no reason why it should not have been raised. The appellant now claims that he did not know that the members of the Investigating Committee had been appointed by the chairman of the Discipline Committee until long after the appeal; but when he launched his appeal to the court of appeal he must have had the report of the Investigating Committee which, on its face, did show by whom the Committee had been appointed.

On several occasions thereafter plaintiff applied for reinstatement but his applications were refused.

There is not and, indeed, from the record it does not appear that there could be any charge of unfairness about the mode of procedure or lack of opportunity for the plaintiff to present any defence that he might have before the Investigating Committee or the benchers in Convocation.

The *Legal Profession Act* with amendments to the date of the hearing of the complaint against the appellant provided:

31. The benchers may from time to time make rules and regulations in respect of the following matters, that is to say:

(*a*) The government of the said society and other purposes connected therewith, including the determination of or adjudication upon any matter or thing which it is the duty of the benchers or any committee thereof to adjudicate upon or determine.

* * *

Provided that all rules and regulations of the Law Society of the North-West Territories in force upon the fifteenth day of March, one thousand nine hundred and seven, shall *mutatis mutandis* constitute the rules and regulations of the society, until and except in so far as they shall be repealed or amended by the benchers.

32. (1) Any three benchers thereunto authorized in accordance with the rules and regulations of the society shall constitute an Investigating Committee and such committee may investigate whether any member of the society has been guilty of conduct unbecoming a barrister or solicitor and the said committee may also investigate any other matter or thing that might form the subject matter of a charge or complain against the member of the Law Society whose conduct is being investigated that shall arise in the course of the said investigation, and may report thereon to the benchers, as hereinafter provided.

Rules and regulations were adopted by the benchers, taking effect January 7th, 1927. Rules 54, 55 and 56 dealt with discipline and Rule 55 is the pertinent one in so far as this appeal is concerned. It provides:

Upon receipt of a complaint against any member of the Society for unprofessional conduct, the Secretary of the Society shall submit the same to the Chairman of the Discipline Committee, and if instructed so to do by such Chairman, shall proceed to formulate a charge in conformity with the facts complained of and shall then forward the charge to the member complained of with a request for his explanation, and shall fix a time for answering. If within the period fixed for answer, none is received, or if received, the answer does not in the opinion of the Chairman of the Discipline Committee suffice to clear the member complained of, a place and time shall be fixed by him for hearing the said charge and an Investigating Committee named, and the matter shall thereupon proceed to a hearing according to the provisions of *The Legal Profession Act* as in force from time to time.

Apart from this, there is no evidence of any written rule or regulation of the benchers, but it does appear that from the year 1927 onwards the practice had been for the chairman of the Discipline Committee to name the members of any investigating Committee that became necessary. That this course had been adopted in the present case was shown by the report of the Investigating Committee itself which was adopted by the benchers on the 3rd January. Although Rule 55 is not clear and specific, I think it is fairly open to the interpretations thus adopted by the benchers and, in view of the fact that the benchers

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themselves constituted the body which had power to make these regulations, I do not think that their action in the matter should now be disturbed.

The decision of this Court in the case of *Harris* v. *Law Society of Alberta* (1) was relied on by counsel for the appellant and forms the basis of the dissenting judgment of Mr. Justice Lunney in the court below. The relevant statute of Alberta in force then was quite different from that which applies to the present case. Moreover, it appears that the Court was of the opinion that Harris never had an opportunity of putting his case fully before the Discipline Committee or the benchers in convocation. In the present case, the appellant had ample opportunity of doing so before the Committee and the Benchers. Then, the provision for appeal applicable in the *Harris* case (1) referred to an appeal from the Discipline Committee as well as from the benchers; but under the statute now in force, section 32 (15), the appeal is from the order of the Benchers and not from the Discipline Committee. This, I think, indicates that it was intended by the Legislature that the decision of the Benchers should be the final decision in the matter, subject only to the right of appeal as provided for in section 32 (15). For these reasons, I think the appeal should be dismissed, but with costs if demanded.

KERWIN J.—The appellant sued for a declaration that he was still a member of the Law Society of Alberta and entitled to exercise and enjoy all the rights and privileges of a barrister and solicitor and a member of the Law Society. The action was dismissed and an appeal to the Appellate Division of the Supreme Court of Alberta was dismissed.

By *The Legal Profession Act*, R.S.A., 1922, chapter 206, the Law Society of Alberta is to be governed by a body composed of members of the Society, to be designated benchers. By section 31:—

> The benchers may from time to time make rules and regulations in respect of the following matters, that is to say:
>
> (*a*) The government of the said society and other purposes connected therewith.

(1) [1936] S.C.R. 88.

A new section 32 was enacted in 1924 and as that section was in force when the benchers made certain rules and regulations, it is important to note subsections 1 and 2:—

32. (1) Any three benchers meeting together as such shall constitute an investigating committee of the society and may investigate under oath any written charge or complaint that a member of the society has been guilty of conduct unbecoming a barrister or solicitor, or has made default in the payment of moneys received by him as a barrister or solicitor, or has been guilty of such misconduct as in England would have been sufficient to bring a solicitor under the punitive powers of the Supreme Court of Judicature, or has been guilty of any breach of the provisions of this Act or of any rules and regulations of the society made or passed under the authority of this Act.

(2) At least ten days' notice in writing shall be given by the secretary of the society to such member of the intention of an investigating committee of three benchers as aforesaid to investigate the said charge or complaint and such notice shall specify the charge or complaint to be investigated and the time and place at which such investigation will be held and shall be served upon such member by being enclosed in a sealed prepaid and registered envelope addressed and mailed to such member at his last post office address on the books of the society.

The rules and regulations took effect January 7th, 1927. Under rule 20, a standing committee known as the discipline committee is to be selected at the first convocation of benchers following the regular election. By rule 53:—

the discipline committee shall be charged with the supervision of the exercise of the disciplinary powers of the Society.

Rules 54 and 55 as so enacted are as follows:—

Rule 54. The Secretary shall from time to time report in writing to the Chairman of the Discipline Committee all complaints against a member of the Society which come to his notice, whether orally or in writing, other than charges ordered by the Benchers to be investigated. Wherever possible, the Secretary shall, before making such report, obtain a complaint in writing.

Rule 55. Upon receipt of a complaint against any member of the Society for unprofessional conduct the Secretary of the Society shall submit the same to the Chairman of the Discipline Committee, and if instructed so to do by such Chairman shall proceed to formulate a charge in conformity with the facts complained of and shall then forward the charge to the member complained of with a request for his explanation, and shall fix a time for answering. If within the period fixed for answer, none is received, or if received, the answer does not in the opinion of the Chairman of the Discipline Committee suffice to clear the member complained of, a place and time shall be fixed by him for hearing the said charge and an Investigating Committee named and the matter shall thereupon proceed to a hearing according to the provisions of *The Legal Profession Act* as in force from time to time.

It is argued that under subsection 1 of section 32 of the Act as enacted in 1924 only the benchers could appoint

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Kerwin J.

an investigating committee and that they had no authority to delegate that power to anyone. If that be so, it is then argued that subsection 1 of section 32 as enacted in 1928 (assented to March 21st but by virtue of a general Act not to come into force until July 1st) could not affect the matter even if its terms were sufficiently wide. It is also contended that on its true construction rule 55 does not purport to authorize the Chairman of the Discipline Committee to appoint the three members of the Investigating Committee.

On July 4th, 1928, the benchers amended the first part of Rule 55 but the amendment is of no importance. It was after this date that the chairman of the Discipline Committee nominated the members of the Investigating Committee and that the investigation occurred. I have come to the conclusion that the 1924 Act did not require the whole body of benchers to appoint the three members of an investigating committee, nor did it contemplate any three benchers meeting together and constituting themselves such a committee. I am of opinion that under clause (*a*) of section 31 (which was also amended in 1928 but not so as to affect the present question), and under ss. 1 of s. 32 as enacted in 1924, the benchers had power to direct that the chairman of the Discipline Committee should nominate the members of an Investigating Committee. The construction of rule 55 is not easy but on this point I have come to the conclusion that the rule carries into effect the power which I believe was possessed by the benchers.

I would dismiss the appeal with costs, if demanded.

Appeal dismissed with costs if demanded.

Solicitors for the appellant: *Tighe & Wilson.*

Solicitor for the respondent: *E. W. S. Kane.*

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HILL - CLARKE - FRANCIS, LIMITED (DEFENDANT) ..... } APPELLANT;

* May 7, 8.
* June 24.

AND

NORTHLAND GROCERIES (QUEBEC) LIMITED (PLAINTIFF) ..... } RESPONDENT.

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

Contract—Building—Contractor—Price to be on basis of costs plus—Work by estimate and contract—Lease and hire of work—Price fixed in advance—Whether specifications necessarily required—Subsidence—Defect of soil—Responsibility of contractor—Presumption of fault—Conditions upon which contractor can be relieved from liability—Articles 1666, 1683, 1688 C.C.

Where the construction of a warehouse has been entrusted to a contractor to be carried out in accordance with plans prepared by himself based upon information obtained from the proprietor as to its requirements for a price to be determined on a basis of costs plus ten per cent and such work was carried out by the contractor under his own superintendence throughout, the evidence showing that the latter had the right to choose the men to be employed, to fix their salaries, to manage them and to dismiss them, such enterprise constitutes work by estimate and contract as contemplated by article 1683 C.C. and not a lease and hire of work as mentioned in article 1666 C.C.

Also, it is not necessary, in virtue of the provisions of article 1683 C.C., that the contract price should be fixed in advance, and the absence of a fixed price is not a reason why a contract may not constitute a contract by enterprise.

Moreover, specifications attached to the plans are not necessarily required in order to constitute a contract by enterprise: such a contract may be complete and valid without them.

In an action for damages brought by the proprietor against the contractor, under the provisions of article 1688 C.C., on the ground that the building, sometime after its construction, had subsided to a considerable extent,

Held that, by the terms of articles 1683 and 1688 C.C., the builder or contractor is responsible for the consequences of a defect in construction or a defect of the soil; and a presumption of fault is created against him. The proprietor of the building is not obliged to prove the fault of the builder or contractor in the case of a contract by enterprise, and the latter can only be relieved from his liability by proving that the damage was attributable either to an act of God, to a fortuitous event, to a fault of the proprietor or to an act of a third person.

Judgment of the Court of King's Bench (Q.R. 69 K.B. 281) affirmed and varied.

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

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HILL-CLARKE-FRANCIS LTD. v. NORTHLAND GROCERIES (QUEBEC) LTD.

APPEAL and CROSS-APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming, though reducing the amount of damages awarded to the respondent, the judgment of the trial judge, Demers Joseph J., and maintaining the respondent's action for damages resulting from the subsidence of a building constructed by the appellant company.

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

L.E. Beaulieu K.C. and *Lucien Labelle K.C.* for the appellant.

Jean Létourneau for the respondent.

The judgment of the Court was delivered by

TASCHEREAU J.—Au cours de l'année 1927, la National Grocers Ltd., par l'intermédiaire de son gérant, Robert M. Elliott, a soumis à l'appelante des plans préparés par les architectes Angus & Angus pour la construction d'un entrepôt à Noranda, P.Q. Dans le mois d'août de la même année, la compagnie appelante soumissionna pour cette construction, mais pour une raison ou pour une autre, les parties n'ont pas donné suite à leurs négociations et l'immeuble n'a pas été construit.

En juillet 1928, l'intimée a été incorporée par lettres patentes émises par le Lieutenant-Gouverneur de la province de Québec, et M. Elliott qui n'était plus à l'emploi de la National Grocers Ltd. devint le gérant de la nouvelle compagnie. Il entra alors de nouveau en négociations avec l'appelante afin de faire construire, pour la nouvelle compagnie, un entrepôt à peu près semblable à celui que désirait avoir son premier employeur. Les anciens plans de Angus & Angus furent consultés; on fit certains changements, et des plans nouveaux furent préparés par l'appélante, après que M. Elliott lui eût dit verbalement ce qu'il désirait avoir. L'appelante a accepté de construire l'immeuble en question, et dans le cours du mois de juillet 1928, elle écrivit une lettre à l'intimée pour confirmer les ententes verbales et pour lui dire les conditions du contrat intervenu. La lettre se lit de la façon suivante:—

(1) (1940) Q.R. 69 K.B. 281.

Hill-Clark-Francis, Limited
Noranda, Que.

July 14th, 1928.

R. M. Elliott, Esq.,
c/o Northland Grocers,
Noranda, Que.

Dear Sir:—

This will confirm our verbal offer for construction of your Warehouse Building at Noranda on cost plus basis, remuneration to be 10% on cost. Our estimated cost of $12,300.00 to be the outside cost on building as shown on our plan of June 30th, 1928. In accordance with your instructions we are altering the size of this to 50 x 70 and estimate that the addition will bring the cost to about $14,000.00 plus the added cost for extra radiation and electric light. The vault door is included in our estimate, for which we have allowed $130.00 in place. We have not included the elevator in our estimate as we understand you now propose using the electric one.

In reference to excavation. We are presuming that we will strike clay or other solid earth for footings at a depth as shown on our plan. Should the black muck extend to a greater depth than this it will be necessary to excavate to solid footing and backfill with stone or other material to bring basement floor and footings to a level where they may be drained to the sewers. This is absolutely necessary in order to ensure a dry cellar. Should we have to go to any great depth in order to get solid earth for footings the backfilling with earth and rock would increase our cost to an extent where we would have to ask for extra money.

We trust that the above meets with your approval and would appreciate a written confirmation of your verbal orders, to go ahead with construction along these lines.

Payments to be made monthly up to 85% of value of material delivered on job, plus labour charges incurred. Balance of 15% will be a holdback until completion of contract.

Yours truly,
Hill-Clark-Francis, Limited,
Per: W. J. Barager.

Durant la construction, commencée quelques jours avant la réception de cette lettre, les travaux étaient dirigés par un nommé Barager, gérant de l'appelante à Noranda, et M. R. M. Elliott, gérant de l'intimée, représentait les intérêts de celle-ci, lorsqu'il se trouvait sur les lieux.

L'intimée a occupé l'entrepôt au cours de l'année 1928, quoiqu'il ne fût pas complètement terminé, et cette occupation a duré jusqu'au début de l'année 1931. Le 20 octobre 1932, elle a loué l'immeuble à la Cie Gamble-Robinson Ltd. pour une période d'une année et deux mois, et elle a consenti à son locataire une option d'acheter durant l'existence du bail pour la somme de $20,000.00.

L'intimée allègue dans son action qu'au printemps de 1929 elle remarqua une fissure dans le mur à l'ouest de l'immeuble, et elle prétend également que durant l'été de

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Taschereau J.

1929 elle constata une différence dans le niveau du plancher. Cette différence de niveau alla en s'accentuant jusqu'en 1931, date où l'intimée quitta les lieux pour continuer son commerce ailleurs. Depuis ce temps, jusqu'au jour où Gamble-Robinson prit possession des lieux loués, l'immeuble ne fût pas occupé et les dégradations allèrent en s'accentuant, tellement que durant l'occupation des locataires la différence de niveau a atteint dix-neuf pouces au printemps de 1933, et vingt-trois pouces au mois de novembre de la même année. La ligne perpendiculaire s'éloignait de quatorze pouces de l'immeuble au niveau du sol. Croyant au début qu'il ne s'agissait que d'un tassement normal, l'intimée réalisa bientôt que la perte de l'immeuble devenait imminente, et écrivit à l'appelante le 6 novembre 1933 pour la mettre en demeure, mais celle-ci refusa de reconnaître sa responsabilité. L'intimée fit alors faire des réparations par un nommé Munro, évaluées à $4,877.68, et par son action elle réclame cette somme, plus $7,000.00 de dommages pour dépréciation à l'immeuble. L'intimée attribua la ruine partielle de l'entrepôt à des vices du sol et à des vices de construction. La Cour Supérieure a accordé la somme réclamée, soit $11,877.68, mais la Cour du Banc du Roi a réduit ce montant à $4,877.68. Les deux parties en appellent devant cette Cour, l'appelante pour faire rejeter l'action totalement, et l'intimée se portant contre-appelante veut faire rétablir le jugement de la Cour Supérieure.

L'intimée prétend fonder son recours sur les articles 1683 et 1688 du Code Civil. Ces articles se lisent de la façon suivante:—

1683. Lorsque quelqu'un entreprend la construction d'une bâtisse ou autre ouvrage par devis et marché, il peut être convenu ou qu'il fournira son travail et son industrie seulement, ou qu'il fournira aussi les matériaux.

1688. Si l'édifice périt en tout ou en partie dans les (cinq) ans, par le vice de la construction ou même par le vice du sol, l'architecte qui surveille l'ouvrage et l'entrepreneur sont responsables de la perte conjointement et solidairement.

La prétention de l'appelante est qu'il ne s'agit pas d'un contrat d'ouvrage par devis et marchés, mais bien d'un simple louage de services vu que l'intimée avait conservé la direction des travaux. Elle allègue en outre que les dommages à l'immeuble doivent être attribués aux conditions et à la nature du sol qui, à cet endroit, est exceptionnelle et telle, qu'il est impossible de prévoir les dom-

mages qui peuvent être occasionnés aux immeubles nouveaux; que l'intimée connaissait la nature du sol; qu'elle a accepté le risque d'une construction à cet endroit; que le sol a été l'objet de perturbations souterraines dues aux opérations minières de la Noranda, alors qu'une quantité considérable d'eau a été tirée du sous-sol et s'est écoulée dans les galeries de cette compagnie minière, faisant ainsi s'effondrer le sol. Elle allègue aussi que ce dommage à l'immeuble est dû à la conduite de l'intimée elle-même qui a surchargé son immeuble, ne l'a pas chauffé durant une saison d'hiver et que la structure elle-même de l'immeuble a été affaiblie par des changements ordonnés par M. Elliott lui-même. Enfin, l'action serait prescrite par cinq ans à cause des dispositions de l'article 2259 du Code Civil.

Afin de bien déterminer la nature de la responsabilité dans la présente cause, il importe de se demander en premier lieu s'il s'agit d'un louage d'ouvrage tel que le prétend l'appelante, ou s'il ne s'agit pas plutôt d'un contrat d'ouvrage par devis et marchés, dont l'essence est l'entreprise, entraînant l'application des articles 1683 et 1688. La preuve révèle, et c'est ainsi également que l'ont interprétée la Cour Supérieure et la Cour du Banc du Roi, que c'est bien l'appelante qui avait la direction des travaux exécutés suivant des plans acceptés au préalable. L'appelante engageait ses propres hommes, exerçait sur eux un contrôle absolu sans intervention de l'intimée. Elle fournissait la main-d'œuvre, la machinerie, et devait exécuter tous les travaux suivant les plans préparés au préalable, ou subséquemment modifiés et acceptés de part et d'autre. Il est vrai que l'intimée a suggéré des changements, mais ceci ne peut avoir aucun effet sur le caractère du contrat d'entreprise. Des modifications dans les plans ne changent pas la nature du contrat intervenu. Le contrôle de l'exécution des travaux était sous la juridiction exclusive de l'appelante, et sa prétention à l'effet que Elliott en avait gardé le contrôle, n'est pas fondée. Au contraire, il est prouvé que Elliott ne se rendait sur les lieux qu'accidentellement, et n'intervenait que pour demander des changements que désiraient avoir ses principaux.

La distinction entre le contrat de louage de services et le contrat d'ouvrage par devis et marchés a souvent été faite par les auteurs et par nos tribunaux. Signalons en premier lieu Frémy-Ligneville—Législation des Bâtiments —tome 1:—

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Taschereau J.

Les devis et marchés en matière de construction sont, dans un sens général, les conventions qui interviennent entre le propriétaire qui veut faire construire et les contracteurs, pour régler d'avance et avec précision le mode suivant lequel la construction voulue sera exécutée et payée.

Baudry-Lacantinerie, 3ème édition, vol. 22, n° 3865:—

Le critérium sert à distinguer le louage de gens de travail du louage d'entrepreneurs d'ouvrages. Dans le premier, comme le supposent la définition du code et les textes, le maître a la direction du travail; le domestique, l'ouvrier ou l'employé a engagé son activité et se trouve vis-à-vis du maître dans un lien de subordination. Dans le second, au contraire, le maître a simplement commandé un travail déterminé que l'entrepreneur fait sans aucune direction et qu'il remet une fois terminé.

Cette Cour, dans une cause de *Québec Asbestos Corporation* vs. *Gédéon Couture* (1), a donné sur cette question des précisions claires. Parlant au nom de la Cour, M. le juge Rinfret s'est exprimé de la façon suivante:—

Or, nous sommes d'avis que c'est bien là la nature juridique du contrat qu'il avait fait avec la compagnie. On y trouve les principaux caractères distinctifs du contrat d'entreprise: le mode adopté pour sa rémunération; le droit de choisir les hommes qu'il employait, de fixer leur salaire, de les diriger et de les renvoyer; la responsabilité en dommages comme conséquence de son défaut d'alimenter l'usine; surtout l'absence d'un lien de subordination entre Couture et la compagnie et son indépendance dans la méthode de travail.

Le contrat de louage d'ouvrage se distingue du contrat d'entreprise surtout par le caractère de subordination qu'il attribue à l'employé. Même payés à la tâche, les ouvriers peuvent être "des locateurs de services, s'ils sont subordonnés à un patron; mais au contraire les ouvriers sont des entrepreneurs, s'ils ne sont pas soumis à cette subordination."

C'est bien le cas qui se présente dans la cause actuelle. L'appelante avait le droit de choisir les hommes qu'elle employait, de fixer leur salaire, de les diriger et de les renvoyer. C'est elle qui aurait été responsable en dommages vis-à-vis ses employés ou pour l'acte de l'un de ses employés, et il n'y avait aucun lien de subordination entre l'appelante et l'intimée, et il existait une indépendance complète dans la méthode de travail. Il est bon de noter de plus, qu'en vertu des dispositions de l'article 1683 du Code Civil, il n'est pas nécessaire que le prix soit fixé d'avance, et cette absence de prix fixe n'empêche pas le contrat d'être un contrat d'entreprise. Il ne faut pas confondre les dispositions de cet article de notre Code avec les dispositions du Code Napoléon où un prix doit nécessairement être fixé d'avance, tel que le veut l'article 1792 C.N. qui se lit de la façon suivante:—

(1) [1929] S.C.R. 166.

Si l'édifice construit à prix fait périt en tout ou en partie par le vice de la construction, même par le vice du sol, les architectes et entrepreneurs en sont responsables pendant dix ans.

C'est d'ailleurs l'enseignement de M. Mignault, Vol. 7, page 400:—

Généralement, le marché fixe d'avance la somme précise que le maître devra payer, et alors ont dit que l'ouvrage est entreprise à prix fait, ou à forfait. Cependant, cette détermination du prix n'est pas de l'essence du louage d'ouvrage par devis et marchés, car il peut être stipulé que le propriétaire paiera le prix des matériaux et de la main-d'œuvre avec une bonification de tant pour cent qui constitue le bénéfice de l'entrepreneur.

L'appelante a soumis également qu'il ne pouvait pas s'agir d'un contrat d'entreprise, entrainant la responsabilité prévue à l'article 1688 C.C., parce qu'il n'y avait pas de spécifications attachées aux plans. Très souvent, évidemment, ces spécifications qui complètent les plans existent, surtout lorsqu'ils ont été préparés par un architecte; elles servent à détailler ces mêmes plans, et à indiquer, d'une façon plus claire, quelle sera la nature et le genre du travail à accomplir. Mais, elles ne sont pas toujours nécessaires, et un contrat d'entreprise peut être complet sans qu'elles se rencontrent, surtout comme dans le cas actuel où l'entrepreneur connaissait le travail à accomplir, et où des plans suffisamment précis n'avaient pas besoin de détails supplémentaires. C'est d'ailleurs la conclusion à laquelle en vient l'honorable Juge Bond qui, en Cour du Banc du Roi, a rendu le jugement unanime de la Cour.

La prétention de l'appelante, qu'il s'agit d'un contrat de louage de services, ne peut donc pas être acceptée, et il faut en venir à la conclusion que le présent litige doit être jugé à la lumière des articles 1683 et 1688 C.C. Il n'y a pas de doute que l'édifice a péri en partie dans les cinq ans de la fin des travaux. Ceux-ci ont été terminés vers la fin de 1928. Les dommages se sont manifestés en 1929, 1930, 1931, 1932, 1933, etc. Le constructeur est responsable des vices de construction et des vices du sol, et il existe contre lui une présomption de faute qui a fait l'objet de commentaires nombreux devant les tribunaux canadiens et du Conseil Privé. Sans qu'il soit nécessaire de faire l'historique de toute la jurisprudence sur ce point, rappelons cette très ancienne cause de *Brown* et *Laurie,* jugée par la

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Taschereau J.

Cour Supérieure de Montréal en 1851 (1). Dans cette cause, jugée cependant avant l'entrée en vigueur du Code Civil et avant par conséquent l'existence de l'article 1688, il a été décidé que le constructeur est responsable des vices du sol, malgré que les excavations aient été faites suivant les plans et devis et sous la direction d'un architecte employé par le propriétaire. La Cour du Banc de la Reine a confirmé cette décision (2), et M. le Juge Panet s'exprime, à la page 68, de façon suivante:—

> Pour ma part j'irais même plus loin que l'honorable président de la Cour; son opinion est basée sur le fait que la perte était prouvée être la conséquence du vice du sol; suivant moi cette preuve n'était pas nécessaire, et le constructeur est responsable de tous les vices qui peuvent se rencontrer, *et qu'il ne prouve pas provenir de force majeure ou du fait même du propriétaire.* Ici l'entrepreneur n'a pas pris les précautions nécessaires, et il est conséquemment responsable.

Dans la cause de *Wardle* vs. *Bethune,* jugée par le Conseil Privé en 1872 (3), il a été décidé qu'un contracteur est responsable de l'enfoncement d'un immeuble construit par lui-même.

Malgré que l'immeuble qui faisait l'objet du litige dans *Wardle* vs. *Bethune* (3) avait été construit en 1862, avant l'existence du Code Civil, on a déclaré que l'article 1688 C.C. n'introduisait pas du droit nouveau dans la province de Québec, mais était déclaratoire du droit existant et le Conseil Privé a dit:—

> When there has been a breach of warranty of the stability of the building, the onus is on the builder to show that he is exempted from liability, by some exception in his favour. It is of primary importance that he should make sure of the sufficiency of the foundation on which he proceeds to build, for, without a sufficient foundation, the warranty could not be kept. It is an inseparable incident, an essential part of the warranty; the warranty of stability of the edifice, includes by necessary implication, the warranty of sufficiency of foundation; and such is the law as explained in *Brown* vs. *Laurie* (1). The architect and builder are therefore bound to provide whatever is essential to the stability warranted.
>
> The exemption from responsibility, on the part of the builder, for the breach of warranty, must be made out (if at all) by legaal implication. There is not in the Code any express exception in favour of the builder; and there is none in his contract.

Nous désirons référer également à la cause de *Protestant Board School Commissioners of the City of Montreal* vs. *Quinlan* (4), et *Canadian Electric Light Company* vs. *Pringle* (5), où M. le juge Carroll s'exprime ainsi:—

(1) (1851) 1 L.C.R. 343.
(2) (1854) 5 L.C.R. 65.
(3) (1872) 16 L.C.J. 85.
(4) (1920) Q.R. 30 K.B. 514.
(5) (1919) Q.R. 29 K.B. 26, at 32.

Les auteurs français discutent beaucoup sur la preuve que l'architecte et l'ingénieur civil doivent produire pour se libérer. Les uns disent que l'*onus probandi* leur incombe, les autres disent que c'est au propriétaire à prouver la faute, d'après les règles du droit commun. Il me semble plus rationnel que l'architecte et l'ingénieur soient obligés de prouver absence de faute de leur part. Ce sont des hommes de l'art; ils sont plus à même que le propriétaire de connaître les défectuosités de l'édifice qu'ils construisent, ils sont en meilleure posture pour prouver que leur plan et leur travail sont parfaits. Comment un propriétaire, ignorant des connaissances techniques nécessaires, peut-il faire la preuve de la faute d'un ingénieur civil ou d'un architecte? D'ailleurs, cette question me semble réglée définitivement pour nous, par le jugement du Conseil Privé dans la cause de *Wardle* v. *Bethune* (3) où il a été déclaré que le fardeau de la preuve incombait au constructeur et conséquemment à l'architecte. Je réfère les parties à cette cause.

Le même principe a également été reconnu de nouveau par cette Cour dans *Canadian Consolidated Rubber Co.* v. *Pringle & Son Ltd. and The Foundation Company Ltd.* (1).

Il n'y a donc pas de doute que le propriétaire de l'immeuble n'a pas besoin de prouver la faute du constructeur lorsqu'il s'agit d'un contrat d'entreprise, mais qu'il appartient à celui-ci de se libérer de sa responsabilité en prouvant que le dommage est attribuable soit, à la force majeure, à un cas fortuit, à la faute du propriétaire, ou à l'acte d'un tiers.

L'appelante n'a pas réussi à établir l'existence de l'une ou de plusieurs de ces exceptions qui, seules, pourraient la soustraire à l'application rigoureuse de l'article 1688 C.C.

Il ne peut être question de force majeure. Il n'y a pas eu davantage de cas fortuit, dont l'occurrence imprévue aurait pu justifier l'appelante. Celle-ci connaissait bien en effet la nature du sol, et si l'on relit le dernier paragraphe de la lettre de juillet 1928, on voit facilement qu'elle réalisait pleinement le genre de travail qu'il y avait à accomplir, et les difficultés probables qu'elle aurait à rencontrer. Voici ce qu'elle écrivait à l'intimée:—

In reference to excavation. We are presuming that we will strike clay or other solid earth for footings at a depth as shown on our plan. Should the black muck extend to a greater depth than this it will be necessary to excavate to solid footing and backfill with stone or other material to bring basement floor and footings to a level where they may be drained to the sewers. This is absolutely necessary in order to ensure a dry cellar. Should we have to go to any great depth in order to get solid earth for footings the backfilling with earth and rock would increase our cost to an extent where we would have to ask for extra money.

(1) [1930] S.C.R. 477.

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L'intimée était prête à payer ce qu'on lui demandait pour que son immeuble reposât sur des bases solides, et ne s'enfonçât pas après quelques années dans un sol vaseux. Il n'est pas établi non plus que le propriétaire fût en faute. L'allégation que l'immeuble aurait été surchargé, ou n'aurait pas été chauffé durant un hiver, ne me paraît pas justifiée. Il n'est certes pas établi qu'il y ait eu de surcharge suffisante pour affecter le sol, et la preuve ne révèle nullement que l'absence de chaleur durant un certain temps ait causé des dommages si considérables, et surtout de la nature de ceux qui ont été constatés. L'intimée, enfin, n'a pas perdu son droit de réclamer parce qu'elle aurait demandé des modifications et des additions à l'immeuble. Si l'appelante, comme tel est le cas, a accepté de les exécuter, elle doit répondre des vices de construction et des faiblesses du sol.

Quant à cette autre prétention de l'intimée que le sol se serait enfoncé comme conséquence des opérations minières de la Noranda Mines, dont les fouilles souterraines auraient provoqué l'écoulement d'une grande quantité d'eau affaiblissant ainsi le sol où reposait l'immeuble, je crois qu'elle n'est pas suffisamment établie pour nous justifier de conclure que les dommages ont été causés par la faute de cette compagnie. La preuve apportée, malgré qu'à l'audience elle m'ait impressionné, n'a pas, je pense, la force probante nécessaire pour placer l'appelante dans le cadre étroit de la dernière exception que j'ai signalée tout à l'heure, et qui ferait disparaître la responsabilité de l'appelante, soit l'acte d'un tiers. Il importait à l'appelante d'établir ce moyen; elle avait incontestablement le fardeau de cette preuve, et les témoins qu'elle a fait entendre, comme d'ailleurs les conjectures de ses experts, sont contredits par la preuve de l'intimée. C'est à cette conclusion qu'en est arrivé le juge de première instance et je ne pense pas qu'il s'agisse de l'un de ces cas exceptionnels où cette Cour peut intervenir pour changer les conclusions de faits du juge qui a vu et entendu les témoins.

Un mot de la question de prescription invoquée dans les plaidoiries comme dernier moyen de défense. Avec raison, le procureur de l'appelante y a renoncé lors de l'audience, car, il semble clair qu'au moment où l'action a été instituée, l'article 2259 C.C. ne pouvait trouver son application. Je crois donc, pour ces raisons, que le jugement de la Cour

du Banc du Roi est bien fondé, et que l'appel principal doit être rejeté avec dépens.

Il reste la question du contre-appel. Le juge de première instance, comme nous l'avons vu, a non seulement accordé $4,877.68 pour réparations à l'immeuble, mais aussi la somme de $7,000.00 de dommages, que dans son jugement la Cour du Banc du Roi a retranchée. La preuve a révélé que l'intimée et contre-appelante avait loué pour une période d'une année et deux mois l'immeuble en question à la Cie Gamble-Robinson et que pour la durée du bail, elle lui avait également accordé le privilège d'acheter au prix de $20,000.00. Subséquemment, la Cie Gamble-Robinson a refusé de payer cette somme de $20,000.00 mais s'est déclarée disposée à faire l'acquisition de cet immeuble pour la somme de $13,000.00, c'est-à-dire $7,000.00 de moins que le montant mentionné à la promesse de vente. Le juge de première instance a accepté ce chiffre comme représentant la dépréciation de l'immeuble, mais la Cour du Banc du Roi en est venue à la conclusion que cette preuve n'était pas suffisante. Cette méthode, en effet, d'établir le dommage souffert par l'intimée n'est pas satisfaisante. Le prix de $20,000.00 ne représentait pas, au moment où l'option a été consentie, la valeur réelle de cet immeuble; et le montant de $13,000.00 n'est pas lui non plus une preuve de sa valeur au moment de la vente. Il est certain que l'immeuble a subi des dommages considérables, mais, avec respect, je suis d'opinion que la base adoptée par le juge de première instance était erronée. Il y a cependant, dans la déclaration et dans la preuve, des éléments suffisants pour déterminer des dommages sur une base différente. L'intimée et contre-appelante allègue dans son action que les réparations affectuées, et pour lesquelles elle a payé la somme de $4,877.68, n'étaient pas complètes. Ce montant déboursé n'a servi qu'à réparer les fondations, mais l'immeuble lui-même a subi des dommages, et il aurait fallu une somme additionnelle de $3,000.00 pour réparer la structure et d'autres parties de l'entrepôt. Sur ce point, M. le juge Bond en vient à la conclusion que la structure elle-même a été endommagée, et dans son jugement il s'exprime de la façon suivante:—

No further proof was adduced to support the alleged estimate by the purchaser of the sum of $3,000 to make repairs to the superstructure. While there seems reason to think that the superstructure was damaged,

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I have been unable to find in the record any evidence which would enable me to place any value on such damage, except upon a purely arbitrary basis, which would not be justified.

Je partage son opinion quand il affirme qu'il y a eu des dommages. Cependant, en ce qui concerne la valeur de ces dommages, étant donné la preuve non contredite qui a été apporté, je ne puis avec respect concourir dans ses vues. Ce montant de $3,000.00 n'est certainement pas exagéré et je crois qu'il aurait dû être accordé. Le contre-appel devrait donc être maintenu jusqu'à concurrence d'une somme de $3,000.00 avec intérêts depuis la signification de l'action et les dépens.

Appeal dismissed and cross-appeal maintained, with costs.

Solicitor for the appellant: *Lucien Labelle.*

Solicitors for the respondent: *Vallée, Fortier, Létourneau* and *MacNaughton.*

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* June 2, 3.
* June 26.

THE CORPORATION OF THE CITY OF OTTAWA ..... APPELLANT;

AND

THE CORPORATIONS OF THE TOWN OF EASTVIEW AND THE VILLAGE OF ROCKCLIFFE PARK ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Public utilities—Supply of water by City of Ottawa to certain adjoining municipalities—Power of Ontario Municipal Board to fix rates under s. 59 (ii) of Ontario Municipal Board Act, R.S.O., 1937, c. 60 (as amended)—Effect of provisions of special Acts relating to said city's water works—Construction of statutes—"Generalia specialibus non derogant"—Appeal—Jurisdiction—"Final judgment" (Supreme Court Act, R.S.C., 1927 c. 35, ss. 2 (b), 36).

Clause (ii) (enacted in 1940, c. 20, s. 1) of s. 59 of *The Ontario Municipal Board Act* (R.S.O., 1937, c. 60) empowers the Ontario Municipal Board to "hear and determine the application of any municipality to confirm, vary or fix the rates charged or to be charged in connection with water supplied thereto by any other municipality."

* PRESENT:—Rinfret, Crocket, Davis, Hudson and Taschereau JJ.

Appellant, the City of Ottawa, has for some years supplied water to respondents, adjoining municipalities, which take the water at or near appellant's boundary line and carry it through their own mains to their consumers, appellant dealing only with the municipalities. There had been a written agreement between appellant and each of respondents as to rates, but the agreements had expired prior to the enactment in 1940 of said clause (ii), and since said expiry the parties have not agreed upon the rates to be paid by respondents for the water, which appellant has continued to supply.

Respondents each applied to the Board, pursuant to said clause (ii), to vary or fix the rates for water supplied. Appellant applied to the Board for an order dismissing respondents' applications, on the ground that the Board has no authority or jurisdiction to hear and determine them, by reason of the provisions of the special Acts relating to appellant City and the powers vested in its council under such Acts. The Board dismissed appellant's application, and the dismissal was affirmed by the Court of Appeal for Ontario ([1940] O.W.N. 524; [1941] 1 D.L.R. 483). Appellant, by special leave from said Court of Appeal, appealed to this Court. Respondents moved to quash the appeal for want of jurisdiction, on the ground that the judgment appealed from was not a "final judgment" within the meaning of ss. 2 (*b*) and 36 of the *Supreme Court Act* (R.S.C., 1927, c. 35). The appeal and the motion to quash were heard together.

Held: This Court had jurisdiction to hear the appeal. The judgment of the Court of Appeal was an adjudication determining a substantive right of the parties in controversy in that Court, and was therefore a "final judgment" within the definition in s. 2 (*b*) of said *Supreme Court Act.*

Held also: The appeal should be dismissed.

Per Rinfret, Crocket and Taschereau JJ.: (1) Appellant, under the special Acts regulating its water works system (Ont.: 35 Vic., c. 80; 42 Vic., c. 78; 3-4 Geo. V, c. 109; 6 Geo. V, c. 85), has power to supply water to respondents; and each of respondents, under *The Public Utilities Act* (R.S.O., 1937, c. 286), ss. 2 (1), 12, 25 (1), has power to purchase water from appellant and to regulate its supply in its municipal area.

(2) The Board has jurisdiction to fix the price of water supplied by appellant to each respondent from the time when an actual agreement in respect of rates ceased to exist; and for as long as the supply of water continues without the price or rate thereof being agreed upon by the parties themselves. Although, under its said special Acts, appellant has power to fix rates for water supplied to another municipality, yet the authority conferred upon the Board by said clause (ii) is not inconsistent with such powers of appellant; it may be read into the special Acts without repugnancy; and therefore the principle expressed in the maxim, *generalia specialibus non derogant* (discussed and cases thereon referred to), does not operate in the present case to exclude appellant from the Board's jurisdiction in the particular matter in question. (It was remarked that it was not contended that there was any power in the Board to compel appellant to supply or continue supplying water to respondents; that whether there is any governmental authority that can compel a municipality to supply water to another municipality was a question not before the Court).

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Per Davis J.: On the particular facts of the case, said clause (ii) applies, and the Board was right in deciding that it could proceed to hear respondents' applications. The Board was competent to make such decision, which was plainly something incidental to its administrative functions.

Per Hudson J.: Appellant has power to supply respondents with water, and the Board has power to fix the rates; but the Board cannot compel appellant to sell or deliver water to respondents and, in so far as the Board is concerned at least, appellant has the right to refuse to deliver water if the rates imposed are not satisfactory to it.

APPEAL by the Corporation of the City of Ottawa from that part of the judgment of the Court of Appeal for Ontario (1) which held that the Ontario Municipal Board had authority and jurisdiction, under clause (ii) (enacted in 1940, c. 20, s. 1) of s. 59 of *The Ontario Municipal Board Act* (R.S.C., 1937, c. 60), to hear the applications of the present respondent municipalities for orders fixing the rates to be charged to said municipalities for water supplied to them by the said City corporation.

The material facts and circumstances of the case and the questions in dispute are sufficiently stated in the reasons for judgment in this Court now reported.

Leave to appeal to the Supreme Court of Canada was granted by the Court of Appeal for Ontario.

The respondents moved to quash the appeal for want of jurisdiction, on the ground that the judgment appealed from was not a "final judgment" within the meaning of ss. 2 (*b*) and 36 of the *Supreme Court Act* (R.S.C., 1927, c. 35). The appeal and the motion to quash were heard together.

F. B. Proctor K.C. and *G. C. Medcalf* for the appellant.

H. E. Manning K.C. for the respondents.

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

RINFRET J.—The City of Ottawa has been supplying water to the respondent municipalities for some period of time.

In April, 1940, the respondents made application to the Ontario Municipal Board for a hearing pursuant to clause (ii) of section 59 of *The Ontario Municipal Board Act* (c. 60 of R.S.O., 1937), praying the Board to vary or fix

(1) [1940] O.W.N. 524; [1941] 1 D.L.R. 483.

the rates for water supplied by the City of Ottawa, and that the contracts or agreements between the City and residents of these municipalities be considered with the same hearing.

The Board appointed May 14th, 1940, for the hearing of all parties interested, whereupon the City applied to the Board for an order dismissing all proceedings, on the ground that the Ontario Municipal Board had no authority or jurisdiction to vary or fix the rates charged, or to be charged, in connection with water supplied to the respondent municipalities by the City, by reason of the provisions of the various special Acts of the Legislature relating to the waterworks of the Corporation of the City of Ottawa and the special powers vested in the Council of the City under such Acts.

On the other hand, the respondents made an application to the Board for an order for production, for examination on discovery of the Chief Engineer of the City of Ottawa, and for the right to inspect the waterworks system of the City.

The Board delivered judgment dismissing the City of Ottawa's motion and holding that the respondents had the right to apply to the Board under and by virtue of sec. 59 (ii) of *The Ontario Municipal Board Act.*

The appellant City of Ottawa took advantage of sec. 103 of *The Ontario Municipal Board Act* and, alleging again that the Board had no jurisdiction in the premises and that its decision with regard to the application of sec. 59 (ii) was erroneous in law, it applied to the Court of Appeal of Ontario to have the respondents' applications and the other proceedings before the Board set aside.

Leave to appeal having been granted, the Court of Appeal affirmed the jurisdiction of the Board in the matter and dismissed the appeal of the City of Ottawa.

From that judgment, the City was given leave to appeal to the Supreme Court of Canada.

As pointed out in the reasons for judgment of the Chief Justice of Ontario, who delivered the unanimous judgment of the Court of Appeal:

> We are not concerned on this appeal with any question of the fairness of the rates charged, but only with the question of the Board's jurisdiction to vary or fix them.

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The judgment appealed from states that the respondent municipal corporations adjoin the City of Ottawa; and, none of them having any municipal waterworks of its own, the appellant has, for some considerable time, supplied water to them through its waterworks system. The method of supplying water has been similar in each case. Each of the respondents has laid its own water mains within its boundaries; and connection is made with a water main of the appellant's, at or near the boundary line. A meter, in each case, has been placed at this point; and each of the respondents pays according to fixed rates for the water measured by its meter. The appellant has nothing to do with the individual proprietor, or owner, or occupant supplied within the respondent municipality and deals only with the municipality.

The appellant raised the preliminary question that, in fact, it has no power vested in it to supply water to another municipality as such.

The appellant then set up the objection that all its rights and powers in respect of its waterworks are given to it by special Acts of the Legislature and that these rights and powers are not affected by the provisions of the general Act as amended in 1940 by the introduction of clause (ii) of sec. 59 of *The Ontario Municipal Board Act.*

The Court of Appeal held that it was not necessary to determine on this appeal the extent of the appellant's power to supply water to the respondent municipalities. It found that, in fact, it was supplying water and charging them for it; and it held that, so long as the appellant did, in fact, supply water to the respondents at a price, the jurisdiction of the Board, under sec. 59 (ii), to hear and determine an application by the respondents to vary or fix the rates charged by the appellant did not depend upon the establishment of some power in the appellant to supply the respondents with the water for which they pay. "One is entitled," said the learned Chief Justice, "to assume against the appellant that what appellant is doing and is being paid for, is done by some lawful authority."

Dealing then with the appellant's contention that the general Statute of 1940, extending the powers of the Municipal Board to the varying or fixing of the rates for water supplied by one municipality to another, should not

be deemed to apply to the appellant, because the latter is governed by and derives its powers from special Acts, the Court of Appeal proceeded to inquire from what source the appellant obtains its powers to fix the prices at which the water is supplied by it.

After having examined successively the Act of 1872, authorizing the construction of the appellant's waterworks, and the several Acts modifying this initial statute, the Court of Appeal came to the conclusion that the appellant did not take from the special Acts its power to establish prices to be paid to it for water supplied to the respondents, but that it took it "from some Act or under some principle of law of general application," and that there was no ground for excluding the appellant from the operation of the general provision contained in sec. 59 (ii) of *The Ontario Municipal Board Act.*

The judgment was, therefore, that the application to set aside the proceedings lodged before the Board should be dismissed and that the respondents shall be

> at liberty to proceed with their motion [to the Board] for directions and for an order for production and for the examination for discovery of the Chief Engineer of the [City of Ottawa], and for the right to inspect the waterworks system of the respondent [City of Ottawa] and generally as to the procedure to be followed in respect of the said applications.

In this Court, the preliminary question raised by the appellant must first be determined. In the Act of 1872 (1), which was the Act whereby the City of Ottawa was authorized to construct waterworks, a body corporate was created under the name of "Water Commissioners for the City of Ottawa." That body was given the powers necessary to build the works "and to carry out all and every the powers conferred on them by this Act."

The Commissioners were entrusted with the matter of supplying water to the City, and, for that purpose, could build and construct the necessary works and appliances requisite for that object. With the assent and approval of the Corporation of the City, they were empowered to acquire lands and buildings as, in their opinion, may be necessary to enable them to fulfill their duties. The lands, buildings, privileges and waters acquired by the Commissioners were to be vested in the Corporation of the City; and they were said to be

(1) 35 Vict., c. 80.

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for distributing water to the inhabitants of the City of Ottawa, or for the uses of the Corporation of the said City, or of the proprietors or occupiers of the land through or near which [the lines of pipes] may pass.

Then comes sec. 10 of the Act, whereunder

the Board of Commissioners for the time being shall regulate the distribution and use of the water in all places and for all purposes where the same may be required, and from time to time shall fix the prices for the use thereof * * *

By sec. 11, the Commissioners were given the power and authority, and it was stated to be "their duty" from time to time to fix the price, rate or rent, which any owner or occupant of any house, tenement, lot or part of lot or both, in, through, or past which the water pipes shall run, shall pay as water rate or rent, "whether such owner or occupant shall use the water or not." These powers were to include the right to assess vacant lots of land in the City of Ottawa fronting on the streets under which the water pipes were to be placed and to tax them, "due regard being had to the assessment and to the advantage which the said lot shall derive from water works."

By sec. 13, full power was given the Commissioners to make and enforce all necessary by-laws and regulations for the collection of the water rent and the water rate. And, among the by-laws that it was declared to be lawful for the Commissioners so to make and enforce, they were authorized to prohibit, by fine or imprisonment, any person being occupant, tenant or inmate of any house supplied with water from the said waterworks from vending, selling or disposing of the water thereof (sec. 17).

Then follow certain provisions here immaterial; and we come to secs. 25, 26 and 27, to which special attention must be given:

25. The said commissioners shall have the full, entire and exclusive possession, control and management of the said lands and water works, and all things appertaining thereto; and shall and may in the name of the commissioners of waterworks for the City of Ottawa prosecute or defend any action or actions, suit or suits, or process at law or in equity, against any person or persons, for money due for the use of the water, for the breach of any contract, express or implied, touching the execution or management of the works, or the distribution of the water, or of any promise or contract made to or with them, and also for any injury, damage, trespass, spoil, nuisance or other wrongful act done, committed, or suffered to the said lands, works, water courses, sources of water supply, pipes, machinery, or any apparatus belonging to or connected with any part of the works, or for any improper use or waste of the water.

26. The water commissioners are hereby empowered to arrange with the corporation or with individuals for the extension of pipes in suburbs or partially built portions of the city, by allowing a deduction from the price charged for the water to such extent as the commissioners shall see fit on the cost of the said pipes when laid by the parties under the direction of the commissioners and subject to their approval; or the commissioners may lay the pipes, charging the said parties in addition to the usual water rate a yearly interest upon the cost of such extension, which interest, or such portion thereof as shall then be due, shall be paid at the same time and collected in the same manner as the water rates.

27. The water commissioners shall have power and authority to supply any corporation, person or persons with water although not resident within the City of Ottawa, and may exercise all other powers necessary to the carrying out of their agreements with such persons as well within the townships of Nepean, Gloucester and the incorporated village of New Edinburgh as within the City of Ottawa; and they may also from time to time make and carry out any agreement which they may deem expedient for the supply of water to any railway company or manufactory; provided that no power or authority shall be exercised under this clause without the consent and approbation of the corporation of the City of Ottawa.

The other provisions of the Act need not be referred to for the purposes of this appeal.

In 1879, by the Statute of Ontario, 42 Vict., ch. 78, the powers of the water works commissioners were transferred to the Corporation of the City of Ottawa to be exercised through its Council. The Council, immediately after the passing of the Act, was to appoint a special committee of aldermen to discharge all the duties heretofore attended to by the Water Commissioners, subject to the approval and according to the directions of the Council.

In 1913, by the Statute of Ontario, 3-4 Geo. V, ch. 109, provision was made for the election of a Board of Water Commissioners. This Board was to have the management, maintenance and conduct of the waterworks of the City and of all buildings, material, machinery, land, water and appurtenances thereto belonging.

By subsec. 2 of sec. 1 of this Act, the provisions of *The Public Utilities Act* applicable to municipal waterworks, except in so far as the same may be inconsistent with the provisions of this Act or of any other special Act relating to the waterworks of the City, were to apply to and govern the Board so elected and the members thereof and the waterworks of the City.

By that statute, the City was authorized to take from certain lakes in the County of Ottawa, in the Province of

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Quebec, and to convey to the City, a supply of water for its waterworks, its municipal purposes and the use of the inhabitants of the City.

Subsec. 2 of sec. 2 of that Act provided as follows:

> The said Corporation may enter into agreements with any municipal corporation in Ontario or Quebec situate along the line of any supply pipe for supplying water to such corporation, and may supply water under the terms of any such agreement.

By the same statute, the City was given power to construct works and to acquire land and other powers for the purposes of its waterworks; and it was also given power to borrow $5,000,000 for this purpose.

Contemporaneously with the statute just mentioned, the City of Ottawa caused two other statutes to be passed respectively by the Legislature of Quebec (c. 81 of 4 Geo. V) and by the Dominion Parliament (c. 166 of 3-4 Geo. V). The former statute gave the City of Ottawa authority to obtain water supply from certain lakes in Quebec and to construct the necessary works therefor, including the right to take and acquire land, to enter into agreements with the City of Hull and with any other municipalities as to terms upon which a supply of water may be provided for such municipal corporations, such terms and conditions to be determined by The Quebec Utilities Commission, if the City of Hull and the City of Ottawa could not agree on them.

The Quebec statute contained further provisions regarding expropriation and municipal taxation, which are immaterial here.

The Dominion statute also gave power to the City of Ottawa to take water from certain lakes in the Province of Quebec, with the consent and subject to the approval of the Government of the Province of Quebec, to supply water to the City of Hull

> and to any other municipal corporation in the Province of Ontario or in the Province of Quebec, for the municipal purposes of any such municipal corporation, and the use of the inhabitants of such corporation.

It contained powers to construct works, to enter upon lands, to acquire (by expropriation or otherwise) lands or rights in Ontario and for compensation thereof, subject to the legislative control of the Legislature of Ontario; with the special provision that the construction, erection and main-

tenance of the said works in, upon or over the Ottawa and Gatineau rivers shall be subject to the approval of the Minister of Public Works for Canada.

It was stated at bar that, for the purpose of exercising the powers conferred by the Ontario Act of 1913 (c. 109 of 3-4 Geo. V) authorizing the City to take a supply of water from certain lakes, the City passed its by-law No. 3649. This by-law was quashed by Lennox J. (1).

A subsequent by-law (No. 3678) passed for the same purpose was again quashed (2).

A joint appeal by the City of Ottawa from the quashing of its by-laws Nos. 3649 and 3678 was dismissed by the Court of Appeal (3).

In 1914, by *An Act respecting the City of Ottawa* (4 Geo. V, c. 82), provision was made for taking a vote of the municipal electors on two alternative water supply systems: that authorized by sec. 2 of the Act of 1913 (c. 109), commonly termed "the Thirty-One Mile Lake scheme"; and what was termed "the Ottawa River Mechanical Filtration scheme." The vote gave a majority in favour of the latter; and, by a further Act of the same year (c. 84), provision was made for carrying this scheme into effect, subject to the approval of the Provincial Board of Health. If this Board refused to approve of the plans and specifications of the Ottawa River scheme, the Thirty-One Mile Lake scheme was to be proceeded with.

The Provincial Board of Health refused to approve the plans and specifications of the Ottawa River scheme; but an Order was made directing it to do so; and the Ottawa River Filtration scheme was subsequently carried into effect.

In 1916, by the Statute, 6 Geo. V, c. 85, the control, management and maintenance of the waterworks of the City and of all buildings, material, machinery, land, water and appurtenances thereto belonging, was vested in the Board of Control of the City, which was to discharge, subject to the approval and according to the directions of its Council, all the duties required by the Act of 1872, or by any Acts passed in amendment thereof, to be discharged by the Water Commissioners.

(1) *Re Clarey and City of Ottawa* (1913) 5 O.W.N. 370.

(2) *Re Clarey and City of Ottawa* (1914) 5 O.W.N. 673.

(3) *Re Clarey and City of Ottawa* (1914) 6 O.W.N. 116.

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Whatever doubts may be expressed as to the constitutionality of the Dominion statute of 1913 in respect of the powers therein granted to the City of Ottawa, it is unnecessary to deal with them in this appeal, for the appellant City need not rely on those powers, or the corresponding rights therein conferred, for the purposes of its argument. It was, no doubt, deemed necessary to secure from the Parliament of Canada the authority to construct, erect and maintain the projected works in, upon, or over, the Ottawa and Gatineau rivers, subject to the approval of the Minister of Public Works for Canada. And nothing more need be said about that statute for the present.

But the Ontario statute of 1913 contains two important provisions:

First, it makes applicable to the Ottawa waterworks the provisions of *The Public Utilities Act,* except, of course, in so far as they may be inconsistent with the provisions of the special Acts relating to that City; and it enacts that, saving cases where it may be inconsistent with the special Acts, *The Public Utilities Act* shall apply to and govern the waterworks in question.

Second, it gives the City of Ottawa the power to

> enter into agreements with any municipal corporation in Ontario or Quebec situate along the line of any supply pipe for supplying water to such corporation [i.e., Ottawa], and may supply water under the terms of any such agreement.

Undoubtedly the Legislature of Ontario was competent to confer such powers on the City of Ottawa, and it is not to the point to argue that these powers were granted in an Act primarily intended to authorize the City to take water from lakes in the County of Ottawa, in the Province of Quebec, and convey to that City a supply of water for its waterworks, its municipal purposes and the uses of the inhabitants of the City, and that the scheme having for object the taking of the necessary water from the lakes in question was not carried out.

The scheme may have been abandoned, at least for the time being, but the powers remain and may yet be taken advantage of.

Moreover, the Statute itself is still in force; and it provides for several other matters, including the application of *The Public Utilities Act* and the authority to supply

water to other municipalities in Ontario and Quebec. It is not to be doubted that all these powers are still in existence and vested in the City of Ottawa.

It being so, there can be no doubt that the appellant City has the required power to supply water to the respondent municipalities. It is unnecessary, therefore, to speculate as to the possible meaning of the words "any corporation" in sec. 27 of the Act of 1872. It is possible that those words are sufficient to include a municipal corporation, as decided by the Court of Appeal, to whose attention the particular subsection 2 of sec. 2 of the Act of 1913 apparently was not brought.

As for the respondents, they have power, under *The Public Utilities Act* (c. 286 of R.S.O., 1937), to purchase water from the appellant and to regulate its supply in their respective municipal area. Sections 2 (1), 12 and 25 (1) are sufficient to give them that power.

We may now, therefore, discuss the main question arising on the appeal: Whether the special Acts regulating the waterworks system of the City of Ottawa have the effect of excluding the application to the latter of subs. (ii) of sec. 59 of *The Ontario Municipal Board Act.*

Section 59 deals with the general jurisdiction and powers of the Board in relation to municipal affairs.

Subsection (ii), added in 1940, extended the jurisdiction of the Board so as to give it the power to

> hear and determine the application of any municipality to confirm, vary or fix the rates charged or to be charged in connection with water supplied thereto by any other municipality.

The subsection obviously presupposes the existence of an already valid and binding contract between the applicant municipality and the municipality which supplies water; otherwise the words "confirm" and "vary" would be deprived of any meaning whatsoever. The Board is given the competency to confirm or vary rates already charged. This can happen only in cases where the supplying municipality has made a contract or an agreement with the applicant municipality. It must mean, therefore, that the Board is given authority to intervene in contracts or agreements and to modify the rates already agreed upon. The occasion for the Board's intervention may be a change of conditions or of circumstances; but the Board evidently is to be the judge of the necessity or, it may be,

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the opportunity of varying the rates, subject to the right of appeal from the Board to the Court of Appeal, upon a question of jurisdiction, or upon any question of law, as provided for by sec. 103 of the Board's Act. If the Board is not satisfied that circumstances warrant a variation in the rates, it need only confirm the latter.

It is not as easy to foresee under what conditions the Board may be called upon to "fix the rates charged or to be charged," for the Board is not given the power to compel a municipality to supply water to another municipality. As a result, the mere fixing of rates would become quite meaningless and inoperative. Conceivably the Legislature had in contemplation the case where a municipality would be willing to supply water to another municipality willing to take it, and where the two municipalities would find it impossible to agree on the rates. They may then refer the matter to the Board, which, in that case, may exercise the power to fix those rates.

And, of course, there may be a case, such as we have in this appeal, where the City of Ottawa has been supplying water for some time to the respondent municipalities without having previously fixed the rates therefor, and, assuming that the supplying and consuming municipalities would find it impossible to agree on the rate that should be charged for the supply, the Legislature has, by the legislation of 1940, designated the Ontario Municipal Board as the proper forum to go to for the purpose. Until that legislation was passed, presumably the supplying municipality would have had to apply to the ordinary courts for the fixation and recovery of the amount due to it on the basis of *quantum meruit*.

It would seem that such is the situation here, in so far as concerns the amount due to the appellant by the respondents for the water already supplied. If it be true, as we understood it to be, that for some time the water has been supplied to the Town of Eastview and to the Village of Rockcliffe Park without any agreement as to rates, and, as it would appear, the parties cannot come to an understanding as to the proper compensation to be paid for the water so supplied, the application of the respondents to have the rates fixed was properly made to the Ontario Municipal Board under sec. 59 (ii).

The above conclusion, however, can hold true only if the appellant was unable to show, as found by the Court of Appeal, that, up to the Statute of 1940, it had the exclusive right to fix its own rates for water supply, and that the Statute of 1940, which is of general application, cannot prevail against the special Acts concerning the waterworks systems of the City of Ottawa.

Such is the contention of the City, based on the well known maxim: "*Generalia specialibus non derogant.*" The scope of that maxim is well expressed in Halsbury, Laws of England, 2nd Ed., vol. 31, p. 549, par. 732:

> 732. Statutory rights are not to be abrogated except by plain enactment, and, therefore, general statutes, whether enacted previously or subsequently, do not, if couched in general terms, operate to control special rights granted by private statutes which, while conferring such special rights, have also imposed special obligations. Rights given by a special statute are not taken away because they cause difficulties in the permissive working of general statutes not directed to the special point. A subsequent general statute may, however, indicate an express intention to control or to abrogate particular rights, especially where those rights are attached to a particular locality, and the subsequent statute brings to it entirely new benefits.
>
> A private statute can only exclude the application of a general statute to the extent to which the provisions of the general statute are excluded expressly or by necessary implication.

The rule laid down by Lord Westbury in the case of *Ex parte The Vicar and Churchwardens of St. Sepulchre's, in re The Westminster Bridge Act, 1859* (1) is this:

> If the particular Act gives in itself a complete rule on the subject, the expression of that rule would undoubtedly amount to an exception of the subject-matter of the rule out of the [general] Act.

And, in *Seward* v. *The Owner of the "Vera Cruz"* (2), the Earl of Selborne, L.C., in the House of Lords, at p. 68, said:

> Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.

Reference might also be made to the judgment delivered by Sir Alfred Wills, on behalf of the Judicial Committee,

(1) (1864) 33 L.J. Ch. 372, at 376.
(2) (1884) 10 App. Cas. 59

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in *Esquimalt Waterworks Company* v. *Corporation of the City of Victoria* (1).

But the manner in which the principle should be applied is illustrated in *Toronto Railway Company* v. *Paget* (2), where the present Chief Justice of this Court, at p. 491, says:

> One possible view is that in such cases the provision in the general Act is to be wholly discarded from consideration; the other is that both provisions are to be read as applicable to the undertaking governed by the special Act so far as they can stand together, and only where there is repugnancy between the two provisions and then only to the extent of such repugnancy the general Act is to be inoperative.

In the same case, at p. 499, former Chief Justice Anglin of this Court said:

> It is not enough to exclude the application of the general Act that it deals somewhat differently with the same subject-matter. It is not "inconsistent," unless the two provisions cannot stand together.

The principle is, therefore, that where there are provisions in a special Act and in a general Act on the same subject which are inconsistent, if the special Act gives a complete rule on the subject, the expression of the rule acts as an exception of the subject-matter of the rule from the general Act (See: *Ontario & Sault Ste. Marie Railway Company* v. *Canadian Pacific Railway Company* (3); *Upper Canada College* v. *City of Toronto* (4)).

In the words of Lord Halsbury, L.C., and of Lord Herschell, in *Tabernacle Permanent Building Society* v. *Knight* (5):

> Where is the inconsistency if both may stand together and both operate without either interfering with the other? * * * I think the test is, whether you can read the provisions of the later Act into the earlier without any conflict between the two.

If the rule, as expounded in the authorities just referred to, be applied in the present case, the Board of Commissioners was given the power to

> regulate the distribution and use of the water in all places and for all purposes where the same may be required, and from time to time shall fix the prices for the use thereof.

We may pass over sec. 25 of the Act of 1872, on the assumption that it deals only with the control and manage-

(1) [1907] A.C. 499, at 509.
(2) (1909) 42 Can. S.C.R. 488.
(3) (1887) 14 Ont. R. 432.
(4) (1916) 37 Ont. L.R. 665, at 670.
(5) [1892] A.C. 298, at 302, 306.

ment of the physical properties appertaining to the waterworks system; but, under sec. 26, the Water Commissioners were

> empowered to arrange with the corporation or with individuals for the extension of pipes in suburbs * * * by allowing a deduction from the price charged for the water to such extent as the commissioners shall see fit * * * charging the said parties in addition to the usual water rate a yearly interest upon the cost of such extension, which interest, or such portion thereof as shall then be due, shall be paid at the same time and collected in the same manner as the water rates.

And, under sec. 27,

> The water commissioners shall have power and authority to supply any corporation, person or persons with water although not resident within the City of Ottawa, and may exercise all other powers necessary to the carrying out of their agreements with such persons as well within the townships of Nepean, Gloucester and the incorporated village of New Edinburgh as within the City of Ottawa.

Moreover, we have already pointed out that, under the Act of 1913 (c. 109 of Statutes of Ontario, 3-4 Geo. V), the Corporation of the City of Ottawa

> may enter into agreements with any municipal corporation in Ontario or Quebec situate along the line of any supply pipe for supplying water to such corporation, and may supply water under the terms of any such agreement.

And the provisions of *The Public Utilities Act* applicable to municipal waterworks are made to apply to and govern the waterworks of the said City, except in so far as the same may be inconsistent with the provisions of the special Acts relating to the latter. If we refer to *The Public Utilities Act* then in force (c. 41 of 3-4 Geo. V), it is significant that the wording of sec. 9 of *The Public Utilities Act* is almost identical with the wording of sec. 10 of the special Act of 1872.

Reading the different sections we have referred to in the special Acts, and quite independently of the additional powers which may have been given to the appellant by the introduction of *The Public Utilities Act,* it would seem difficult not to conclude that the appellant has been given the authority to fix the prices and rates at which water is to be supplied by it. Indeed, its power to fix the prices and rates, if it were not otherwise expressed as it is, may be said to be incidental to its power to supply and to make agreements for that purpose. It is hardly conceivable that the City of Ottawa would have the authority

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to make agreements for the supply of water and that such authority would not carry with it the power to fix the price thereof.

Where, in sec. 10 of the Act of 1872, power is given to regulate the distribution and use of the water in all places and for all purposes where the same may be required, and from time to time to fix the prices for the use thereof; or in sec. 27, power and authority is given to supply any corporation, person, or persons, with water, although not resident within the City of Ottawa and it is said that the said Commissioners

> may exercise all other powers necessary to the carrying out of their agreements with such persons as well within the townships of Nepean, Gloucester and the incorporated village of New Edinburgh as within the City of Ottawa,

it would seem to follow that the power to make the agreement necessarily includes the power to fix the price, and that such power to fix the price is co-extensive with the power to supply the water.

In our opinion, therefore, the power to fix the prices and rates for the supply of water outside of Ottawa was granted to the latter by the special Acts concerning its waterworks system.

But it need not necessarily follow that the authority conferred upon the Ontario Municipal Board by sec. 59 (ii) is inconsistent with such powers as have been given to the City of Ottawa in its special Acts.

The authority of the Ontario Municipal Board under sec. 59 (ii) is for the purpose of supervising and controlling the rates charged or to be charged in connection with water supplied by one municipality to another municipality. As already noted, it presupposes that the prices or rates have already been fixed or agreed upon between the two municipalities; and, for some reasons of public concern present in the mind of the Legislature of Ontario, it enacts that the Board may confirm or vary these prices or rates charged or to be charged.

The two powers are not inconsistent. Those given in the general Act may well be read into the special Act without repugnancy. The City of Ottawa, in making its agreement with the other municipalities, will fix the rates; but, for some special reasons such as the happening of fresh circumstances or conditions, the Board may be asked

to intervene and to vary those prices and rates and it will be within the competency of the Board to order the variation to be made. The two provisions can stand together within the principle laid down in this Court, and already referred to, in *Toronto Railway Company* v. *Paget* (1); and, as a consequence, the maxim, *generalia specialibus non derogant,* does not operate in the present case to exclude the City of Ottawa from the jurisdiction of the Ontario Municipal Board in this particular matter.

That jurisdiction is to "hear and determine the application of any municipality to confirm, vary or fix the rates charged or to be charged," etc. The words "confirm, vary" imply that the rates are already in existence, either by having been agreed upon between the two municipalities or through having been fixed by the supplying municipality and accepted by the municipality taking the water. In that case, presumably the reason for the application to the Board for varying the rates might be the happening of fresh facts, changed conditions, or new circumstances of a nature to justify a modified price or consideration for the water supplied.

But the language of the legislation necessarily supposes already existing rates in respect of which the applicant municipality moves the Board to order a modification.

Of course, in the present case, the Court of Appeal, dealing with the applications of the Townships of Gloucester and Nepean (which had joined the present respondents in applying to vary or fix the rates for water supplied by the City of Ottawa), found that, at the time when the amendment of 1940 was enacted, the two townships had a contract still current by which the prices for water to be supplied were fixed for the term of the contract. It was deemed that the new legislation was not intended "to affect rights existing at the time of its enactment"; and, for that reason, the Court of Appeal decided that the appeal should be allowed as to the Townships of Gloucester and Nepean.

If, however, the new legislation does not affect contracts or agreements already in existence at the time it came into force, there can be no question that the intention of the Legislature was to vest in the Board the

(1) (1909) 42 Can. S.C.R. 488.

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necessary competency to modify, in respect of rates, contracts or agreements entered into at a date subsequent to the coming into force of the legislation.

It is also apparent that the Board has been given the power to fix rates for water already supplied, in cases where there has been no agreement as to rates. We apprehend that the right to "determine the application of any municipality to * * * fix the rates charged" can have no other meaning, or, at all events, is sufficiently wide to include such a power.

The Board accordingly has jurisdiction to fix the price of water supplied by the City of Ottawa to the Town of Eastview and the Village of Rockcliffe Park from the time when an actual agreement in respect of rates ceased to exist between the City and the two other municipalities respectively and for as long as the supply of water continues without the price or rate thereof being agreed upon by the parties themselves.

It was not contended that there was any power in the Municipal Board to compel the City of Ottawa to supply or to continue the supply of water to the respondents or either of them. And whether there is any governmental authority that can compel one municipality to supply water to another municipality is a question that is not before us.

The applications made to the Board by the respondents are merely "to vary or fix the rates for water supplied by the City of Ottawa." We find nothing, either in the order issued by the Board on September 27th, 1940, or in the judgment of the Court of Appeal, to indicate that the order of the Board has reference to anything more.

The respondents raised a preliminary point that this Court had no jurisdiction to entertain the appeal. The appeal was launched after special leave thereto was granted by the Court of Appeal; but the respondents contend that the judgment of the Board was not final within the definition of "final judgment" in the *Supreme Court Act*.

The point in controversy in the Court of Appeal, and upon which that Court made an adjudication, was in respect to the jurisdiction of the Ontario Municipal Board and the right of the respondents to bring the appellant before that Board for the object of fixing or varying the rates for the supply of water by the appellant to the

respondents. In our view, the judgment of the Court of Appeal determined a substantive right of the parties which was in controversy in that proceeding, and accordingly a matter well within the definition of "final judgment" in sec. 2 (*b*) of the *Supreme Court Act*. (*Quebec Railway, Light & Power Company* v. *Montcalm Land Company and the City of Quebec* (1)).

The appeal should be dismissed with costs.

DAVIS J.—This is an appeal by the City of Ottawa from the order of the Court of Appeal for Ontario which affirmed the jurisdiction of the Ontario Municipal Board.

The City of Ottawa has for many years supplied water to two adjoining municipalities, the Town of Eastview and the Village of Rockcliffe Park, by delivering the same, not to the individual consumers in those municipalities, but to the adjoining municipalities themselves, who take the water at or near the City's boundary line, carry it through their own waterworks systems, make delivery to their own consumers and apparently charge their consumers with whatever rates they see fit.

Not only has the City of Ottawa been supplying water to these adjoining municipalities for many years, but it is continuing to do so and makes no threat of cessation of the supply of water by it to these adjoining municipalities. Prior to an amendment to *The Ontario Municipal Board Act* made in 1940, to which I shall presently refer, the then existing written agreements between the City of Ottawa and these two adjoining municipalities respectively had expired by effluxion of time and the parties have since been unable to agree upon the price or rate to be paid by the adjoining municipalities to the City of Ottawa for the continued supply of water. Some tentative arrangement appears to have been made between the parties until the matter is settled, though the terms of any such arrangement are not disclosed.

By ch. 20 of the Statutes of Ontario, 1940, sec. 59 of *The Ontario Municipal Board Act*, R.S.O. (1937), ch. 60, which defines the general municipal jurisdiction of the Board, was amended by adding thereto the following clause:

(1) [1927] S.C.R. 545, at 560.

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59. (ii) hear and determine the application of any municipality to confirm, vary or fix the rates charged or to be charged in connection with water supplied thereto by any other municipality.

The adjoining municipalities made application to the Municipal Board, pursuant to this amendment, to have the rates to be charged them by the City of Ottawa fixed by the Board. But the City protested upon several grounds that the Board had no jurisdiction in the matter. The City contended that strictly it has not and never had any power to sell and deliver water to other municipal corporations; that if there is any such power, there is no obligation to do so; that the City, if it has authority to make an agreement for the supply of water, will impose whatever rates it thinks fair and that the Ontario Municipal Board has no right to interfere and fix the rates to be charged.

The Board heard argument on this preliminary objection of the City but decided that it had jurisdiction to proceed with the applications. The Court of Appeal, pursuant to sec. 103 of *The Ontario Municipal Board Act*, gave leave to the City to appeal to that Court. That Court affirmed the jurisdiction of the Municipal Board to deal with the applications of the two adjoining municipalities. The City of Ottawa now further appeals to this Court from that judgment.

The respondents, the adjoining municipalities, raised a preliminary point that this Court is without jurisdiction, contending that the order of the Court of Appeal is not a final judgment. But if the appellant, the City of Ottawa, succeeds in its appeal, that is, succeeds in its contention that the Ontario Municipal Board has no jurisdiction to entertain the applications of the adjoining municipalities to fix the rates to be charged, then that is the end of the matter, and I think the order appealed from comes within the definition of "final judgment" in the *Supreme Court Act*.

The validity of *The Ontario Municipal Board Act* was considered recently by the Privy Council in the case of *Toronto* v. *York* (1). In the judgment of the Privy Council the Board as constituted by the statute is primarily an administrative body and as such its constitution and operations are within the legislative competence of the

(1) [1938] A.C. 415.

Ontario legislature. The Privy Council did point out several sections in the Act which it thought involved judicial functions and as such beyond the legislative competence of the Ontario legislature, but considered those sections severable.

The real point in the appeal is whether or not the Municipal Board had the right to entertain an application to determine its own jurisdiction in the matter. The Board heard argument and decided it had power to proceed. On the particular facts of the case I think the Board was competent to say, as it did, that it could proceed with the applications of the adjoining municipalities to fix the rates to be charged. It was not in dispute that the City of Ottawa has been supplying water to these adjoining municipalities for many years and continues to do so. It is not suggested by the City that it desires or intends to cut off the supply of water to these adjoining municipalities. But the parties cannot agree upon the rate or price. On those facts I think it plain that the case is covered by the 1940 amendment to *The Ontario Municipal Board Act* and that the Board was right in saying that it could proceed to hear the applications to fix the rates to be charged. Such a decision is plainly something incidental to the administrative functions of the Board.

I should dismiss the appeal with costs.

HUDSON J.—It is unnecessary for me to restate the facts and the relevant sections of the Statute. My conclusion is that the City of Ottawa has power to supply the adjacent municipalities with water, but that the Ontario Municipal Board has not the power to compel Ottawa to sell or deliver water to these municipalities. I think that the true construction of the enactments is that the Ontario Municipal Board has power to fix the rates charged or to be charged by Ottawa to these municipalities, but that the City of Ottawa has the right, in so far as the Board is concerned at least, to refuse to deliver water if the rates thus imposed are not satisfactory.

It was contended on behalf of Eastview and Rockcliffe that the Provincial Minister of Health has the right to compel delivery of water but no such order has been made, and it is not necessary to the disposition of the

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present matter that this question should be considered. My view, therefore, is that the opinion of the Court of Appeal is substantially correct and that the appeal should be dismissed, with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Frank B. Proctor.*

Solicitors for the respondents: *Long & Daly.*

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* May 23.
* June 24.

RE CARNOCHAN

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Habeas corpus—Appeal taken, pursuant to s. 8 of Habeas Corpus Act, R.S.O., 1937, c. 129, from dismissal of application for order discharging applicant from detention in mental hospital—Powers of Court of Appeal as to procedure—Direction for examination and report by doctors—Sufficiency of certificates for admission of a patient to hospital, under s. 20 of Mental Hospitals Act, R.S.O., 1937, c. 392, as to examination and investigation made.

On an appeal, taken pursuant to s. 8 of *The Habeas Corpus Act,* R.S.O., 1937, c. 129, from the dismissal of appellant's application (made following the issue of a writ of *habeas corpus*) for an order discharging him from custody in an Ontario hospital where he was detained as being mentally ill, the Court of Appeal for Ontario, after reserving judgment, directed that appellant be examined separately by two doctors appointed by the Court, not connected with any Ontario hospital for persons mentally ill, and then adjourned the appeal *sine die*. The two doctors made their reports, finding appellant to be mentally ill; whereupon the Court of Appeal dismissed the appeal. Appellant appealed to this Court.

Held: Under s. 8 (2) of said Act, the Court of Appeal had the power to proceed as it did; and the present appeal from its order should, upon consideration of said doctors' reports, be dismissed.

A point raised in the Court of Appeal and in this Court (and which, it was held, could, in a proceeding of this nature, be so raised, though not raised before the Judge of first instance) was that appellant was improperly detained because he was not a properly certificated patient under s. 20 of *The Mental Hospitals Act,* R.S.O., 1937, c. 392, in that the certificates upon which he was originally admitted to the hospital did not "show clearly" that the medical practitioner "after due inquiry into all the necessary facts relating to the case of the patient, found him to be mentally ill." No opinion was expressed in the Court of Appeal or in this Court as to the sufficiency of the certificates in question; but this Court pointed out

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

that "it might be difficult successfully to contend that a certificate did 'show clearly' that due inquiry was made into all the necessary facts relating to the case of the patient, if a medical practitioner signing a certificate considered that the patient had delusions without any investigation on the doctor's part as to whether they were in fact delusions."

APPEAL from the judgment of the Court of Appeal for Ontario dismissing the appellant's appeal from the order of Hogg J. (1) dismissing his application (made following the issue of a writ of *habeas corpus*) for an order discharging him from custody in the Ontario Hospital at Brockville, where he was detained as being mentally ill.

S. Berger K.C. and *H. Solway* for the appellant.

C. P. Hope K.C. for the respondents.

The judgment of the Court was delivered by

KERWIN J.—This is an appeal by Robert Kenneth Carnochan from an order of the Court of Appeal for Ontario affirming the dismissal by Hogg J. of the application of the appellant for an order discharging him from custody in the Ontario Hospital at Brockville. The only ground stressed before us was that the appellant never was, and is not now, a proper certificated patient under section 20 of *The Mental Hospitals Act,* R.S.O., 1937, chapter 392, and that he is, therefore, improperly detained and should be discharged.

The certificates upon which the appellant was admitted to the institution were made upon the prescribed forms but it is said that they were not sufficient because each does not, to quote subsection 2 of section 20,

state and show clearly that the medical practitioner * * * after due inquiry into all the necessary facts relating to the case of the patient, found him to be mentally ill.

Emphasis was placed upon the words "show clearly." In each certificate appears paragraphs 1 and 2. These, together with the answers made by one doctor, are as follows:—

1. Facts indicating mental illness observed by myself:

Appearance.	Negative.
Conduct.	Quiet and rational. Seems to have fixed delusions as to the infidelity of his wife and says his mother, brother

(1) [1940] O.R. 310; [1940] 3 D.L.R. 412.

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and sister side with her. Also will not definitely state
Conversation. that his wife may have put poison in his food but that he has some grounds for thinking so.

2. Other facts, if any, indicating mental illness communicated to me by others:

(State from whom the information received.)
[Not answered.]

In the other certificate, these paragraphs and the answers read:—

1. Facts indicating mental illness observed by myself:

Appearance. Nervous, suspicious.
Conduct. Talkative, agitated.
Conversation. Pertaining to supposed infidelity of wife and fact which to the patient's mind confirms his theory of her infidelity and illegitimacy of their child.

2. Other facts, if any, indicating mental illness communicated to me by others:—

(State from whom the information received.)

Brief outline of history for past 2 years obtained from Dr. McKerracher *re* patient's belief that his wife has committed adultery with patient's brother, that child is illegitimate, that he is actually impotent, that wife has fed him saltpetre, etc., causing monthly rectal pains.

This point was not dealt with by Mr. Justice Hogg because at that time counsel for appellant admitted "that all the terms and provisions of section 20 of the said statute were complied with." The question was raised, however, before the Court of Appeal, and in a proceeding of this nature there is nothing to prevent this being done. We do not understand that the Court of Appeal took any different view. The formal order of that Court states:— "this Court expressing no opinion or conclusion thereon." After reserving judgment, the Court of Appeal directed that the appellant be examined separately by two doctors appointed by the Court, not connected with any Ontario Hospital for persons mentally ill, and then adjourned the appeal *sine die*. The two doctors made their reports, finding the appellant mentally ill, whereupon the Court of Appeal dismissed the appeal.

A writ of *habeas corpus* had been issued, following which the motion was made before the judge of first instance, and the appeal from the latter's order to the Court of Appeal was taken pursuant to section 8 of *The Habeas Corpus Act*, R.S.O., 1937, chapter 129. Under subsection 2 of this section, that Court had the power to proceed as it did, and consideration of the reports from the two doctors appointed by the Court of Appeal satisfies us that

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the proper order has been made in the circumstances. We express no opinion as to the sufficiency of the certificates under which the appellant was originally committed to the Ontario Hospital at Brockville, but deem it proper to point out that it might be difficult successfully to contend that a certificate did "show clearly" that due inquiry was made into all the necessary facts relating to the case of the patient, if a medical practitioner signing a certificate considered that the patient had delusions without any investigation on the doctor's part as to whether they were in fact delusions.

The appeal should be dismissed without costs.

Appeal dismissed without costs.

Solicitors for the appellant: *Berger & Greenberg.*

Solicitor for the respondents: *C. P. Hope.*

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* May 26, 27, 28.
* June 26.

MEDERIC LANDREVILLE AND ARTHUR GARDNER (DEFENDANTS) ..... APPELLANTS;

AND

ELMYES BROWN (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Motor vehicles—Plaintiff struck by motor car—Action for damages—Directions to jury—Jury's findings—Question as to negligence of plaintiff—Onus of proof on defendants as to negligence—Form of question to jury—Amount of damages awarded—New trial.

The action was for damages for injury to plaintiff caused by his being struck by a motor car while he was making a purchase at a bakery sleigh on a business street in the city of Ottawa. The jury, to the question: "Have the defendants satisfied you that the damages sustained by the plaintiff were not caused or contributed to by the negligence of [the driver of the car]?" answered "No"; and to the question: "Was the plaintiff guilty of any negligence which caused or contributed to the accident?" answered "No"; and assessed plaintiff's damages at $25,000, for which amount judgment was given. An appeal to the Court of Appeal for Ontario was dismissed, and defendants appealed to this Court.

This Court ordered a new trial.

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

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The Chief Justice (dissenting in part) would dismiss the appeal except as to damages, as regards which he would direct a new trial.

Per Rinfret and Crocket JJ.: Defendants' defence was not fairly put to the jury by the trial judge, particularly, in view of the circumstances and plaintiff's actions, with regard to the question as to plaintiff's negligence and with regard to the doctrine of contributory negligence. On these matters and also as to the degree of onus of proof on defendants under *The Highway Traffic Act* (R.S.O., 1937, c. 288, s. 48), there were statements or inadequate explanations amounting to misdirection in the trial judge's charge. The form of the first above quoted question to the jury, as the questions were put in this case, was calculated to mislead a jury. The fact that the Legislature has placed the onus of negativing negligence upon the defendant does not require the use of such a form of question. The amount of damages awarded was unreasonable, and unjustifiable in any conceivable view of the evidence.

Per Davis and Hudson JJ.: Some features of the trial were so highly unsatisfactory that there should be a new trial.

Per Taschereau J.: The verdict of the jury on the questions of contributory negligence and assessment of damages was not supported by the evidence, and no jury properly instructed and acting judicially could reasonably have reached it.

APPEAL by the defendants from the judgment of the Court of Appeal for Ontario dismissing their appeal from the judgment of McFarland J., upon the findings of the jury, at trial. The action was for damages for injury suffered by the plaintiff caused by his being struck by a motor car driven by the defendant Gardner, who was an employee of the defendant Landreville, and was, in the course of his employment, driving a taxi-cab owned by the defendant Landreville.

The plaintiff had called to the driver of a bakery sleigh which was proceeding westerly on the north part of Rideau street in the city of Ottawa, and the plaintiff crossed the street to purchase some pies and was in the act of purchasing them at the sleigh when the accident happened, being at about 4.50 p.m. on February 16, 1939. The taxi-cab was being driven westerly. The driver of it testified that he had got off the street car tracks to let a street car behind him pass, that he was driving at about 10 to 12 miles an hour, that the surface of the street was icy, that the sun was shining very brightly right in his eyes, and he did not see the bread sleigh until he was near to it, that he put on his brakes and the car skidded.

The plaintiff was badly injured, suffering a severe crushing of the right leg.

At the trial, the jury, to the question: "Have the defendants satisfied you that the damages sustained by the plaintiff were not caused or contributed to by the negligence of the defendant Gardner?" answered "No"; and to the question: "Was the plaintiff guilty of any negligence which caused or contributed to the accident?" answered "No." The jury assessed the damages sustained by the plaintiff at $25,000, for which amount judgment was given for the plaintiff.

The defendants appealed to the Court of Appeal for Ontario and their appeal was dismissed. The defendants appealed to this Court.

Auguste Lemieux K.C. for the appellants.

Walter F. Schroeder K.C. and *Lionel Choquette* for the respondent.

THE CHIEF JUSTICE (dissenting in part)—With great respect for my colleagues, who take a different view, I should dismiss this appeal except as to damages, as regards which I should direct a new trial.

The judgment of Rinfret and Crocket JJ. was delivered by

CROCKET J.—I think the record discloses that the appellants' defence was not fairly put to the jury. The gist of that defence was that the plaintiff's injury was solely caused by his own negligence, and that he was the author of his own regrettable misfortune. That was the vital issue as raised by the pleadings. It clearly necessitated for its intelligent consideration by a jury, not only a statement of the recognized definition of negligence generally, but a clear, precise and understandable exposition of the much more difficult doctrine of contributory negligence in its application to the facts and circumstances of the case. Yet the presiding judge, after telling the jury that they must accept his directions upon questions of law, and that the crucial question in the case was whether Gardner's act in driving blind on a street heavy with traffic for at least 100 feet was the act of a prudent man, distinctly told them that that was not the act of a prudent man. And this without directing their attention to any of the undisputed facts and circumstances, upon which

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Duff C.J.

the defence relied as an excuse for his doing so. He had already plainly told the jury that all three of the persons involved in the collision (Gardner, the driver of the horse drawn bakery delivery sleigh and the plaintiff) had a right to be where they were (presumably immediately before the collision). And this, notwithstanding the fact, as he later pointed out, that he personally would accept the evidence of the driver of the delivery sleigh, and of the plaintiff himself, as against the testimony of a passing witness, whose evidence was to the contrary, and that the situation was this, as he saw it:

> the sleigh is there, there is a car parked between it and the curb, so we may take it that the left side of the sleigh (that is the south side) was probably 12 to 14 feet south of the north curb of the street.

This close to five o'clock in the afternoon on one of the principal and most congested streets in Ottawa with a double line of electric car tracks and trams constantly running along each line. In my opinion, these statements constituted positive misdirection.

Moreover, two questions, upon which the appellant's liability depended, were left to the jury. They were:—

> 1. Have the defendants satisfied you that the damages sustained by the plaintiff were not caused or contributed to by the negligence of the defendant Gardner?
>
> 2. Was the plaintiff guilty of any negligence which caused or contributed to the accident?
>
> If your answer to that question is "Yes," then state fully the particulars of such negligence.

All His Lordship said in leaving these two decisive questions to the jury was:—

> You, gentlemen, know that in actions of this kind, for damages, and so on, the onus is upon the plaintiff, the man who brings the action; he is under the necessity of satisfying the jury, beyond a reasonable doubt, that the defendant was negligent. But some years ago, on account of the tremendous increase in accidents involving pedestrians and motor-cars, and the tremendous slaughter on the highways, the legislature in its wisdom saw fit to change that, and consequently they enacted a new section, which is in the Highway Traffic Act, which governs these affairs. The effect of that section is that there are issues involved which arise out of the contact of a motor-car with a pedestrian on a highway, the onus is shifted, and the necessity is upon the driver of the car to prove that he was not guilty of negligence; that the vehicle was not operated in a manner which constituted negligence on his part.

Having instructed the jury that had it not been for the action of the legislature, "on account of the tremendous

increase in accidents involving pedestrians and motor-cars, and the tremendous slaughter on the highways," in shifting the onus which formerly lay upon the plaintiff in an action against the owner or driver of a motor-car of satisfying the jury "beyond a reasonable doubt," the jury could not very well be expected to draw any other inference from this language than that the owner or driver of a car, upon whom the onus is now placed, must satisfy the jury that he was not guilty of negligence by the same degree of proof, viz., proof "beyond reasonable doubt." No such result, of course, follows the shifting of the onus from the plaintiff to the defendant in any civil action for damages.

This to my mind was further misdirection.

Having regard to the undisputed fact that it was the plaintiff himself who, from the sidewalk on the opposite side of the street, signalled the bakery delivery to stop in order that he might buy some pies on the street, and that he detained the covered sleigh in the position described by him beside a parked automobile while he inspected the pies the driver was showing him after opening the rear doors of the delivery sleigh, and to the continuous movement of automobiles and electric cars along that side of the street, I cannot think that the presiding judge was warranted in practically withdrawing from the jury, as he did, the question of negligence on the part of the plaintiff himself. The icy condition of the street pavement, and the fact that all automobiles moving westward would have to swerve from the northerly railway track when signalled by approaching electric cars and make room for them to pass, must surely have been as patent to him as to anybody else. By his own evidence he not only made the first move in the creation of the obstruction of the highway, but he caused its continuance for his own private convenience regardless of the inconvenience and danger it might cause to others.

The suggestion that the plaintiff could not in law be held either to have caused or to have materially contributed to cause the accident by so unnecessarily stopping a horse drawn baker's delivery at such a time and place and in such circumstances and detaining it while he leisurely proceeded to make his desired purchase in the middle of

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the street without regard either to his own safety or the danger he was thereby creating for others, cannot to my mind be entertained.

Then there is the further objection as to excessive damages. As to this the learned trial judge gave much fuller instructions, going into detail as to the plaintiff's occupation as a paper-hanger, painter and decorator, and his average earnings for a period before the accident (stated by him as being $100 a month); the loss of the rental value of an apartment; the expenses of medical, surgical and hospital treatment he had undergone, and the estimated cost of future treatment in the event of amputation of his leg becoming necessary, which one of the doctors placed at $1,000, including the cost of an artificial leg, and $1,500 in case it should not have to be amputated. Dealing with the question of the prospective loss of earnings as a painter, His Lordship directed the jury that they must consider the possibility of his securing some other employment. In this connection he pointed out that he was a man of only 33, who had impressed him as of fairly good education, keen and industrious, and suggested the probability of a man of his age and capability getting employment at some task in some other business, which might afford him a greater remuneration than his former business did. The jury, however, made a lump assessment of damages—no less than $25,000. This amount, I have no hesitation in saying I regard as altogether unreasonable and one which it is impossible to justify in any conceivable view of the evidence.

Counsel for the respondent submitted a statement in his factum to meet the objection regarding the abnormal amount of the assessment. This statement tries to show that approximately $10,000 of this amount was for special damages as estimated, including loss of earnings for two years more ($3,456, at $144 a month) and the $1,500 estimated for possible future hospital, medical and surgical expenses. Apparently counsel had then concluded that the leg would not have to be amputated, so the $1,500 is set down instead of the $1,000, had amputation been found necessary. Anyway it is submitted that the jury really awarded *only* $15,000 for general damages. The statement only shows, I think, the extreme difficulty the respondent's

counsel have had in their endeavours to find any justification for such an unprecedented award of damages for a comminuted fracture of a leg, or, as the plaintiff's attending surgeon described it, "an explosive fracture" of the leg—"The kind of fracture," the plaintiff's counsel immediately interjected, "that you would expect from a shell, that sort of blows the bone to pieces?" to which the attending surgeon at once replied "Yes, explodes it." It is, perhaps, not to be wondered at in view, not only of the harrowing nature of the injury, but of the apparently excruciating nature of the treatment the plaintiff was compelled to undergo, as depicted in this and other equally leading questions,—none of which seem to have been objected to,—that the jury should have felt it to be their duty, not only to indemnify the plaintiff, but to punish the defendant and his employer by saddling upon them such an amount of damages as it would be difficult to justify, even upon the basis of exemplary or punitive damages.

I do not say that there was no evidence, upon which a jury might perhaps find that there was some negligence on the part of the driver of the automobile, which contributed in the legal sense to the accident. For this reason the action could not now well be dismissed. I cannot understand, however, how the jury, had they been properly instructed upon the question of contributory negligence and had the question concerning the defendants' negligence been put to them in the same form as that which concerned the plaintiff's negligence, could reasonably find, in the face of the plaintiff's own testimony, that the plaintiff himself was not guilty of any negligence, which contributed to the accident. I understand that there have been some cases, in which a similar form of question has been used, but it seems to me that the form of question 1 is calculated to mislead a jury, especially when it is not accompanied by any direction, in the event of their answering "Yes," to state fully the particulars of such negligence, as the jury here were directed to do in question 2, and to place any defendant in such a case at a distinct disadvantage as implying that the court expected the answer to that question to be "No." The fact that the Legislature has placed the onus of negativing negli-

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gence upon the defendant does not require the use of such a form of question. Surely any trial judge could leave the question of the defendants' negligence in the same terms as those in which he leaves the question of the plaintiff's negligence, and instruct the jury as to the burden of proof, which the *Highway Traffic Act* has cast upon the driver or owner of a motor vehicle.

For all these reasons, my conclusion is that this appeal should be allowed, and the judgment of the Court of Appeal affirming the trial judgment set aside with costs here and in the Court of Appeal, and that the whole case should be sent back for a new trial. The costs of the abortive trial should be in the discretion of the judge at the new trial.

The judgment of Davis and Hudson JJ. was delivered by

DAVIS J.—I regard some features of the trial of this action as so highly unsatisfactory that I should direct a new trial.

I should therefore allow the appeal, set aside the judgment at the trial and the order of the Court of Appeal affirming that judgment, and direct a new trial. The appellants are entitled to their costs in the Court of Appeal and in this Court. The costs of the abortive trial should be in the discretion of the judge at the new trial.

TASCHEREAU J.—I believe that this appeal should be allowed and a new trial ordered.

The verdict of the jury on the questions of contributory negligence and assessment of damages is not supported by the evidence, and I am satisfied that no jury properly instructed and acting judicially could reasonably have reached it.

The appellants should be entitled to their costs in the Court of Appeal and in this Court. The costs of the abortive trial should be in the discretion of the judge at the new trial.

Appeal allowed with costs; new trial ordered.

Solicitor for the appellants: *Auguste Lemieux.*

Solicitor for the respondent: *Lionel Choquette.*

WILLIAM KOUFIS .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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* April 30.
* May 1.
* June 24.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Criminal law—Evidence—Accused charged with arson—Contention that accused arranged that other persons carry out the crime—Evidence of conversations between such other persons—Admissibility—Questioning of accused, in cross-examination, as to alleged fire at other premises than those in question.

The accused appealed from the judgment of the Supreme Court of Nova Scotia *en banc*, 15 M.P.R. 459, affirming his conviction of having unlawfully and wilfully set fire to a store. The appeal was based on certain objections of law, which were grounds of dissent in the said Court *en banc*.

(1) One G. testified that accused hired him to commit the crime and G. arranged with P. to do it. P. testified that he secured the assistance of T. P. and T. gave evidence that they set the premises on fire. It was objected that evidence of P. and T., particularly with reference to their conversations with each other and with G., was improperly admitted.

Held, that this ground of appeal failed.

Per the Chief Justice and Kerwin J.: The evidence of P. and T. did not implicate accused in any way, but was admissible to prove the actual setting of the fire. Accused was not charged with having conspired to commit arson and, as the trial judge explained to the jury, the actions of P. and T. and the conversations between them were relevant to the charge upon which accused was being tried only if the jury were satisfied as to the truth of the evidence given by G. relating to his conversation with accused.

Per Rinfret, Crocket and Taschereau JJ.: Any acts done or words spoken in furtherance of the common design may be given in evidence against all (*Paradis* v. *The King*, [1934] S.C.R. 165). This rule applies to all indictments for crime, and not only when the indictment is for conspiracy, and it also applies even if the conspirator whose words or acts are tendered as evidence has not been indicted (*Cloutier* v. *The King*, [1940] S.C.R. 131, at 137). These principles were properly applied to the present case.

(2) It was objected that the prosecuting officer, in cross-examining accused, had improperly questioned him as to an alleged fire at other premises than those in question, which questioning had greatly prejudiced accused with the jury.

Held: Effect should be given to this objection; the appeal should be allowed and a new trial ordered.

Per the Chief Justice and Kerwin J.: The likely, if not the only, effect upon the jurymen of said questioning would be that accused was a person who was very apt to commit the crime with which he was

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

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charged. A person charged with having committed a crime is not only entitled to have placed before the jury only evidence that is relevant to the issues before the court, but, when testifying on his own behalf, he may not be asked questions that have no possible bearing upon such issues and might only tend to prejudice a fair trial. The questioning complained of could not be justified on the ground that it went to accused's credibility: credibility cannot arise in connection with questions relating to an extraneous matter that has not been opened by the examination in chief of accused or otherwise on his behalf.

Per Rinfret, Crocket and Taschereau JJ.: An accused has to answer the specific charge mentioned in the indictment for which he is standing on trial, and the evidence must be limited to matters relating to the transaction which forms the subject of the indictment (*Maxwell* v. *Director of Public Prosecutions,* [1935] A.C. 309); otherwise the real issue may be distracted from the jury's minds, and an atmosphere of guilt created, prejudicial to the accused. The accused cannot be cross-examined on other criminal acts supposed to have been committed by him, unless he has been convicted, or unless these acts are connected with the offence charged and tend to prove it (*Paradis* v. *The King,* [1934] S.C.R. 165, at 169), or unless they show a system or a particular intention, as decided in *Brunet* v. *The King,* 57 Can. S.C.R. 83. The questioning of accused complained of may have influenced the verdict of the jury and caused accused a substantial wrong.

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc* (1) affirming (Hall and Archibald JJ. dissenting) the conviction of the appellant, at trial before Doull J. and a jury, of having " unlawfully, without legal justification or excuse, and without colour of right, wilfully set fire" to a certain store "and did thereby commit arson."

The questions before this Court on this appeal, and the nature of the evidence or proceedings from which such questions arose, are sufficiently set out in the reasons for judgment in this Court now reported.

The appeal to this Court was allowed and a new trial ordered.

J. W. Maddin K.C. and *I. G. MacLeod* for the appellant.

Hon. J. H. MacQuarrie K.C. and *M. A. Patterson* for the respondent.

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

(1) 15 M.P.R. 459; [1941] 1 D.L.R. 609.

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KERWIN J.—The appellant Koufis was convicted on an indictment charging him with having unlawfully set fire to a store known as Diana Sweets, in Sydney, Nova Scotia, on or about April 18th, 1940. On an appeal to the Supreme Court of Nova Scotia *en banc*, the conviction was affirmed. Mr. Justice Hall and Mr. Justice Archibald dissented and would have ordered a new trial on the ground that the prosecuting officer, in cross-examining the accused, had improperly questioned him as to an alleged fire at premises known as the London Grill, in Sydney, which greatly prejudiced the accused with the jury. Mr. Justice Hall also dissented on the ground that the evidence of two witnesses called by the Crown (Pentecost and Thistle), particularly with reference to their conversations with each other and with one Jerome Gerrior, was improperly admitted in evidence.

Koufis appealed to this Court against the affirmance of this conviction on these two questions of law. As to the second point, we announced at the hearing that we would not require to hear counsel for the respondent, as we considered the evidence of the two men admissible. As to the first, we have had the advantage of a complete argument and we have determined that the questions referred to were improperly asked.

At one time Koufis was a partner in the restaurant and confectionery business known as Diana Sweets and also in a similar business operated under the name of the London Grill. He sold his interest in both and left Sydney. Upon his return to that city, he desired to become a partner in the Diana Sweets business again but that was not acceptable to some, if not all, of the then members of the partnership. Thereupon he, with others, commenced a third business known as the Dome, which was still in operation on April 18th, 1940.

On that date the store in which the Diana Sweets business was carried on and which was known by that name was destroyed by fire and it was in connection with that fire that Koufis was charged with arson. The basis for the charge was the evidence of Gerrior. He testified that Koufis had promised to pay him a sum of money to burn Diana Sweets and had said to him: "If you are scared to do it, get somebody else and give him half the money";

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and that he (Gerrior) accordingly arranged with Pentecost to do the work. The latter testified that he in turn secured the assistance of Thistle. Both Pentecost and Thistle gave evidence that they set the premises on fire, and the learned trial judge, therefore, was quite accurate when he stated in his charge to the jury: "so, if you give effect to that evidence, it is clear that somebody is guilty of the crime of arson."

The trial judge put to the jury as the crux of the case: "Did the accused directly or through Gerrior procure Thistle and Pentecost to set the fire?" He instructed the jury as to the danger of convicting upon the uncorroborated testimony of an accomplice and also told them that there was no corroboration of the stories told by Gerrior, Pentecost and Thistle. The evidence of the last two did not implicate Koufis in any way but was admissible to prove the actual setting of the fire. Koufis was not charged with having conspired to commit arson and, as the trial judge explained, the actions of Pentecost and Thistle and the conversations between themselves were relevant to the charge upon which Koufis was being tried only if the jury were satisfied as to the truth of the evidence given by Gerrior relating to his conversations with the accused. On this point we are satisfied that the appeal could not succeed.

Turning now to the first point, we find that when John Raptis, one of the partners in Diana Sweets and a witness on behalf of the Crown, was testifying in chief as to the conversation between him and the accused when the latter wanted to again become a partner in that business, the following occurred:—

Q. Tell us what he said.

A. Lots of us down on Charlotte street and we get along very well. I never saw him until he got the Dome down to the Capital, and I met him one night before the first Dome was burned and he ask me "You have to raise the price, no money in the meals" and I say we are doing all right; and I saw him again after the fire, the first fire in the Dome.

Q. A year ago?

A. Two years ago in August.

Q. It was before that first fire he complained to you about the prices?

A. Yes, wanted to increase the prices. After he was at this Dome I never see him except in Church, just say "hello."

Q. You were not talking to him after the fire?

A. No.

This was the first mention in the evidence of any fire other than the one in question.

The following appears in the examination in chief of Gerrior when he was asked as to whether he had seen Koufis about two weeks before Christmas of 1939 after an accidental fire had occurred in Diana Sweets:—

A. Yes, two days after. I told him about it and he said "Why did you not leave it burn" and I said "Why?" and he said "If you had leave it burn I would give you $50." I let it go at that. Couple of days after I met him and he asked me to go down and see him, and I did go down about twelve at night. He told me if I burn the Diana he would give me $350; he did not like them, they did not come up to his place and they were no good; he wanted them destroyed. He told me how it could be done. He said "You could burn it and nobody would suspect you because you are a fireman. When the other Dome burned nobody suspected the fireman and no questions asked to him."

Q. Was he at the other Dome when it burned?

A. He was running it.

Later in his testimony in chief, in the course of an answer to a question, he stated: "After the Dome Grill burned I went to see Koufis."

Testifying on his own behalf, the accused, in answer to his own counsel and with reference to the Dome business, was asked:—

Q. And you were burned out?

A. Yes.

Q. What did you do then?

A. We have heavy loss in the fire. We lose $5,000 and another $4,000. Either $9,000 or $10,000 altogether.

In cross-examination he was asked what he considered the Diana Sweets business was worth at the time he sold his interest in it.

A. $28,000 or $27,000 besides the good will.

Q. Was the Diana Sweets worth more then than at the time of your last fire?

A. I don't know. That is for the time I was there.

Later in cross-examination he was asked a number of questions as to the amount of insurance that had been carried on the Dome business at the time of a fire there. While we are not concerned with the evidence as to any fire at the Dome restaurant since no dissent is based on the admission of that evidence, I have referred to it in order to show how those fires came to be mentioned. Then

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followed the evidence with reference to the London Grill, upon which the dissent below has been based and which evidence I transcribe:—

Q. Did you own the London Grill?
A. Yes, four partners.
Q. What four partners?
A. Roy Woodill, Russell Urquhart, myself and Gus Mandros.
Q. That place burned too?
A. Never.
Q. Never a fire there?
A. Never a fire there in the London Grill?
Q. Do you mean the London Grill situated on the corner of Charlotte and Wentworth streets was never on fire at any time?
A. Never have any claim for fire insurance.
Q. Was there a fire there?
A. Inside the store?
Q. Yes.
A. The London store never had a fire. The building next to it. There are two places there, the London Grill on one side and groceries on the other.
Q. The two are under one roof?
A. Absolutely.
Q. And this fire was in the partition between the two?
A. No, started at the end of the building.
Q. Was it underneath the building the fire started?
A. I don't know, the other end.
Q. It was underneath the building, wasn't it?
A. No, not in our basement.
Q. Wasn't it underneath the building?
A. I don't know.
Q. Anyway, the building that the London Grill was in caught fire?
A. Yes.

This was the only reference to a fire at or near the London Grill and the likely effect, if not the only effect, upon the jurymen of this line of cross-examination, particularly the questions "Was it underneath the building the fire started" and "It was underneath the building, wasn't it" and "Wasn't it underneath the building," would be that the accused was a person who was very apt to commit the crime with which he was charged. In fact, the trial judge stated to the jury: "The only reason he would be asked about another fire is to show he was likely to start this." Again there is no dissent as to the charge and I mention it merely to indicate that any doubt in the mind of the jury as to the purpose of these questions would be set at rest by this comment.

By section 4 of the *Canada Evidence Act,* every person charged with an offence is a competent witness for the defence, and by section 12, a witness may be questioned

as to whether he has been convicted of any offence and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction. We are not concerned on this appeal with the question as to when the prosecution is entitled to give evidence of the bad character of an accused because it is not suggested that Koufis had been convicted of any crime in connection with the fire at the London Grill, or that he had been even charged with any such crime, or in fact that any crime had been committed by anyone. A person charged with having committed a crime is not only entitled to have placed before the jury only evidence that is relevant to the issues before the Court, but, when testifying on his own behalf, he may not be asked questions that have no possible bearing upon such issues and might only tend to prejudice a fair trial. In the opinion of the majority of the Supreme Court *en banc,* these questions were justified on the ground that they went to the credibility of the accused, but credibility cannot arise in connection with questions relating to an extraneous matter that has not been opened by the examination in chief of the accused or otherwise on his behalf. The conviction should be set aside and a new trial ordered.

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

TASCHEREAU J.—The appellant, William Koufis, has been found guilty of the crime of arson and sentenced to serve five years in Dorchester Penitentiary. The Court of Appeal for Nova Scotia confirmed this conviction (Hall and Archibald JJ. dissenting).

There is no suggestion that the accused set fire himself to the building called the Diana Sweets which was burned, but the contention of the Crown is that the accused hired one Jerome Gerrior to commit the crime and that the latter offered Clayton Pentecost one hundred and seventy-five dollars ($175), who shared this sum with Edward Thistle to burn the premises. The grounds of appeal are the following:—

1. The evidence of Clayton Pentecost and Edward Thistle, particularly with reference to their conversations

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with each other and Jerome Gerrior, was inadmissible in the trial against William Koufis and was improperly admitted in evidence.

2. The accused was greatly prejudiced in his defence by the publication and circulation in the City of Sydney and surrounding districts of a certain newspaper known as *The Steelworker and Miner,* which charged the accused with having committed the offence hereinbefore recited as well as imputing to him, the said William Koufis, the crime of arson in connection with fires which have occurred at premises known as the Dome Grill at Sydney, as well as with an alleged fire at premises known as the London Grill at Sydney, and an alleged fire in a bowling alley in Sydney.

3. The learned prosecuting officer for the County of Cape Breton in cross-examining the accused improperly questioned him as to fires in the said Dome Grill and the London Grill, which greatly prejudiced the accused with the jury.

I believe that the first ground of appeal is unfounded. It is well settled law that any acts done or words spoken in furtherance of the common design may be given in evidence against all (*Paradis* v. *The King* (1)). This rule applies to all indictments for crime, and not only when the indictment is for conspiracy, and it also applies even if the conspirator whose words or acts are tendered as evidence has not been indicted (*Cloutier* v. *The King* (2)). These principles were properly applied to the present case, and I believe that the conversations between Gerrior, Pentecost and Thistle were rightly admitted in evidence.

The appellant further submits that even if such an evidence is legal, there must be some independent evidence of conspiracy before the statements of co-conspirators become admissible one against the other. Although the pronouncements on this ground have not always been unanimous, the matter has been definitely settled in the case of *The King* v. *Paradis,* cited *supra,* and which was based on a decision rendered by the Supreme Court of

(1) [1934] S.C.R. 165. (2) [1940] S.C.R. 131, at 137.

British Columbia (*The King* v. *Hutchinson* (1)). In the case of *Paradis* v. *The King* (2), Mr. Justice Rinfret, giving the judgment of the Court, said:—

> Nor would it be error for a trial judge to permit proof of acts of alleged conspiracy to be given in evidence before the agreement to conspire has been established, if the latter is in fact proved during the course of the trial.

The second point raised by the appellant is that the accused has been prejudiced by the publication of certain articles in *The Steelworker and Miner.*

The articles complained of were certainly of a serious character, as they clearly stated that the appellant was the party responsible for several fires which occurred in Sydney some time before the trial. These articles, however, were not referred to at the trial and were put in the record only when the case reached the Court of Appeal. An affidavit was filed signed by I. J. MacLeod to the effect that *The Steelworker and Miner* is widely circulated throughout the County of Cape Breton and the City of Sydney; but there is nothing in the record or the evidence to show that the members of the jury had any knowledge of the contents of these articles nor that they did not give a free unbiased verdict. Under these circumstances, I am of opinion that the appellant cannot succeed on this point.

The third ground of appeal is much more serious and is obviously the one on which the appellant practically rests his whole case. It raises the question of the cross-examination of the accused by the solicitor for the respondent on previous fires which occurred at the Dome Grill and at the London Grill at Sydney. The learned judges, however, do not enter a formal dissent as to the cross-examination on the fire which destroyed the Dome Grill, but they dissent on the ground that the accused has been improperly cross-examined as to the alleged fire at the London Grill. The *Canada Evidence Act,* section 12, says:—

> A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction.

If the accused admits having committed the offence, the answer, being a collateral one, is obviously final. If he

(1) (1904) 8 Canadian Criminal Cases, 486.

(2) [1934] S.C.R. 165, at 170.

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denies having committed the offence, then the conviction may be proved by legal means provided for in subsection 2, paragraphs (*a*) and (*b*), of section 12. The authority given to the Crown is to cross-examine the accused on *previous convictions,* but this section 12 cannot be interpreted as meaning that the accused may be cross-examined on offences which he is suspected of having committed but for which he has not been convicted.

When an accused is tried before the Criminal Courts, he has to answer the specific charge mentioned in the indictment for which he is standing on trial, " and the evidence must be limited to matters relating to the transaction which forms the subject of the indictment " (*Maxwell* v. *Director of Public Prosecutions* (1)). Otherwise, " the real issue may be distracted from the minds of the jury," and an atmosphere of guilt may be created which would indeed prejudice the accused.

In the present case, the accused was asked in cross-examination *if he had owned the London Grill? If that place had burned too? If the fire had started underneath the building?* All these questions were obviously asked in order to convey to the jury the impression that the accused had set fire previously to another building, and to establish the possibility that he committed the offence for which he is now charged. The accused cannot be cross-examined on other criminal acts supposed to have been committed by him, unless he has been convicted, or unless these acts are connected with the offence charged and tend to prove it (*Paradis* v. *The King* (2)), or unless they show a system or a particular intention as decided in *Brunet* v. *The King* (3). It is clear to my mind that this cross-examination may have influenced the verdict of the jury and caused the accused a substantial wrong.

I would allow the appeal and direct a new trial.

Appeal allowed and new trial ordered.

Solicitor for the appellant: *J. W. Maddin.*
Solicitor for the respondent: *M. A. Patterson.*

(1) [1935] A.C. 309. (2) [1934] S.C.R. 165, at 169.
(3) (1918) 57 Can. S.C.R. 83.

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* May 9.
* June 24.

FRANK E. WALKER AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

BARCLAYS BANK (CANADA) (DEFENDANT) ..... } RESPONDENT;

AND

THE SOUTH SHORE LUMBER & BUILDERS SUPPLIES LIMITED. (MIS-EN-CAUSE)

FRANK E. WALKER AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

BARCLAYS (CANADA) LIMITED (PLAINTIFF) ..... } RESPONDENT;

AND

THE SOUTH SHORE LUMBER & BUILDERS SUPPLIES LIMITED. (MIS-EN-CAUSE)

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

Novation—Company—Shares given to a bank as collateral security for debt——Sale of assets and business of company as going concern—Consideration being payment by purchaser of all debts and liabilities of vendor—Purchaser also to create and issue bonds to be delivered to vendor and then to be delivered by the latter to the creditors of the company—Agreement between the parties—Whether intentions of parties were to operate novation—Whether full and complete discharge or only qualified discharge—Rights of the bank upon collateral securities—Articles 1171, 1173, 1174 C.C.

One J. R. Walker, in order to accommodate Walker Press Limited, provided, as collateral security for certain indebtedness of the latter to the respondent bank, a certificate in his name for 150 shares of the South Shore Lumber Company and $10,000 of bonds of the Back

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* PRESENT:—Rinfret, Crocket, Davis, Hudson and Taschereau JJ.

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River Power Company. On October 31st, 1932, an agreement was entered into between Walker Press Limited, as vendors, E. S. Alger as purchaser, and Walker Paper Company, Kruger Paper Company, The Royal Bank of Canada and Barclays Bank (Canada), as intervenants, by the terms of which Walker Press Limited sold its assets and business as a going concern to E. S. Alger, in consideration of the payment and satisfaction of all the obligations of the latter in respect of the lease of the premises occupied by it and in respect of the debts and liabilities of the vendor mentioned in a certain list attached thereto. Alger further undertook to cause a new company to be incorporated and to transfer to that company all the assets conveyed to him, subject to the above mentioned liabilities, and to invest $2,000 in cash in the new company; he was also to cause the new company to create and issue bonds of the par value of $19,000, secured on all the assets acquired from Walker Press Limited as well as upon all future assets of the new company, these bonds to be delivered to Walker Press Limited within 30 days from the date of the agreement. Walker Press Limited undertook to surrender its charter within a reasonable time after the receipt of the bonds and deliver them to the intervenants pro rata and in proportion to their respective claims, Alger acknowledging that he was already in possession of all the assets of Walker Press Limited. Then the agreement contained the following clause: The intervenants (above mentioned) agreed with the Walker Press Limited, vendors and Alger, purchaser, "that when the said bonds of the new company, hereinabove men- "tioned, shall have been issued and delivered to the Walker Press "Company or its representative or representatives that they individu- "ally will accept a pro rata amount of the said bonds proportionate "to their respective claims against the Walker Press in full settle- "ment and satisfaction of any and all claims they may have against "the Walker Press and the purchaser directly or indirectly, save that "inasmuch as the Royal Bank of Canada and Barclay's Bank "(Canada) and the Kruger Paper Co. Limited hold certain securities "as collateral security against the amounts due them by the Walker "Press, it is understood that the said banks and the Kruger Paper "Co. Ltd., shall be entitled to continue to hold and/or realize upon "such security until and unless their said claims are paid in full "through the payment of the said bonds or otherwise, it being under- "stood that the present agreement shall not in any way interfere "with the rights of the said banks and Kruger Paper Co. Ltd. in "respect of said collateral security."

Pursuant to the agreement, Alger caused the new company to be incorporated, and the bonds were created and delivered to Walker Press Ltd.; but, before they were issued, S. R. Alger, a brother of the purchaser, submitted to the respondent bank an option to purchase the bonds to which they were entitled as a result of the agreement, for the sum of $2,811.24. The option was accepted and carried out. The bank received the sum of $2,811.24 and surrendered to S. R. Alger its rights to the bond of $14,056.20, which it would otherwise have received. Subsequently, by their action, the executors of James R. Walker claimed that the debt for which the collateral security had been given was extinguished and that they were entitled to recover from the respondent bank the 150 shares of the South Shore Lumber & Builders Supplies Ltd and the $10,000 bonds of the Back River Power Company. At the same time, Barclays (Canada)

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Limited, an assignee of the bank, brought an action to compel the completion of the transfer of the South Shore Company's share certificate in its name. The Superior Court, applying articles 1171, 1173 and 1174 C.C., held "that the agreement of 1932 (did) not "create novation; that the Walker Press was discharged only with "the reserve that the Bank would hold or realize upon the collateral "security until the claim of the Bank was paid in full * * *, it "being understood that the agreement would in no way interfere with "the rights of the bank in respect of the said collateral security—a "stipulation which amounts to say that the bank renounces to any "personal recourse against the Walker Press Limited, but the debt is "not extinguished, since the bank has the right to sell the collateral "in payment of the debt." The judgment of the Superior Court was affirmed by the appellate court, which decided that the respondent bank was entitled to hold the collateral securities: the action of the appellants was therefore dismissed and, consequently, the action of Barclays (Canada), respondent in the second appeal, to have the transfer completed in its favour, was maintained.

Held that the judgment appealed from should be affirmed. The intention of the parties to the agreement above mentioned was not to effect novation: as stated in article 1171 C.C., novation is never presumed and the intention to effect it must be evident. By force of article 1173 C.C., even if the agreement should be interpreted as one by which Walker Press Limited gave to the respondent bank a new debtor who obligated himself towards the bank, such delegation did not effect novation "unless it is evident that the creditor intends to discharge the debtor who makes the delegation." The alleged full and complete discharge to the Walker Press Limited was, in reality, only a qualified discharge. Undoubtedly the intervenants were giving up any right to claim against Walker Press Limited personally and any right to be paid out of the general assets of Walker Press Limited, except in so far as the bonds which they were getting from Alger Printing Company (the new company) were to be secured upon those assets through the trust deed executed in connection with the issue of the bonds. But their rights upon the collateral securities remained untrammelled and, to the extent that the existence of the debt of Walker Press Limited was necessary for the purpose of preserving to the collateral security the character of a legal pledge, that debt was to remain in existence. It could no longer be claimed as a personal debt against the Walker Press Limited, it could not have been realized against the latter's general assets, but it subsisted as a debt which could be realized against the collateral securities. It became a claim *propter rem*.

APPEALS from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming two judgments of the Superior Court, Philippe Demers J., rendered in two actions which were joined at the trial, the trial judge dismissing an action taken by the appellants as executors of the estate of the late J. R. Walker against the respondent bank for the return to them of shares and bonds which had been pledged with the respondent by a company known as the Walker Press Limited as general

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security for that company's indebtedness to the respondent as its banker, and the trial judge maintaining an action by the respondent, in the second appeal, so that the latter be declared to be the only owner of the shares and ordering the transfer of these shares in the books of that company.

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

Aimé Geoffrion K.C. and *H. N. Chauvin K.C.* for the appellants.

Ls. St-Laurent K.C. and *W. C. Nicholson K.C.* for the respondents.

The judgment of the Court was delivered by

RINFRET J.—These are two appeals by the testamentary executors of the late James Robert Walker from judgments rendered against them by the Superior Court of the province of Quebec, sitting in Montreal and the Court of King's Bench (appeal side) of that province.

The decision in each of them depends on the solution to be given to identical questions of law, and, in point of fact, on the construction of the same document. They were submitted to this Court on the same argument and may be conveniently disposed of on the same set of reasons.

The late James Robert Walker, in order to accommodate Walker Press Limited, provided, as collateral security for certain indebtedness of the latter to the respondent bank, the following:

(*a*) a certificate in the name of J. R. Walker for 150 shares of the common stock of the South Shore Lumber Company (now the South Shore Lumber & Builders Supplies Limited);

(*b*) $10,000 of the 6% bearer bonds due 1st January, 1941, of the Back River Power Company.

On October 31st, 1932, an agreement was entered into between Walker Press Limited, as vendors, E. S. Alger of Oshawa, Ont., as purchaser, and Walker Paper Company, Kruger Paper Company Limited, The Royal Bank of Canada, and Barclays Bank (Canada), as intervenants, by the terms of which Walker Press Limited sold its assets

and business as a going concern to E. S. Alger, in consideration, amongst others, of the said Alger providing for the payment of the debts of Walker Press, as will later be more fully explained.

In the first action, the appellants prayed for the delivery to them of the 150 shares of the South Shore Lumber & Builders Supplies Limited and of the $10,000 of bonds of the Back River Power Company, or, in the alternative, for the payment to them of the equivalent value of these securities; and further for an order to the mis-en-cause to make the requisite entries in its books to give effect to the judgment to be rendered.

In the second action, instituted by Barclays (Canada) Limited, it was stated that, for the purpose of realizing upon its security, the respondent bank sold and transferred the 150 shares of the South Shore Company to Barclays (Canada) Limited; and the conclusion is that Barclays (Canada) Limited be declared the true and only owner of the shares, and that the estate of James R. Walker be condemned to do all things and sign and execute all documents necessary to complete the transfer of the shares on the books of the mis-en-cause, failing which the mis-en-cause be authorized and ordered to register the necessary transfer upon service of a copy of the judgment to be rendered and to issue to Barclays (Canada) Limited a new certificate in its name for the shares in question.

The agreement of October 31st, 1932, provided for the sale by Walker Press Limited and the purchase by E. S. Alger of all the business and assets of Walker Press Limited, in consideration of the payment and satisfaction of all the obligations of the latter in respect of the lease of the premises occupied by it and in respect of the debts and liabilities of the vendor mentioned in a certain list attached thereto. Alger further undertook to cause a new company to be incorporated and to transfer to that company all the assets conveyed to him, subject to the above mentioned liabilities; and to invest $2,000 in cash in the new company. He was to cause the new company to create and issue bonds of the par value of $19,000 secured on all the assets acquired from Walker Press Limited, as well as upon all future assets of the new company, as a first floating charge by way of hypothec, mortgage, pledge,

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cession and transfer. These bonds of $19,000 were to be delivered to Walker Press Limited within thirty days from the date of the agreement.

Walker Press Limited undertook to surrender its charter within a reasonable time after the receipt of the bonds and to divide the bonds and deliver them to the intervenants pro rata and in proportion to their respective claims.

Alger acknowledged that he was already in possession of all the assets of Walker Press Limited.

Then comes the following clause on which the whole litigation turns:

> And the said intervenants hereunto intervening, having taken communication of the foregoing provisions of the present agreement, individually acknowledge that the said agreement is made in fulfilment of an agreement between them and the said E. S. Alger set forth in a letter to him dated the 8th of July, 1932, and the said intervenants agree with the parties of the first and second part that when the said bonds of the new company, hereinabove mentioned, shall have been issued and delivered to the Walker Press Company or its representative or representatives that they individually will accept a pro rata amount of the said bonds proportionate to their respective claims against the Walker Press in full settlement and satisfaction of any and all claims they may have against the Walker Press and the purchaser directly or indirectly, save that inasmuch as the Royal Bank of Canada and Barclays Bank (Canada) and the Kruger Paper Co. Limited hold certain securities as collateral security against the amounts due them by the Walker Press, it is understood that the said banks and the Kruger Paper Co. Ltd., shall be entitled to continue to hold and/or realize upon such security until and unless their said claims are paid in full through the payment of the said bonds or otherwise, it being understood that the present agreement shall not in any way interfere with the rights of the said banks and Kruger Paper Co. Ltd. in respect of the said collateral security.

Pursuant to the agreement, Alger caused the new company to be incorporated, and the bonds were created and delivered to Walker Press Ltd.; but, before they were issued, S. R. Alger, a brother of the purchaser, submitted to the respondent bank an option to purchase the bonds to which they were entitled as a result of the agreement, for the sum of $2,811.24. The option was accepted and carried out. The bank received the sum of $2,811.24 and surrendered to S. R. Alger its rights to the bond of $14,056.20, which it would otherwise have received.

As a consequence, the executors of James R. Walker claimed that the debt for which the collateral security had been given was extinguished and that they were entitled to recover from the bank the 150 shares of the

South Shore Lumber & Builders Supplies Ltd. and the $10,000 bonds of the Back River Power Company. At the same time, Barclays (Canada) Limited, as assignee of the bank, brought its action to compel the completion of the transfer of the South Shore Company's share certificate in its name.

The Superior Court (Demers J.) and the majority of the Court of King's Bench held that the debt to the bank had not yet been paid, was not extinguished, and that the bank was, therefore, entitled to hold the collateral securities, and the action of the Walker estate was dismissed. Consequently the action of Barclays (Canada) Limited to have the transfer completed in its favour was maintained.

St-Germain J., in the Court of King's Bench, dissented. He was of opinion that the agreement of October 31st, 1932, created a novation in respect of the debt to the respondent bank and that, by releasing the bond of the Alger Company, the bank had caused the principal debt to be extinguished and the debtor to disappear, thereby becoming obliged to return the collateral security to the Walker estate.

It is now our duty to decide whether both courts below have erred in their interpretation of the agreement to which the intervenants, and amongst them the respondent bank, have given their consent.

The Superior Court referred to articles 1171, 1173 and 1174 of the Civil Code. They read as follows:

1171. Novation is not presumed. The intention to effect it must be evident.

1173. The delegation by which a debtor gives to his creditor a new debtor who obliges himself toward the creditor does not effect novation, unless it is evident that the creditor intends to discharge the debtor who makes the delegation.

1174. The simple indication by the debtor of a person who is to pay in his place, or the simple indication by the creditor of a person who is to receive in his place, or the transfer of a debt with or without the acceptance of the debtor, does not effect novation.

Applying these articles, the Superior Court held

that the agreement of 1932 (did) not create novation; that the Walker Press was discharged only with the reserve that the bank would hold or realize upon the collateral security until the claim of the bank was paid in full * * * it being understood that the agreement would in no way interfere with the rights of the bank in respect of the said collateral security—a stipulation which amounts to say that the bank

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renounces to any personal recourse against the Walker Press Limited, but the debt is not extinguished, since the bank has the right to sell the collateral in payment of the debt.

The Court held that such a stipulation was legal. If it were not, by article 1080 C.C., the whole agreement would be null.

The Court added that

by the said agreement, E. S. Alger did not oblige himself to pay said debt to the bank, but promised to give a further guarantee to the bank by issuing bonds, which obligation he has fulfilled to their satisfaction.

The Court of King's Bench found no error in that judgment and confirmed it purely and simply, St-Germain J. dissenting, as already stated.

By what may be called the intervention clause, the intervenants agreed with Walker Press and with E. S. Alger, that, when the bonds would have been issued and delivered to the Walker Press Company, or its representatives, they individually would accept a pro rata amount of the bonds proportionate to their respective claims against the Walker Press

in full settlement and satisfaction of any and all claims they may have against the Walker Press and the purchaser (E. S. Alger) directly or indirectly, save that inasmuch as * * * Barclays Bank (Canada) * * * hold certain securities as collateral security against the amounts due them by the Walker Press, it is understood that the said bank * * * shall be entitled to continue to hold and/or realize upon such security until and unless their said claims are paid in full through the payment of the said bonds or otherwise; it being understood that the present agreement shall not in any way interfere with the rights of the said bank * * * in respect of the said collateral security.

The rights which the bank possessed "in respect of said collateral security" are evidenced by the hypothecation thereof made on November 29th, 1931, and of which a copy was filed in the record. The collateral securities were stated to be held by the bank as a pledge to secure all advances presently made or which at any time thereafter may be made to Walker Press Limited. It was agreed that, in default being made in repaying any advance or any part thereof, when due, or on failure to comply with any demand for payment, or if any security should, in the opinion of the bank, depreciate in value, the bank could, without notice, without advertisement and without any other formality, all of which are declared waived, sell the collaterals, or any of them on any recognized exchange,

or by public or private sale. The bank was not to be responsible for any loss occasioned by any sale of any collateral, or by the retention of or refusal to sell the same. The bank or its manager was made the attorney irrevocable of the Walker Press Limited and could transfer all or any of the collaterals, or fill in all blanks in any transfer of stock, bonds or debentures, or any power of attorney or document delivered to it, and the bank could delegate its powers and its delegate could sub-delegate the same.

At the request of the bank, Walker Press Limited was to execute all transfers and documents which may be reasonably required, with all powers of sale and other necessary powers as may be expedient for vesting in the bank, or such person or persons as it may appoint, all or every such collaterals.

If any payment on account of the advance be made the bank shall not by reason thereof be required to surrender any of the collateral pledged.

Obviously, the main object of the intervention of the bank in the agreement of 1932 was to give the bank's consent to the sale by the Walker Press Limited of all its assets (bulk sale), under articles 1569 (*a*) *& seq.* of the Civil Code, to E. S. Alger—a sale which otherwise could not have been made to the prejudice of the Walker Press' creditors.

The intention was not to effect novation. As stated in art. 1171 C.C., novation is never presumed and the intention to effect it must be evident.

Here, by force of art. 1173 C.C., even if the agreement should be interpreted as one by which Walker Press Limited gave to the bank a new debtor who obliged himself towards the bank, such delegation did not effect novation "unless it is evident that the creditor intends to discharge the debtor who makes the delegation." Otherwise, the simple indication by the Walker Press of a person who was to pay in its place did not effect novation (Art. 1174 C.C.).

The words in the intervention clause:

in full settlement and satisfaction of any and all claims they may have against the Walker Press and the purchaser directly or indirectly,

if the stipulation stopped there, would of course be decisive of the present case; but these words are qualified by what

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follows; and what follows is a saving condition, which would have no meaning unless it is understood to mean what the learned trial judge has held to be the true construction of the agreement. The qualification is that, inasmuch as the bank holds certain collateral securities against the amounts due by the Walker Press, it is understood that the bank shall be entitled to continue to hold and to realize upon such securities until and unless their "said claims are paid in full through the payment of the said bonds or otherwise."

The words "said claims" are evidently the claims against Walker Press Limited. The words "or otherwise" mean that the parties contemplated that these "claims" might be paid either through the payment of the bonds or in some other way. The bond issued by the new company, delivered to Walker Press Limited and, in turn, remitted to the respondent bank, was not, therefore, to be the only means through which the bank could expect payment of its debt against the Walker Press.

Moreover, the clause goes on to say:

> it being understood that the present agreement shall not in any way interfere with the rights of the said bank * * * in respect of the said collateral security.

And, as we have seen, the rights of the bank in respect of the collateral security were that the bank could sell them on a recognized exchange, or by public or private sale, in order to satisfy its claim against Walker Press Limited. The bank could realize upon these collaterals or allow them to be sold and was not to be responsible for any loss occasioned by any sale. Further, any substituted collaterals would be held by the bank subject to the same terms and conditions and with the same powers and authorities.

It was not E. S. Alger himself, but it was the new company that he was to form, which undertook to issue the bonds; and the bonds were not to be issued in favour of the intervenants, including the respondent bank, but they were to be issued and given to Walker Press Limited purely and simply in payment of the assets and the business purchased by Alger.

The true meaning of the intervention by the larger creditors was that they consented to the wholesale transfer of the assets and the business of Walker Press to Alger

(which could not have legally been made without such consent); but, although they were, of course, willing to receive the bonds of the new company, and they would, in consideration for receiving same, relieve Walker Press of its personal obligations towards them, they made it quite distinctly understood that their rights in the collateral securities were to be in no way interfered with. And that means that such rights would remain absolutely intact, to guarantee the claim already in existence against Walker Press as well as the additional claim which they would acquire against Alger Printing Company, when they would become the holders of the bonds. This is clearly expressed in the clause by the words " shall be entitled to continue to hold and/or realize upon such security until and unless their said claims are paid in full through the payment of the said bonds or otherwise." Henceforth the bank and the larger creditors were to have a claim both as a result of holding the bonds " or otherwise "; and the agreement was not " in any way " to interfere with the rights of these larger creditors " in respect of the said collateral securities." They would have been interfered with in some way if the collateral securities were not to guarantee the full original claim against Walker Press and were afterwards to guarantee only the payment of the bonds. In other words, the intervenants intended to preserve their full rights to be paid out of the proceeds of the collateral securities, until and unless they had been otherwise paid of their debt.

So that the alleged full and complete discharge to the Walker Press was, in reality, only a qualified discharge. Undoubtedly the intervenants were giving up any right to claim against Walker Press personally and any right to be paid out of the general assets of Walker Press, except in so far as the bonds which they were getting from Alger Printing Company were to be secured upon those assets through the trust deed executed in connection with the issue of the bonds.

But their rights upon the collateral securities remained untrammelled and, to the extent that the existence of the debt of Walker Press was necessary for the purpose of preserving to the collateral security the character of a legal pledge, that debt was to remain in existence. It could no longer be claimed as a personal debt against the Walker

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Press, it could not have been realized against the latter's general assets, but it subsisted as a debt which could be realized against the collateral securities. It became a claim *propter rem.*

True it is that the stipulation in the agreement whereby the Walker Press undertook to surrender its charter supplies a difficulty in the interpretation adopted by the trial judge and by the Court of King's Bench; but the construction of the agreement may not depend upon this stipulation taken alone and isolated from the remainder of the document. The agreement must be interpreted as a whole. There is to be found in it the clear intention of preserving all the rights of the creditors against the collateral security, and, of necessity, the intention that the Walker Press' indebtedness should subsist in so far as necessary to keep the pledge alive.

It follows that we are in agreement with the conclusions of the judgments appealed from.

The consequence is that when Walker Press delivered the bonds to the respondent bank, either physically or constructively, in compliance with the agreement, it was getting relieved of the personal obligation it had incurred towards the respondent bank in so far as that obligation may have authorized the bank to realize against the general assets of Walker Press; but it was not otherwise relieved of its obligation in so far as it could be realized against the collateral security. There was no intention to effect novation in that respect; and, at all events, such intention was far from being evident, or such as to meet the requirements of the Civil Code. The respondent bank sold the bond of the Alger Printing Company for an amount less than the total indebtedness of Walker Press Limited. In view of what we have already said, this bond could well be considered, as it has been by the two courts below, as a further guarantee or security to the bank. Under the terms of the hypothecation of the collateral securities, this additional security was held by the bank "subject to the same terms and conditions and with the same powers and authorities" as had been conferred in respect of the original collaterals. The bank could sell these collaterals, or any of them, by private sale. And it was not to be responsible towards Walker Press "for any loss occasioned by any sale of any collateral."

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Both the trial court and the appellate court came to the conclusion that

> Il semble bien, d'après la preuve, qu'il n'aurait guère été possible de trouver acheteur à un prix plus élevé pour ces bons.

These findings are fully warranted by the evidence. At all events, the burden of proving the contrary fell upon the appellants, and they have failed to discharge that burden.

We have given every consideration to the very able argument of counsel for the appellants and we find ourselves unable to come to a conclusion different from that reached by the judgments appealed from, which should, therefore, be confirmed with costs.

Appeals dismissed with costs.

Solicitors for the appellants: *Chauvin, Walker, Stewart & Martineau.*

Solicitors for the respondents: *Magee, Nicholson & O'Donnell.*

EDYTHE G. LAMPORT (PLAINTIFF).....APPELLANT;

AND

STANLEY ALEXANDER THOMPSON AND CHARTERED TRUST AND EXECUTOR COMPANY, EXECUTORS AND TRUSTEES OF THE LAST WILL AND TESTAMENT OF ALEXANDER M. THOMPSON, DECEASED, AND TRUSTEES OF THE EDYTHE G. LAMPORT TRUST, AND THE SAID STANLEY ALEXANDER THOMPSON IN HIS PERSONAL CAPACITY AND AS ADMINISTRATOR AD LITEM OF THE ESTATE OF HARRY ALCROFT THOMPSON, AND CHARTERED TRUST AND EXECUTOR COMPANY (DEFENDANTS) ..... } RESPONDENTS.

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* March 12, 13, 14, 17, 18.
* June 24.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Limitation of actions—Action for alleged breach of trust—Application of s. 46 (2) of The Limitations Act, R.S.O., 1937, c. 118—Proviso in s. 46 (2) (b) that statute shall not begin to run against beneficiary

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

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unless and until interest of beneficiary becomes an interest in possession—Beneficiary having an interest in possession as to revenue of fund and a contingent interest in corpus.

This Court dismissed an appeal from the judgment of the Court of Appeal for Ontario, [1940] O.R. 201, dismissing the appellant's appeal from the judgment of Hogg J. (*ibid*) dismissing her action, which was brought for relief for alleged breach of trust.

Under the will of her father, who died on October 18, 1929, appellant was entitled, during a certain period after her father's decease, to part, and after expiration of said period, to the whole, of the revenue from a trust fund to be set apart by the trustees and executors of the will; should appellant become a widow, she was to receive the corpus of the fund, but if she died without having become a widow, the fund was to go to her brothers.

The trust fund was partially set up in December, 1929, and was completed in 1936. In the action, commenced in March, 1937, against the executors and trustees of the will, appellant alleged that a certain mortgage, included in the partial set up of the fund in December, 1929, was not a proper security to have been included therein. There was no allegation of fraud or fraudulent breach of trust.

Held (*per* Rinfret, Kerwin, Hudson and Taschereau JJ.): As the action was commenced more than six years after the alleged breach of trust occurred, it was barred by s. 46 (2) of *The Limitations Act* (R.S.O., 1937, c. 118). Appellant did not come within the proviso in s. 46 (2) (*b*) that the statute of limitations "shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes an interest in possession." So far as the revenue from the trust fund was concerned, appellant's interest was one in possession; and, that being so, it could not be said that, because she had only a contingent interest in the corpus of the fund, she came within said proviso. The proviso is not intended to protect an interest *in rem* but a beneficiary. Appellant's cause of action, if it existed, arose when her interest as the person entitled to the income or part of it was an interest in possession, and the lapse of time had barred her claim for the alleged breach of trust, even though she might be entitled to a further interest in the property in the future. (Hudson J. held also that, on the evidence, appellant must fail on the ground that her action was barred by a certain agreement of August 7, 1931, made for the purpose of settling matters in dispute between her and the defendants).

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) dismissing her appeal from the judgment of Hogg J. (1).

The plaintiff was a beneficiary under the will of her father who died on October 18, 1929. The defendants were executors and trustees of the will; and two of them

(1) [1940] O.R. 201; [1940] 2 D.L.R. 619.

were brothers of the plaintiff and were the residuary legatees under the will. The action, commenced on March 19, 1937, was for relief for alleged breach of trust. (The defendant Harry Alcroft Thompson died on May 16, 1939, since the trial of the action; and the defendant Stanley Alexander Thompson was appointed administrator *ad litem* of his estate).

By the will the testator gave all his estate to his executors and trustees upon certain trusts, one of which was to set apart for the benefit of the plaintiff the sum of $100,000 and to keep the same invested in good legal securities and to pay to her the sum of $2,500 per year out of the net revenue thereof, for a period of the first ten years after the testator's decease, and after the expiration of said period of ten years she was to receive the full revenue from said $100,000, together with any increase that there might be to the same owing to her receiving only a portion of the net revenue therefrom for the said period of ten years. The full net revenue was to be paid to her for the balance of her life only. Should she become a widow then she should receive the corpus. After her death without having become a widow, the said bequest so set apart for her benefit should revert and become part of the residue of the estate and be divided equally between the testator's two sons.

In December, 1929, assets representing the sum of $60,000 were set apart as part of the plaintiff's trust fund. In the action the plaintiff alleged that a certain mortgage for $30,000, included in these assets so set apart, was not a proper security to have been included therein, and that defendants failed in their duty as trustees in allocating this mortgage to the plaintiff's trust fund.

The defendants completed the whole of the trust fund in 1936.

There was an agreement dated August 7, 1931, for the purpose of settling matters in dispute between the plaintiff and the defendants. In the action the plaintiff asked that this agreement be set aside for the reason that she did not have independent advice and was not aware, when she executed the agreement, of the state or condition of the property covered by said mortgage for $30,000 allocated to her trust fund and approved by her under the terms of the agreement as part of the fund.

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The trial judge, Hogg J., dismissed the action (1). He held that the facts and circumstances present in the case were such that the defendants, as trustees, were protected from liability by s. 46 of *The Limitations Act* (now R.S.O., 1937, c. 118), there having elapsed over seven years from the time when, according to the plaintiff's claim, the defendants acted in violation of the trust, until the issue of the writ in the action. He dealt also, however, with other questions which were raised in the action and decided them in favour of the defendants. As to the said agreement of August 7, 1931, he held that the plaintiff's actions subsequent to the date of her execution of that agreement, and the length of time which had elapsed since she acquired knowledge of the matters with respect to which she now complained, were sufficient to show conclusively that she acquiesced in the agreement and its terms and that she elected to abide by it.

In the Court of Appeal (1), McTague J.A., with whom Robertson C.J.O. agreed, based his judgment, dismissing the appeal, upon s. 46 of *The Limitations Act* (R.S.O., 1937, c. 118), which, he held, applied and was an answer to the plaintiff's claim. Fisher J.A. agreed with McTague J.A. as to the action being barred by the statute; and he also held that the agreement of August 7, 1931, was a bar; that plaintiff had approved the agreement, received and accepted benefits thereunder, acquiesced in its terms and elected to be bound by it.

The plaintiff appealed to this Court.

R. L. Kellock K.C. and *J. E. Tansey* for the appellant.

D. L. McCarthy K.C. and *K. G. Morden* for the respondent Chartered Trust and Executor Company.

J. L. G. Keogh for the respondent Thompson.

THE CHIEF JUSTICE—I concur with the judgment dismissing the appeal with costs.

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

KERWIN J.—Under the terms of the will of her father the appellant was entitled, during the first ten years after his decease, to part of the revenue from a trust fund which he directed his executors and trustees to set apart. After

(1) [1940] O.R. 201; [1940] 2 D.L.R. 619.

the expiration of the ten years, the appellant was entitled to the entire revenue. Should she become a widow, she was entitled to the corpus of the fund but, if she died prior to becoming a widow, the fund was to be divided equally between her brothers. The latter and a trust company were named executors and trustees of the will and are the respondents in the present appeal. These executors and trustees set aside certain securities to constitute part of the fund, among them being a mortgage which the appellant as plaintiff in this action claimed was not a proper trust security and sued the respondents for breach of trust.

The trust fund was partially set up on December 12th, 1929, and the claim is that the breach of trust occurred at that time. As the respondents subsequently completed the fund and have retained nothing from it, I agree with Mr. Justice McTague when he observes: "It may be a case of improperly constituting the fund, but it is not a case of retention." Hence the action is not one to recover trust property or the proceeds thereof retained by the trustees or previously received by them and converted to their use, as mentioned in subsection 2 of section 46 of *The Limitations Act,* R.S.O., 1937, c. 118; nor is there any allegation of fraud or fraudulent breach of trust.

The action having been commenced more than six years after December 12th, 1929, it is barred by virtue of clause (*b*) of subsection 2 unless the appellant is brought within the following words of that clause:—

> but so nevertheless that the statute * * * shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes an interest in possession.

So far as the revenue from the trust fund is concerned, the appellant's interest was one in possession, and it was admitted by Mr. Kellock that her claim with respect to such revenue was barred, but he argued that that bar does not extend to the appellant's contingent interest in the corpus of the fund. For that contention he relied upon the remarks of North J. in *Mara* v. *Browne* (1), at pages 95 and 97. The decision in that case was reversed on another ground (2), and the Court of Appeal, therefore, did not deal with this point. It is a difficult one but, upon consideration, I am of opinion that the proviso in

(1) [1895] 2 Ch. 69. (2) [1896] 1 Ch. 199.

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clause (*b*) is not intended to protect an interest *in rem* but a beneficiary. The appellant's cause of action, if it existed, arose when her interest as the person entitled to the income or part of it was an interest in possession, and the lapse of time has barred her claim for the alleged breach of trust, even though she may be entitled to a further interest in the property in the future.

This is sufficient to dispose of the appeal, which should be dismissed with costs. I say nothing one way or the other as to the other questions argued before us.

HUDSON J.—I agree that the plaintiff must fail in this action on the grounds stated by Mr. Justice McTague in the Court of Appeal. I am also of the opinion that the plaintiff must fail on the ground that her action is barred by the agreement of 7th August, 1931. It appears from the evidence that this agreement was in the nature of a family settlement; its terms were settled after protracted negotiations between her brothers, herself and the Trust Company. It also appears from the evidence that she is an intelligent and competent business woman and I quite agree with the learned trial judge and Mr. Justice Fisher in the Court of Appeal that she understood the agreement, and her subsequent conduct confirms this. She accepted benefits under the agreement which she would not otherwise have been entitled to, and this action was not commenced until more than five years after the agreement was made and until after the death of Mr. W. S. Morden, the official of the Trust Company who had the active management of the estate and who was the only official with whom the appellant had any interviews before negotiations leading up to the agreement. If the plaintiff ever had any right to complain, she acquiesced in what was done and should not now receive the aid of a court of equity.

I think the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Lamport, Ferguson & Co.*

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

Solicitors for the respondent Chartered Trust and Executor Company: *Armstrong & Sinclair.*

ALICE MAUD PRICE (PLAINTIFF).....APPELLANT;

AND

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY (DEFENDANT).....RESPONDENT.

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* Feb. 25, 26.
* June 24.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Accident insurance—Death of insured—Suit to recover under policy—Proximate cause of death—Insured taking insulin for diabetic condition—Death alleged to have been caused by insulin reaction from taking dose of insulin—Application and effect of s. 5 (in force at time of death) of Accident Insurance Act, R.S.N.B., 1927, c. 85.

Plaintiff sued to recover upon an accident insurance policy upon the life of her deceased husband. The deceased suffered from diabetes and took insulin therefor. One morning he took (as found by inference from the evidence) the usual dose, later in the day became very ill, from, according to evidence given, an "insulin reaction," and died three days later. The policy by its terms insured against (*inter alia*) death resulting from "bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means." Sec. 5 (in force at the time of deceased's death) of the New Brunswick *Accident Insurance Act* provided that "in every contract of accident insurance, the event insured against shall include any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or as the indirect result of his intentional act * * *"

Held: Plaintiff was entitled to recover. Though deceased's diabetic condition co-acted with the insulin, yet, on the true construction of the policy and said s. 5 of the Act, there was only one cause of death (*Fidelity and Casualty Company of New York* v. *Mitchell,* [1917] A.C. 592, at 597), viz., the bodily injury, sustained as a result of the taking of the insulin. The bodily injury (the event insured against) was occasioned by external agency and happened without deceased's direct intent, within the meaning of said s. 5.

Judgment of the Supreme Court of New Brunswick, Appeal Division, 15 M.P.R. 418, reversed. (Crocket J. dissenting).

Per Crocket J. (dissenting): The effect of the judgment of this Court on the former appeal in this action ([1938] S.C.R. 234, which ordered a new trial) was that, upon the proper construction of s. 5 of the Act, the external force or agency (in this case the injection of the insulin by the insured) which occasions the bodily injury, must be the proximate cause of the insured's death. Under the policy and the Act alike, the "means" or "external force or agency" must be at least accidental as well as external. The suggestion that s. 5 of the Act was intended to include as accidents, circumstances where the means is not accidental but intentional and an unintentional result follows, is contrary to the clear effect of said former judgment

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

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of this Court; and s. 5 cannot now be regarded as doing away with the fundamental and universally recognized principle of accident insurance, viz., that the accident must be found in the "means" or (as expressed in said s. 5) in the "external force or agency" from which the bodily injury insured against has naturally and directly resulted.

APPEAL by the plaintiff from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), which, reversing the judgment of Richards J. (2), dismissed the action (Harrison J. dissenting).

The plaintiff's claim in the action was as beneficiary under a policy of insurance issued by the defendant insuring the plaintiff's husband against (*inter alia*) death resulting from "bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means."

The insured suffered from diabetes and took insulin therefor. As found by inference from the evidence (there being no direct evidence of the fact), he took insulin on the morning of February 26, 1933. Later on that day he became very ill, and he died on March 1, 1933. Plaintiff's statement of claim alleged that deceased "accidentally and by mistake took a dose [amended to read "an overdose"] of insulin as a result whereof and not otherwise" the deceased came to his death. The trial judge, Richards J., found that there was no evidence that deceased took an overdose, or from which an inference could be drawn that he took an overdose, of insulin; that the only possible inference was that the normal dose or quantity was taken (and was taken intentionally); and this finding was agreed with in the Appeal Division and in this Court. There was evidence given to the effect that deceased, after taking the insulin, suffered an "insulin reaction," which caused conditions resulting in his death.

On the question of defendant's liability, there were involved questions with regard to the construction, application and effect of s. 5 of the *Accident Insurance Act*, R.S.N.B., 1927, c. 85; which section was in force at the time of deceased's death, but has since been repealed. It is set out in the reasons for judgment in this Court now reported.

(1) 15 M.P.R. 418; [1941] 1 D.L.R. 241.
(2) [1940] 3 D.L.R. 244.

By a previous judgment of this Court in the same action (1) a new trial was ordered. The new trial took place before Richards J., who held that the plaintiff was entitled to judgment (2). His judgment was reversed by the Supreme Court of New Brunswick, Appeal Division (3), which (Harrison J. dissenting) dismissed the action. It is from the latter judgment that the present appeal was taken. The appeal to this Court was allowed and the judgment of the trial judge restored, with costs throughout; Crocket J. dissenting.

O. M. Biggar K.C. and *J. F. H. Teed K.C.* for the appellant.

T. N. Phelan K.C. and *J. E. Friel* for the respondent.

The judgment of the majority of the Court (The Chief Justice and Kerwin, Hudson and Taschereau JJ.) was delivered by

KERWIN J.—Pursuant to the judgment of this Court (4), a new trial was had between the parties before Mr. Justice Richards without the intervention of a jury. The plaintiff succeeded in her claim (5) but the Appeal Division of the Supreme Court of New Brunswick (Mr. Justice Harrison dissenting) set aside the judgment and dismissed the action (6). The plaintiff again appeals.

By the policy issued by the respondent, the deceased was insured against bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means, and

> if any one of the disabilities enumerated below shall result from such injuries alone within ninety days from the date of accident, the Company will pay the sum specified opposite such disability.

Under the schedule of indemnities for loss of life, ten thousand dollars was payable in a certain manner.

It was conceded that the appellant could not succeed under the terms of the policy alone, but she relies on section 5 of the New Brunswick *Accident Insurance Act*, which was in force at all relevant times and which reads as follows:—

(1) [1938] S.C.R. 234.
(2) [1940] 3 D.L.R. 244.
(3) 15 M.P.R. 418; [1941] 1 D.L.R. 241.
(4) [1938] S.C.R. 234.
(5) [1940] 3 D.L.R. 244.
(6) 15 M.P.R. 418; [1941] 1 D.L.R. 241.

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Kerwin J.

5. In every contract of accident insurance, the event insured against shall include any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or as the indirect result of his intentional act, and no term, condition, stipulation, warranty or proviso of the contract, varying the obligation or liability of the insurer shall, as against the insured, have any force or validity, but the contract may provide for the exclusion from the risks insured against of accidents arising from any hazard or class of hazard expressly stated in the policy.

Without detailing the evidence, I am satisfied that the deceased suffered a bodily injury occasioned by external agency and that the injury, which was the event insured against, happened without his direct intent. He suffered from diabetes and it was his custom to take eight units of insulin morning and afternoon. There can be really no dispute that on the morning in question he took insulin, and while there is no direct evidence as to the quantity, the proper inference is that he took the usual dose. This finding, coupled with the testimony that he suffered an insulin reaction, means that while he intentionally took the eight units, the bodily injury occasioned thereby happened without his intending it.

What was the proximate cause of death? It is true that the deceased's diabetic condition co-acted with the insulin but, while they were both ingredients, there was, on the true construction of the policy and section, only one cause of death. *Fidelity and Casualty Company of New York* v. *Mitchell* (1). That was the bodily injury sustained as a result of the taking of the insulin.

The appeal should be allowed and the judgment at the trial restored. The appellant is entitled to her costs of the appeals to the Appeal Division and to this Court.

CROCKET J. (dissenting)—This action, which was brought by the appellant as the beneficiary under a policy of accident insurance to recover the indemnity provided for thereby for the death of her husband through alleged accidental injury, was originally tried before Barry, Chief Justice of the King's Bench Division of the Supreme Court of New Brunswick, and a jury.

The statement of claim, as originally framed, alleged that the insured, prior to March 1st, 1933, received bodily injuries effected directly and independently of all other

(1) [1917] A.C. 592, at 597.

causes, through external, violent and accidental means, within the meaning of the said policy of insurance, in that he "accidentally and by mistake took a dose of insulin, as a result whereof and not otherwise [he] came to his death," on March 1st, 1933. During the trial the words "an over-dose of insulin" were substituted for the words "a dose of insulin", and the Chief Justice left two principal questions to the jury directed to that particular issue, viz.: "Did the insured accidentally, and by mistake, take an over-dose of insulin?" and, "Was the insured's death caused solely by taking, accidentally and by mistake, an over-dose of insulin?" To the first of these questions the jury answered "Yes," and to the second "Yes, indirectly." Notwithstanding these two answers and further findings by the jury, in answer to other questions, that the insured's death was caused or contributed to by diabetes indirectly through insulin reaction, His Lordship, upon consideration of a motion for the entry of judgment, dismissed the action on the ground that there was no evidence whatever to justify the finding that the insured accidentally and by mistake took an over-dose of insulin, and that the answer to the second question should have been "No" instead of "Yes, indirectly."

The plaintiff appealed from that judgment to the Appeal Division, with the result that the trial judgment was sustained by Baxter C.J., and Grimmer J.; Harrison J. dissenting (1).

The appellant then appealed to this Court from that decision, with the result that a new trial of the action, except on the incidental issues of non-disclosure and of age, was ordered in March, 1938 (2). The second trial came on before Richards J., sitting without a jury, in December, 1938. That learned judge, putting to himself the same question which Chief Justice Barry had put to the jury on the former trial, viz.: "Did Dr. Price take an over-dose of insulin accidentally and by mistake?", found that there was only one possible answer to be made thereto, which was "No," and that the only logical finding is that Dr. Price took the normal quantity of eight units intentionally. Later, in addressing himself to the

(1) 11 M.P.R. 490; [1937] 2 D.L.R. 369.

(2) [1938] S.C.R. 234.

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question as to whether the death of Dr. Price was an accident within the terms of the policy itself, His Lordship said:

> There was no mistake about the taking of the insulin, there was no overdose, there was no accident within the ordinary meaning of the term. It seems unnecessary to discuss this feature further.

He decided however that the appellant was entitled to recover for the indemnity provided by the policy on the ground that the case was one which fell under the express terms of s. 5 of the New Brunswick *Accident Insurance Act*, c. 85, R.S.N.B., 1927, as he construed it. That section, though it has since been repealed, was in force at the time of the insured's death. It read:—

> In every contract of accident insurance, the event insured against shall include any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or as the indirect result of his intentional act, and no term, condition, stipulation, warranty or proviso of the contract, varying the obligation or liability of the insurer shall, as against the insured, have any force or validity, but the contract may provide for the exclusion from the risks insured against of accidents arising from any hazard or class of hazard expressly stated in the policy.

His Lordship said that it seemed abundantly clear to him that the section was intended to provide and did provide for cases where the external force or agency is intentional and something unexpected happens as a result—either (*a*) without the direct intention of the person injured, or (*b*) as the indirect result of his intentional act, and held that the first alternative (*a*) exactly applied to the present case. In support of this view he quoted a dictum of Chief Justice Rose of Ontario, which, he pointed out, was *obiter*, in *Battle* v. *Fidelity & Casualty Company of New York* (1), and dicta of Riddell and Middleton JJ.A., of the Ontario Court of Appeal, in *Lang Shirt Co.'s Trustee* v. *London Life Ins. Co.* (2), as well as dicta from the majority judgment of this Court, written by Mignault J., on appeal in that case (3), dealing with an identical Ontario enactment. From this judgment the present respondent appealed to the Appeal Division, where the appeal was allowed and the action dismissed *per* Baxter C.J. and

(1) (1923) 54 O.L.R. 24. (2) (1928) 62 O.L.R. 83.
(3) *London Life Ins. Co.* v. *Trustee of the Property of Lang Shirt Co. Ltd.*, [1929] S.C.R. 117, at 132, 133.

Grimmer J.; Harrison J. dissenting, so that the case comes to us now a second time by way of appeal on the part of the plaintiff.

The majority judgment suggested, as the Appeal Division had done on the plaintiff's first appeal, that the object of s. 5 of the New Brunswick *Accident Insurance Act* was to prevent advantage being taken of exceptions in policies like those considered in *Cole* v. *Accident Ins. Co.* (1), and in *United London & Scottish Ins. Co.; In re Brown's Claim* (2), and held that it did not *define* the term "accident," as suggested by Rose J. and Middleton J.A., in the dicta quoted by the trial judge, but simply declared that the "event insured against," which must necessarily be the result of an accident, shall include certain things. It quotes s. 2 (*a*) of the Act, which declares that in that chapter "accident insurance" means "insurance against loss arising from accident to the person of the insured," points out that the policy insured the deceased against "*bodily injuries*, effected directly and independently of all other causes, through external, violent and *accidental* means," and takes the ground that the whole subject falls within s. 2 (*a*). The learned Chief Justice quotes the dictum of Lord Adam of the Scottish Court of Sessions in *Clidero* v. *Scottish Accident Ins. Co.* (3) that:

> A person may do certain acts, the result of which acts may produce unforeseen consequences, and may produce what is commonly called accidental death, but the means are exactly what the man intended to use, and did use, and was prepared to use. The means were not accidental, but the result might be accidental.

He also quotes a passage from the judgment of Bray J., in *Scarr* v. *General Accident Assce. Corpn.* (4), to the same effect: that the fact of an intentional physical act producing an unforeseen or unexpected result does not render the act, which induces the result, accidental; and also the dictum of Lord Lindley in the well known Workmen's Compensation case of *Fenton* v. *Thorley* (5), that in an action on a policy the *causa proxima* is alone considered in ascertaining the cause of loss. He says that it was to ascertain the *causa proxima* that the case had been sent back for a new trial, and held that the intentional inser-

(1) (1889) 5 T.L.R. 736.
(2) [1915] 2 Ch. 167.
(3) (1892) 19 R. (Court of Session) 355, at 362.
(4) [1905] 1 K.B. 387, at 393.
(5) [1903] A.C. 443.

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tion of the hypodermic needle could not be considered the proximate cause of the insured's death within the meaning of the section. That enactment only declared what "bodily injuries" shall include, and in his opinion was "directed to the *result* of an accident; not to the accident itself."

Harrison J. in his dissenting judgment said that the clear implication of the judgment of this Court in the former appeal was that, if the taking of insulin on the morning in question was the proximate cause of the death of the insured, the plaintiff was entitled to succeed in her claim upon the accident policy under the provisions of the New Brunswick *Accident Insurance Act* or that otherwise the action would have been dismissed in accordance with the judgment of the dissenting judge; and that death by insulin shock due to the taking of a dose of insulin could be an accident within the meaning of the *Accident Insurance Act* and there was sufficient evidence of such an accident if death was in fact caused by the taking of insulin and that the question was, therefore, *res judicata.* With all respect, I think the judgment of this Court carried no such implication as the learned judge sugggests.

Mr. Justice Davis, who delivered the majority judgment, said that the real question in issue, broadly speaking, was whether or not the insured's death was caused by accident, and that the basis of the claim under the policy was that his death was caused by his having taken insulin for his diabetic condition on the morning in question in too large a dose. "There is no direct evidence," he continued,

> that he took any insulin the morning in question, but it is a fair inference, and really not in dispute, that he had taken insulin that morning, as he had been accustomed to do for several months each morning and each evening. Whether on the particular occasion the quantity he took was in excess of the quantity that had been prescribed for him and which he had been taking regularly for some months or whether he took the usual quantity that morning but it was too much for his system at that particular time is not made plain because, of course, no one knows the exact amount he did take.

Then he went on to discuss s. 5 of the New Brunswick *Accident Insurance Act.* He said the section was obviously intended to put an end to defences by accident insurance companies which had raised technical and confusing issues, and the statute, therefore, created liability in the companies

whether the event insured against (i.e., the accident) happened "without the direct intent of the person injured" or "as the indirect result of his intentional act." In applying the section to the circumstances of this case the essential point is that in law the external force or agency *which occasions the bodily injury* must be the proximate cause of the death.

After a lengthy quotation from the judgment of Scrutton J., as he then was, in *Coxe* v. *Employers' Liability Assce. Corpn. Ltd.* (1), which turned on the construction of a condition in an insurance policy excepting death "*directly or indirectly caused by,* arising from, or traceable to * * * war," and in which it was held that it was impossible to reconcile the last italicized words with the maxim *causa proxima non remota spectatur,* which must be applied to all policies of insurance, whether marine or accident, unless it be excluded by express words or necessary implication, Davis J. said:

> In the section of the statute which governs the case before us, the words are "any bodily injury *occasioned by external force or agency*"—not, occasioned "directly or indirectly" by external force or agency. That being so, upon the proper construction of the section the external force or agency must be the proximate cause of the bodily injury.

Then, having pointed out so clearly the basis of the action, viz., the taking of an over-dose of insulin, and that the question whether he had taken an overdose or had taken the prescribed and normal dose but which was too much for his system at that particular time, had not been made plain, and construed the critical section of the *Accident Insurance Act* in the language I have reproduced, he immediately proceeded to consider the effect of the jury's answers to the questions submitted by Barry C.J.

As to this feature of the case, he said in introducing the subject that "the real question for the jury was whether or not the taking of the insulin on the morning in question directly resulted in the death of the insured," and added that "their answers present a good deal of difficulty to us in ascertaining what their conclusion really was on the vital fact whether or not the insulin was the proximate cause of death." He then set out the answers to questions 1, 2, 8 and 11, and added these words: "It is plain that the jury have not determined the vital issue as to whether or not the taking of the insulin on the morning

(1) [1916] 2 K.B. 629, at 633.

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in question was the proximate cause of death," and for that reason held that the case would have to go back for a new trial.

It is these three last quoted statements of the judgment, and the fact that the Court ordered a new trial as stated, which have been seized on by the appellant's counsel to support the proposition that the judgment on the former appeal necessarily means that if a diabetic patient, who has for months been regularly taking insulin in the quantity prescribed for him, dies as the direct result of his voluntary and intentional injection into his own body of any insulin—whether it be an over-dose taken accidentally and by mistake or not—and such a patient has an accident insurance policy on his life, the beneficiary named therein is entitled to recover for his death as having been solely occasioned by external force or agency under the provisions of the New Brunswick *Accident Insurance Act* in force at the time of the death of the insured.

I should have thought that the words "*the* taking of *the* insulin" themselves manifestly imply a reference to the taking of an over-dose of insulin accidentally and by mistake, as alleged by the plaintiff in her statement of claim, and as specifically found by the jury in answer to the first and fundamental question, which the Court was considering, and which the judgment had previously so clearly pointed out was the sole basis of the plaintiff's claim in the action. Otherwise we should have to regard this portion of the Court's judgment as a direct and immediate disaffirmance of what the Court had just laid down as to the proper construction of s. 5 of the *Accident Insurance Act*.

So far as my own judgment in the former appeal is concerned, I may say that before writing it I had the advantage of reading and carefully considering a copy of my brother Davis's proposed judgment. I stated in my judgment, as may be seen at pages 242 and 243 of the official reports, that I agreed with him that the section did not exclude the maxim *causa proxima* and that it followed that there could be no recovery under any contract of accident insurance, whether for a bodily injury or for death resulting directly from a bodily injury, unless such bodily injury was directly caused by external force or

agency, or, in other words, unless external force or agency was the proximate cause of such bodily injury. That, as I said, was precisely the construction which the learned Chief Justice of New Brunswick and Grimmer J. placed on the section in their majority judgment, and upon which their decision affirming the dismissal of the action by the trial judge was manifestly based.

So far, then, as the effect of s. 5 of the New Brunswick *Accident Insurance Act* is concerned, as it applies to this case, it is clear that this Court on the former appeal definitely laid it down that upon the proper construction of that enactment the external force or agency, which occasions the bodily injury, *must be the proximate cause* of the insured's death. That surely cannot mean that the section may be interpreted as providing that the essential external force or agency may be merely a contributory cause or one of several causes, whose combined operation brought about the insured's death. Obviously it can only mean that the injection of the insulin by means of the hypodermic needle in the hand of the insured himself, which is the only thing that could conceivably be described as "external force or agency," must be the sole and exclusive cause of the death, or, in other words, that the death must have occurred as the direct and natural consequence of the alleged external force or agency without the intervention of any other cause. Indeed, as already pointed out, that was the entire basis of the appellant's claim, as alleged in para. 8 of her statement of claim, viz., if I may repeat: that the insured "received bodily injuries effected directly and independently of all other causes, through external, violent and accidental means * * *" in that he "accidentally and by mistake took an overdose of insulin [substituted for "a dose of insulin"], as a result whereof and not otherwise" he came to his death. This was the fundamental issue on which the case was first tried, when everybody clearly took it for granted that under the policy and the New Brunswick *Accident Insurance Act* alike the "external force or agency" or "means" —as both the policy and the statement of claim express it—must be at least "accidental," as well as external. Richards J., on the second trial, however, in view of the explicit findings he had made on that basic issue, distinctly

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held that the death of the insured was not an accident within the terms of the policy alone, but was an accident within the terms of s. 5 of the *Accident Insurance Act*. Founding himself upon the dicta in the *Lang* (1), *Battle* (2), and other cases, to which he referred, His Lordship suggested that that section of the statute was intended to include as accidents circumstances where the means is not accidental but intentional and an unintentional result follows. While, no doubt, some of these dicta appear to strongly support the view of the learned trial judge, I am of opinion, with the greatest possible respect, that the clear effect of the unanimous judgment of this Court on the appellant's first appeal, upon that question, is quite to the contrary; and that the section cannot now be regarded as doing away with the fundamental and universally recognized principle of accident insurance, viz.: that the accident must be found in "the means," or, as the section itself expresses it, in the "external force or agency," from which the bodily injury insured against has naturally and directly resulted.

I think the appeal should be dismissed, and with costs, if asked.

Appeal allowed with costs.

Solicitor for the appellant: *E. Albert Reilly.*

Solicitors for the respondent: *Friel & Friel.*

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* Mar. 3, 4, 5, 6, 7, 10, 11, 12.
* Oct. 7.

NESBITT, THOMSON & COMPANY LIMITED (DEFENDANT)... APPELLANT;

AND

JOSEPH M. PIGOTT AND PIGOTT CONSTRUCTION COMPANY LIMITED (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Rescission—Alleged fraudulent misrepresentations in a selling circular inducing purchase of shares in company—Construction of representations—Right to rescission of contract of purchase—Principles applicable—Status to sue—Shares bought and held by purchaser

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

(1) (1928) 62 O.L.R. 83. (2) (1923) 54 O.L.R. 24.

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for benefit of a company which later surrendered its charter after assigning its assets to a successor company—Limitation of actions—Time from which statute of limitation begins to run.

This Court dismissed the defendant's appeal from the judgment of the Court of Appeal for Ontario, [1939] O.R. 66, dismissing its appeal from the judgment of Greene J., [1937] O.R. 888, rescinding a contract for purchase from the defendant of shares of stock in a company on the ground that the purchase was induced by false and fraudulent representations in a prospectus or selling circular issued by the defendant.

Per Rinfret, Crocket and Taschereau JJ.: The mere fact that statements in a prospectus issued by a defendant are false does not necessarily render him liable in damages; the false representation has to be made knowingly, or without belief in its truth, or with reckless disregard of whether it is true or false. If the defendant was indifferent as to whether the statements were false or true, this frame of mind is sufficient, when the facts are proven to be false, to create civil liability (*Derry* v. *Peek*, 14 App. Cas. 337).

The shares in question had been purchased by P. who purchased and held them as trustee for P.-H. Co., the beneficial owner. That company later surrendered its charter, after having assigned its assets to its successor, P. Co., which therefore became the beneficial owner of the shares, P. holding them as trustee for it. The plaintiffs in the action were P. and P. Co. *Held:* The action was maintainable. *Per* Rinfret, Crocket and Taschereau JJ. (agreeing with Masten and Fisher JJ.A. in the Court of Appeal): (1) P. had by himself a status to maintain the action; P. Co., though not a necessary party, was yet a proper party plaintiff. (2) The rule that a right incidental and subsidiary to the ownership of property is assignable and does not savour of champerty or maintenance, applies to the facts of this case. *Per* Kerwin J.: The contract was made between defendant and P., and the right of action for rescission vested in P. as trustee and there it remains.

A contention that the action was barred by *The Limitations Act*, Ont., over six years having elapsed between the purchase of the shares and the commencement of the action, was rejected. The judgment of Masten and Fisher JJ.A. in the Court of Appeal, refusing to interfere with the trial judge's findings that plaintiffs had not been guilty of laches and did not suspect any fraud until a time much less than six years before commencement of the action, and holding that the statute began to run only at that time, was (*per* Rinfret, Crocket and Taschereau JJ.) approved.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1) dismissing (Henderson J.A. dissenting) the defendant's appeal from the judgment of the trial judge, Greene J. (2), holding that the plaintiffs were entitled to rescission of a certain contract for purchase of shares of stock in the Montreal Island Power

(1) [1939] O.R. 66; [1938] 4 D.L.R. 593.
(2) [1937] O.R. 888; [1937] 4 D.L.R. 598.

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Company and to repayment of the purchase price with interest, upon the plaintiffs returning to the defendant the shares. With respect to said shares, the formal judgment at trial declared that the plaintiff Joseph M. Pigott was induced to purchase them by means of false and fraudulent representations in a prospectus or selling circular issued by the defendant, and that the contract for the purchase was not binding upon the plaintiffs; and rescinded and set aside the said contract; and provided for delivery by the plaintiffs of the share certificates, recovery against the defendant of the price paid for the shares and interest, and delivery to the defendant of the share certificates upon payment of the sum recovered against the defendant and costs.

Besides the disputes with regard to the alleged misrepresentations, certain other questions were raised.

The shares had been purchased by the plaintiff Joseph M. Pigott, and were purchased and held by him as trustee for the beneficial owner, Pigott-Healy Construction Co. Ltd. (the name of which was later changed). That company later surrendered its charter, after having assigned all its assets to its successor, Pigott Construction Co. Ltd., which therefore became the beneficial owner of the shares, Mr. Pigott holding them as trustee for it. The latter company was made a co-plaintiff in the action. The defendant contended that the plaintiffs had no right to maintain the action.

Dealing with this question in the Court of Appeal, Masten and Fisher JJ.A., with whose reasons on this question Rinfret, Crocket and Taschereau JJ. in this Court agreed, said

> Here, the contract for purchase of these shares was between the appellants and Pigott as an individual, and the misrepresentations complained of were made to him. The shares were transferred to him and he became and has remained at all times a shareholder of the Power Company. As the contract was his, and the representations were made to him, he has the right to claim personally its rescission for such a right is incidental to his personal contract with appellants, and the fact that third parties are entitled to look to Pigott as a trustee for them cannot affect, much less annul, his right to claim rescission. Indeed, as a trustee, that was his duty. As between the successive cestui que trustent the transfer of interest from one to the other cannot operate to annul and defeat Pigott's right of action. The appellant contracted with Pigott personally and cannot set up in his defence the outstanding rights of third parties for whom Pigott is trustee.

and, after referring to certain cases and authorities, they concluded:

(1) That Pigott had by himself a status to maintain this action, and that the Pigott Construction Company, Limited, though not a necessary party, is yet a proper party plaintiff.

(2) That the rule that a right incidental and subsidiary to the ownership of property is assignable and does not savour of champerty or maintenance applies to the facts of this case.

The defendant claimed that the plaintiffs' alleged cause of action was barred by *The Limitations Act* (R.S.O., 1927, c. 106, s. 48). The purchase of the shares in question was made in 1927 and the action was commenced in 1935. On this question the trial judge said:

* * * The plaintiffs made no enquiries until 1932 and according to the evidence of Mr. Pigott did not suspect any fraud until Mr. Acres, an engineer employed by the plaintiffs, made his report late in 1934. In my opinion, the statute began to run then. It was argued for the defendant that there must be concealment by the defendant to prevent the statute running, but *Bulli Coal Mining Company* v. *Osborne* (1) is authority for the statement that so long as there has been no laches by the party defrauded, it is immaterial whether or not there have been on the part of the wrongdoer active measures to prevent detection. See also Kerr on Fraud and Mistake, 6th ed. at p. 447, and at pp. 16 and 17.

The plaintiffs were not guilty of laches. Dividends were not expected on the preference shares for a few years, so that the plaintiff in commencing his definite enquiries in 1932 acted with reasonable promptness.

In the Court of Appeal, Masten and Fisher JJ.A., with whose reasons on this question Rinfret, Crocket and Taschereau JJ. in this Court agreed, said:

We have carefully read and considered all the cases that are referred to by counsel on either side, and it seems to us that they are completely and accurately summarized in the 9th edition of Salmond on Torts, at page 180, in the following words:—

"When the defendant has been guilty of fraud or other wilful wrongdoing, the period of limitation does not begin to run until the existence of a cause of action has become known to the plaintiff. This is commonly spoken of as the rule of concealed fraud, but the term *fraud* is here used in its widest sense as meaning any act of wilful and conscious wrongdoing—for example, a wilful underground trespass and abstraction of minerals. The term *concealed,* moreover, does not imply any active suppression of the facts by the defendant, but means merely that the wrong is unknown to the person injured at the time of its commission."

Whether the circumstances imposed a duty on the plaintiffs of making an earlier investigation, and whether they were thus guilty of laches is a question of fact upon which the trial Judge gives effect to the evidence of Mr. Pigott that he did not suspect any fraud until late in 1934. The fact that no dividends were to be expected on this stock for some years after its purchase, lends support to this finding of fact by the trial Judge;

(1) [1899] A.C. 351.

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and for the reasons which have appeared earlier in this judgment we think that this Court ought not to interfere with the finding of fact of the trial Judge.

W. N. Tilley K.C. and *B. V. McCrimmon* for the appellant.

Glyn Osler K.C. and *H. A. F. Boyde K.C.* for the respondent.

THE CHIEF JUSTICE—I agree that this appeal should be dismissed with costs.

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

TASCHEREAU J.—The claim of the respondents is based on alleged misrepresentations made to them by the appellant and which induced them to purchase a number of 6% preference shares of an issue of $1,000,000 of the Montreal Island Power Company (dividends to be cumulative from January 1st, 1928).

The circular which was issued by the appellant on the 15th of June, 1927, contained, *inter alia,* the following statements which are the target for the attacks of the respondents, and which are qualified as being misleading, untrue and false representations:—

BUSINESS AND PROPERTY: The Montreal Island Power Company, incorporated under the laws of the Province of Quebec, has been formed for the purpose of developing a water power located on the Rivière des Prairies (Back River) about seven miles from the heart of the city of Montreal, Que. It is estimated that this site, under a head of 26 feet, is capable of developing 65,000 h.p. twenty-four hour power. Construction will start immediately and will be so carried out that 40,000 h.p. should be available for delivery by the end of 1929, provision being made for increasing the capacity to 65,000 h.p. at minimum cost, as required.

POWER MARKET: The Company has entered into a contract with the Montreal Light, Heat & Power Consolidated, whereby that Company will purchase all the power from this development for a period of thirty years, with provision for extension of the contract for a further like period. The power will be taken in specified annual instalments, until the entire capacity is absorbed.

Montreal Light, Heat & Power Consolidated operates one of the largest public utility systems in Canada. Directly, through subsidiaries or associated Companies, it does all the gas business and practically all the electric power and lighting distribution for domestic, industrial, municipal and tramway purposes in Greater Montreal, serving a rapidly growing community with a present population in excess of 1,000,000. The growth and strength of the contracting company are indicated by its net revenue, which has been as follows:—

1922—$6,483,473. 1924—$7,670,190. 1926—$8,693,688.

The average annual increase in demand for power for the past five years amounted to 16,000 h.p. At the same rate of increase the entire capacity of Montreal Island Power Company would be utilized and sold within four years.

EARNINGS: Under the above mentioned contract at ultimate capacity, it is estimated that net earnings of the Company will amount to approximately $900,000 per annum, or over seven and one-half times dividend requirements after payment of bond interest.

ENGINEERING AND CONSTRUCTION: Under arrangements agreed upon the technical work and supervision of construction of this development will be carried out by the Engineers of Power Corporation of Canada Limited.

This development has been favourably reported upon by the Engineers of Power Corporation of Canada Limited, and by Messrs. J. M. Robertson, R. S. and W. S. Lea and T. Pringle & Son Limited.

The plaintiffs allege that on the strength of these representations they purchased, on the 22nd day of June, 1927, 100 preferred shares of this issue and 40 shares of common stock at the aggregate price of $9,800, and on the 27th of April, 1929, 50 additional common shares at the price of $2,000. They claim rescission of these contracts and the return to the plaintiffs of the sum of $11,800 with interest.

Their contention is that the alleged misrepresentations were false and untrue and related to (1) the estimated output of power; (2) the contract under which the power was sold; (3) the estimated future increase in power demand; (4) the estimated net earnings, and (5) the reports made by the engineers. The trial Judge maintained partially the action, ordered the defendant to pay $9,800, but dismissed the claim for rescission of the contract for the purchase of 50 shares made on the 27th of April, 1929. The Court of Appeal (Mr. Justice Henderson dissenting) affirmed this judgment.

There is no doubt, as it has been pointed out by the learned counsel for the appellant, that whether or not there were fraudulent misrepresentations on the part of the appellant, must be determined not by the examination of subsequent evidence, but by an examination of circumstances at the time the circular was issued. It is also settled law that the appellant may be found liable only if the statements of which the respondents complain were false and were made knowing them to be false, or with reckless disregard as to whether they were true or false.

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It is what the appellant thought the result of the enterprise would be that must be considered, and not what it turned out to be.

After a careful study of the various reports prepared by very reputable firms of engineers, I have come to the conclusion that they do not justify the appellant to say in its circular letter that "it is estimated that this site, under a head of 26 feet, *is capable* of developing 65,000 h.p. 24 hour power."

In 1922, Pringle & Son Limited estimated an output of 45,000 h.p. In 1923, J. M. Robertson, of Montreal, reached identical conclusions, and in 1924, R. S. and W. S. Lea said in their report:—

> We believe 20,000 c.f.s. or more a fair estimate for the average year, but not likely to be maintained every year, assuming of course that past records are correct.

They also expressed the view that in a few years, the flow would be over 20,000 c.f.s. and eventually nearer 30,000 than 20,000 c.f.s., but this possibility, however, was on the basis of further storage developments. The highest headrace figured by R. S. and W. S. Lea is 56 feet, giving a maximum head of 26 feet, with therefore an output of approximately 50,000 h.p., but this is assuming that the head would always be 26 feet, which under the conditions prevailing at Des Prairies River is an impossibility. R. S. and W. S. Lea also warned that they were not sufficiently familiar with ice conditions to offer an opinion on the head which would be available during the winter months.

In September, 1926, a further report was obtained from the Power Corporation of Canada, Limited, and the engineers of that Company came to the conclusion that at the date on which the report was written, 20,000 c.f.s. may be accepted as a dependable flow for commercial purposes. They add that storage works are under construction in the water shed tributary to the Back River, and that they are expected to raise the dependable flow to 23,000 c.f.s. before the proposed development could reasonably be in operation. It is their opinion that a normal gross head of 26½ feet will be available but they add that during certain seasons it may be reduced to 18 feet. If we use the formula adopted, and multiply the head by the flow and divide by 10·23, it will be seen that 23,000 c.f.s. with a head of 26½

feet will give approximately 59,000 h.p., but this is assuming that the head is always 26½ feet and that it will never be reduced to 18 feet as pointed out in the report of the engineers. As to power available, the Power Corporation state that they provide for machinery installation to deliver 65,000 h.p. continuously, but they do not say that the development is capable of an output of 65,000 h.p. This ultimate output is based on contingencies which may never happen. None of these engineers venture to state that the proposed development is capable of furnishing 65,000 h.p. *24 hour power,* and I fail to see how their reports can be interpreted as having such a meaning.

When heard as a witness, Mr. Wurtele of the Power Corporation, who had prepared the report for this Company, repeated that the dependable flow would be raised to 23,000 c.f.s. at the time the plant is ready for operation, and that, within ten or fifteen years it might be ultimately up to 27,000 c.f.s. if storage facilities not yet decided upon, but the result of his self-made studies were available. It is only in the event of the happening of these contingencies that a firm power of 65,000 h.p. would be the output of the plant. This corroborates his report, and in the meantime for ten or fifteen years, the power developed would be approximately 59,000 h.p. *non-continuous* power on account of the frequent head reduction to 18 feet. This is far from the promised 65,000 h.p. *twenty-four hour power,* and at $19 per h.p., it makes a substantial difference in returns available for dividends.

It has been argued on behalf of the appellant that the elevation of the headrace has been determined in the three earlier reports without any definite knowledge as to what level the municipal authorities would permit, having regard to sewers discharging into the river. This point, they say, was apparently cleared up in 1926 when the Power Corporation in its report of September 28th of that year fixed the headrace level at 56·5 which was higher than the headrace level taken in any of the earlier reports. It is true that the reports prepared by Pringle, Robertson and Lea give a lower head on account of a lower headrace, but even with a higher headrace the output of power would not have been 65,000 h.p. twenty-four hour power. And the best evidence of this, is that with a headrace of 56½ feet the

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engineers of the Power Corporation do not foresee with the actual flow a 65,000 h.p. twenty-four hour power. It seems that this 65,000 h.p. continuous power is not available because the flow of the river is not sufficient.

Another of the appellant's contentions is that the Board of the Montreal Island, after the construction of the plant, was under the control of the Montreal Light, Heat, and that this Company which had purchased 125,000 h.p. from the Beauharnois, refused to permit the installation of additional units, which would have given additional power. This has been dealt with by the learned trial Judge, and the Court of Appeal, who came to the conclusion that if no additional units were installed, it is because there was not a sufficient dependable flow to justify such units, and no convincing reasons have been submitted to us why this finding should be set aside.

The circular further states that the construction is to start immediately and that 40,000 h.p. should be available for delivery by the end of 1929, and that the Montreal Light, Heat & Power Consolidated Company will purchase all the power from this development for a period of 30 years with provision for extension of the contract for a further like period. The power is to be taken in specified annual instalments until the entire capacity is absorbed. The facts are that the contract with the Montreal Light, Heat & Power provides for the purchase of 60,000 h.p., an initial block of 20,000 h.p. to be delivered by October 15th, 1930, and then a block of 10,000 h.p. annually during the four succeeding years. This means that by October, 1930, under the contract the Montreal Light, Heat & Power is to take delivery of only 20,000 h.p. and not 40,000 h.p. by the end of 1929 as stated in the prospectus. The Montreal Light, Heat & Power was not bound to take delivery and pay for 40,000 h.p. before the 15th of October, 1932. It is true that the Montreal Light, Heat & Power advanced its purchases one year, taking 20,000 h.p. on October 15th, 1929, but it is still false that by the end of 1929, 40,000 h.p. were available for delivery, and a revenue from 40,000 h.p. was not paid to the Montreal Island Company until two years after the time mentioned in the prospectus.

As to the estimated future increase in power demand and which is referred to as follows in the circular letter:

> The average annual increase in demand for power for the past five years amounted to 16,000 h.p. At the same rate of increase the entire capacity of Montreal Island Power Company would be utilized and sold within four years.

I believe that the statement is misleading. It conveys the idea that within four years, that is in 1933, the plant would have an output of 65,000 h.p. all sold to the Montreal Light, Heat & Power Company, when the truth is that under the terms of the contract it was only in October, 1934, that the last 10,000 h.p. should be delivered to the purchasing Company, and making a total of 60,000 h.p.

In view of what I have said in reference to the total capacity of the development, it follows that the statement as to the net earnings of the Montreal Island Company estimated in the prospectus at "$900,000 per annum, or over seven and one-half times dividend requirements after payment of bond interest," is not according to facts, and cannot by any stretch of the imagination be termed as a true picture of the situation.

The last paragraph of the circular letter reads as follows:—

> This development has been favourably reported upon by the Engineers of Power Corporation of Canada Limited, and by Messrs. J. M. Robertson, R. S. and W. S. Lea and T. Pringle & Son Limited.

I cannot agree with the suggestion of the learned counsel for the appellant as to the interpretation that should be given to this statement. The true meaning of this paragraph, and the only way it could have been read by a prospective purchaser, is obviously that all these competent and very widely known engineers had given their approval to *this development*. It conveys the idea that they all concurred in the statement "that under a head of 26 feet it was capable of developing 65,000 h.p. 24 hour power." In fact, none of the reports of these engineers substantiate this statement, and the inaccuracy of this representation certainly must have had a bearing in the minds of the investors, and developed an optimism which the disclosure of the real facts would surely not have justified.

On the whole, I come to the conclusion that the judgment of the courts below should not be disturbed, and I

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am satisfied that if the respondents had been furnished with the real facts, they would not have invested their money in this development, the possibilities of which have been unduly magnified.

As I have said already, the mere fact that statements in a prospectus are false does not necessarily render the defendant liable in damages. The false representation has to be made knowingly, or without belief in its truth, or with reckless disregard of whether it is true or false. It seems to me that the draftsman of this circular letter was at least indifferent as to whether the statements were false or true. And this frame of mind is sufficient, when the facts are proven to be false, to create civil liability. (*Derry* v. *Peek* (1)).

As to the technical objection raised by the appellant in respect of the plaintiffs' right to sue, and the defence raised on the statute of limitation, I agree with what has been said by Masten and Fisher JJ.A. of the Court of Appeal for Ontario.

I would dismiss this appeal with costs.

KERWIN J.—Having read the evidence in the light of the various submissions made by counsel for the appellant, I am satisfied that I would have arrived at the same conclusion as the trial judge. As to the right of the plaintiffs, or either of them, to sue,—the contract was made between the defendants and Joseph M. Pigott, and even though he had been a trustee for a corporation since dissolved and is now trustee for his co-plaintiff, the right of action for rescission vested in him as trustee and there it remains. The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Tilley, Thomson & Parmenter.*

Solicitors for the respondents: *Bruce & Boyde.*

(1) (1889) 14 App. Cas. 337.

ROSS SHEPPARD (DEFENDANT).....APPELLANT;

AND

MAX ARNO FRIND (PLAINTIFF).....RESPONDENT.

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* May 26.
* Oct. 7.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Maintenance—Suit for damages for alleged intermeddling and stirring up litigation—Requisites for recovery—Absence of proof of special damage.

Respondent sued to recover damages against appellant for maliciously instigating and stirring up respondent's wife to commence and prosecute an action for alimony. Appellant had had nothing to do with the alimony action itself, but had merely put into the wife's head the idea of bringing it. During the course of the trial of the alimony action, respondent entered into a settlement by which he agreed to pay his wife $500 per annum for life and to deposit securities as security for payment and to pay her costs; and judgment was given declaring the settlement binding.

Held (reversing the judgment of the Court of Appeal for Ontario, [1940] O.R. 448, and restoring the judgment of Roach J., [1940] O.R. 292): Respondent's claim against appellant should be dismissed.

Per the Chief Justice: In the circumstances of the case, the action could only succeed on proof of the absence of reasonable and probable cause for the alimony action. Also special damage was not proved. On both these grounds respondent's claim should be dismissed.

Per Rinfret, Davis and Hudson JJ.: In the case of civil proceedings, while there cannot be "maintenance" in the strict sense of the term until the action is commenced, a person who, without reasonable and probable cause, instigates another to bring an action incurs a civil liability to the defendant similar to that incurred by a maintainer. But the action against the instigator is only maintainable in respect of legal damage actually sustained. In the present action it cannot be said that the settlement in the alimony action was not the recognition by respondent of a legal obligation on him towards his wife or that appellant, who stirred up the litigation, was the cause of respondent having to make the payments under the judgment. At least it can scarcely be said that the wife had no right to bring that action.

Per Taschereau J.: Appellant intermeddled and stirred up litigation; but no special damage to respondent had been proved; and without proof of special damage a civil action for damages by reason of said facts cannot succeed. Such an action at common law is not one for the invasion of a right; it is one in respect of an offence which causes damage to the plaintiff. The annual payments ordered in the alimony action were clearly the discharge of a legal obligation; and they do not, nor do the costs adjudged against respondent (or incurred by him) in that action, constitute special damages for which the present action can be maintained.

* PRESENT:—Duff C.J. and Rinfret, Davis, Hudson and Taschereau JJ.

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APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1) which (reversing, on the question now in issue, the judgment of Roach J. (2)) gave judgment to the plaintiff against the defendant for damages in the sum of $4,000 upon the plaintiff's claim that the defendant had "by officious intermeddling, improperly and maliciously, and for the purpose of stirring up litigation and strife and without having any interest in the suit, instigated, stirred up, encouraged and advised" the plaintiff's wife "to commence and prosecute an action" against him for alimony and other claims. The material facts with regard to the question in issue in this appeal are sufficiently stated in the reasons for judgment in this Court now reported. The appeal to this Court was allowed and the judgment of the trial Judge restored. No costs were awarded of the appeal to this Court or to the Court of Appeal.

T. N. Phelan K.C. for the appellant.

A. C. Heighington K.C. for the respondent.

THE CHIEF JUSTICE—I agree with my brother Davis that in the circumstances of this case the action could only succeed on proof of the absence of reasonable and probable cause.

I agree also with my brother Davis and my brother Taschereau that special damage was not proved.

On both these grounds the appeal should, I think, be allowed, but without costs in this Court or in the Court of Appeal.

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

DAVIS J.—The action out of which this appeal arises had two branches but we are only concerned in the appeal with one branch, what has been referred to as a claim for damages for maintenance. The respondent alleged that the appellant, who is a solicitor practising in Toronto, "by officious intermeddling, improperly and maliciously, and for the purpose of stirring up litigation and strife and without having any interest in the suit, instigated, stirred

(1) [1940] O.R. 448; [1940] 4 D.L.R. 455.
(2) [1940] O.R. 292; [1940] 3 D.L.R. 196.

up, encouraged and advised" the respondent's wife "to commence and prosecute an action" against him in which she claimed alimony amongst other relief.

The facts as found by the trial judge are not in dispute. The respondent was married in Montreal on December 11th, 1930. Husband and wife immediately went to Toronto. Four days after the marriage they separated and the wife returned to her father's home in Grand'Mère, Quebec, and has apparently remained there ever since. The husband continued to reside in Toronto. In the spring of 1931 and subsequently, the trial judge found, the wife attempted to bring about a reconciliation between herself and the respondent and offered to return and live with him as his wife, but the respondent spurned her offers. It was not until June 1st, 1938, however, that the wife took any action against her husband, at which time she commenced an action in Ontario against him and claimed alimony. That action went down to trial at Toronto before Chief Justice Rose in February, 1939, and after some evidence was given the parties agreed to a settlement. By the settlement the husband agreed to pay his wife $500 per annum for life and to deposit securities with a trustee as security for the said payments. He also agreed to pay his wife's costs fixed at $700. Judgment was given in the action declaring the settlement binding upon the parties. The respondent has complied with all the terms of the settlement.

The respondent in the present action seeks to recover damages against the appellant for instigating and stirring up his wife to commence and prosecute the action for alimony. What is said in effect is that the wife had been living in Quebec province for over seven years separate and apart from her husband and making no claim against him; that the appellant then maliciously put the idea into her head of bringing an action in Ontario against her husband for alimony. The appellant appears to have known and been a friend of both husband and wife, though the trial judge finds that he had not seen or heard from her from 1931 till November, 1937, during which time he had acted as the husband's solicitor and during which time the wife apparently had never contemplated any legal proceedings against her husband. The appellant then became annoyed with the respondent over a legal account and began a corre-

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spondence with the wife in Quebec, stirring her up to commence an action in Ontario against her husband.

It is plain that in the strict sense of the term there was no "maintenance" of the alimony action by the appellant. What he did was merely to put the idea of bringing the action into her head. She consulted another solicitor in Toronto, who advised the action and who subsequently brought the action on her behalf. The appellant had nothing whatever to do with the action itself. In the case of civil proceedings, however, while there cannot be "maintenance" in the strict sense of the term until the action is commenced (*Flight* v. *Leman* (1)), a person who, without reasonable and probable cause, instigates another to bring an action incurs a civil liability to the defendant similar to that incurred by a maintainer. See the judgment of Lord Alverstone, C.J., in *Greig* v. *The National Amalgamated Union* (2), Halsbury, 2nd ed., Vol. I, p. 71, para. 87 (*s*) and (*t*). But the action is only maintainable in respect of legal damage actually sustained. *Cotterell* v. *Jones* (3); and the decision of the House of Lords in the *Neville* case (4).

The learned trial judge dismissed the respondent's action, but the Court of Appeal reversed the judgment and gave damages for the respondent in the sum of $4,000, and from that judgment this appeal has been brought to this Court. The judgment of the Court of Appeal obviously went on the basis that the respondent's wife had really no valid claim against her husband and that it could not say that in the settlement of the action the husband was only discharging his just debts. But that action went to trial and during the course of the hearing the respondent, who was represented by experienced counsel, made the settlement of the action above referred to, and I do not see how it can be said in this action that that was not the recognition by the husband of a legal obligation on him towards his wife or that the apellant, who stirred up the litigation, was the cause of the respondent having to make the payments under the judgment. The husband has to make the payments under the judgment because he is the husband and entered into an agreement with his wife

(1) (1843) 4 Q.B. 883.
(2) (1906) 22 T.L.R. 274.
(3) (1851) 11 C.B. 713.
(4) *Neville* v. *London "Express" Newspaper, Ltd.*, [1919] A.C. 368.

which became crystallized in the judgment. At least it can scarcely be said that the wife had no right to bring the action. While I think it plain that the appellant instigated the bringing of the action, the appellant could only be made liable to the respondent in respect of legal damage actually sustained by him.

The appeal should be allowed and the judgment at the trial restored, but in view of the conduct of the appellant I think he should not be awarded any costs, either in this Court or in the Court of Appeal.

TASCHEREAU J.—I believe that the appellant intermeddled in a matter in which he had no concern. He interfered in such a way that Marcelle Collin conceived the idea of instituting against her husband, Max Arno Frind, an action for alimony, and enforced rights which she did not seem disposed to enforce. (*Goodman* v. *The King*) (1).

The appellant for many years had been the respondent's solicitor, and a quarrel relative to a bill of costs brought about a rupture of their friendly relations. It was then, as revealed by the evidence, that the appellant by his letters to the wife incited her and improperly encouraged her to prosecute an action in which he had no legal interest, thus stirring up a litigation against the respondent.

It is plain that the appellant technically incurred a civil liability, but it is claimed on his behalf that even if he did instigate a law suit, the judgment of the Court of Appeal ordering him to pay $4,000 and costs should be reversed, because no special damage has been occasioned to the plaintiff. The rule as laid down by the House of Lords in *Neville* v. *London "Express" Newspaper, Ltd.* (2), is that the action for maintenance at common law is not an action for the invasion of a right; it is an action in respect of an offence which causes damage to the plaintiff. As Lord Finlay says: "The criminal law prohibits and may punish the act, but in the absence of damage the remedy is not by civil action." Even nominal or exemplary damages may not be recovered. The plaintiff must have sustained special damage.

(1) [1939] S.C.R. 446.

(2) [1919] A.C. 368, at 380.

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In the present case, the respondent's wife enforced her rights to claim an alimony, and after an agreement had been reached by the parties, Chief Justice Rose ordered her husband, Frind, to pay to his wife $500 annually, and costs, and, to guarantee the payment of the alimony, he had to deposit with a Trust Company securities to the value of $10,000. This payment was clearly the discharge of a legal obligation. The amount paid by a debtor as the result of the exercise of a creditor's rights, even if the latter has been improperly induced to prosecute the action, may not be recovered as damages by the debtor against the maintainer. These payments in capital and costs do not constitute the special damages which are recoverable before the courts. The same thing may be said respecting costs paid by a defendant to his solicitor and incurred in a vain attempt to oppose the claim.

In the *Neville* case cited *supra,* Lord Finlay in his speech expressed as follows the views of the majority:—

> In the present case, there is no damage. The plaintiff, it is true, has had to repay money which he had obtained by fraud and to pay costs in respect of his having resisted payment. It cannot be regarded as damage sufficient to maintain an action that the plaintiff has had to discharge his legal obligations or that he has incurred expenses in endeavouring to evade them.

These principles should be applied to this case where no special damage has been proven. The appeal should be allowed, but in view of the circumstances of the case, I would not award the appellant any costs, here and in the Court of Appeal.

Appeal allowed.

Solicitors for the appellant: *Phelan, Richardson, O'Brien & Phelan.*

Solicitors for the respondent: *A. and E. F. Singer.*

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TERAS KRAWCHUK.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

* July 21.
* July 23.

KRAWCHUK v. THE KING.

Criminal law—Section 1025 Cr. C.—Appeal to the Supreme Court of Canada—Conflicting decisions—"Judgment of any other court of appeal"—Must be courts within Canada.

The "court of appeal" contemplated by section 1025 of the Criminal Code which gives right of appeal to the Supreme Court of Canada, upon leave to appeal being granted, "if the judgment appealed from conflicts with the judgment of any court of appeal" does not include any courts other than Canadian courts. *Arcadi* v. *The King* ([1932] S.C.R. 158) foll.

APPLICATION for leave to appeal from a decision of the Court of Appeal for British Columbia, upholding the conviction of the appellant for the offence of murder.

E. F. Newcombe K.C. for the appellant.

W. L. Scott K.C. for the respondent.

THE CHIEF JUSTICE—I have no hesitation in expressing my agreement with the conclusion of my brother Rinfret in *Arcadi* v. *The King* (1), that the courts of appeal, contemplated by section 1025 of the Criminal Code, do not include any courts other than Canadian courts.

In addition to the reasons of my brother Rinfret, I may add that the interpretation very ably contended for by Mr. Newcombe (that conflict with a decision on a criminal appeal in England is sufficient to give jurisdiction under that section) might open up in any case the question whether the judgment in which leave to appeal was prayed was inconsistent with the decisions of the Court of Crown Cases Reserved, of the Exchequer Chamber, of the House of Lords, or of the Privy Council; in other words, might open up a field of examination so broad as to trench upon the limitation in section 1023 to a degree probably not contemplated by section 1025.

Then, the Chief Justice, after dealing with the merits of the case, dismissed the application.

Application dismissed.

* PRESENT:—The Chief Justice in Chambers.

(1) [1932] S.C.R. 158; 57 C.C.C. 130.

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*Oct. 7.
*Oct. 10.

LA DUCHESSE SHOE LIMITED (DEFENDANT) ..... APPELLANT;

AND

LE COMITÉ PARITAIRE DE L'INDUSTRIE DE LA CHAUSSURE (PLAINTIFF) ..... RESPONDENT.

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

Appeal—Jurisdiction—Claims of several employees against same employer cumulated in single action—Each claim amounting to less than $200—Action taken by Joint Committee on behalf and for the benefit of employees—Powers of Joint-Committee granted by provincial statute—Workmen's Wages Act, Que., 1937, 1 Geo. VI, c. 49, s 20.

The respondent, a joint-committee constituted as a corporation under the Quebec *Workmen's Wages Act*, claimed from the appellant, under the provisions of section 20 (*k*) of the Act, on behalf and for the benefit of over 200 workers and apprentices, a sum of $4,790.93, amount alleged to be due for wages under a collective agreement; and also claimed under other provisions of the Act further sums, payable to the respondent itself, of $753.97 as liquidated damages and $27.40 as penalty. Nearly all the individual claims were under $100 and none of them exceeded $200. The respondent's action was maintained by the trial judge, which judgment was affirmed by the appellate court. The respondent moved to quash an appeal to this Court for want of jurisdiction.

Held that no appeal lies to this Court from the judgment appealed from. *Cousins* v. *Harding*, ([1940] S.C.R. 442) followed.

MOTION on behalf of the respondent for an order quashing the appeal to this Court, which was brought from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the trial judge, White J., and maintaining the respondent's action.

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

Jean Genest K.C. for the motion.

E. Veilleux contra.

The judgment of the Court was delivered by

*PRESENT:—Rinfret, Crocket, Kerwin, Hudson and Taschereau JJ.

RINFRET J.—Motion to quash for want of jurisdiction.

The respondent is a committee which, by the Quebec *Workmen's Wages Act* (c. 49 of the statute I Geo. VI, 1937), is constituted a corporation and has the powers, rights and privileges appertaining to ordinary civil corporations (s. 20).

It may

demand from any employer and any employee violating the provisions of a decree respecting wages an amount equal to 20% of the difference between the wage made obligatory and that actually paid;

and such amount is "accorded as liquidated damages."

Then the statute (s. 20*k*) provides that the committee may

Notwithstanding any law to the contrary, institute, for the benefit of the employee who has not taken action and caused same to be served within one month from the due date of his salary or wages or who having taken action does not proceed with all possible diligence, any action in his favour arising out of the decree, without having to establish an assignment of claim from the person concerned and in spite of any express or implied renunciation by the latter.

The claims of several employees against the same employer may be joined in the same suit.

No employer sued by the committee may set up any grounds by way of cross demand.

The amount claimed as liquidated damages may be added to the amount of the claim.

The claim shall be deemed a summary matter and be prosecuted as such.

In this case, Le Comité Paritaire demanded $4,790.93

pour le bénéfice et avantage des ouvriers, apprentis et ouvrières ci-dessus mentionnés, chacun des dits employés devant bénéficier du jugement rendu, en faveur du demandeur, pour le montant lui revenant, à titre de solde de salaire, tel que sus-mentionné; conclut en outre le demandeur à ce que la défenderesse soit condamnée à lui payer, à lui-même, à titre de dommages liquidés, une somme de $753.97, représentant 20% des réclamations des ouvriers et une autre somme de $37.67 représentant un prélèvement de 1% conformément aux dispositions de la loi I Geo. VI, ch. 49 et de ses amendements.

The parties later admitted

that, if the Defendant Company was liable on the action instituted, the amount for which the Company was responsible was $3,568.40, plus one per cent, i.e., $27.40, and also an indemnity of 20% making in all $4,309.48.

The appellant lost both in the Superior Court and in the Court of King's Bench (appeal side). It then launched

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Rinfret J.

a further appeal to this Court; and the respondent moves to quash this appeal on the ground that the Court has no jurisdiction to hear it.

In our opinion, no material distinction can be made between this case and the case of *Cousins* v. *Harding* (1), where it was held that

> the mere fact that several plaintiffs have joined their claims in a single action does not affect our jurisdiction * * * Each claim by itself must be considered as separate for purposes of jurisdiction.

In that case, the claims of several employees against the same employer were cumulated in a single action, as authorized under sec. 22 of the *Fair Wages Act*. Under that Act, the employees brought their action in their own name, but several of them had joined in the action. It is true that, as pointed out by the appellant, by the procedure under the Quebec *Workmen's Wages Act*, which governs the present case, instead of the employees joining together and cumulating their claims in a single action, the action is brought in the name of the Committee. This is an exception to article 81 of the Code of Civil Procedure, whereby "a person cannot use the name of another to plead." But that exception does not go any further than to authorize the bringing of an action for the several claims of the employees in the name of the committee; otherwise it is made clear by the wording of the statute that the committee itself has no monetary interest in the wages sued for. The action is brought "for the benefit of the employee." There is no "assignment of claim" from the employee concerned; and the conclusions of the declaration in the case now under discussion are strictly along those lines, since the committee prayed for judgment

> pour le bénéfice et avantage des ouvriers, etc., chacun des dits employés devant bénéficier du jugement rendu en faveur du demandeur pour le montant lui revenant à titre de solde de salaire.

In the declaration, a list of the employees concerned is given with the amount or "solde de salaire" claimed on behalf of each of them. We do not doubt that the appellant could have filed—and, as a matter of fact, it did file—

(1) [1940] S.C.R. 442.

a defence alleging facts peculiar to each individual claim and having nothing to do whatever with the claim of another employee in the list.

The "solde de salaire" demanded on behalf of the employee in no case exceeds two hundred dollars. In the great majority of them, the sum claimed is below one hundred dollars. Indeed, were it not for the amount claimed as liquidated damages representing "20% of the difference between the wage made obligatory and that actually paid" ($753.97), none of the amounts mentioned would be within the competency of the Court of King's Bench (appeal side), and *a fortiori* within the jurisdiction of this Court. Moreover, as pointed out in *Cousins* v. *Harding* (1), the statute is only permissive and not compulsory.

We think the motion ought to be granted and the appeal quashed.

But the security on appeal to this Court was given and approved on the 24th day of January, 1941. The respondent might have made its motion to quash and brought it for hearing either at the February sittings or at the April sittings. Notice of motion was given only on the 26th day of September, 1941, with the result that, in the meantime, the appellant had caused the case to be printed and the appeal is set down for hearing at the present sittings of the Court. If the motion had been made promptly, as it should have been, all these costs and expenses would have been avoided. They may not be recovered from the respondent by the appellant, in view of the fact that the appellant itself should have realized that the Court was without jurisdiction to hear the appeal; but, under the circumstances, the respondent is also responsible for the delay and he should, on that account, be awarded no costs on its motion.

The motion will be granted without costs.

Motion granted without costs.

Solicitor for the appellant: *Gaston Desmarais.*

Solicitors for the respondent: *Beaulieu, Gouin, Bourdon, Beaulieu & Montpetit.*

(1) [1940] S.C.R. 442.

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* April 28, 29, 30.
* June 24.

IN THE MATTER OF THE FARMERS' CREDITORS ARRANGEMENT ACT, 1934, AND AMENDMENTS THERETO

AND

In re JANE McEWEN

AND

THE CHIEF COMMISSIONER AND THE COMMISSIONERS OF THE BOARD OF REVIEW FOR MANITOBA AND OTHERS..... } APPELLANTS;

AND

THE TRUST AND LOAN COMPANY OF CANADA..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Debtor and Creditor—Farmers' Creditors Arrangement Act (Dom.) 1934—Jurisdiction of Board of Review to entertain proposal—Party making proposal under the Act—Whether a "debtor"—Whether respondent is a "secured creditor"—Absence of privity—Grounds against proposal raised by way of certiorari—Jurisdiction of the Court of Appeal—Illegal transfer of property in order to bring it within reach of machinery of the Act—Abuse of statutory procedure—Certiorari—Applicability to Board of Review—Board's confirmation of proposal quashed—Devisee of mortgaged land obtaining title after May, 1935—Effect of section 19 of the Act—When a debt is "incurred" in the sense of that section—Whether creditor should not have raised grounds against proposal before County Court—Farmers' Creditors Arrangement Act (Dom.) 1934—Section 2 (2); section 2 (d) as amended by c. 47 of 1938; sections 5, 7, 12 (5) (6) and section 19 as enacted by amending statute of 1938.

In September, 1919, one John McEwen borrowed $4,000 from the respondent and executed a mortgage upon his land in favour of the latter. He died on August 26th, 1934. His will appointed his wife, Jane, executrix and devised all his real and personal estate to her. The will was admitted to probate on August 13th, 1935. At the time of John McE.'s death, the whole of the mortgage debt was owing to the respondent, as well as a large sum for accumulated interest. The respondent, acting under the powers contained in its mortgage, leased the land to Robert J. McE. for terms from November, 1934, to November, 1936, and the widow continued to live on the farm until her death in 1940. In July, 1936, a proposal under the *Farmers' Creditors Arrangement Act, 1934,* was filed by the latter, in her personal capacity and not as executrix, with the Official Receiver, the only debts disclosed being the amount due to the respondent under its mortgage and a sum of $170 for taxes. Actually, Jane McE. had never assumed payment of the mortgage debt or interest, nor had she in any way

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

obligated herself to the respondent. At the time of filing her proposal, the certificate of title to the land was held by the widow, not as owner but only as executrix. In October, 1936, she, as personal representative, purported to transfer the land to herself personally for an expressed consideration of $1, and a certificate of title was issued to her; but the estate had not yet been fully administered. Immediately upon receipt of notice of the proposal and again in November, 1936, the respondent advised the Official Receiver that it had no claim against Jane McE. and that she was not entitled to the benefit of the Act; and later, in March, 1937, the respondent's solicitors wrote to the Registrar of the Board of Review asserting lack of jurisdiction on the part of the Board. The Board of Review, in October, 1937, formulated its proposal, reducing the amount of the respondent's mortgage, and confirmed it in October, 1938. The respondent, in October, 1939, on its behalf as well as on behalf of all the creditors of the deceased, brought an action against the widow, both as executrix and in her own right, to have her required to administer the estate, to have the transfer of the land to herself as owner set aside and to have the land sold to discharge the respondent's debt. The Board's proposal was pleaded as a bar to the action, such proposal having allegedly operated to extinguish the liability of the estate. Jane McE. died in March, 1940, and probate of her will was granted to the appellants, Robert J. McE. and Edith McE. who obtained registration of the land in their names as personal representatives. On June 19th, 1940, they transferred the land to themselves in their personal capacities, and, on the same day, they both joined in a transfer to Robert J. McE. who became the registered owner. The respondent, in September, 1940, launched before the Court of Appeal for Manitoba an application for *certiorari* in order to bring the proposal before that Court and have it quashed. The Court of Appeal ordered the issue of the writ and later on made an order declaring the proposal to be beyond the powers of the Board of Review and directing that it be quashed.

Held, Davis J. dissenting, that the judgment of the Court of Appeal ([1941] 1 W.W.R. 129) should be affirmed.

Per the Chief Justice: Upon the admitted facts of this case, the land in question, before the transfer of it to herself in October, 1936, was not the property of Jane McE. in the sense of the *Farmers' Creditors Arrangement Act*. Being beneficially entitled to the residue of her husband's estate, she was entitled to have the land, subject to the rights of the mortgagee, applied in payment of the debts of the estate; and as legal personal representative, it was her duty to see that this was done. As the estate was admittedly insolvent, she had no interest in the land which could lawfully be made available to satisfy her personal debts if she had any. Under such circumstances she could not properly transfer the land to herself. The purpose of such transfer was evidently prompted by the supposition that it might enable her to bring the land and the mortgage debt within reach of the machinery of the Act. With such facts before them, the Board of Review ought to have declined to act on the proposal made by Jane McE. on the ground that they were confronted by a manifest abuse of the statutory procedure; and, if the question had been raised by an application to the Court, it must inevitably have been held that by such devices the creditors of the estate could not

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be deprived of their rights.—Moreover, even assuming that, the title to the farm being vested in Jane McE. in virtue of the certificate of title or of the transfer to her in October, 1936, it was her property in the sense of the *Farmers' Creditors Arrangement Act, 1934,* and that the mortgage debt could be deemed to be her debt for the purposes of the Act, the amendments of 1938 to that Act which, it was contended, brought her into privity of contract with the mortgagee, had no application, for the reason that section 19 of that Act, added thereto by statute of 1935, c. 20, provides that the "Act shall not, without the concurrence of the creditor, apply in the case of any debt incurred after May 1, 1935": the essential condition being that the property affected by the security shall have been the property of the debtor in the sense of the amending statute, consequently, the mortgage debt in this case never became (constructively) the debt of Jane McE. until long after that date.—A "debt" (if it be a mortgage debt) cannot be "incurred" in the sense of section 19 before the property or interest on which it is charged has become the "property" of the debtor within the contemplation of section 2 (*d*) of the statute.

Per Rinfret, Crocket and Hudson JJ.—Under the circumstances of the case, Jane McE. was not entitled to file a proposal under *The Farmers' Creditors Arrangement Act,* for the reasons that she was not the owner of the land and that there was no privity of contract between her and the respondent company. She was in no way the "debtor" of the respondent within the requirements of the Act, even after the introduction of the amendment of 1938 to section 2 (*d*). The only debt appearing in the proposal formulated by the Board of Review was the respondent's mortgage account; that was not her debt, so much so that the respondent could not have sued her for it; it was not a "debt provable in bankruptcy" against her, or against her estate in bankruptcy: the sole object of the procedure being to obtain a reduction on the debt owing to the respondent by the estate. Therefore, under the circumstances of this case, the Board of Review had no jurisdiction to deal with the respondent's mortgage debt and more particularly to reduce the rate of interest on that mortgage; and the Board could not, consistently with the provisions of the Act, deal with Jane McE.'s request, or formulate a proposal, in complete disregard of the position and interest of the respondent.—Also, the provisions of section 2 (*d*) of the Act, as amended by c. 47 of 1938, defining the word "creditor" did not confer any greater jurisdiction upon the Board in the present case; the object of the amended definition has apparently enlarged the class of "creditors", but did not alter the status of the "debtor". —Moreover, section 19 of the Act, above referred to, finds application in this case: "the debt incurred," referred to in that section, is necessarily a debt personally incurred by an applicant and does not concern a debt which, though at present owing by the applicant farmer towards the creditor, had been incurred by a previous debtor (who may not have been a farmer) and at a date prior to the first day of May, 1935, as it is in the present case.—Therefore the proposals formulated by the Board of Review were made without authority and jurisdiction and were invalid. It should also be *held* that the Court of Appeal had power to deal with the matter in controversy in this case on an application for *certiorari* by the respondent; that the preliminary questions raised by the respondent were of such a nature that, in an ordinary case, they would properly give rise to

an inquiry on *certiorari* by a superior court and that, for the purposes of that inquiry, the facts bearing on the question of jurisdiction could be put before that Court by means of affidavits.

Per Davis J. dissenting—In view of all the facts and circumstances of this case, on one hand, the conduct of the respondent throughout has been such as to disentitle it to relief in *certiorari* proceedings and, on the other hand, allowance of the appeal would put the appellants the Board of Review, the Registrar, the executors of Mrs. Jane McE. and her son R. J. McE. to the burden of excessive and unnecessary costs of litigation.—The effect of the lodging by Mrs. Jane McE. with the Official Receiver of a composition, extension or scheme of arrangement, on July 31st, 1936, was to put the subject-matter of the proposal into the exclusive jurisdiction, subject to appeal, of the County Court of Dauphin, which was the judicial district where Mrs. McE. resided and the farm was located; such district being designated by section 5 (1) of *The Farmers' Creditors Arrangement Act*. And the Act moreover gave to the Board of Review a right to work out a proposal which might involve secured creditors, even in the absence of their concurrence. Although the respondent had the right at its own risk to deliberately ignore the proceedings under the Act, on the alleged grounds that Mrs. Jane McE. was not its debtor and that it was not a secured creditor, a very convenient and speedy remedy was available to the respondent when it got notice of Mrs. Jane McE.'s application with the Official Receiver, by moving at once in the County Court to have the proposal set aside upon any of the grounds alleged by the respondent in its present proceeding by way of *certiorari*. The county judge would have certainly entertained any such application and would have dealt with the matter at the time in a speedy and inexpensive manner; and, moreover, a statutory right to appeal from any decision so rendered would have been available to the respondent.

APPEAL, by leave of appeal granted by the Court of Appeal for Manitoba from the judgment of that Court (1), allowing a motion in *certiorari* proceedings to quash an order by the Board of Review for Manitoba under *The Farmers' Creditors Arrangement Act, 1934*, confirming a proposal thereunder.

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

H. A. Bergman K.C. for the appellants, the Board of Review and the Registrar.

A. T. Warnock for the appellants R. J. and I. E. McEwen.

W. C. Hamilton K.C. for the respondent.

H. A. Bergman K.C. and *D. W. Mundell* for the Attorney-General of Canada.

(1) [1941] 1 W.W.R. 129; [1941] 2 D.L.R. 54; 22 C.B.R. 183.

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Duff C.J.

THE CHIEF JUSTICE.—Jane McEwen's right to avail herself of the enactments of *The Farmers' Creditors Arrangement Act* as amended in 1938 necessarily rested upon two propositions:

first, that the farm which she as the legal personal representative of her husband had transferred to herself and for which she had procured a certificate of title to be issued to herself personally was her "property" within the meaning of sec. 2 (*d*) of the statute as amended in 1938;

and second, that the respondent company was a "secured creditor" within the meaning of the amending enactments of 1938.

On the admitted facts it is not open to dispute that before the transfer of it to herself in October, 1936, the land was not her property in the sense of the statute. Being beneficially entitled to the residue of her husband's estate, she was of course entitled to have the land, subject to the rights of the mortgagees, applied in payment of the debts of the estate; and as legal personal representative it was her plain duty to see that this was done. As the estate was admittedly insolvent, the assets being insufficient to meet the mortgage debt, she had, of course, no interest in the land which could lawfully be made available to satisfy her personal debts if she had any. She ought to have been advised that in the circumstances she could not properly transfer the land to herself. The purpose of this transfer is plain; it was prompted by the supposition that it might enable her to bring the land and the mortgage debt within reach of the machinery of the Act. With the facts before them, the Board of Review ought to have declined to act on Mrs. McEwen's proposal (of the 31st July, 1936) on the ground that they were confronted by a manifest abuse of the statutory procedure. Had the question been raised by an application to the Court, it must inevitably have been held that by such devices the creditors of the estate could not be deprived of their rights.

This alone would be a sufficient ground for dismissing the appeal; because the Court of Appeal having held that the remedy by *certiorari* is properly applicable, I think with the greatest respect that we are not required, in such a palpable case of abuse of statutory procedure, to hold that their exercise of discretion is vitiated by reason of the grounds relied upon by Mr. Bergman.

This appeal, however, may be considered on the assumption that the title to the farm being vested in Mrs. McEwen in virtue of the certificate of title of the 20th October, 1936, or of the transfer to her of the 14th October, 1936, it was her property in the sense of *The Farmers' Creditors Arrangement Act,* and that it was (from this point of view) sufficient that it should be so at the date when the Board of Review formulated their proposal, in order to give the Board jurisdiction in that behalf. Under the provisions of the amending statute of 1938 the respondent company is to be deemed by construction of law to have been at the date when the proposal was formulated by the Board of Review a secured creditor of Mrs. McEwen and the mortgage debt is deemed to be her debt, for the purposes of the Act.

As Mr. Bergman said in argument, the mortgage debt was, by force of the Act, her debt for the purposes of the Act. It would appear that the amending Statute of 1938 takes effect retrospectively at the date of the formulation of the proposal by the Board (if a proposal has been formulated) otherwise at the filing of the proposal of the debtor. But the essential condition is that the property affected by the security shall have been the property of the debtor in the sense of the amending statute; and consequently the mortgage debt in question here never became (constructively) the debt of Mrs. McEwen until long after the 1st of May, 1935.

Within the intendment of sec. 19 the debt is "incurred" when it is "incurred" by the debtor; the mortgage debt in question was "incurred" in that sense, constructively, by force of the amending Statute (the only sense in which it was ever "incurred"), when that Statute came into force in 1938, and, by relation, at a date not earlier than the date of the certificate of title of the 20th October, 1936, or than that of the transfer of October 14th, 1936.

Debts so constructively "incurred" (in virtue of the amending statute) are in my opinion within the intendment of sec. 19; and, I repeat, such a "debt" (if it be a mortgage debt) cannot be "incurred" in the sense of that section before the property or interest on which it is charged has become the "property" of the debtor within the contemplation of sec. 2 (*d*) of the statute. On this point, as to the application of sec. 19, I respectfully concur with Mr. Justice Trueman.

The appeal should be dismissed with costs.

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Rinfret J.

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

RINFRET J.—The facts of this case are complicated.

In September, 1919, one John McEwen, then of Dauphin, Manitoba, now deceased, borrowed four thousand dollars ($4,000) from the respondent and executed a mortgage upon his land in favour of the latter. The mortgage provided for repayment instalments of $250 on November 1st in each of the years 1921 to 1923 inclusive, and of the balance on November 1st, 1924, with interest at seven per cent per annum, payable annually.

John McEwen died on August 26th, 1934. Probate of his will was granted to his widow, Jane McEwen, on August 13th, 1935. By the will, the deceased after directing payment of his debts, devised and bequeathed all his real and personal estate to his widow.

At the time of John McEwen's death, the whole of the mortgage debt was owing to the respondent, as well as a large sum for accumulated interest thereon.

The respondent, acting under the powers contained in its mortgage, leased the land to Robert James McEwen for a term from November 7th, 1934, to November 1st, 1935, and for a further term from February 3rd to November 1st, 1936.

On or about July 31st, 1936, Jane McEwen, in her personal capacity, and not as executrix, filed with the Official Receiver of the Dauphin Judicial District a proposal purporting to be made under *The Farmers' Creditors Arrangement Act, 1934*. The only debts disclosed by the proposal were the amount owing to the respondent under its mortgage, there placed at $6,000, and the further sum of $170 payable to the Rural Municipality of Dauphin in respect of taxes.

Actually, Jane McEwen had never assumed payment of the mortgage debt or interest, nor had she in any way obligated herself to the respondent.

At the time of filing her proposal, Jane McEwen was not the owner of the land, although afterwards, on October 20th, 1936, she, as personal representative, purported to transfer the land to herself in her personal capacity for an expressed consideration of $1.

By the proposal, Jane McEwen asked that the respondent's debt be reduced to $2,500, with interest at 6 per cent, spread over a period of fifteen years, and that other accounts be not affected. Outside of the sum due to the municipality of Dauphin for taxes, Jane McEwen apparently was not indebted to any person whomsoever.

By the proposal, she valued the land at $2,500. When applying for probate, she had valued it at $3,000. Afterwards, on August 17th, 1937, she insured the buildings for $4,050.

Immediately upon receipt of notice of the proposal, the respondent advised the Official Receiver that it had no claim against Jane McEwen and that it was not affected by the proposal. On November 28th, 1936, the respondent again wrote the Official Receiver that Jane McEwen was not a debtor and not entitled to the benefit of the Act.

Later, on March 29th, 1937, the respondent's solicitors wrote to the Registrar of the Board of Review, setting forth fully the objections of the respondent and asserting lack of jurisdiction on the part of the Board.

The Board heard the application on March 31st, 1937, and, on October 29th, 1937, purported to formulate a proposal. The respondent's mortgage account was the only obligation attempted to be dealt with. The proposal states that the amount of that debt as of November 1st, 1936, stood at $6,336.65. At the date of the proposal, another year's interest had accrued, so that the actual amount owing at that time would be $6,678.15.

The Board proceeded to direct a reduction to $2,800, with future interest at 6 per cent. The respondent dissented, as appears from a letter from its solicitors to the Registrar, dated November 9th, 1937.

The Board gave no effect to the various protests and objections of the respondent and confirmed the proposal on October 5th, 1938.

The respondent further, on several occasions, advised both Jane McEwen and Robert James McEwen, as well as Mr. A. T. Warnock, the Official Receiver, who was also apparently acting as their solicitor, that it would not be bound by or recognize the proposal. The respondent's attitude was definite and consistent throughout.

On October 10th, 1939, the respondent commenced an administration action in the Court of King's Bench against

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Jane McEwen, both as executrix of her husband's estate and also in her personal capacity. The action was brought on behalf of the respondent itself, as well as on behalf of all the creditors of the deceased. By its statement of claim, the respondent took the position that the debt of the deceased to the respondent was unaffected by the proposal, that the full amount was still owing and that the conveyance of the land to Jane McEwen as a devisee before satisfying the debts of the deceased constituted a breach of her duties as executrix. The respondent asked that the estate be administered, the conveyance set aside and the land sold to discharge the respondent's debt.

The statement of defence delivered by Jane McEwen as executrix urged that the proposal had operated to extinguish the liability of the estate. The respondent, by its reply, after setting up that the estate was not a party to the proceedings before the Board of Review, contended that the Board was without authority to deal with the matter.

It is stated that, at the request of defendant's solicitor, made because of the illness of his client, the litigation was not pressed for the time being.

Jane McEwen died on March 27th, 1940; and, on May 9th, 1940, probate of her will was granted to the appellants, Robert James McEwen and Isabella Edith McEwen. On April 28th, 1940, the respondent's solicitors wrote the solicitor for the appellant estate asking to be advised of the issue of the grant of probate. The necessary information was given by a letter dated June 29th, 1940.

It then appeared that, following the grant of probate of the will of Jane McEwen, the appellants Robert James McEwen and Isabella Edith McEwen had obtained registration of the land in their names, as personal representatives.

On June 19th, 1940, they transferred the land to themselves in their personal capacities; and, on the same day, they both joined in a transfer to Robert James McEwen, who became the registered owner. The respondent then felt compelled to take some step to have the proposal made by the Board of Review declared to be of no effect. For that purpose, on September 17th, 1940, the respondent

issued a notice of motion to be made to the Court of Appeal for Manitoba, in order that the proposal be brought before that Court by way of a writ of *certiorari*, and so that an application to have it quashed might be proceeded with.

The Court of Appeal ordered the issue of the writ, to which a return was made by the appellants, the Chief Commissioner, the Commissioners and the Registrar of the Board of Review for the province of Manitoba.

Following the return, an order declaring the proposal to be beyond the powers of the Board, and directing that it be quashed, was made by the Court of Appeal. That order is now appealed from, leave to appeal having been granted by the Court of Appeal of Manitoba.

Before this Court, the appellant Board of Review and the appellants Robert James McEwen and Isabella Edith McEwen appeared separately; but their grounds of appeal are substantially the same. They contend that the court *a quo* should have refused the motion for a writ of *certiorari* because it had no power to deal with such a matter under the Act and the rules as well as under the procedure set up by the King's Bench Act; that the proposal returned into court pursuant to the writ of *certiorari* constituted the only and entire record before the court on the motion to quash and it was not open to the court to go behind the return and to consider extraneous material; that the majority of the court, in effect, dealt with the case as if it were an appeal from the decision of the Board of Review and failed to keep within the limits of its jurisdiction on *certiorari*; that the application for *certiorari* was, in any event, barred by delay, prejudice and estoppel; that the court erred in holding that Jane McEwen did not properly administer the estate and, therefore, improperly conveyed title to herself, or in holding that, at the date of the filing of the proposal (July 31st, 1936), she was not the owner of the land; and finally that there was error in the holding of the court that the proposal of the Board of Review was a nullity, owing to absence of privity of contract between Jane McEwen and the company, as a consequence of the wrong interpretation of *The Farmers' Creditors Arrangement Act* as amended in 1938.

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Rinfret J.

The grounds of appeal may, in reality, be grouped under two heads:

(1) The Court of Appeal erred in deciding that Jane McEwen was not entitled to file a proposal under the Act, because she was not the owner of the land, and because there was no privity of contract between her and the respondent company;

(2) The Court of Appeal had no jurisdiction to deal with these matters through a writ of *certiorari;* and it could not, pursuant to that writ, go behind the proposal of the Board of Review, whose jurisdiction, on the only record before the Court, was on its face conclusive.

Dealing first with head no. 1: In order that the Board of Review may have power and jurisdiction to formulate or confirm the proposal it did, on the application of Jane McEwen, it was necessary that she should be a farmer unable to meet her liabilities as they became due, and also that she should be the debtor of the respondent company which, in effect, in the premises, was her only alleged creditor. Otherwise, it stands to reason that the respondent could not be brought in the scheme of arrangement under the Act; and the Board of Review, in formulating its proposal, and subsequently in confirming it, exceeded its powers, authority and jurisdiction.

I think the recent decision in *Diewold* v. *Diewold* (1) is conclusive on that point, so far at least as this Court is concerned.

The mortgage debt owing to the respondent, and which the proposal purported to reduce, was incurred by the deceased John McEwen. No other person ever assumed or personally became responsible for it before any application was made for a proposal. Following the death of John McEwen, the respondent had the right to look to his estate for payment of its debt.

The application which resulted in the proposal now under consideration was an application made by Jane McEwen in her personal capacity.

At that time (July 31st, 1936), Jane McEwen was not the debtor of the respondent and, moreover, was not

(1) [1941] S.C.R. 35.

insolvent. She was not, therefore, entitled to invoke the benefits of the Act, not to speak of the disputed question whether she could be classed as a farmer.

Had she come within that class, the only proposal which she could file with the Official Receiver was a proposal in respect of her actual personal obligations.

On the face of the proposal formulated by the Board, the only debt disclosed, for which she was liable, was the sum of $91 owing to The International Harvester Company of Canada, Limited, incurred in 1936 and which could not be the subject of a personal proposal.

The only other debt appearing in the proposal is the respondent's mortgage account. That was not her debt. The respondent could not have sued her for it. It was not a "debt provable in bankruptcy" against her, or against her estate in bankruptcy.

As it turned out, it seemed pretty clear that the sole object of the proceeding was to obtain a reduction in the debt owing to the respondent by the John McEwen Estate. Jane McEwen herself apparently was not indebted to any person whomsoever.

In order to bring the debt of the estate first before the Official Receiver, and then before the Board, the Act, at that time, contained no provision under which its benefits could be invoked. It was only in 1938, by the amendment adding sec. 6 (A) to the Act (sec. 4 of C. 47 of the statutes of Canada, 1938), that provision was made for proposals by legal representatives of farmers who died after the 3rd day of July, 1934, upon satisfying certain conditions there mentioned and obtaining leave of the court. This procedure was never resorted to in the present case.

Up to that amendment, it had been consistently held that an executor could only proceed as such, and not as a farmer; and, as a Board of Review could only deal with debts of farmers in order to keep them on the land, the necessary jurisdiction was lacking.

The form of the proposal herein and of everything connected therewith was, throughout, essentially a proceeding on behalf and for the benefit of the John McEwen estate; and the only personal interest of Jane McEwen shewn therein was that her name appeared in it and purported to be signed, not by her, but "per Robert J. McEwen, her

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agent". It was the latter who verified the statement of affairs and who signed the statutory declaration before the Official Receiver.

The first duty of Jane McEwen as executrix of the estate of her deceased husband was to administer properly the estate and to apply the assets in reduction of the debts before any conveyance to a beneficiary. I need not here discuss the point whether, when attempting to transfer the land to herself, she committed a breach of trust, and, notwithstanding such transfer, she should be treated as a trustee for the creditors of the John McEwen's estate. It is sufficient to state that the security given by John McEwen for the respondent's loan could not be released, reduced or affected, so long as the liability of the estate existed, by means of a proposal made and filed by Jane McEwen personally.

Under the circumstances, the Board of Review had no jurisdiction to deal with the respondent's mortgage debt. More particularly, it had no authority to reduce the rate of interest on that mortgage; and the Board of Review could not, consistently with the provisions of *The Farmers' Creditors Arrangement Act,* deal with her request, or formulate a proposal, in complete disregard of the position and interest of the respondent.

It need not be said that, so that the Act may be validly invoked, it is not sufficient that there should be a debt; it is necessary that the applicant farmer should be the debtor of such a debt. Here, there was undoubtedly a debt, but the applicant for relief was not the debtor. The debtor was the John McEwen estate, which refrained from making an application, although it might have done so after the amending legislation of 1938.

On behalf of the appellants, it was argued that another amendment introduced by that legislation (1938), and to which reference has not yet been made, has had the effect of doing away with the necessity of some privity of contract between the applicant for a proposal and the creditor.

Up till then, the Court of Appeal for Ontario, in *Gofton* v. *Shantz* (1) and in *Nesbitt* v. *Hogg* (2) had held that the Act did not apply where the relation of debtor and creditor did not exist, as here. It was claimed, however, by the

(1) [1937] O.R. 856. (2) (1938) 19 C.B.R. 254.

appellants that sec. 2(*d*) of the Act, as amended by ch. 47 of the statutes of 1938, conferred jurisdiction upon the Board in this instance.

The subsection just referred to provides:

> (*d*) "Creditor" includes a secured creditor and, notwithstanding the absence of privity of contract between the debtor and any of the persons hereinafter mentioned, a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof and, in case the debtor holds real property under an agreement of sale or under an assignment of an agreement of sale, the vendor of such property or any person entitled under an assignment by such vendor.

I do not think this new section helps the appellants. The object of the amended definition appears to have been to enlarge the class of "creditors"; but it does not alter the status of the "debtor". This was pointed out by Masten, J.A., in *Swaffield* v. *Baycroft* (1). In that case, neither the holder of the mortgage, nor the owner of the land, was an original party to the mortgage; but the owner of the land had by an extension agreement specifically covenanted to pay the debt. Having become a "debtor", he would have come within the purview of the Act but for the fact that the extension agreement was entered into after May 1st, 1935, and that, by force of sec. 19, the Act "does not, without the consent of the creditor, apply in the case of any debt incurred after" that date.

Masten J.A., in my view, properly set forth the limits of the new definition:

> But there is nothing in the Act of 1938 which brings the situation within the principal Act if the farmer who is in possession does not owe the debt secured by the mortgage. By the statute of 1938 a limitation on his right additional to that created by the original Act is imposed on the holder for the time being of a security against the farm of the debtor; that is all. The rights and liabilities of the debtor are not referred to in the Act of 1938, and, in my view, are not affected.
>
> * * *
>
> And I should only add that, in my view, it is impossible to conceive that the statutory alteration in the definition of "creditor" carries with it by implication a corresponding alteration in the common law meaning of "debtor". That would, in my view, be legislation by the Court.

Independently of the language of section 2(*d*), which does not purport to enlarge the class of "debtors," it should be noticed that the new definition therein contained still requires, notwithstanding the absence of privity of contract

(1) [1939] O.R. 1.

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between the applicant and the "person holding a mortgage, hypothec, pledge, charge, lien or privilege," that the mortgage or hypothec, etc., must be a mortgage or hypothec "on or against the property of the debtor or any part thereof." This requirement would make it impossible to include Jane McEwen within the meaning of the definition, as, at the time of the proposal, she was not the owner of the property mortgaged.

The reasoning of Masten J.A. is further strengthened by reference to the other sections of the Act, which assume throughout that the applicant must also be the debtor. An example of this may be found in sec. 11 (1), whereby

> on the filing with the Official Receiver of a proposal, no creditor * * * shall have any remedy against the property or person of the debtor, or shall commence or continue any proceeding under the *Bankruptcy Act*, or any action, execution, or other proceeding for the recovery of a debt provable in bankruptcy * * * unless with leave of the court and on such terms as the court may impose.

There can be no debt "provable in bankruptcy" unless the applicant for the proposal is the debtor of the "creditor, whether secured or unsecured."

I fail to see how the respondent could validly be brought in a scheme of arrangement with Jane McEwen, who was not its personal debtor and who did not own the land upon which it held its mortgage. Jane McEwen was in no way the "debtor" of the respondent within the requirements of the Act, even after the introduction of the amendment of 1938 to section 2 (*d*).

And section 19 of the Act does not improve the appellants' situation. It has already been referred to. It enacts that the

> Act shall not, without the concurrence of the creditor, apply in the case of any debt incurred after the first day of May, 1935.

The appellants rely on that section and claim that, as the mortgage debt was incurred by John McEwen on September 29th, 1919, and as John McEwen died August 26th, 1924, the Act applies to the debt so incurred.

I do not overlook the respondent's contention that it cannot be so, since the will of John McEwen was probated only on August 13th, 1935, the transfer of the land to Jane McEwen made by her as personal representative to herself in personal capacity took place only on October 20th, 1936,

and that, moreover, such a transfer was, in effect, a breach of trust which must be held ineffective, in so far as it may affect the interests and rights of the respondent. But it is sufficient to say that sec. 19 can have no other meaning than that the first day of May, 1935, therein mentioned, is referable and can be referable only to the date when the debt was incurred by the applicant farmer himself. The whole Act deals with the liabilities of the farmer who files a proposal with the Official Receiver and his "present and prospective capability * * * to perform the obligations prescribed", as well as "the productive value of his farm." The "composition, extension of time, or scheme of arrangement" for which he is authorized to file a proposal, or the Board of Review may formulate a proposal, concern only the applicant farmer, whom the Dominion Parliament has declared essential, in the interest of the country, to retain on the land as an efficient producer (See preamble of the Act). It follows that "the debt incurred", referred to in sec. 19, is necessarily the debt personally incurred by the applicant and does not concern a debt which, though at present owing by the applicant farmer, towards the creditor, was incurred by a previous debtor (who may not have been a farmer) and at a date prior to the first day of May, 1935, as is the case here.

As a consequence of the foregoing, the point raised by the respondent that if the Act, and more particularly sec. 2 (*d*), should be construed otherwise than was contended by it, the Act would be unconstitutional, need not be considered.

On that point, we have heard argument on behalf of the Attorney-General of Canada; and it is sufficient to say that as, in my view, the Act and the amendments of 1938 ought to be construed as submitted by the respondent, the latter has no interest to raise the question of constitutionality and it need not be gone into in the present case.

But the fact remains that the respondent has succeeded to establish that the Act did not apply to Jane McEwen at the time when she filed her proposal, or at the time when the Board of Review pretended to formulate or to confirm a proposal in respect of her liabilities; and that, accordingly these proposals were made without authority and jurisdiction and they were invalid, as held by the majority of the Court of Appeal of Manitoba.

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There remains to discuss whether, as contended by the appellants, that Court had no power to deal with this matter on an application for *certiorari,* and it should have refused the motion for the issue of the writ.

I do not think this Court ought to concern itself with the procedure set up by the King's Bench Act and the rules thereunder. This is essentially a matter of practice which, at least in the present case, should properly be left as settled by the Court of Appeal of Manitoba.

The same thing may be said of the point raised by the appellants that the respondent's application for *certiorari* was, in any event, barred by delay, prejudice and estoppel. This, to my mind, was a matter to be determined according to the discretion of the Court of Appeal. Moreover, where the subject of the discussion raises not only the question of the competency of the Official Receiver and of the Board of Review, but might involve as well the constitutional jurisdiction of the Parliament of Canada, I do not think that, generally speaking, an objection based on delay, latches, or estoppel, could be held to deprive the courts of the power to inquire into the substantial points which are discussed in this appeal.

The fallacy of the appellants' contention is that the Official Receiver or the Board of Review were given the authority to pass upon these substantial questions. Starting from that erroneous premise, they asked the Court to hold that the Board of Review had made findings on these substantial questions, and, there being no appeal from the decisions of the Board, the findings so made must be held as conclusive and as thereby withdrawn from the supervisory authority of the provincial Supreme Court.

But, of course, a mere perusal of the Act shows that the Board of Review has been given no such authority. The Official Receiver or the Board, naturally, must proceed generally upon a *prima facie* case of jurisdiction being established, but that is vastly different from the suggestion that, in the exercise of their jurisdiction, the Official Receiver or the Board may determine the questions of law, as distinguished from the questions of pure fact (Reference concerning the Tariff Board of Canada) (1).

(1) [1934] S.C.R. 538, at 548.

Of course, the status of a farmer, and whether he is able to meet his liabilities as they become due, and whether there exists between the interested parties the relation of debtor and creditor, are largely questions of fact; but whether these facts are covered by the Act, and whether they bring the matter within the meaning of the Act and under the jurisdiction of the Receiver and the Board are questions of law. The whole subject is one of mixed law and fact. Neither the Receiver, nor the Board, has been given by the Act the power to determine these questions in their legal aspect. The courts designated by the Act for that purpose are, in Quebec, the Superior Court and, in the other provinces, the County or District Court. The jurisdiction conferred on these courts by section 5 of the Act is stated to be "a jurisdiction in bankruptcy" and that wording implies a qualified jurisdiction. But such jurisdiction is sufficient to give to these courts the power to determine the status as a farmer of the applicant to the Official Receiver, as well as the other questions: Whether the farmer is unable to meet his liabilities as they become due and whether, for the purposes of the application of the Act, the relation of creditor and debtor exists between the interested parties.

Nowhere in the Act are the Official Receiver or the Board of Review given any such jurisdiction. And the existence of the status of farmer, or of his insolvency, or of the relation of debtor and creditor, is a condition precedent to the validity of the proceedings before the Official Receiver or before the Board; it is a prerequisite of their competency in the premises. Unless these conditions exist, the Official Receiver and the Board cannot enter into the matter at all. Further, the Receiver, or the Board, have not been given by the Act the power to decide these matters, they are specifically declared to be within the exclusive jurisdiction in bankruptcy of the courts named in section 5.

In this case, it was stated at bar, and it is apparent from the record, that these preliminary questions, which it was essential to have decided before the Receiver or the Board could acquire jurisdiction, were never brought before the County or District Court having territorial jurisdiction in Manitoba.

Upon the return to the writ of *certiorari*, the Board of Review certified to the Court of Appeal the proposal it

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made as of October 29th, 1937, confirmed as originally formulated and declared to be binding upon all creditors of the so-called farmer debtor on October 5th, 1938, and filed in the County Court of Dauphin on October 8th, 1938. This was the only document returned by the Registrar of the Board.

It is true that, as shown by that proposal, the Board therein found "the farmer entitled to the benefit of the Act," although it is not clear whether this may be taken as a finding that Jane McEwen was a farmer, or as assuming that she was a farmer and holding that she was otherwise entitled to the benefit of the Act. But, be that as it may, for the reasons above given, the exact meaning of the finding is immaterial. It is sufficient that it shows that the Board was treating Jane McEwen as a farmer entitled to invoke the Act and was proceeding to formulate a proposal as if the Act applied to her, notwithstanding the objections of the respondent clearly put before that body prior to the formulation of the proposal.

The document returned upon the writ and certified to by the Registrar of the Board of Review as being the proposal confirmed by the Board and intended to be binding upon the respondent discloses:

> That the farmer's son, Robert McEwen, who is at present living and working on the farm, intends to remain there and finds that the farm is being efficiently operated.

This statement is strongly suggestive of the fact that Jane McEwen herself was not farming the land, but that her son was the farmer who, in accordance with the preamble of the Act, was to be retained on the land as efficient producer. The statement so made, together with the facts otherwise established and related in the early part of this judgment (not forgetting that the farm was leased to the son by the mortgagee) sufficiently show that the status of Jane McEwen as a farmer was disputable and of such a doubtful character as should have required a decision by the court competent to pass upon it.

The proposal further states:

"There appeared to be no unsecured creditors"; and it mentions that

> the taxes levied against the said land by the rural municipality of Dauphin have been paid to the 31st December, 1935;

and that

> the claim of International Harvester Company of Canada, Limited, having been incurred since the first day of May, 1935, shall not be affected by this proposal.

The only liability apparent on the face of the document is the respondent's mortgage there stated to have been "given by John McEwen, now deceased, the farmer's late husband". Nowhere is it stated that this mortgage has become the debt of Jane McEwen either through will, through transfer or in any other way. As there shewn, it is a debt of the estate of John McEwen.

The result is that the document itself does not show the existence of any debt owing by Jane McEwen. If that be so, there was no evidence before the Board of the alleged insolvency of Jane McEwen and, accordingly, nothing to indicate or even to suggest that she was unable to meet her liabilities, since there were none. Nor was there even a scintilla of evidence that the relation of debtor and creditor existed between Jane McEwen and the respondent.

It is clear, therefore, on the proposal itself, that none of the conditions essential and prerequisite to the existence of the jurisdiction of the Board were present in the case. These facts were still made clearer, if necessary, by the evidence put before the Court of Appeal of Manitoba in the affidavits filed by the parties.

It was objected by the appellants that the proposal, returned into court pursuant to the writ of *certiorari,* constituted the only and entire record before the court on the motion to quash, and that it was not open to the court to go behind the return and to consider extraneous material. It was argued before us that, by taking the affidavits into account, the Court of Appeal was, in point of fact, exercising an appellate jurisdiction which it could not do in *certiorari* proceedings.

Although, in my view, the proposal itself is sufficient evidence of the lack of jurisdiction of the Board, more particularly if it is coupled with the admission at bar that the respondent's objections were never submitted to the County Court, it may be in order to mention that it is not strictly correct to say that a court, acting on *certiorari* in the exercise of its supervisory authority, should not be allowed to inquire into the actual facts, in order to determine the

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question of the jurisdiction of an inferior tribunal (9 Halsbury, p. 898, sec. 1514, notes (p) and (q); *Regina* v. *Bolton* (1)).

The subject was fully considered in *Rex* v. *Nat Beli Liquors Limited* (2). In that case, Lord Sumner, delivering the judgment of their Lordships of the Privy Council, said (p. 153):

> In *Reg.* v. *Bolton* (1), Lord Denman, in a well-known passage, says: "The case to be supposed is one * * * in which the Legislature has trusted the original, it may be (as here) the final, jurisdiction on the merits to the magistrates below; in which this Court has no jurisdiction as to the merits either originally or on appeal. All that we can then do * * * is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law * * * Where the charge laid before the magistrate, as stated in the information, does not amount in law to the offence over which the statute gives him jurisdiction, his finding the party guilty by his conviction in the very terms of the statute would not avail to give him jurisdiction; the conviction would be bad on the face of the proceedings, all being returned before us. Or if, the charge being really insufficient, he had mis-stated it in drawing up the proceedings, so that they would appear to be regular, it would be clearly competent to the defendant to show to us by affidavits what the real charge was, and, that appearing to have been insufficient, we would quash the conviction; * * * But, as in this latest case, we cannot get at the want of jurisdiction but by affidavits, of necessity we must receive them. It will be observed, however, that here we receive them, not to show that the magistrate has come to a wrong conclusion, but that he never ought to have begun the inquiry * * *

At page 154:

> The law laid down in *Reg.* v. *Bolton* (1) has never since been seriously disputed in England.

At page 160:

> When it is contended that there are grounds for holding that a decision has been given without jurisdiction, this can only be made apparent on new evidence brought ad hoc before the Superior Court. How is it ever to appear within the four corners of the record that the members of the inferior court were unqualified, or were biased, or were interested in the subject-matter?

The hearing of the Board as a result of which the proposal was formulated was held *ex parte,* for the respondent did not appear, and there were no creditors present. The consequence was that the Board assumed the reality of the preliminary questions relating to its jurisdiction and, in the result, it established its jurisdiction, or took it for

(1) (1841) 1 Q.B. 66. (2) [1922] 2 A.C. 128.

granted, by proceeding upon assumed facts. But, in the words of Lord Sumner, "the reality of that assumption having been inquired into (in the Court of Appeal) on affidavit as to the facts, since questions going to the jurisdiction of the (Board) must, in case of need, be inquired into, and it having been found that in fact (Jane McEwen was not a farmer, was not insolvent and was not the debtor of the respondent), the order was rightly quashed" (*Nat Bell* case (1)). Further to quote Lord Sumner (p. 158):

> While the decision (of the Board) is final, if jurisdiction is established, the decision that its jurisdiction is established is open to examination on *certiorari* by a superior court.

Coleridge, J., delivering the judgment of the Court in *Bunbury* v. *Fuller* (2), stated the rule thus:

> No court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars making up together that subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make a preliminary inquiry whether some collateral matter be or be not within the limits, yet upon this preliminary question, its decision must always be open to inquiry in the superior court.

Upon the authority of those cases, I think it must be decided that the preliminary questions raised by the respondent were of such a nature that, in an ordinary case, they would properly give rise to an inquiry on *certiorari* by a superior court and that, for the purposes of that inquiry, the facts bearing on the question of jurisdiction could be put before that court by means of affidavits (*The Security Export Company* v. *Hetherington* (3)).

The judgment of this Court in the *Hetherington* case (3) was reversed on the ground that the proceeding there in question was not judicial, but merely administrative; but the learned Law Lords fully endorsed the exposition, there made by my Lord the present Chief Justice, of the law pertaining to *certiorari* (4).

Since the enactment of *The Farmers' Creditors Arrangement Act,* procedure by way of *certiorari* in respect of proposals under the Act has been held to be available in many cases: *Re Ratz* (Manitoba Court of Appeal (5),

(1) [1922] 2 A.C. 157.
(2) (1853) 9 Ex. 11, at 140.
(3) [1923] S.C.R. 539, at 549, *et seq.*
(4) [1924] A.C. 988.
(5) (1939) 47 M.R. 381.

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Re Hawkins (Manitoba Court of Appeal) (1), *Re Hudson's Bay* (Alberta) (2), *Crédit Foncier* v. *Board of Review* (Saskatchewan Court of Appeal) (3), *Re Drewry* (Saskatchewan Court of Appeal) (4). See also *The Queen* v. *Justice of Surrey* (5) and *The King* v. *Stafford Justices* (6). Short & Mellor, 2nd Ed., p. 48.

But there was a special reason in this case why the writ of *certiorari* should be resorted to. It appears by the document certified by the Registrar of the Board of Review upon the return to the writ, that the proposal, as formulated by the Board, was confirmed by the latter and declared to be binding upon all creditors of the so-called farmer debtor on October 5th, 1938, and that it was "filed in the County Court of Dauphin, on the 8th day of Oct. 1938." This filing in the court concluded the whole matter, so far as the operation of the *Farmers' Creditors Arrangement Act* was concerned. Nothing remained to be done under it. The respondent Board of Review became *functus officio* as soon as it had confirmed the proposal formulated by it and such proposal was transmitted to the Official Receiver, to be filed by him in the court under Rule 23 of the Rules and Regulations made under the Act. The Official Receiver did file the proposal in court on October 8th, 1938, as appears on the face of the document returned upon the *certiorari*. There is no longer, under the Act, any provision that the proposal so filed should be approved by the court. Upon it being filed, it became immediately "binding upon all the creditors and the debtor" (subs. 6 of s. 12), and, in particular, upon the respondent, unless it elected to contest the validity of the same, so as to be relieved of the arrangement made by the Board.

As a consequence, the jurisdiction in bankruptcy given by s. 5 of the Act to the County Court was exhausted; and, assuming that jurisdiction was exclusive while the Act was operating, clearly it could no longer stand in the way of the supervisory authority of the Court of Appeal after the Act had accomplished its purpose and its effect (*Prudential Ins. Co.* v. *Berg.* (7).

(1) (1939) 47 M.R. 429, at 439.
(2) [1938] 2 W.W.R. 412, at 420,
(3) [1939] 3 W.W.R. 632, at 636.
(4) [1940] 2 W.W.R. 389, at 390.
(5) (1870) L.R. 5 Q.R. 466.
(6) [1940] 2 K.B. 33, at 43, 44.
(7) [1940] 2 W.W.R. 381.

In the circumstances of this case, *certiorari* was a remedy open to the respondent.

The latter might also have continued its proceedings in the Court of King's Bench in respect of its mortgage account claim which, as we were told, is still pending, although the statement of defence in that action pleaded *The Farmers' Creditors Arrangement Act* and alleged that the confirmation and filing in court of the proposal was a bar to the respondent's action.

The respondent has refused consistently to recognize the jurisdiction of the Board of Review, it has never acquiesced in it, and it could validly invoke the authority of a superior court (in this case, the Court of Appeal of Manitoba) to question the jurisdiction of the Board and to have the Court inquire whether the conditions precedent and prerequisite to the Board's competency existed in this matter.

I have, therefore, come to the conclusion that the appeal should be dismissed with costs. There should be no costs to the Attorney-General of Canada.

DAVIS, J. (dissenting):—The Board of Review for the province of Manitoba under *The Farmers' Creditors Arrangement Act,* 1934, and amendments, assumed to reduce the amount of the respondent company's mortgage on, what may for convenience be called, the McEwen farm in Manitoba. The mortgage had been on the property since October, 1919; nothing has been paid on the principal amount of $4,000; and arrears of interest on the 1st of November, 1936, amounted to $2,332.15, which indicates that the interest on the mortgage could not have been paid for many years. No proceedings appear to have been taken at any time by the respondent either to recover the money debt or to enforce the security. John McEwen, who had made the mortgage in 1919, remained the owner of the farm until his death on the 26th of August, 1934. By his will he devised and bequeathed all his property, real and personal, to his wife, Jane McEwen, and appointed her the sole executrix of the will. The widow and a son appear to have continued to reside on and work the farm following upon the death of the husband and father. Then, on July 31st, 1936, Mrs. McEwen sought relief under the provisions of *The Farmers' Creditors Arrangement, Act,* 1934, by lodging with the Official

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Receiver for Dauphin Judicial District a proposal under the statute for a composition, extension or scheme of arrangement. With the proposal was the required statement of affairs in which Mrs. McEwen said that her principal occupation was farming; that she was unable to meet her liabilities as they became due; and she gave as the amounts of claims of creditors the respondent's mortgage at $6,000 and arrears of taxes on the farm of $170. She was then, the statement said, 76 years old; had 170 acres under cultivation; the causes of her financial difficulties were, "Debt too heavy. Failure of crops and low prices."

The proceedings in connection with this proposal moved rather slowly. It was not until March 31st, 1937, that the Board of Review for Manitoba constituted under *The Farmers' Creditors Arrangement Act* heard the matter, and it was not until October 29th, 1937, that the Board formulated, what is called under the statute, its proposal wherein it reduced the amount owing on the respondent's mortgage to $2,800 as at the 1st of January, 1937, including principal and interest, and the rate of interest (which had originally been 7 per cent per annum) from the said date was reduced to 6 per cent per annum; and special terms were imposed for the repayment of the reduced principal amount in instalments.

I interject in the narrative here the statement that the proceedings out of which this appeal comes to this Court were *certiorari* proceedings that were not commenced until September 17th, 1940, on which date the respondent served notice of motion upon the Registrar of the Board of Review and upon the executors of Jane McEwen (she having died in the meantime on the 27th of March, 1940) and upon the son, Robert James McEwen, to whom his mother had devised the property by her will and who was at the time in occupation of the farm. The notice of motion was made direct to the Court of Appeal for Manitoba (in accordance with the practice in that province)

for an order that a writ of *certiorari* do issue out of this Honourable Court for the return into this Court of the proposal made by the Board of Review under *"The Farmers' Creditors Arrangement Act,"* and dated the 29th day of October, 1937, which said proposal purports to have been made binding by the filing of the same in the County Court of Dauphin, in order that the said proposal, or those portions contained

in paragraphs numbered 1, 2, 3 and 4 thereof, may be quashed, and for such further or other order as to this Honourable Court may seem proper.

The grounds set forth in the notice of motion were that the Board of Review in making the said proposal acted without jurisdiction or in excess of jurisdiction; that Jane McEwen was not a farmer within the meaning of the statute and that she was not at the time of her application the owner of the property; and that she was not indebted to the respondent in respect of the said mortgage, never having assumed or undertaken to pay the debt secured by the said mortgage or to perform any of the covenants therein contained.

The Court of Appeal reviewed the matter at large, granted the writ and quashed the proposal made by the Board of Review, Dennistoun, J.A. dissenting, which meant that the reduction of the amount of the mortgage and the new terms of repayment were nullified. From that judgment the proceedings have come to this Court by way of special leave granted by the Court of Appeal. All phases of the matter were discussed at considerable length before us. Counsel for the respondent raised many objections to the whole course of proceedings under *The Farmers' Creditors Arrangement Act,* including an attack upon the constitutional validity of certain amendments to the Act that were made by Parliament in 1938. Some of the objections raised are undoubtedly formidable objections. But I am satisfied that the respondent misconceived its proper remedy and that in the special circumstances of this case the application for the issue of a writ of certiorari should have been refused. It may be fortunate for the respondent that an action it commenced in the courts of Manitoba many months prior to its commencement of these *certiorari* proceedings (to which action I shall later refer) is still pending. In that action the respondent itself put in issue the alleged invalidity of the proposal under *The Farmers' Creditors Arrangement Act* and the alleged lack of jurisdiction in the Board of Review to deal with the matter under the statute.

I return now to the first step that was taken by Mrs. McEwen under the statute, i.e., the lodging with the Official Receiver (having jurisdiction in the county or dis-

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trict in which Mrs. McEwen resided) of a composition, extension or scheme of arrangement. That was, as I said before, July 31st, 1936. The effect of that first step was to put the subject matter of the proposal into the exclusive jurisdiction, subject to appeal, of the County Court of Dauphin, which is admitted to be the judicial district where Mrs. McEwen resided and the farm was located. The exclusive jurisdiction of the County Court of Dauphin in the matter, subject to the right of appeal provided by the statute, is to me the fundamental and most important fact in considering the *certiorari* proceedings which have come before us. *The Farmers' Creditors Arrangement Act* is part of the bankruptcy and insolvency legislation of the Parliament of Canada and the Act was made to be read and construed as one with *The Bankruptcy Act.* Sec. 2 (2). For the purposes of *The Farmers' Creditors Arrangement Act,* Parliament saw fit to designate the local courts, the County or District Courts (except in the province of Quebec), to have jurisdiction in respect of the statutory means provided whereby compromises or rearrangements might be effected of debts of farmers who were unable to pay (the recital in the Act). The following is the provision of the statute which gave the County Court of Dauphin exclusive jurisdiction, subject to appeal:

> Sec. 5. (1) In the case of an assignment, petition or proposal, in the province of Quebec, the Superior Court of the judicial district where the farmer resides, and in other provinces, the county or district court, shall have exclusive jurisdiction in bankruptcy subject to appeal as provided in section one hundred and seventy-four of the *Bankruptcy Act.*

Section 7 enacts that 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 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. I am not forgetting that one of the strongest points made by counsel for the respondent is that the respondent was not a secured creditor of Mrs. McEwen because she was not its debtor. But leaving that question aside for the moment, it is important, I think, to observe that Parliament gave to the

Board of Review a right to work out a proposal which might involve secured creditors, even in the absence of their concurrence.

The Board of Review is under the statute essentially an administrative body. A proposal first goes to the Official Receiver having jurisdiction in the locality and if at a meeting of creditors called by him the proposal or some modification of it is not approved by the creditors, the Official Receiver reports this fact to the Board of Review, and the Board then shall, at the written request of a creditor or of the debtor, endeavour to formulate an acceptable proposal to be submitted to the creditors and the debtor, and the Board shall consider representations on the part of those interested. Sec. 12 (4). If any such proposal formulated by the Board is approved by the creditors and the debtor, it shall be filed in the court and shall be binding on the debtor and all the creditors. Sec. 12 (5). But 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 filed in the court (i.e., again the County Court) and shall be binding upon all the creditors and the debtor as in the case of a proposal duly accepted by th ecreditors and approved by the Court. Sec. 12 (6).

The proposal formulated and confirmed by the Board of Review was filed in the County Court of Dauphin October 8th, 1938. I think it obvious that the Board must have withheld the filing of the document, which was dated October 29th, 1937, because of its own doubt as to whether or not the Act applied to the case of a mortgage security which, while it lay as a charge against the farmer's lands, was not a debt which the farmer himself had incurred or had undertaken to assume and pay, until the 1938 amendments to the statute, which became effective July 1st, 1938, attempted at least to bring this sort of claim within the ambit of the statute.

In considering whether or not *certiorari* proceedings against the Board became available on the notice of motion that was not made until September 17th, 1940, it is important to observe that as early as August 5th, 1936, when the respondent was notified by the Official Receiver of the proposal he had received from Mrs. McEwen, the respondent

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took the position in a letter to the Official Receiver of that date, and has adhered to the position consistently throughout, that it was not in any way affected by the proposal. But the respondent at no time appeared or took any proceedings, either before the Official Receiver or before the Board of Review or in the County Court of Dauphin. Holding consistently to its position that Mrs. McEwen was not its debtor and that it was not a secured creditor, the respondent deliberately ignored, as it had a perfect right to do at its own risk, the proceedings under *The Farmers' Creditors Arrangement Act*. A very convenient and speedy remedy was available to the respondent when it got notice in August, 1936, that Mrs. McEwen had filed an application with the Official Receiver. It could have moved at once in the County Court of Dauphin, which in my view had exclusive jurisdiction, subject to appeal, to have the proposal set aside upon any of the grounds alleged by the respondent, that is, that Mrs. McEwen was not a farmer within the meaning of the statute, that she was not the owner of the lands and that she was not entitled to the benefit of the Act, or to stay proceedings or to have it determined that in any event the respondent was not a creditor of the applicant and was not affected by the proposal or proceedings under the statute. I have not the slightest doubt that the County judge would have entertained any such application and would have dealt with the matter at the time in a speedy and inexpensive manner. A statutory right to appeal from any decision that he might give was available. It may be that a declaratory action might have been brought in the Court of King's Bench to determine the rights of the parties and to grant relief by injunction or otherwise, though I do not find it necessary to pass upon that as an available remedy. The respondent did, however, commence an action in the Court of King's Bench on December 9th, 1939, (more than three years after Mrs. McEwen sought relief under the statute and more than a year after the Board of Review's proposal had been filed in the County Court of Dauphin), against Mrs. McEwen as executrix under the will of her deceased husband and against herself personally, for the administration of the estate of John McEwen and to have the lands ordered to be sold, subject

to the mortgage, to satisfy the debts. In the statement of claim the respondent alleged that there was then owing to it under the mortgage the sum of $7,102 and that it had security for a portion of the said debt, namely, the sum of $2,612.15, but had no security for the balance, being the sum of $4,489.85. The important point is that in that action, in reply to a demand for particulars, the respondent as plaintiff in the action stated that the figure it had given for the security on the loan was the amount fixed by the Board of Review under *The Farmers' Creditors Arrangement Act,* and in reply to the statement of defence, set up that the Board of Review

> was without power or jurisdiction to compromise, reduce or in any way deal with the debt of the deceased or his estate

under the mortgage, and, in the alternative, that

> if the said proposal does purport to compromise, reduce or deal with the said debt, such proposal was made without power or jurisdiction and is void and of no effect.

That reply was delivered January 16th, 1940. No further step appears to have been taken by the respondent in that action and it was admitted that the action is still pending in the Court of King's Bench for Manitoba. Eight months after the respondent put in issue in that action the alleged invalidity of the proposal and the alleged want of jurisdiction of the Board of Review, it commenced these *certiorari* proceedings in the Court of Appeal for Manitoba against the Board, seeking an order that the proposal of the Board be quashed. The Board had become functus so far as this matter was concerned when it filed its proposal in the County Court of Dauphin in October, 1938. The proposal rested thereafter in the said County Court, which had exclusive jurisdiction in the matter, subject to the right of appeal.

Further, it is to be observed that sec. 11 (3) of the statute provides that no proposal shall be received in the province of Manitoba later than the 30th day of June, 1939. That means in this case that if the proposal is quashed, no new proposal can now be made by the owner of the farm to gain the advantage of the provisions of the statute. Notwithstanding that the original proposal was brought to the notice of the respondent by the Official

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Receiver as early as August, 1936, the respondent did not institute these proceedings by way of *certiorari* until September, 1940.

The Court of Appeal reviewed the evidence submitted to it as if the proceedings were by way of an appeal from the Board of Review, examining the merits of the case to the extent of even admitting particulars of fire insurance policies on the buildings and contents in an effort on the part of the respondent to show that the valuation of the applicant to the Board had been an undervaluation. Further, the confirmation and filing of the Board's proposal in the County Court made that proposal, by force of the statute (sec. 12 (6)), "binding upon all the creditors and the debtor" and had the effect of a judgment of that Court. There appears to be no reported decision in which *certiorari* has been granted to quash the judgments of inferior courts of civil jurisdiction. Halsbury, 2nd ed., Vol. IX, page 844, para. 1431, note (*q*).

In view of all the facts and circumstances of the matter, I am of the opinion that the conduct of the respondent throughout has been such as to disentitle it to relief in *certiorari* proceedings. To dismiss this appeal with costs is in my opinion, with great respect to those with whom I differ, to put the appellants the Board of Review, the Registrar, the executors of Mrs. McEwen and her son, Robert James McEwen, to the burden of what appear to me to be excessive and unnecessary costs of litigation.

The application for the writ ought, in my opinion, to have been dismissed and I should therefore allow the appeal and direct that the order be refused, with costs to the appellants throughout.

Appeal dismissed with costs.

Solicitors for the appellants—The Board of Review and the Registrar: *Johnson & Bergman.*

Solicitors for the appellants: R. J. and I. E. McEwen: *A. T. Warnock.*

Solicitors for the respondent: *Hamilton & Hamilton.*

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LOWER MAINLAND DAIRY PRODUCTS BOARD, MILK CLEARING HOUSE LIMITED, W. E. WILLIAMS AND E. D. BARROW (DEFENDANTS) ..... APPELLANTS;

* May 28, 29, 30.
* Oct. 7.

AND

ACTON KILBY (DEFENDANT)

AND

TURNER'S DAIRY LIMITED AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law—Natural Products Marketing (B.C.) Act—Order in council—"Scheme" to regulate marketing of milk—Constitution of Lower Mainland Dairy Products Board—Milk Clearing House Limited incorporated as a company to act as sole "agency"—Orders of Board—Providing for equalization of return to milk producers—Validity of orders—Obnoxious or exceeding delegated powers—Indirect taxation—Extrinsic evidence to prove intent or effect of orders—Admissibility—Natural Products Marketing (B.C.) Act, R.S.B.C., 1936, c. 165.

Under the provisions of the *Natural Products Marketing (B.C.) Act*, R.S.B.C., 1936, c. 165 the Lieutenant-Governor in Council passed an order in council creating a "scheme" to regulate the dairy business within a specified territory in British Columbia and constituted the appellant Board to administer the scheme, the appellants Williams and Barrow and the defendant Kilby being appointed as its members. The appellant The Milk Clearing House Limited was incorporated and an order of the Board designated that company as the sole "agency" through which the milk produced in that area was to be marketed. The appellant Board also passed other orders for the purpose of carrying out the scheme. Milk producers were prohibited from selling their milk otherwise than to this agency and the latter was given the exclusive right to sell milk to dairies and manufacturers. The Milk Clearing House was receiving the total receipts from the sale of the milk, and these receipts, less expenses, were divided amongst the producers at a certain period, called the settlement period: the amounts thus paid being based on a system of "quotas." A certain fixed percentage of the milk purchased by the Milk Clearing House from each producer was treated as having been sold in the "fluid-milk market" and the remainder was treated as having been sold in the lower-priced "manufactured-milk market," quite irrespective of where each producer's milk had actually been sold and without regard to the quantity of milk sold by each individual producer on the "fluid-milk" market: the amount being thus

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

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paid to the producers on the basis of an equalized price. The trial judge held that the orders were *ultra vires* and his judgment was affirmed by the appellate court.

Held, affirming the judgment appealed from (56 B.C.R. 103), that the impugned orders of the appellant Board cannot stand, as they go beyond the limits of the powers granted to the Board by the Act.

Per the Chief Justice and Davis and Hudson JJ.:—There was sufficient evidence, (and it was so found by the trial judge whose findings were approved by a majority of the Court of Appeal) to support the view that the purpose and effect of the impugned orders was to enable the appellant Board, in co-operation with its agent the Milk Clearing House, to equalize prices as between producers who have a market for their milk in the more advantageous fluid milk market and producers whose milk is not sold in the fluid milk market but must be sold in the manufacturers market at a lower price; and to accomplish this by abstracting from the proceeds of the sales of the former class in the fluid milk market a sufficient part of the returns from the sale of their milk to enable the Board, by handing that part over to the other producers, to bring the several rates of return for the two classes into a state of equality. Such an administrative body as the appellant Board in exercising its statutory powers—powers affecting the rights and interests of private individuals—is under an obligation not only to observe the limits of its powers and to act conformably to the procedure laid down; it is under a strict duty to use its powers in good faith for the purposes for which they are given. (*The Municipal Council of Sydney* v. *Campbell* ([1925] A.C. 338) and *Campbell* v. *Village of Lanark* (20 O.A.R. 372)). The impugned orders are obnoxious to this principle in the purpose disclosed by the orders themselves and the evidence adduced to accomplish indirectly what the King in Council has adjudged they cannot lawfully do directly, namely, by enacting monetary contributions from milk producers by a method constituting indirect taxation. *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Limited* ([1933] A.C. 168, at 176).

Per Rinfret, Crocket and Taschereau JJ.—The orders formulated by the appellant Board go beyond the authority granted by the Act, and the appeal could be dismissed on the ground that the Board has exceeded its delegated powers. But these orders could also be declared illegal on the further ground that the Board has attempted to do something upon which the legislature itself could not legislate and this is to impose indirect taxation. There is no substantial difference between the consequences that flow from the impugned orders and the results obtained under the *Dairy Products Sales Adjustment Act* of 1929, which had been declared *ultra vires* the province. *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Limited* ([1933] A.C. 168).

Held, also, that the extrinsic evidence given at the trial to show the intent and effect of the orders was admissible.

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APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, D. A. McDonald J. (2) and maintaining the respondent's action.

The action was for a declaration that certain orders of the appellant Board were *ultra vires* and not binding on the respondents, who are milk producers, for an injunction restraining the Board from taking steps to compel the respondents to comply with the provisions of these orders; for an injunction restraining the appellant Milk Clearing House Limited from acting as the designated agency pursuant to these orders; for a declaration that the milk marketing scheme of the Lower Mainland of British Columbia, established by order in council, was *ultra vires* and for an injunction restraining the appellant Board from exercising any of the powers purporting to have been invested in it by that scheme. By the *Natural Products Marketing (B.C.) Act,* the Lieutenant-Governor in Council was empowered to establish marketing boards and to inaugurate schemes for the regulation of marketing of natural products in the province. The appellant Board was so constituted with extensive powers as set out in the scheme. Under the powers so conferred, the Board enacted the orders attacked in this action in August, 1939. On the trial, it was held that the orders complained of were *ultra vires* the appellant Board and the respondents were granted the relief sought. This judgment was affirmed by a majority of the Court of Appeal for British Columbia.

C. H. Locke K.C. for the appellants.

J. W. deB. Farris K.C. and *John Farris* for the respondents.

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

THE CHIEF JUSTICE—The learned trial judge in his reasons for judgment says:—

> The gravamen of the plaintiffs' complaint in the present action is that in order to escape the results of the decision in the *Crystal Dairy* case (1) the defendant Board adopted a colourable scheme whereby to make it appear that milk was actually being sold by the producers to

(1) 56 B.C.R. 103; [1941] W.W.R. 342; [1941] 2 D.L.R. 279.
(2) [1940] 3 W.W.R. 42; [1941] 2 D.L.R. 279, at 280.

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the defendant Milk Clearing House Limited and resold by the Clearing House to the distributors at prices fixed by the Board whereas there was in fact intended to be no sale at all. The contention is that the Clearing House was intended to operate as a mere conduit pipe, an instrument whereby the price to be paid to producers of milk should be equalized so that in effect the proceeds of milk produced by producer A should in certain proportions be taken from him and handed over to producer B, as had been in effect the practice under the earlier scheme.

The plaintiffs are met *in limine* with the objection that, admitting that the statute is *intra vires* and the scheme set up by the Lieutenant-Governor in Council under the statute is *intra vires* and the orders issued by the Board are plain on their face, it is not open to the courts to make any enquiry as to the motives which actuated the members of the Board in passing the orders which are now attacked.

* * *

The members of the Board who passed these orders knew that the agency theretofore existing would be attacked as being merely an agency formed for the purpose of equalizing prices and, hence, subject to being impugned under the decision in the *Crystal Dairy* case (1). With a view to escaping from that attack the Board was instrumental in having the defendant Milk Clearing House Limited incorporated under the *Companies Act*. It is pretended that it was so incorporated as an ordinary commercial concern whose object is to buy in the cheapest market and sell in the dearest market and in the ordinary course of trade to make a profit for its shareholders. I think the more one examines the evidence the more he must become convinced that this is a mere sham. I do not believe it was ever intended that the Clearing House should make any profit and if there were any doubt on this one needs only to examine the evidence of Mr. Sherwood, one of the directors of the company.

If, as I think, the real purpose and effect of the impugned orders are, as alleged in paragraph 25 of the statement of claim, "to take from the producer supplying the fluid market a portion of his real returns and to contribute the same to other producers for the purpose of equalization (and that) the so-called sales and resales to and by the agency so-called are colourable," then I am satisfied the orders cannot stand.

The learned trial judge's findings were approved by the majority of the Court of Appeal.

There was sufficient evidence to support the view that the purpose and effect of the impugned orders was to enable the Board, in co-operation with its agent the Clearing House, to equalize prices as between producers who have a market for their milk in the more advantageous fluid milk market and producers whose milk is not sold in the fluid milk market but must be sold in the manufacturers market at a lower price; and to accomplish this by abstracting from the proceeds of the sales of the former class in the fluid milk market a sufficient part of the returns from

(1) [1933] A.C. 168.

the sale of their milk to enable the Board, by handing that part over to the other producers, to bring the several rates of return for the two classes into a state of equality.

Mr. Locke, in his able argument, did not succeed in convincing me that the Board is entitled to employ its powers respecting marketing and the regulation of prices to do what it has attempted.

Such an administrative body as the Board in exercising its statutory powers—powers affecting the rights and interests of private individuals—is under an obligation not only to observe the limits of its powers and to act conformably to the procedure laid down; it is under a strict duty to use its powers in good faith for the purposes for which they are given. The application of this principle is illustrated in the judgments in the House of Lords in *The Municipal Council of Sydney* v. *Campbell* (1), and in *Campbell* v. *Village of Lanark* (2). The impugned orders are obnoxious to this principle in the purpose disclosed by the orders themselves and the evidence adduced to accomplish indirectly what the King in Council has adjudged they cannot lawfully do directly, namely, by enacting monetary contributions from milk producers by a method constituting indirect taxation. *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Limited* (3).

In view of some of the arguments advanced in the factums and elsewhere I think it is wise perhaps to call attention to the wide difference between a provincial legislature which exercises powers of legislation in the strict sense, the Crown being a party to its enactments, and an administrative body exercising powers of administration under statutory authority, such as the appellant Board.

The appeal will be dismissed with costs.

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

TASCHEREAU J.—In their statement of claim, the plaintiffs-respondents attack the validity of Orders nos. 10, 12, 13, 14 and 15 formulated by the Lower Mainland Dairy Products Board, which has been established under the

(1) [1925] A.C. 338. (2) (1893) O.A.R. 372.
(3) [1933] A.C. 168, at 176.

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authority of the *Natural Products Marketing Act* (Ch. 165, R.S.B.C., 1936), and submit that they are *ultra vires* of the Board. They also ask that the scheme created by Order in Council be declared illegal, and pray for an injunction restraining all the defendants from exercising any of the powers purported to have been invested in them.

Mr. Justice D. A. McDonald of the Supreme Court of British Columbia declared that Orders 11, 12, 13, 14 and 15 were *ultra vires,* ordered that the defendant Milk Clearing House Limited be restrained from acting as the agency pursuant to these Orders, and that the Board, and its members Williams and Barrow be also restrained from taking any steps to compel the plaintiffs to comply with the provisions of the Orders. The court further held that the action against the defendant Kilby, one of the members of the Board, and the claim of the plaintiffs for a declaration that the Milk Marketing scheme is *ultra vires,* should be dismissed. The defendants appealed from this judgment, and the plaintiffs cross-appealed claiming that the judgment should be varied by declaring that the Milk Marketing scheme is *ultra vires.* The Court of Appeal for British Columbia (Chief Justice MacDonald dissenting) dismissed the main appeal and the cross-appeal with costs. As there has been no cross-appeal here, this Court is concerned only with the validity of the Orders, and the injunction restraining the Board, the Milk Clearing House and the defendants Williams and Barrow, from taking any steps or proceedings to compel the plaintiffs to comply with the Orders.

The plaintiffs, except W. A. Hayward and Charles Hawthorne who produce milk for sale, are engaged in distributing milk and cream, and in carrying on a general dairy business in the cities of Vancouver and of New Westminster. In that region of the province of British Columbia there are two different markets for milk. One is called the Fluid Milk Market, where the milk is used in fluid form, and the second is known as the Manufacturers Market, where the milk is used for the manufacture of ice-cream, butter, condensed milk, etc. There is an excess of milk produced in that area over the requirements of the Fluid Milk Market, and some dairy farmers, therefore, in order to avoid a congestion of the Fluid Milk

Market, are necessarily obliged to market a portion of their milk in the form of manufactured products at world market prices, which are lower than the price obtained for milk in fluid form. A group of farmers called the Independent Farmers have sold in the past much more of their milk proportionally on the Fluid Market than another group of farmers of the Fraser Valley Milk Producers Association. This situation has existed for many years, and in order to meet the demand of the farmers the Legislature passed in 1929 the *Dairy Products Sales Adjustment Act,* which required all dairy farmers and distributors to make returns to the Committee of Adjustments of all milk sold and bought and the prices paid. This Committee has power to ascertain the price during each month of milk sold on both markets, and had also the power to spread the difference between the two sums, so that each dairy farmer would receive a uniform price for his milk per pound butterfat, regardless of the market in which the commodity was sold. The farmer receiving more than the ascertained equalized price was required to pay to the Committee an amount sufficient to reduce his return to the equalized price, and the Committee would then pay from the sum so received an amount sufficient to bring up to the same level the prices received by the vendors in the Manufacturers' Market.

This legislation was submitted to the Supreme Court of British Columbia (1), and Mr. Justice Murphy before whom the case was tried, found that this adjustment by the Committee constituted a tax on one farmer and a bonus to the other. He also came to the conclusion that this tax, and the levy collected to pay certain expenses was indirect taxation, not within the legislative competence of the Province. This judgment was upheld by the Court of Appeal of British Columbia (2) and also by the Judicial Committee of the Privy Council (*Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Limited* (3).

In view of this decision of the Privy Council declaring the Act of 1929 *ultra vires,* the Legislature of British Columbia enacted in 1934 (amended in 1936) the *Natural*

(1) (1931) 44 B.C.R. 508. (2) (1932) 45 B.C.R. 191.
(3) [1933] A.C. 168.

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Products Marketing British Columbia Act. This law purported to provide for the control and regulation in any or all respects of the transportation, packing, storage and marketing of natural products within the province; and marketing was defined as buying and selling, for sale or storage; and natural products included any product of agriculture, or of the forest, sea, lake, or river and any article of food or drink wholly or partly manufactured or derived from any such product. This definition clearly included milk.

Under paragraph 2 of section 4 of the Act, the Lieutenant-Governor in Council was empowered to establish, amend and revoke schemes for the control and regulation within the province of any natural products, and was also authorized to constitute marketing boards to administer such schemes. The validity of this legislation was again contested before the courts, and in 1938 the Judicial Committee (1) held that this legislation was *intra vires* and, consequently, the impugned statute was held to be within the legislative powers of the province of British Columbia.

On the 31st of March, 1939, an Order in Council was passed providing a scheme to regulate the transportation and marketing of milk and certain milk products in the Lower Mainland of the province of British Columbia. As a consequence of this Order in Council, the Lower Mainland Dairy Products Board was established and the three defendants Messrs. Williams, Barrow and Kilby were appointed members of that Board. The defendant the Lower Mainland Dairy Products Board passed certain Orders nos. 1 to 9. Later, Orders 3, 4, 5, 6, 7, 8 and 9 were repealed, and Orders nos. 11, 12, 13, 14 and 15 were passed and, in one of these Orders, one of the defendants the Milk Clearing House Limited, a company incorporated under the laws of British Columbia, was appointed sole agency through which all the milk produced in the Lower Mainland area is to be marketed. Although a certain price to be paid to the farmers per pound butterfat has been determined by the Board, the payment is to be made only after going through quite complicated proceedings. All dairy farmers in the area are prohibited from selling their milk to any one but a single agency which is the appellant,

(1) *Shannon* v. *Lower Mainland Dairy Products Board* [1938] A.C. 708.

the Milk Clearing House Limited, and which is also given sole power to sell to dairies and manufacturers. The Milk Clearing House Limited receives the total receipts from the sale of the milk, and at a certain period, which is called the settlement period, divides amongst the producers these receipts less expenses. This payment to the producers, however, is not made in the usual way, but each farmer has a base, which is the quantity of butterfat determined from the average daily weight and butterfat test of eligible milk marketed in cans by a producer, during the first three and last three calendar months of the previous calendar year, and during which period the producer has been a consistent marketer of eligible milk in cans. The dairy farmer then receives an amount for his fluid milk determined by his base in proportion to the total bases. This is called his *quota*. Quota in other words is

> the percentage of a producer's base as all milk marketed by the Clearing House for the Fluid Milk Market in cans during such settlement period is of the total of all bases for milk marketed in cans.

If a farmer has a base of 1,000 pounds and if the total bases are 100,000 pounds, and if the total sales by the agent amount only to 50,000 pounds butterfat of fluid milk, which is 50 per cent of the milk available, then this farmer will be paid only for 50 per cent of what he sold, which is 500 pounds. This 50 per cent or 500 pounds is the quota of this farmer. Assuming now that, only 400 pounds of another producer's milk, who has also a base of 1,000 pounds, has been sold on the Fluid Market, he would nevertheless on account of his base and quota be paid for 500 pounds. For the amount of milk sold in excess to the Clearing House, these dairy farmers receive the manufacturers' price which is substantially lower. Under the Act of 1929 which was declared *ultra vires* of the British Columbia Legislature in the *Crystal* case (1), equalization was obtained by allowing the farmer to receive the full amount of the price of his commodity, and compelling him to pay to the Board such portion as would reduce his balance to the equalized price. The amount paid by the farmer was declared to be an indirect tax, and, therefore, *ultra vires*.

Under the new scheme the proceeds of the sale are kept by the agent but the amount that the farmer vendor is to

(1) [1933] A.C. 168.

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receive is determined only at the end of the month when the returns of the dairies are in. From that total amount which the agent receives, each month the expenses incurred are deducted and the balance is paid to the farmers on the basis of an equalized price, and without regard to the quantity of milk sold by each individual farmer on the Fluid Market.

It seems plain that the orders go beyond the authority granted by the Act and that the appeal could be dismissed on the ground that the Board has exceeded its delegated powers. But, it has gone a step further in the field of illegality, and has attempted to do something upon which the legislature itself could not legislate, and this is to impose indirect taxation. For I fail to see any substantial difference between the results obtained under the Act of 1929, and the consequences that flow from the impugned orders.

In the *Crystal* case (1) the farmer had to reimburse a portion of what he had received for the benefit of another one, and under the new scheme, a part of the money to which he is entitled is intercepted and paid to one of his less fortunate competitors. Both schemes have indeed the same object which is to effect equalization by two different methods in form, but similar in substance. As in the *Crystal* case (1), the amount of which the farmer is deprived is a tax. These adjustments are compulsorily imposed by a statutory committee which is a public authority, are enforceable by law and imposed for public purposes. I do not think that this Clearing House which has been created alters the situation which arose under the Act of 1929, in any substantial manner. It came to life for the sole purpose of evading the legal consequences of the judgment of the Judicial Committee in the *Crystal* case (1), and of doing indirectly all that has been declared *ultra vires*. As Lord Thankerton said in the *Crystal Dairy* case (1):—

> The substantive provision of the Act is to transfer compulsorily a portion of the returns obtained by the traders in the Fluid Milk Market to the traders in the Manufactured Products Market * * * In the opinion of their Lordships the adjustment levies are taxes * * * it seems to follow that the expense levies in the present case, which are ancillary to the adjustment levies, must also be characterized as taxes.

(1) [1933] A.C. 168.

The orders of the Board are also levies imposed on the farmers to obtain revenues, and to equalize the returns of the farmers by giving to some of them out of the receipts more than they should get, and to some others less than what they are entitled to, and for the reasons given by Mr. Justice O'Halloran of the Court of Appeal of British Columbia, and with whom I agree, I believe that this tax is indirect, and, therefore, invalid. Under the orders, the farmers for the fluid milk receive from the Clearing House 56 cents per pound butterfat, and the dealers pay 60 cents to the same Clearing House. These prices are substantially higher than the prices paid before, and it seems clear that the tendency will be to pass that increase on to the ultimate consumer, thus bringing the tax within the well known principles that make it indirect, and therefore invalid.

The appellants have also submitted that some evidence given to show the intent and effect of the orders was improperly admitted. I agree with the majority of the Court of Appeal, that the evidence was admissible and that the objection cannot stand. In certain cases, in order to avoid confusion extraneous evidence is required to facilitate the analysis of legislative enactments, and thus disclose their aims which otherwise would remain obscure or even completely concealed. The true purposes and effect of legislation, when revealed to the courts, are indeed very precious elements which must be considered in order to discover its real substance. If it were held that such evidence may not be allowed and that only the form of an Act may be considered, then colourable devices could be used by legislative bodies to deal with matters beyond their powers. The Privy Council took similar views in *Attorney-General for Alberta* v. *Attorney-General for Canada* (1), and Lord Maugham delivering judgment for the Judicial Committee said:—

(*Re* Object or Intent.)

> A closely similar matter may also call for consideration, namely, the *object* or *purpose* of the act in question. It is not competent either for the Dominion or a province under the guise or the pretence or in the form of an exercise of its own powers to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other. Here again matters of which the Court would take judicial notice must be borne in mind and *other evidence* in a case which calls for it.

(1) [1939] A.C. 130.

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(*Re* Effect.)

The next step in a case of difficulty will be to examine the *effect* of the legislation. For that purpose the Court must take into account any public general knowledge of which the Court would take judicial notice and may in a proper case require to be *informed by evidence* as to what the effect of the legislation will be.

I believe that this is the law that should govern this case. It applies to the interpretation of federal and provincial statutes, and I cannot see why the courts should withhold its application to orders of a board which is an emanation of a body subject to this rule.

The appeal should be dismissed, but with a slight variation in the formal judgment. In their statement of claim the respondents asked that Orders 10, 12, 13, 14 and 15 be declared *ultra vires*. The Supreme Court of British Columbia and the Court of Appeal declared *ultra vires* Orders nos. 11, 12, 13, 14 and 15. Order no. 10 which is the order repealing previous orders should stand as decided by the courts below, but Order no. 11 has obviously been set aside by mistake. It provides for the licensing of producers, dairies, producer vendors, etc., and the Act authorizes the fixing and collection of licence fees which are within the powers of the Legislature.

The respondents will be entitled to their costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Williams, Manson & Rae.*

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

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* May 19, 20.
* Oct. 7.

THE CORPORATION OF THE CITY OF TORONTO (DEFENDANT)..... APPELLANT;

AND

THE CONSUMERS' GAS COMPANY OF TORONTO (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Highways—Public utilities—Drainage—Company supplying gas in city—Removals, replacements and repairs of portions of its mains and pipes made necessary by works done by city on its

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

streets—Recovery of cost by the gas company from the city—Application of The Public Service Works on Highways Act (now R.S.O., 1937, c. 57)—"Constructing, reconstructing, changing, altering or improving any highway"—Nature of works done by city—Construction of (inter alia) sewers—Claim by gas company against city for cost of alterations made necessary by construction of subways ordered by Board of Railway Commissioners for Canada.

Plaintiff was a company distributing artificial gas through its mains and pipes in the streets of defendant, the City of Toronto. From time to time, to enable defendant to do, or by reason of its doing, certain works—construction of sewers, pavements, sidewalks, street gradings, street diversions, street widenings, drainage systems, retaining walls, etc.—plaintiff made removals, replacements and repairs of portions of its mains and pipes; and for the cost thereof it claimed payment from defendant.

Sec. 2 of *The Public Service Works on Highways Act* (now R.S.O., 1937, c. 57) provides: "Subject to the provisions of section 3, where in the course of constructing, reconstructing, changing, altering or improving any highway it becomes necessary to take up, remove or change the location of appliances or works [which, by the Act, include pipes and pipe lines] placed on or under the highway by an operating corporation [which, by the Act, includes a company distributing gas], the road authority [which, by the Act,. includes a municipal corporation] and the operating corporation may agree upon the apportionment of the cost of labour employed in such work and in default of agreement the cost of such work shall be apportioned equally between the road authority and the operating corporation, but such costs shall not include the replacement or renewal of the appliances or works nor the cost of any materials or supplies, nor any other expense or loss occasioned to the operating corporation." (Plaintiff contended, *inter alia,* that said provisions did not affect its rights, in view of provisions of its incorporating Act (11 Vict., (Canada), c. 14) and of Acts relating to it).

Plaintiff also claimed payment from defendant of plaintiff's cost of making alterations in its mains and pipes ordered by the Board of Railway Commissioners for Canada and made necessary by reason of construction, ordered by said Board, of subways at certain places on streets of the city where railway tracks crossed them.

Held (affirming judgment of the Court of Appeal for Ontario, [1941] O.R. 175):

(1) The term "highway" in said Act includes the public streets of a city.

(2) Said Act governed plaintiff's right to compensation when defendant's operations, in exercise of its powers, were of the character described in said s. 2; and in such cases plaintiff was entitled to recover no more than 50% of the labour cost only of its removals, replacements and repairs.

(3) The construction of certain sewers in question, whether for sanitary purposes or for surface drainage (storm water sewers), could not be regarded as works of defendant which came within the description in said s. 2 (though a storm water sewer might, on a particular set of facts, be properly regarded as "an improvement to a highway"

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within the meaning of said Act); and for relocations of gas mains by reason of such construction the plaintiff was entitled to payment in full. (Kerwin J. dissented as to the storm water sewers, holding that, generally speaking, storm water sewers are constructed by municipalities in the course of improving a highway and that, on the evidence, highways were improved by the storm water sewers in question; a drain may improve a highway under which a gas company has its mains and also other highways from which surface water is drained, but, so long as the first condition exists, said s. 2 applies).

(4) Plaintiff was not entitled to recover for its cost of the alterations made necessary by reason of said construction of subways.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1) in so far as it varied the judgment of Hogg J. (2); and CROSS-APPEAL by the plaintiff from the said judgment of the Court of Appeal for Ontario in so far as it denied to the plaintiff payment in full of its claims.

The plaintiff is a Gas Company incorporated in 1848 by an Act of the late Province of Canada, 11 Vict., Cap. XIV (Canada), for the purpose amongst others of supplying the inhabitants of the City of Toronto with gas and it is a Company distributing artificial gas for light, heat and power in the City of Toronto and surrounding municipalities and it has the right under its Act of Incorporation and amending Acts to lay and maintain its mains and pipes in the streets, squares and public places of the said City. The defendant is the Corporation of the City of Toronto.

From time to time, for the purpose of enabling the defendant to do certain works—construction of sewers, pavements, sidewalks., street gradings, street diversions, street widenings, drainage systems, retaining walls ,etc.—the plaintiff removed to other locations portions of its mains and pipes, and replaced other portions destroyed and repaired other portions damaged by reason of the defendant's works. The removals, replacements and repairs now in question were made between March 28, 1929 (the date of the amendment hereinafter mentioned to *The Public Service Works on Highways Act*) and November 20, 1935. For the cost of these the plaintiff claimed payment from the defendant in full. The defendant contended that it was not liable to pay more than 50% of the labour cost thereof

(1) [1941] O.R. 175; [1940] 4 D.L.R. 670.
(2) [1941] O.R. 175; [1940] 2 D.L.R. 367.

only, by reason of *The Public Service Works on Highways Act,* as amended on March 28, 1929, (the Act is now c. 57 of R.S.O. 1937). Sec. 2 of that Act provides:

> Subject to the provisions of section 3, where in the course of constructing, reconstructing, changing, altering or improving any highway it becomes necessary to take up, remove or change the location of appliances or works placed on or under the highway by an operating corporation, the road authority and the operating corporation may agree upon the apportionment of the cost of labour employed in such work and in default of agreement the cost of such work shall be apportioned equally between the road authority and the operating corporation, but such costs shall not include the replacement or renewal of the appliances or works nor the cost of any materials or supplies, nor any other expense or loss occasioned to the operating corporation.

By said amendment of March 23, 1929 (19 Geo. V, c. 19), the words " appliances and works " in the Act were made to include " pipes and pipe lines," and the words " operating corporation " in the Act were made to include " a company or individual * * * distributing or supplying * * * artificial or natural gas for light, heat or power." (The plaintiff contended, *inter alia,* that, in view of provisions of its incorporating Act and of Acts relating to it, its rights could not be held to be affected by the provisions of *The Public Service Works on Highways Act*).

In the formal judgment at trial (Hogg J.) it was declared that the plaintiff was entitled to be paid 50% of the cost of labour employed for the said removals, replacements and repairs " except the relocations of gas mains by reason of the construction of certain sanitary sewers, certain watermains and the repairing of a leak in a gas main on Dovercourt Road " for which excepted items the plaintiff was entitled to payment in full.

That part of the judgment at trial was varied by the Court of Appeal by substituting for the words in the judgment at trial " by reason of the construction of certain sanitary sewers " in the said excepted items for which the plaintiff was to be paid in full, the words " by reason of the construction of sewers," thus including within the excepted items for which the plaintiff was to be paid in full the relocations by reason of the construction of "storm" or "surface drainage" sewers, as well as sanitary sewers.

The Court of Appeal agreed with the trial judge in holding that the term " highway " in said Act included the public streets of a city, and that said Act governed the

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plaintiff's right to compensation when the defendant City's operations were of the character described in said s. 2. But it held that the statute could be applied only in cases where, in undertaking the work that had made it necessary to take up, remove or change plaintiff's mains or pipes, the defendant City had proceeded in the exercise of its powers to "construct, reconstruct, change, alter or improve" a highway; and that the construction of a sewer, whether for sanitary purposes or for surface drainage, does not come within that description, even if incidentally it does effect some improvement in the highway. The Court stated that it is common knowledge that when intended to carry surface water only, a sewer usually has connections for surface drainage with the private properties that front on the street, and in many cases carries as well the surface water from other streets than that upon which it is laid.

The plaintiff also claimed payment from the defendant of the plaintiff's cost of making alterations in its mains and service pipes ordered by the Board of Railway Commissioners for Canada and made necessary by reason of construction, ordered by the said Board, of subways on streets of the defendant City at certain places where tracks of railway companies crossed streets of the defendant. On this claim the defendant denied liability. This claim was dismissed by the trial judge and the dismissal was affirmed by the Court of Appeal.

By the judgment at trial, costs were given to defendant. This was changed by the Court of Appeal, which ordered that there be no costs to either of the parties. The Court of Appeal (by express statement) made no order as to costs of the appeal.

The defendant appealed to the Supreme Court of Canada from that part of the judgment of the Court of Appeal which varied the judgment of Hogg J. The plaintiff cross-appealed, asking that the judgment of the Court of Appeal should be varied in so far as it allowed the plaintiff only 50% of the cost of labour employed for certain removals, replacements and repairs as aforesaid, and in so far as it dismissed the plaintiff's claim for the cost of the alterations made necessary by reason of the construction of subways as aforesaid; and asked that the plaintiff's claim in the action be allowed in full.

By the judgment of this Court, now reported, the appeal and cross-appeal were dismissed with costs; Kerwin J. dissenting in respect of the appeal.

F. A. A. Campbell K.C. and *John Johnston* for the appellant.

W. N. Tilley K.C. and *J. L. Wilson K.C.* for the respondent.

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

DAVIS J.—I should dismiss both the appeal and the cross-appeal with costs.

There is nothing that I can usefully add to the careful reasons for the judgment of the Court of Appeal (1), which were written by the Chief Justice of Ontario, except to say (and I do not think the Chief Justice would disagree with this) that a storm water relief sewer might, on a particular set of facts, be properly regarded as "an improvement to a highway" within the meaning of *The Public Service Works on Highways Act*. But where, as in the present case, you have a storm sewer built from Yonge street at Hayden street southerly to and along Wellesley street and southeasterly into the Don river, serving such a large central district of the city (the evidence puts it: "almost the entire district north of Wellesley street and east of Yonge, south of Bloor street"), I quite agree with the judgment in appeal that it cannot be treated as the improvement of a particular highway within the meaning of the statute so as to require the gas company to remove or change the location of its appliances or works placed on or under the highway, on the statutory basis of being compensated only to the extent of one-half its cost of labour, without any compensation for the cost of materials or supplies necessitated by the replacement or renewal of the appliances or works or for any other expense or loss thereby occasioned to the company.

KERWIN J. (dissenting in part)—I agree with what the trial judge and the Court of Appeal have said with reference to the matters involved in the cross-appeal, and

(1) [1941] O.R. 175; [1940] 4 D.L.R. 670.

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have nothing further to add. The appeal itself is concerned with three storm water sewers, constructed by the appellant and in connection with which it became necessary for the respondent to change the location of its gas pipes. The trial judge found that each of the sewers fell within the terms of section 2 of *The Public Service Works on Highways Act,* but the Court of Appeal considered that the statute could be applied only "in cases where, in undertaking the work that has made it necessary to take up, remove or change [the Gas Company's] mains or pipes, [the City] has proceeded in the exercise of its powers to construct, reconstruct, change, alter or improve a highway," and that the construction of a sewer for surface drainage did not come within that description, even if it incidentally effected some improvement in the highway.

With deference, I am of opinion that, generally speaking, storm water sewers are constructed by municipalities in the course of improving a highway, and that the evidence in this case makes it clear that highways were improved by the particular storm water sewers. By section 455 of the *Municipal Act,* the council of every municipality has jurisdiction over all highways within the municipality, and by section 480 they are to be kept in repair by such municipality. This power and duty are irrespective of any other authority, such, for instance, as that conferred by subsection 7 of section 404, to construct and maintain drains, sewers or water-courses. A drain may improve a highway under which the Gas Company has its mains and also other highways from which surface water is drained, but, so long as the first condition exists, section 2 of *The Public Service Works on Highways Act* applies. I understand no difficulty arises in connection with the work at the Eastern Avenue bridge over the Don river, in the sense referred to in the reasons for judgment in the Court of Appeal. The appeal should be allowed and the judgment at the trial restored.

The appellant pleaded tender of the total amount found to be due the respondent, with the exception of $443.79. The trial judge ordered the respondent to pay the costs of the action, but the Court of Appeal, after pointing out that there was no proper plea of tender before action and

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that no money was paid into Court by the appellant, directed that there should be no costs of the action or of the appeal. This direction might stand, but the appellant is entitled to its costs of the appeal and cross-appeal to this Court.

Appeal and cross-appeal dismissed with costs.

Solicitor for the appellant: *C. M. Colquhoun.*

Solicitors for the respondent: *Mulock, Milliken, Clark & Redman.*

CANADIAN NATIONAL RAILWAY COMPANY (DEFENDANT) ..... APPELLANT;

AND

CANADIAN INDUSTRIES LIMITED (PLAINTIFF) ..... RESPONDENT.

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* Mar. 24, 25.
* Oct. 20.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Carriers — Railways — Negligence — Contract — Pleadings — Evidence — Goods damaged by derailment and fire while being carried on defendant's railway—Suit for damages for defendant's failure to deliver—Allowance by trial judge of amendment to plead negligence against defendant—Judgment grounded on negligence—Onus of proof as to negligence—Defendant claiming benefit of conditions in standard bill of lading: as to notice and benefit of insurance—Whether such conditions, if available, afforded defence.

Plaintiff sued defendant railway company for damages for defendant's failure to deliver goods which, plaintiff alleged, defendant had undertaken to transport. The goods had been purchased by plaintiff from manufacturers in England and shipped from there, and at Saint John, N.B., the shipping line, pursuant to instruction in the bill of lading, delivered them to defendant for carriage to Schumacher, Ontario. The goods were damaged by derailment and fire while being carried on defendant's railway. The trial judge found that there was no contract between plaintiff and defendant but, when delivering judgment, gave leave to plaintiff to amend its statement of claim by adding an allegation that the goods were damaged by the negligence of defendant, and gave judgment for plaintiff. Said allowance of amendment and judgment was affirmed by the Court of Appeal for Ontario ([1940] O.W.N. 452; [1940] 4 D.L.R. 629) subject to giving to defendant an opportunity (not exercised) of denying negligence (it was held that the onus was on defendant to disprove negligence) and having a new trial on the questions raised by the amendment. Defendant appealed to this Court.

Defendant claimed that its carriage of the goods was subject to conditions in a standard form of bill of lading approved by the Board of Railway Commissioners for Canada, one of which conditions provided that,

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

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unless a certain notice of loss was given, the carrier should not be liable, and another gave to the carrier (on reimbursing to the insured the premiums paid) the full benefit of any insurance that might have been effected upon the goods, "so far as this shall not avoid the policies or contracts of insurance." There was insurance, and after the loss the insurers advanced a sum to plaintiff under terms set up in a loan receipt, by which the sum was received "as a loan, not a payment of any claim," and plaintiff agreed "to repay this loan to the extent of any net recovery made from" any carrier responsible for the loss, and authorized the insurers to sue the carrier in plaintiff's name. The policy was subject to the provisions of the (Imperial) *Marine Insurance Act, 1906* (c. 41, s. 79), providing specifically for subrogation.

Held: Defendant's appeal should be dismissed. The affirmance (in terms as aforesaid) by the Court of Appeal of allowance of said amendment and of judgment for plaintiff on the ground of negligence was right.

Even if the conditions in said standard form of bill of lading were available to defendant (as to which, *quaere*), the conditions relied on did not afford a defence. As to the condition as to notice (non-observance of which was not pleaded but was claimed at trial): *Per* the Chief Justice: Defendant was bound to plead non-observance, and no amendment should in the circumstances be allowed. *Per* Rinfret, Kerwin, Hudson and Taschereau JJ.: In view of the evidence as to actual notice of the damage and of intention to make claim, and subsequent conduct of the parties, a defence based on this condition was not maintainable. As to the condition as to insurance: *Per curiam:* Any contract made by plaintiff which would impair the insurers' right of subrogation would relieve the latter from liability. Under the terms of the loan receipt the insurers would be entitled to return of the money advanced if it were found that they had been deprived of the fruit of subrogation because of some action by the insured. There was no suggestion, and it was entirely improbable, that the insurers knew anything about the condition now set up. Under the circumstances, the condition was not operative.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1) dismissing the defendant's appeal from the judgment of Rose C.J.H.C. (2) adjudging that the plaintiff recover the sum of $2,765.26 for loss suffered by the plaintiff by reason of damage to its goods by derailment and fire at Bagot station, while being carried on defendant's railway en route to Schumacher, Ontario. The goods had been purchased by plaintiff from manufacturers in England and on their arrival at Saint John, New Brunswick, the shipping line, pursuant to instruction in the bill of lading, delivered them to defendant for carriage to Schumacher.

(1) [1940] O.W.N. 452; [1940] 4 D.L.R. 629.
(2) [1940] 3 D.L.R. 621.

In its statement of claim, as originally framed, plaintiff alleged that defendant undertook to transport the goods from Saint John, N.B., and deliver them at Schumacher, Ont.; that defendant did not deliver the goods as undertaken, the goods having been damaged as a result of a train derailment on defendant's railway line at Bagot station; that plaintiff lost the sum for which it claimed by reason of the default of defendant to deliver the goods in pursuance of its duty and/or undertaking. A question arose as to whether or not there was any contractual relationship between plaintiff and defendant on which plaintiff could make a claim based on contract. The trial judge, Rose, C.J.H.C., was of opinion that there was no contract between plaintiff and defendant, but, when delivering judgment, gave leave to plaintiff to amend its statement of claim by adding an allegation that the goods were damaged by the negligence of the defendant; and gave judgment for the plaintiff. The Court of Appeal upheld the trial judge in allowing the amendment to plead negligence, but gave an opportunity to defendant to deny negligence and have a new trial on the questions raised by the amendment. (The Court was of opinion that the onus was upon the defendant to disprove negligence.) The formal judgment in the Court of Appeal, reciting "that the defendant has elected not to file an affidavit denying negligence pursuant to leave granted by the court," ordered that the appeal be dismissed with costs.

In its statement of defence the defendant pleaded (*inter alia*) that the shipment delivered to it and transportation thereof by it " was subject to the tariffs and classifications in effect on the date the said shipment was received by " defendant " and to all terms, conditions and exceptions of the Carriers carrying the said shipment beyond the port of discharge, and in particular but without limitation to the conditions set forth in the form of Straight Bill of Lading approved by the Board of Railway Commissioners for Canada by Order No. 7562 dated the 15th day of July, 1909."

The conditions relied upon by defendant were in respect to notice and insurance and are set out in the reasons for judgment in this Court now reported. Non-observance of the condition as to notice was not pleaded but was claimed

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at trial. As to the condition as to insurance, defendant (after pleading that it was not liable in law for any loss or damage by reason of the fire) pleaded in the alternative that if it was liable on account of loss of or damage to any of the goods, it was ready and willing to reimburse to the insured the premiums paid in respect thereof and was entitled to the full benefit of any insurance that might have been effective on account of the said goods.

The appeal to this Court was dismissed with costs.

R. E. Laidlaw K.C. and *A. D. McDonald* for the appellant.

T. N. Phelan K.C. and *B. O'Brien* for the respondent.

THE CHIEF JUSTICE—I agree that the amendment directed by the Chief Justice of the High Court, Rose, C.J., was a competent and proper amendment. Mr. Justice Middleton in his judgment has given convincing reasons for this, with which I agree, and I will add nothing to them.

It is unnecessary to decide whether or not the statement of claim without the amendment contained a sufficient allegation of negligence. Failure to deliver by reason of damage to the goods "as a result of a train derailment" is alleged. Derailment of the train would be evidence of negligence sufficient to constitute a *prima facie* case. Whether there is a presumption of law that the goods were damaged by reason of the carrier's negligence, within the meaning of the rules of pleading, is a question on which it is unnecessary to express any opinion.

Negligence being established, it is not disputed that the appellants are responsible unless relieved by the conditions in the bill of lading. Here again it is unnecessary, in my view, to decide whether or not the rights of the respondents are regulated by these conditions, and I should prefer to reserve for another occasion the decision of the question whether, in circumstances such as those presented by this case, the railway company is not protected by the stipulations of the bill of lading.

The two conditions upon which the appellants rely are that relating to notice and that relating to insurance. As regards the first, the appellants were, in my opinion, bound to plead non-observance of the condition and no amend-

ment ought, in the circumstances, to be allowed. As regards the second, the appellant's contention, in my opinion, fails.

For the reasons given by my brother Hudson, I think the carrier cannot be given the benefit of the policy of insurance without avoiding the policy and, consequently, the condition is not operative.

The question does not arise, I may add, whether, assuming the appellants are not entitled to the benefit of the conditions of the bill of lading, their liability in respect of the goods would necessarily rest upon the negligence of their servants. Lord Dunedin's judgment in *London & North Western Railway Company* v. *Richard Hudson & Sons, Ltd.* (1) seems to show that, according to the view of that great judge, the appellants would be responsible as insurers, unless, of course, as regards Dominion railway companies the common law obligation is in some way affected by the provisions of the *Railway Act*.

I should dismiss the appeal with costs.

The judgment of Rinfret, Kerwin, Hudson and Taschereau JJ. was delivered by

HUDSON J.—A quantity of sodium cyanide belonging to the plaintiffs, while being conveyed by the defendants on their railway, was badly damaged, and this action was brought to recover for the loss sustained.

At the trial, Chief Justice Rose held that the goods had been damaged under circumstances justifying a finding of negligence and gave judgment for the plaintiffs.

On appeal to the Court of Appeal, the learned judges there thought that the defendants should be given the option of giving evidence on the question of negligence, if they so desired, but, defendants failing to take advantage of this option, the appeal was dismissed.

The writ, as endorsed, was quite wide enough to enable the plaintiffs to plead either in tort or in contract, but the statement of claim did not in terms allege negligence and, in the opinion of the learned trial judge, was not wide enough to cover a claim in tort. However, at the time of delivering his judgment, he gave leave to amend by adding an allegation of negligence, and this was done.

(1) [1920] A.C. 324.

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Hudson J.

The propriety of granting leave to amend was a major subject of controversy in the Court of Appeal, but the only concession made to the defendants was the option to give evidence rebutting negligence. I agree with the decision of the Court of Appeal on this point for the reasons given by Mr. Justice Middleton.

On the merits, the material evidence is very fully set forth in the judgment of Chief Justice Rose. Briefly, the plaintiffs had bought a quantity of sodium cyanide in England, which was shipped by a through bill of lading from Newcastle-on-Tyne in England to Schumacher in Ontario. On arrival at the Port of Saint John the goods were transferred to the defendant company, for carriage by rail. No bill of lading was issued by the railway company and there is no evidence of a contract of carriage, except what can be extracted from a way-bill apparently prepared by the Shipping Company's agent, stating the freight rate to be charged on the shipment from Saint John to Schumacher, such rate being at a figure which would indicate that the goods were being shipped on what is known as a standard bill of lading, the form of which had been approved by the Board of Railway Commissioners.

At the trial, the defendants contended that there was no contractual relationship between the plaintiffs and themselves and that their only contract was with the shipowners, for whom they acted as agents. In the alternative, they claimed that they received the goods on the conditions and limitations of the standard bill of lading approved by the Board of Railway Commissioners, and were entitled to the benefit of certain conditions therein respecting insurance and notice of claim.

The plaintiffs claimed under a contract of carriage and in the alternative for negligence.

The learned trial judge held that the contract made with the shipowners was an entire contract for the carriage of the goods from Newcastle to Schumacher, and that the shipowners had no authority on behalf of the plaintiffs to enter into a contract with the defendants for the carriage of the goods for a portion of the distance. He held that, in the absence of contract, the case was in principle the

same as *Allen* v. *Canadian Pacific Ry. Co.* (1), which was binding on him, and that under the circumstances here the defendants were not entitled to rely upon the terms of a standard bill of lading. Having come to this conclusion, and that defendant had been negligent, he did not find it necessary to deal with the effect of the conditions of the bill of lading, if applicable.

As I have said before, the main question argued before the Court of Appeal was the propriety of allowing the amendment setting up negligence. That question having been disposed of, the Court of Appeal had no difficulty in dismissing the appeal.

The defendants, having caused the loss through their negligence, are liable unless there is some limitation on their liability beyond what is given them by the common law. It has been held by Chief Justice Rose, and indeed it was contended on behalf of the defendants, that there was no privity of contract between the defendants and plaintiffs, and the limitation on liability, if any, must arise in some other way.

The defendants say that they received the goods on the conditions and limitations of the standard bill of lading approved by the Board of Railway Commissioners, and were entitled to the benefit of certain conditions therein respecting insurance and notice of claim. It will be convenient here to state the terms and conditions on which the defendants rely. The first is:

> Notice of loss, damage or delay must be made in writing to the Carrier at the point of delivery, or to the Carrier at the point of origin, within four months after delivery of the goods, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless notice is so given the Carrier shall not be liable.

The defendants did not plead the absence of such notice but claimed in the course of the trial that there was non-compliance with this condition. It appears from the evidence that the defendants were properly notified of the damage and that in due course a claim would be made for the loss, when the amount had been ascertained. Thereafter, the officers of the plaintiffs and defendants actively co-operated in an endeavour to minimize the loss as much as possible. The circumstances are more fully set forth in

(1) (1909) 19 O.L.R. 510; (1910) 21 O.L.R. 416.

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the judgment of Mr. Justice Middleton in the Court below. The defence on this point is purely technical and without merit and should not be upheld.

The second condition relied upon is:

> Any Carrier or party liable on account of loss or damage to any of said goods, on reimbursing to the insured the premiums paid in respect thereof, shall have the full benefit of any insurance that may have been effected upon or on account of said goods, so far as this shall not avoid the policies or contracts of insurance.

The defendants plead alternatively that

> if the defendant is liable on account of loss of or damage to any of the said goods, it is ready and willing to reimburse to the insured the premiums paid in respect thereof and is entitled to the full benefit of any insurance that may have been effective on account of the said goods.

The facts are, that the goods were insured by the consignors at the time they were loaded on the ship at Newcastle. The policy was a marine policy but covered the goods not only by sea but also by rail to Schumacher. After the loss occurred, the insurance company made an advance on the condition set up in a loan receipt reading as follows:

> Received from IMPERIAL CHEMICALS INSURANCE LIMITED and THE MARITIME INSURANCE COMPANY LIMITED the sum of £1,439.9.2, as a loan, not a payment of any claim, pending the ascertainment whether the loss is a loss for which any Carrier, Bailee or other person is responsible; and I/we hereby agree to repay this loan to the extent of any net recovery made from, or from any insurance effected by, any such Carrier, Bailee or other person, and as security for such repayment I/we hereby pledge to said Insurance Company all such claims and any recovery thereon. I/we hereby appoint the Officers of said Insurance Company and their Successors, severally, my/our Agents and Attorneys in fact, with irrevocable power to collect any such claim and to begin, prosecute, compromise or withdraw in my/our name, or in the name of the Insurance Company, but at the expense of the Insurance Company, any and all legal proceedings deemed necessary to the Insurance Company to enforce such claim or claims, and to execute in my/our name any documents, including receipts and releases, which may be necessary or convenient to carry into effect the purposes of this Agreement.
>
> CANADIAN INDUSTRIES LIMITED
> F. T. PARKER.
>
> CANADIAN INDUSTRIES LIMITED
> P. R. BARRY.
>
> MONTREAL, June 30/38.

The policy was subject to the provisions of the (Imperial) *Marine Insurance Act, 1906,* chapter 41, section 79, providing specifically for subrogation. If the plaintiffs or their

successors entered into any contract which would impair this right of subrogation, the insurance company would be relieved from liability: see Arnould on Marine Insurance, 12th Edition, Vol. 2, pages 1639 *et seq.;* and also Porter on Insurance, 8th Edition, page 238, and the case of *Inman* v. *South Carolina Ry. Co.* (1).

Under the terms of the loan receipt the insurance company would, I think, be entitled to a return of the money advanced if it were found that they had been deprived of the fruit of subrogation because of some action by the insured. There is no suggestion here that the insurance company had been advised of any condition such as that set up; in fact, it is entirely improbable that they knew anything about it. Under these circumstances, it would seem clear that the condition relied upon could not in any way cover the circumstances here.

Therefore, even if the conditions in a standard bill of lading could be invoked, they do not afford the defendants any defence.

The question of whether or not the defendants had the right to set up the conditions of the standard bill of lading against the plaintiffs is more difficult. It is now common ground that there was no privity of contract between the parties. The plaintiffs could not set up the terms of the contract against the defendants. How, then, could the defendants set up the terms of the contract against the plaintiffs?

In Pollock on Torts, 14th Edition, page 436, it is stated:

> Wherever the parties have come into such a relation that a duty to take proper care can be established without reference to any contract, there the violation of that duty by negligence is a tort, whether it consist in commission or in omission, and whether there be in fact a contract or not.

This is illustrated in the case of *Meux* v. *Great Eastern Railway Company* (2). In this case a servant of the plaintiff took a ticket for a journey on the defendants' railway, and a portmanteau of his was accepted as his personal luggage. The portmanteau contained property belonging to the plaintiff, his mistress. This property was destroyed through the misconduct of defendants' servant. It was held in the Court of Appeal that the defendants were liable. Lord Esher, at page 390:

(1) (1889) 129 U.S. Reports 128. (2) [1895] 2 Q.B. 387.

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There being no contract in this case with the plaintiff, she gets no right to sue for a breach of the contract which was made, and there is no duty towards her arising on contract. There is nothing in such a state of things that deprives the plaintiff of a right which she has independently of contract, and which she would have even if there were no contract. * * * They cannot say that it was done without their authority; and, therefore, for such a wrongful act the person injured has a right of action against them, although as between him and them there was no contract, and although there was a contract between them and some one else with regard to the luggage.

See also *Foulkes* v. *Metropolitan District Ry. Co.* (1), particularly the remarks of Lord Bramwell at pages 158-159.

However, some modification of this principle is suggested in more recent cases, the principal one of which is *Elder, Dempster & Co. Ltd.* v. *Paterson, Zochonis & Co. Ltd.* (2). This case is fully discussed in the judgment of Chief Justice Rose at the trial, and I will here do no more than quote the concluding words of the judgment of Lord Sumner, at page 564, which was concurred in by a majority of the other members of the Court:

It may be, that in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading. It may be, that the vessel being placed in the Elder, Dempster & Co.'s line, the captain signs the bills of lading and takes possession of the cargo only as agent for the charterers, though the time charter recognizes the ship's possessory lien for hire. The former I regard as the preferable view, but, be this as it may, I cannot find here any such bald bailment with unrestricted liability, or such tortious handling entirely independent of contract, as would be necessary to support the contention.

The matter is discussed in a learned note in 50 Law Quarterly Review, at page 8, dealing with some statements made by Mr. Justice Langton in *The Kite* (3).

From these discussions it does not appear as yet that any defined principle of general application has been evolved.

I am inclined to agree with the conclusion arrived at by Chief Justice Rose, that the conditions of the standard bill of lading are not available as a defence to this action under all of the circumstances here. However, it is not necessary to give any conclusive opinion on this point and

(1) (1880) 5 C.P.D. 157. (2) [1924] A.C. 522.
(3) [1933] P. 154.

I prefer to base my judgment on the other point, that the particular conditions of this case do not afford a defence. I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *R. E. Laidlaw.*

Solicitors for the respondent: *Phelan, Richardson, O'Brien & Phelan.*

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NATIONAL TRUST COMPANY LIMITED (PLAINTIFF)..... APPELLANT;

AND

THE CHRISTIAN COMMUNITY OF UNIVERSAL BROTHERHOOD LIMITED AND THE BOARD OF REVIEW FOR THE PROVINCE OF BRITISH COLUMBIA (DEFENDANTS) ..... RESPONDENTS.

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* April 22, 23, 24.
* June 24.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Debtor and creditor—Farmers' Creditors Arrangement Act, 1934 (Dom.)—Structure and operation of the Act—Whether respondent Community is a "farmer"—Board of Review—Jurisdiction—Whether county or district courts have exclusive jurisdiction under the Act—Jurisdiction of Supreme Courts of the provinces in the matter—Action by creditor against debtor before Supreme Court and appointment by the latter of a Receiver, prior to proceedings by the debtor under the Act—Farmers' Creditors Arrangement Act, 1934 (Dom.), s. 2 (2), s. 5 (1), s. 6 (1) (2) (7), s. 11 (1) (2), s. 12 (4) (5) (6).

On May 18th, 1938, the appellant instituted in the Supreme Court of British Columbia a debenture holder's action against the respondent Community, praying foreclosure, or sale, of certain properties and assets mortgaged to the appellant by the respondent Community to secure the payment of certain debentures of the Community. In May and July, 1938, by orders of the Supreme Court of British Columbia, a Receiver (an authorized trustee in bankruptcy) was appointed and immediately entered upon his duties. This action is still pending and the Receiver is still executing his duties In June, 1929, the Community purported to file a proposal under the *Farmers' Creditors Arrangement Act.* In the same month, by County Court orders, "upon the application of" the Official Receiver, under said Act, "for directions," "and upon reading the statement of affairs herein and the proposal and the resolution of the Directors" of the Community, the latter was "hereby permitted to make appli-

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

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cation under and (was) entitled to take advantage of the provisions of" said Act, and the Official Receiver was "hereby permitted to accept the said proposal" of the Community under said Act. On September 14, 1939, the respondent Board of Review gave notice to the Receiver that a written request by a creditor of the Community had been made to the Board of Review to formulate an acceptable proposal for a composition, extension of time or scheme of arrangements of the affairs of the Community and gave notice of hearing. The appellant immediately on the 16th of September, 1939, brought the present action, claiming, *inter alia,* a declaration that the respondent Community was not a farmer within the meaning of the *Farmers' Creditors Arrangement Act* and was not entitled to the benefit of that Act, that the respondent Board of Review was without jurisdiction and that it had no jurisdiction over the appellant and the other creditors of the Community. The trial judge held that he was invested with jurisdiction to render a decision in the action, and his decision was that the respondent Community was not a farmer within the meaning of the above Act. The appellate court, reversing that judgment, held that the Supreme Court of British Columbia had no jurisdiction in the matter and that, by force of the provisions of the Act, such jurisdiction resided exclusively in the County Court, and it further held that the respondent Community was a farmer.

Held, that the respondent Community was not a farmer within the meaning of the *Farmers' Creditors Arrangement Act,* and, as such, entitled to a proposal for a composition of its liabilities under the provisions of that Act; and, also, that, under the circumstances of this case, the Supreme Court of British Columbia had jurisdiction to determine the questions raised by the appellant's action. *Barickman Hutterian Mutual Corporation* v. *Nault* ([1939] S.C.R. 223) disc. and dist.

Held, also, *per* The Chief Justice and Davis and Hudson JJ., that, under the circumstances of this case, the Supreme Court of British Columbia had jurisdiction to entertain the appellant's action—It is not necessary, for the purpose of this appeal, to determine generally the jurisdiction of the County Court and of the Supreme Court, respectively, in relation to the statutory validity of a proposal filed by a debtor who is invoking the provisions of the statute.—In the present case, property of the respondent Community affected by the debentures was in the hands of a Receiver appointed by the Supreme Court. Whatever may be the effect of the general language of the enactment which purports to give to the County Court exclusive jurisdiction in bankruptcy, such general language cannot be read as giving to the County Court any control over the assets of the respondent Community, in the hands of the Receiver, which could be exercised without the consent of the Supreme Court; and it seems necessarily to follow that it would be within the jurisdiction of the Supreme Court to ascertain by an examination of the facts (if such a claim were made) whether or not the purported proceedings under the statute were competent proceedings,—whether or not, in other words, the County Court had acquired exclusive jurisdiction in relation to the debtors' assets by force of the statute. The Board of Review was about to consider a proposal to be formulated under s. 12 (4) (5) of the Act, and, in the case of a proposal being formulated and confirmed by the Board, questions might very well arise as to the position of the Receiver.

S. 11, read literally and giving effect to it according to the full scope of its terms, without any qualification, would appear directly to affect the Receiver in any proceedings by him to realize property within the receivership (*e.g.*, in an action to collect a book debt charged by the debentures in suit). Only the very clearest language would justify the conclusion that Parliament intended in these circumstances to deprive the Supreme Court of the authority to decide for itself whether the filing of the Community's proposal had any statutory warrant. The words employed in the first paragraph of section 5 of the Act ought not to be read as excluding the jurisdiction of the Supreme Court to decide whether, in such circumstances as those in this case, its jurisdiction in respect of property in its possession, and in respect of proceedings in relation to that property pending before it, has been ousted. The trial judge had all the circumstances before him and, having regard to those circumstances, felt it his duty to pronounce upon the issue. The trial judge was right in exercising the jurisdiction he did exercise. He was not deciding upon any abstract question. It was important that the issue should be decided speedily, to avoid conflict of jurisdiction with resulting confusion and expense. As to the County Court orders (The recital shows that they were made on application for directions before the Community's proposal was filed—and *quaere* whether, until such filing, the Official Receiver has any status, or the Court any jurisdiction, on such an application): The farmer's right to file a proposal arises from provisions of the Act, not from any leave of the Court; the Act does not contemplate an application for such leave. The purpose of the procedure under Rule 42 is to enable the Official Receiver to obtain directions as to his own acts in the course of administration where the application of the Act, which is the foundation of the authority both of the judge and the Official Receiver, is assumed—it is not its purpose to empower the Court to make binding orders affecting the rights of third persons who are not parties to the proceeding. It does not follow that on an application for directions questions of right and jurisdiction may never be determined. The County Court has jurisdiction, speaking generally, to determine such questions in a summary way, and the hearing of an application for directions in a particular case may be a convenient and unobjectionable occasion for dealing with such questions, when proper care is taken to see that everybody concerned is fully represented and has full opportunity of bringing out the facts and presenting his case. The County Court orders in question should be treated as directions to receive and file proposals, and the statement therein that the Community is permitted to make application under, and is entitled to take advantage of, the provisions of the Act, must be regarded simply as introductory, expressing the judge's opinion *quantum valeat* with regard to matters upon which he had no authority to make a binding pronouncement.

Per Rinfret J.—The principal powers of the Board of Review are enumerated in section 12 of the *Farmers' Creditors Arrangement Act* and its subsections; but, nowhere is there to be found vested in the Board of Review the power to determine as a question of law the applicability of that Act to a person whose quality and status as a "farmer" is disputed, or where it is objected, by some party having an interest in the matter, that the applicant for a proposal does not come within the definition of the Act: the courts of justice are the proper forum where the matter must be debated and determined.—

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As to the question whether, in a province other than the province of Quebec, an interested party, who decides of his own initiative to contest the status of an applicant as farmer, must necessarily have to institute his proceedings in the county or district court or whether he is deprived of the right of invoking the general jurisdiction of the Supreme Court of the province, it should be *held*, as far as the interpretation of the statute is concerned, that, as the *Farmers' Creditors Arrangement Act* may be regarded as a chapter of the *Bankruptcy Act*, the status of a farmer and the question whether he is entitled to invoke the benefit of the *Farmers' Creditors Arrangement Act* are included within the words "jurisdiction in *bankruptcy*" mentioned in the first paragraph of section 5 of the Act and that, therefore, these matters, under the Act, are within the exclusive jurisdiction of the county and district courts of all the provinces except in the province of Quebec.—It does not necessarily follow that the Supreme Courts of these provinces are divested by the Act of their supervisory authority over an official such as the Official Receiver or a board such as the respondent Board of Review, which jurisdiction is exercised through the writs of prohibition, *mandamus* or *certiorari*, or possibly by declaration and injunction as contended by the appellant; but this latter question may be left for wider examination in a case where the point may come up squarely for decision—In the present case, however, there is a special situation. The appellant's Debentures Holders' action was instituted prior to the respondent Community's application to the Official Receiver under the *Farmers' Creditors Arrangement Act* and before the county court orders were issued. That action is still pending and the Receiver appointed in that action of the Supreme Court of British Columbia is still carrying on his duties. The effect of the Receiver's appointment by the Supreme Court was to put all the property and assets of the Community under the authority of that Court. In such circumstances, its jurisdiction in respect of the assets of the respondent Community and with regard to the proceedings then pending before it could not be interfered with by the mere application of the Official Receiver to the county courts under the *Farmers' Creditors Arrangement Act*.

Per Crocket J.—Upon a consideration of the record and of the relevant provisions of the *Farmers' Creditors Arrangement Act* and its regulations the trial judge had full jurisdiction to make the declaration which he did and his judgment was fully warranted by the evidence. If the respondent Community was not a farmer, neither the Official Receiver nor the Board of Review nor any County Court judge had any authority whatsoever to bring the respondent Community within the operation of that Act, and any orders or reports purporting to recognize such respondent as a farmer must be held under the explicit provisions of the Act to have been wholly void and of no effect. If the respondent Community was not a farmer within the meaning of the Act, the fact that a County Court judge had without authority and erroneously found that the respondent Community was a farmer cannot possibly have the effect of ousting the jurisdiction of the Supreme Court to pronounce upon the validity of these proceedings and of removing from the custody and control of a special receiver appointed by the Supreme Court for the administration of the British Columbia assets and business of the respondent Community for the realization of the moneys secured by the respondent's deed of trust and mortgage, and placing them in the exclusive control of the county

court. Moreover, the whole tenor of the statute negatives the suggestion that the Parliament of Canada intended to interfere with the inherent jurisdiction of the Supreme Court of the various provinces to declare the nullity of wholly unauthorized proceedings and orders of all inferior statutory functionaries or tribunals at the suit of those whose property and civil rights such proceedings and orders purport to affect.

Judgment of the Court of Appeal (55 B.C. Rep. 516) reversed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the Supreme Court, Robertson J. (2) which had maintained an action by the appellant in which the latter sought a declaration that the respondent Community was not a farmer within the meaning of the *Farmers' Creditors Arrangement Act.*

A. E. Hoskin K.C. and *D. N. Hossie K.C.* for the appellant.

C. L. McAlpine K.C. for the respondent Community.

F. P. Varcoe K.C. for the respondent Board of Review.

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

THE CHIEF JUSTICE—I shall refer to the respondent, The Christian Community of Universal Brotherhood, Limited (which is a company incorporated under the Dominion Companies Act) as the respondent company.

The respondent company is not, I am satisfied, on the facts disclosed in the evidence before us, a farmer within the contemplation of the *Farmers' Creditors Arrangement Act* of 1934, and for this and other reasons the proceedings of the Official Receiver and the respondent, the Board of Review, were without statutory warrant. Had it not been for the decision of this Court in *Barickman* v. *Nault* (3), it would never have occurred to anybody, I think, that the respondent company was a farmer within the intendment of that statute. The only point of law decided in that case was that a corporation may be a farmer and entitled as such to avail itself of the provisions of the

(1) (1940) 55 B.C.R. 516; [1940] 3 W.W.R. 650; [1941] 1 D.L.R. 268.
(2) (1939) 54 B.C.R. 386; [1940] 3 W.W.R. 203; [1940] 4 D.L.R. 767.
(3) [1939] S.C.R. 223.

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statute. In the very special circumstances of that case we held that the corporation was a farmer within the definition

> a person whose principal occupation consists in farming or the tillage of the soil.

There is little pertinent resemblance between the corporation whose status was there in question and the respondent company, and that decision is really of no assistance in the decision of the question before us. I think it is very clear that, although the members of the Community for the most part are farmers, the incorporated company itself is not a farmer in the ordinary sense of the term, or in the sense of the statute. My brother Rinfret has given conclusive reasons for this.

An important question, however, which was very fully argued, arises. That question is whether it is competent to this Court to give practical effect on this appeal to its conclusion that the respondent company has the right to avail itself of the benefit of the enactments of the *Farmers' Creditors Arrangement Act,* and that question again depends upon the answer to the question whether or not the Supreme Court of British Columbia was competent to adjudicate upon the respondent company's rights in that respect.

The *Farmers' Creditors Arrangement Act* provides in section 6 (1) and (2) as follows:—

> 6. (1) A farmer who is unable to meet his liabilities as they become due may make a proposal for a composition, extension of time or scheme of arrangement either before or after an assignment has been made.
>
> (2) Such proposal shall be filed with the Official Receiver who shall forthwith convene a meeting of the creditors and 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.

By section 7:—

> 7. A proposal may provide for a compromise or an extension of time or scheme of arrangement in relation to a debt owing to a secured 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.

By section 11 (1) and (2):—

> 11. (1) On the filing with the Official Receiver of a proposal, no creditor whether secured or unsecured, shall have any remedy against

the property or person of the debtor, or shall commence or continue any proceedings under the *Bankruptcy Act,* or any action, execution or other proceedings for the recovery of a debt provable in bankruptcy, or the realization of any security unless with leave of the court and on such terms as the court may impose; Provided, however, that the stay of proceedings herein provided shall only be effective until the date of the final disposition of the proposal. 1938, Ch. 47 Am.

(2) On a proposal being filed the property of the debtor shall be deemed to be under the authority of the court pending the final disposition of any proceedings in connection with the proposal and the court may make such order as it deems necessary for the preservation of such property.

By section 5, subsection (1):—

5. (1) In the case of an assignment, petition or proposal in the province of Quebec, the Superior Court of the judicial district where the farmer resides, and in other provinces, the county or district court, shall have exclusive jurisdiction in bankruptcy subject to appeal as provided in section one hundred and seventy-four of the *Bankruptcy Act.*

The statute also provides for a Board of Review consisting of a Chief Commissioner and two Commissioners, and that where the Official Receiver reports that a farmer has made a proposal, but that no proposal has been approved by the creditors, the Board shall, on the written request of a creditor or of the debtor, endeavour to formulate an acceptable proposal, and the Board shall consider representations. If the proposal so formulated is accepted by the debtor and the creditors it is to be filed in Court and then, by force of section 12, subsection (5), it becomes binding on the debtor and all the creditors. Even where a debtor and the creditors refuse to approve a proposal so formulated the Board may, nevertheless, confirm the proposal with or without amendments, and on being filed in Court it becomes binding on all the creditors and the debtor as if it had been accepted by the creditors and approved by the Court.

In May, 1938, the appellants instituted in the Supreme Court of British Columbia a Debenture Holders action against the respondent company, praying foreclosure or sale of certain properties and assets mortgaged to the appellant to secure the payment of debentures. In May and July, 1938, by orders of the Supreme Court of British Columbia, one G. L. Salter was appointed Receiver and immediately entered upon his duties. This action is still pending and the Receiver is still executing his duties.

In June, 1939, the respondent company purported to file a proposal under the *Farmers' Creditors Arrangement*

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Act and on the 14th of September, 1939, the Board of Review sent to the Receiver a notice stating that a written request by a creditor of the respondent company had been addressed to the Board of Review, requesting the Board to formulate an acceptable proposal for a composition, extension of time or scheme of arrangements of the affairs of the said company, and that this request would be dealt with at Nelson, in the county of Kootenay, on the 26th of September, 1939. The appellants immediately commenced an action in the Supreme Court of British Columbia, claiming, among other things, a declaration that the respondent company is not a farmer entitled to take advantage of the *Farmers' Creditors Arrangement Act.*

The issue of substance which the appellants sought to raise in their action in the Supreme Court of British Columbia was, of course, the question whether the respondent company was entitled to take advantage of the *Farmers' Creditors Arrangement Act.* The appellants, being the holders of debentures in the amount of three hundred and fifty thousand dollars ($350,000) and having, as already observed, in a Debenture Holders action had a Receiver appointed of property affected by their security in British Columbia, had, of course, an immediate and practical concern in the proceedings taken by the respondent company, purporting it to be under the authority of the *Farmers' Creditors Arrangement Act.*

The statute, as appears from the enactments already set out, where a proposal, which is a proper proposal within the contemplation of the statute, is filed by a person who is entitled to the benefit of the provisions of the statute, effects (*inter alia*) a stay of all proceedings taken by the holder of the security to realize his security pending at the time the proposal is filed; and also brings the property of the debtor filing the proposal under the authority of the Court, which is the County Court of the county in which the debtor resides, and gives the County Court authority to make orders for the preservation of the property.

Furthermore (it cannot be too plainly kept in view), authority is given to the Board of Review to formulate a proposal providing for a compromise and extension of

time or scheme of arrangement in relation (*inter alia*) to a debt owing to a secured creditor, and such proposal so formulated by the Board may be confirmed by the Board and filed in the County Court and thereupon (even without the consent of the secured creditor) it becomes binding upon all the creditors and the debtor.

The appellants, I repeat, were naturally and properly concerned with these proceedings, and when they received notice from the Board that the Board intended to consider the framing of a proposal they instituted their action in the Supreme Court of British Columbia, as already mentioned.

On behalf of the respondent company and the Board of Review it was argued that the statute invests the County Court with exclusive jurisdiction in bankruptcy and that this includes any proceeding to determine the question raised by the action; and so precludes the exercise of jurisdiction therein by the Supreme Court. I do not think it is necessary for the purpose of this appeal to determine generally the jurisdiction of the County Court and of the Supreme Court, respectively, in relation to the statutory validity of a proposal filed by a debtor who is invoking the provisions of the statute. *Prima facie* it would seem that an application made to the County Court judge to set aside such a proposal as incompetent would fall within the "jurisdiction of bankruptcy" within the meaning of the statute, and that the County Court judge would have jurisdiction to pass upon such an application.

In the present case property of the respondent company affected by the debentures is in the hands of a Receiver appointed by the Supreme Court of British Columbia. On general principles any attempt to interfere with the possession of the Receiver would constitute contempt of court. In the absence of some statute to the contrary effect, the Supreme Court would not permit even an action to be brought against the Receiver in respect of his receivership, unless leave of the Court were first obtained. *Blair* v. *Maidstone* (1); *Russell* v. *East Anglia Rly. Co.* (2); *Coleman* v. *Grenville* (3), *per* Strong, V.C.

(1) [1909] 2 Ch. 286. (2) (1850) 3 Mac. and G. 104, at 120.
(3) (1871) 18 Gr. 42, at 43, 44.

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This, of course, is well-known law. Whatever may be the effect of the general language of the enactment which purports to give to the County Court exclusive jurisdiction in bankruptcy, such general language cannot, in my opinion, be read as giving to the County Court any control over the assets of the respondent company, in the hands of the Receiver, which could be exercised without the consent of the Supreme Court. Only the most precise language would justify one in ascribing such an intention to the legislature; and it seems necessarily to follow that it would be within the jurisdiction of the Supreme Court to ascertain by an examination of the facts (if such a claim were made) whether or not the purported proceedings under the statute were competent proceedings,—whether or not, in other words, the County Court had acquired exclusive jurisdiction in relation to the debtors' assets by force of the statute.

In the present case the Board of Review was about to proceed to consider a proposal to be formulated under section 12, subsections (4) and (5) and, in the case of a proposal being formulated and confirmed by the Board of Review, questions might very well arise as to the position of the Receiver. It is to be noticed that section 11 read literally, when effect is given to it according to the full scope of its terms, without any qualification, would appear directly to affect the Receiver in any proceedings by him to realize property within the receivership—in an action, for example, to collect a book debt charged by the debentures in suit. Only the very clearest language would, I repeat, justify the conclusion that the legislature intended in these circumstances to deprive the Supreme Court of the authority to decide for itself whether the filing of the proposal had any statutory warrant.

The principle of *Stradling* v. *Morgan* (1) must, I think, be applied. The words employed ought not, I think, to be read as excluding the jurisdiction of the Supreme Court to decide whether, in such circumstances as those before us, its jurisdiction in respect of property in its possession, and in respect of proceedings in relation to that property pending before it, has been ousted.

(1) (1558) Plowden 204.

The learned trial judge had all the circumstances before him and, having regard to those circumstances, felt it his duty to pronounce upon the issue. He held that the respondent company is not a farmer within the contemplation of the statute, a conclusion with which, as I have mentioned, we are in entire agreement.

As already observed, the only point remaining to be considered is whether or not the trial judge was also right in exercising the jurisdiction he did exercise, or whether, on the contrary, the County Court was solely competent to pass upon the issue presented to him. If the learned trial judge was wrong in holding that he was invested with jurisdiction, the only course open to us would be to dismiss the appeal, with the result that the question must go back to the County Court for determination, and the time and energy spent in trying the issue before the County Court judge and in arguing it before the Court of Appeal and before this Court thrown away. Happily, in my opinion, this course is not forced upon us because I think the trial judge's decision on the question of jurisdiction, as well as his decision on the question of substance, is right. He was not deciding upon any abstract question. It was important that the issue should be decided speedily in order to avoid conflict of jurisdiction, with resulting confusion and expense.

With the deepest respect for the learning and the judgment of the able and experienced Chief Justice of British Columbia, I am, for the reasons I have indicated, unable to accept his conclusion. I may add, also, that I have read the valuable judgment of Mr. Justice O'Halloran with care, but, with respect, it does not meet the point upon which I think the appeal must be decided.

I think perhaps some observations ought to be made upon certain orders by the judges of the County Court of Yale and the County Court of West Kootenay, respectively.

On the 26th of June an order was made by Judge Kelly, of the County Court of Yale, and on the 28th of the same month an order in the same terms was made by Judge Nisbet, of the County Court of West Kootenay. These orders are in the following terms:—

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Duff C.J.

June 1939.

In the County Court of

holden at

In the matter of "The Farmers' Creditors Arrangement Act, 1934," and Amendments thereto, and

In the matter of a proposal for composition, extension or scheme of arrangement of The Christian Community of Universal Brotherhood, Limited, Farmer.

Before His Honour Judge

in Court

, the day of June, 1939.

Upon the application of Walter Gordon Wilkins, an Official Receiver under the said Farmers' Creditors Arrangements Act, 1934, and amendments thereto for directions.

And upon reading the statement of affairs herein and the proposal and the resolution of the Directors of the said Christian Community of Universal Brotherhood Limited and the affidavit of Nicholas M. Plotnikoff attached thereto.

It is ordered that the said Christian Community of Universal Brotherhood Limited is hereby permitted to make application under and is entitled to take advantage of the Provisions of the said Farmers' Creditors Arrangement Act, 1934, and amendments thereto.

And it is further ordered that the said Official Receiver, Walter Gordon Wilkins, is hereby permitted to accept the said proposal of the Christian Community of Universal Brotherhood Limited under the said Farmers' Creditors Arrangement Act, 1934, and amendments thereto.

Judge, County Court of

(SEAL)

C. C. of

Entered this day of June, 1939

Registrar,

County Court.

The recital shows that the order was made on an application by the Official Receiver to the County Court for directions before the proposal was filed. It may be open to question whether until the proposal is filed the Official Receiver has any status, or the Court any jurisdiction, under Rule 42. It is not necessary, however, to decide that point.

Section 6 of the *Farmers' Creditors Arrangement Act* does not contemplate a proposal filed by leave of the County Court; it does not contemplate an application for such leave by a person seeking to avail himself of the provisions of the statute. The right of the farmer is a statutory right arising from the provisions of the statute and not from any leave of the Court. Rule 42 does not

empower the County Court to give any direction contrary to the Act, or, on an *ex parte* application in the absence of the parties known to be principally concerned, to adjudicate upon any controversy touching the right of any person to file a proposal as an insolvent farmer under the authority of section 6 of the *Farmers' Creditors Arrangement Act*. The purpose of the procedure under rule 42 is to enable the Official Receiver to obtain the advice of the Court in matters of administration where the application of the Act, which is the foundation of the authority of the judge as well as the Official Receiver, is assumed. The purpose of the procedure is to enable the Official Receiver to obtain directions as to his own acts in the course of administration for his own protection and for the orderly conduct of the administration; it is not its purpose to empower the Court to make binding orders affecting the rights of third persons who are not parties to the proceeding.

It does not follow, of course, that on an application for directions, when all parties are present, questions of right and jurisdiction may never be determined. The County Court has jurisdiction, speaking generally, to determine such questions in a summary way and the hearing of an application for directions in a particular case may be a convenient occasion for dealing with such questions, and there can be no objection to such a course when proper care is taken to see that everybody concerned is fully represented and has a full opportunity of bringing out the facts and presenting his case.

The proper way to read the orders is to treat them as directions to the Official Receiver to receive and file proposals and the earlier paragraph must be regarded simply as introductory, expressing the judge's opinion *quantum valeat* with regard to matters upon which he had no authority to make a binding pronouncement.

I think the appeal should be allowed and the judgment of the learned trial judge restored with costs throughout.

RINFRET J.—Prior to the commencement of the action in respect of which the present appeal is asserted, the appellant had, on May 18th, 1938, commenced in the Supreme Court of British Columbia a Debentures Holders' action against the respondent Community, asking for the foreclosure, or sale, of certain properties and assets of the

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Community mortgaged to the appellant by the Community to secure the payment of certain bonds of the Community which are still outstanding and unpaid. In that first action, one Mr. G. L. Salter, a chartered accountant and authorized trustee in bankruptcy, was appointed Receiver by Orders of the said Supreme Court of British Columbia, dated May 18th and July 15th, 1938.

The Receiver immediately entered upon his duties as such and he has ever since and still is carrying on the same; and the Debentures Holders' action is still pending in the Supreme Court.

The Receiver is and at all material times was an Officer of the Supreme Court of British Columbia.

About the end of the month of June, 1939, the Community purported to file a proposal under the *Farmers' Creditors Arrangement Act, 1934;* and, on or about August 1st, 1939, it purported to make a request under that Act to the respondent Board of Review.

On September 14th, 1939, the Board sent out a notice of hearing, whereupon the appellant brought the present action on September 16th, 1939.

At all material times, the Debentures Holders' action was proceeding in the Supreme Court of British Columbia and the Receiver appointed by that Court was in charge and acting.

In the present action, the appellant alleged, among other things, that the Community was not a farmer within the meaning of the *Farmers' Creditors Arrangement Act* and was not entitled to the benefit of that Act; that the Community had not made a proposal for a composition, extension of time or scheme of arrangement pursuant to the Act; and that accordingly the Act had no application to the Community, and the Board of Review for the province of British Columbia was without jurisdiction, that it had no jurisdiction over the appellant and the other creditors of the Community.

The appellant asked and claimed:

(*a*) A declaration that the *Farmers' Creditors Arrangement Act* of 1934 does not apply to the respondent Community;

(*b*) A declaration that the Community is not entitled to make a proposal for a composition of its liabilities under the provisions of the Act;

(*c*) A declaration that the respondent Board is not authorized or empowered and has no jurisdiction to hold a hearing, or formulate a proposal for such a composition;

(*d*) A declaration that all proceedings of the Board pursuant to the application of the Community are null and void;

(*e*) An injunction restraining the respondents, and each of them, from taking any further steps under the Act with respect to the application of the Community, or with respect to its liabilities;

(*f*) The costs of this action;

(*g*) Such further or other relief as to this Honourable Court may seem meet.

The formal judgment of the Supreme Court of British Columbia, at the trial before Robertson J. (1), was a declaration that the Community was not a farmer within the meaning of the Act; and it gave liberty to apply for an injunction as against the Board, in the event of its deciding to proceed with the "Request for Review." The judgment gave costs to the appellant against the Community.

Having decided that the Community was not a farmer within the meaning of the Act, the learned judge stated that, under the circumstances, it was not necessary to consider the appellant's alternative submissions.

Both the Community and the Board appealed from this judgment to the Court of Appeal of British Columbia, where the appeal was allowed and the judgment was set aside with costs against the present appellant (2).

The Court of Appeal decided that the Supreme Court of British Columbia had no jurisdiction in the matter and that, by force of the provisions of the Act, such jurisdiction resided exclusively in the County Court. It decided further that, on the authority of *Barickman Hutterian Mutual Corporation* v. *Nault* (3), the Community was a farmer.

The other questions raised in the action have not been dealt with by the appeal court.

The substantial question that stands to be decided in the present appeal is whether the Community is a farmer

(1) (1940) 55 B.C.R. 516. (2) (1939) 54 B.C.R. 386.
(3) [1939] S.C.R. 223.

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within the meaning of the *Farmers' Creditors Arrangement Act* and, as such, entitled to a proposal for a composition of its liabilities under the provisions of that Act.

When once this point is settled, there will have to be examined the further question whether the respondent Board established under the Act is authorized and empowered and has jurisdiction to hold a hearing, or to formulate a proposal for a composition of the liabilities of the respondent Community.

If these two questions be disposed of in accordance with the contentions of the appellant, there will remain to be decided whether the County Court is vested with the exclusive jurisdiction to pass upon these questions, subject to appeal as provided in sec. 174 of the *Bankruptcy Act,* or if the appellant's action was competently brought before the Supreme Court of British Columbia; and, in such a case, whether the jurisdiction of that Court should have been exercised in a declaratory action such as was instituted here, or whether the intervention of the Supreme Court could be asked for only by petition for a writ of certiorari.

I will deal first with the question whether, on the evidence before the Court, the respondent Community can be held to be a farmer within the meaning of the *Farmers' Creditors Arrangement Act.*

The Christian Community of Universal Brotherhood is a limited company incorporated by letters patent under the Dominion *Companies Act* on April 25th, 1917, with a capital stock of $1,000,000 divided into 10,000 shares of $100 each.

Its powers and objects are those usually granted to an ordinary commercial corporation. The Charter contains no reference to any religious beliefs, practices, or observances.

Some of the objects and powers of the Company are as follows:

(*a*) To carry on agricultural pursuits, and to manufacture the products of the farm, the mine, the soil and the forest; to manufacture, purchase or otherwise acquire, to hold, own, sell, assign and transfer or otherwise dispose of, to invest, trade, deal in and deal with, either at retail or wholesale, goods, wares and merchandise, and real and personal property, corporeal and incorporeal, of every class and description whatsoever and whatsoever required; to grow, produce, manufacture, buy, sell, trade, deal in and deal with raw materials, live stock, grains, fruits, agricultural

products and all other products and by-products of the soil, the forest, the mine, the lakes and rivers; including among others the raising, buying, selling, trading in and dealing with cattle, sheep, horses and live stock of every kind, and to manufacture any and all materials, goods, products and merchandise of any and every kind from any of the foregoing;

(*e*) To distribute any of the property of the company in specie among the members;

(*f*) To promote freedom of contract, and to resist, insure against, counteract and discourage interference therewith, and to subscribe to any association or fund for any such purposes;

(*g*) To distribute any of the assets for the time being of the company among the members in kind, and to stipulate for and obtain for the members, or any of them any property, rights, privileges or options;

(*h*) To carry on any other business (whether manufacturing or otherwise) which may seem to the company capable of being conveniently carried on in connection with the above or calculated directly or indirectly to enhance the value of or render profitable any of the company's property or rights;

(*k*) To enter into partnership or into any arrangement for sharing of profits, union of interests, co-operation, joint adventure, reciprocal concessions or otherwise, with any person or company carrying on or engaged in or about to carry on or engage in any business or transaction which the company is authorized to carry on or engage in, or any business or transaction capable of being conducted so as directly or indirectly to benefit the company; and to lend money to, guarantee the contracts of, or otherwise assist any such person or company, and to take or otherwise acquire shares and securities of any such company, and to sell, hold, re-issue, with or without guarantee, or otherwise deal with the same;

(*t*) To procure the company to be registered and recognized in any foreign country and to designate persons therein according to the laws of such foreign country to represent this company and to accept service for and on behalf of the company of any process or suit;

(*w*) To sell, improve, manage, develop, exchange, lease, enfranchise, dispose of, turn to account or otherwise deal with all or any part of the property and rights of the company;

(*x*) To do all or any of the above things in any part of the world and as principals, agents, contractors or otherwise, and by and through agents or otherwise, and either alone or in conjunction with others;

The incorporators of the Company were nine individuals: Two farmers, a clerk, a carpenter, an accountant, a fruit dealer, a housekeeper, a gardener and a contractor. These nine individuals were among those subsequently appointed permanent directors of the Company.

After its incorporation, the Community purchased from Peter Verigin, one of its directors, certain city, town and farm lands and certain property in the provinces of British Columbia, Saskatchewan and Alberta for $600,000, paid for by the allotment to each of the twelve directors of the Company of 500 fully paid up shares.

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Prior to the purchase of these properties, the same were occupied by members of an unincorporated association commonly called The Doukhobors, for whom Peter Verigin held the same in trust.

The lands acquired from Verigin were registered in the name of the incorporated company (the respondent Community).

The lands so owned by the Community represented over 60,000 acres of land in British Columbia, Saskatchewan and Alberta, although in Alberta the lands there owned were registered in the name of a wholly subsidiary company: The Christian Community of Universal Brotherhood of Alberta Limited.

While a large part was farm land, the respondent Community also owned city and town property and industrial sites, from the rental of which revenues were derived.

The business of the Community in British Columbia, with which we are more directly concerned, included logging, milling of various products, the operation of a flour mill, the manufacture and selling of jam, the operation of a brick yard and the operation of several general stores.

The relative importance of these separate operations appears from an examination of the balance sheets of the Community. For example, the Community balance sheet as of December 31st, 1928, shows, under the heading of "Received Assessment from Members of Community" rents in British Columbia, Alberta and Saskatchewan totalling $333,948.50. The profit and loss account headed "British Columbia Industry—Commercial Branch" shows a total of over $1,000,000, and the statement of profit and loss headed "Saskatchewan Industry—Commercial Branch" shows a total of over $230,000.

The balance sheet as of December 31st, 1938, shows assets in excess of $5,300,000 and liabilities of a little over $860,000. Among the latter liabilities are shown $340,000 owing to individual Doukhobors or Community Groups of Doukhobors.

While the respondent Community owned farm lands, it did not operate the farms itself, but rented the land to individual or to groups of Doukhobors. The rent was paid to the Community in the form of assessments, which were made "according to the quality of the land." These

assessments were paid, whether the farms rented were or were not under cultivation, and without consideration to the value of the products. At all events, the products belonged to the individuals or the groups who were working the farm and did not belong to the Community.

The Debentures Holders' action was for the recovery of the amount outstanding on a bond issue of $350,000 secured by a deed of trust and mortgage in favour of the appellant, executed on December 3rd, 1925; and, at the time of the purported proceedings under the *Farmers' Creditors Arrangement Act,* the deed of trust and mortgage to the appellant covered all the property and assets of the Community of whatsoever kind and wheresoever situate.

The mortgage and claim of the appellant had and has priority over the claims of all other creditors of the Community and is a direct charge upon all its properties and assets.

Under the above circumstances, can it be said that the Community is a farmer within the definition of the Act (c. 53 of the Statutes of Canada, 1934, s. 2*f*)?

Under that definition, a farmer is "a person whose principal occupation consists in farming or the tillage of the soil."

Whether a person comes under that definition is almost exclusively a question of fact; and the learned trial judge has held that the Community was not a farmer, at least within the meaning so defined.

It seems clear that, so far as lands were concerned, the Community was in the position of a landlord or vendor. The "farming or the tillage of the soil" was done by the individuals or the groups who paid the assessments to the Community.

It need not be repeated here that a limited company is an entity separate from its component members (*Salomon* v. *Salomon* (1); *Macaura* v. *Northern Assurance Company* (2); *Pioneer Laundry* v. *Minister of National Revenue* (3)). The Community never worked the farm lands itself. It rented them out to the members of the unincorporated Christian Community of Universal Brotherhood and received from their members who leased the lands an

(1) [1897] A.C. 22. (2) [1925] A.C. 619.
(3) [1940] A.C. 127, at 137.

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annual assessment which, to all intents and purposes, was a rental. On this point, the evidence, both documentary and verbal, is conclusive and fully warrants the holding of the trial judge. Indeed, the Community itself did not contend at the trial that the farming was being carried on by it. Particularly after the year 1926, the Community confined its endeavour in British Columbia to logging, milling forest products, manufacturing and selling jams and operating stores. Neither was it doing any farming in Alberta or Saskatchewan. Farm lands in Saskatchewan were all sold in 1928.

It is apparent from the "statement of affairs" accompanying the proposal made by the Community and filed with the Official Receiver that the Community itself hired no labour. All the work was done by families on the land. No record of the crop raised on the lands was kept by the Community; it was "kept by each individual on land to whom the Corporation made assessments annually." In fact, the Community had no knowledge of what the crop record was, since the crops belonged to the individuals.

In view of these facts, it does not seem possible to reverse the finding of fact of the trial judge that the respondent Community was not a farmer, and, more particularly, that it was not "a person whose principal occupation consisted in farming or the tillage of the soil," as defined in s. 2*f* of the Act.

The decision of this Court in the *Barickman* case (1) is, of course, authority for the principle that the definition of "farmer" in the Act may include a body corporate and politic and a corporation of such a nature as that of the Barickman Hutterian Mutual Corporation. In that case, such inclusion was said to be justified by the definitions of the words "person" and "corporation" in the *Bankruptcy Act* (s. 2*cc* and s. 2*k*) which are brought into the *Farmers' Creditors Arrangement Act* by s. 2 (2) of the latter Act, and also by the fact that, on consideration of the *Farmers' Creditors Arrangement Act*, such inclusion is consistent with and not obnoxious to the provisions and objects of that Act.

But an examination of the nature and the methods of operation of the respondent Community with those under

(1) [1939] S.C.R. 223.

consideration in the *Barickman* case (1) shows that there was no comparison between the two, in so far as the *Farmers' Creditors Arrangement Act* may be made to apply to each of them. There is no similarity between the two corporations.

The member of the Hutterian corporation can own nothing and does not own anything. He is, at best, an employee of the Hutterian corporation working for his board and lodging, not even in the ordinary position of a hired man on a farm who, in addition to board and lodging, would receive wages as his own. The farming operations are the operations of the Hutterian corporation and the crops are theirs.

The position of the Hutterian is very fully described by the Chief Justice of Canada in the *Barickman* case (1).

The respondent Community is an entirely different organization. In so far as lands are concerned, it is, in fact, like an ordinary land or real estate company leasing or selling its lands to others; and, so far as its other activities are concerned, it is like any other commercial corporation carrying on certain commercial undertakings and industries, such as stores, jam factories, saw mills, planing mills, brickyards, etc. In this case, as already stated, the individual or the group is the farmer. He is not a hired man; but he works for himself and he pays rent to the Community. If he happens to work in a store, factory, or saw mill belonging to the Community, he is paid wages. When he sells his fruit to the jam factory, he is paid for it. He is an independent tenant or owner; and when he harvests his crops the proceeds are his.

He can, and apparently does, accumulate large sums of money for, among the creditors of the Community, as appears by the "Statement of Affairs" filed with the proposal, there are a large number of Doukhobors with claims amounting to two-thirds of the total indebtedness of the Community, or over $342,000.

The Doukhobor, therefore, is the owner of wealth; he accumulates money and property and lends it to the Community, while the Hutterian can and does own nothing. The latter works without wages and entirely for the Corporation.

(1) [1939] S.C.R. 223.

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It need not be said that the *Farmers' Creditors Arrangement Act* does not concern itself with the landlord or the vendor, but only with the actual farmer—the man on the land. The farmers are those whom "it is important to retain on the land as efficient producers" or, in this case, the individual Doukhobors, the men who farm, and not their landlord or vendor, the respondent Community. If the foreclosure action of the appellant be proceeded with and maintained, the farmer on the land in the present case will not be put off, he will merely change his landlord.

It seems that, for the purpose of ascertaining whether the respondent Community can be classed as a farmer within the meaning of the Act, the facts, in the premises, clearly distinguish this case from the *Barickman* case (1).

The learned trial judge held that, in view of all the circumstances, the Community was not a farmer; and I am unable to think of any reason why his finding should be disturbed.

We now come to the point whether, in the circumstances, the respondent Board established under the Act is authorized and empowered and has jurisdiction to hold a hearing or to formulate a proposal for the composition of the liabilities of the respondent Community.

In discussing this point, it is necessary to bear in mind that the *Farmers' Creditors Arrangement Act,* envisaged as the exercise of the jurisdiction ot the Parliament of Canada, finds its justification, so far as legislative competency is concerned, on the ground that it is legislation dealing with insolvency and bankruptcy (Reference *re Farmers' Creditors Arrangement Act* (2); *Attorney-General for British Columbia* v. *Attorney-General for Canada* (3)). It follows that the jurisdiction conferred by that Act upon the Official Receiver and the Board of Review must be strictly confined within the sphere of the Act for the dual reason that, unless so confined, and if the case under discussion fails to come within it, the result would be not only that the Receiver or the Board do not establish a foundation for their jurisdiction, but the matter itself would have to be regarded as beyond the competency of the Dominion Parliament and *ipso facto* would cease to have any effective operation.

(1) [1939] S.C.R. 223.
(2) [1936] S.C.R. 384. (3) [1937] A.C. 391.

We must, therefore, start from the point that, before the Act can be entered into at all, the applicant of a proposal for a composition or scheme of arrangement must be "a farmer who is unable to meet his liabilities as they become due" (s. 6 of the Act). Unless these conditions exist, not only is the Act not applicable, but it could not have been competently enacted by the Dominion Parliament.

Assuming, however, that we have a farmer who is unable to meet his liabilities as they become due, the latter is entitled, under the Act, to make a proposal which shall be filed with an Official Receiver. It is then the duty of such Official Receiver forthwith to convene a meeting of the creditors and 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.

On the filing of a proposal with the Official Receiver, no creditor shall have any remedy against the property or the person of the debtor, or shall commence, or continue, any proceedings under the *Bankruptcy Act,* or any action, execution or other proceedings for the recovery of a debt provable in bankruptcy, or the realization of any security, unless with leave of the court and on such terms as the court may impose (s. 11-1).

On a proposal being filed, the property of the debtor is deemed to be under the authority of the court, pending the final disposition of any proceedings in connection with the proposal (sec. 11-2).

If the proposal filed with the Official Receiver fails to receive the approbation of the creditors, and the Official Receiver so reports, it is then that, on the written request of a creditor or of the debtor, the Board endeavours to formulate an acceptable proposal to be submitted to the creditors and the debtor, and the Board shall consider representations on the part of those interested (sec. 12-4). If the proposal formulated by the Board is approved by the creditors and the debtor, it is filed in the court and becomes binding on the creditors and on the debtor. If the creditors or the debtor decline to approve the proposal, the Board may nevertheless confirm the proposal, either as formulated or as amended by the Board. In that case, it is filed in the court and becomes binding on all the

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creditors and on the debtor as in the case of the proposal accepted by the creditors and approved by the court (ss. 12-5 and 12-6).

Certain rules, regulations and forms under the Act were made by the Governor General in Council pursuant to sec. 15 of the Act, and became effective on June 1st, 1935.

Under them, a farmer who is unable to meet his liabilities as they become due and who intends to make a proposal must, at the time when he asks for a convening of the meeting of his creditors, lodge with the Official Receiver a true statement of his affairs in the prescribed form, verified by statutory declaration. That statement must include a list of his creditors, with their addresses and the amount due to each of them; it must state for what purpose the debt was incurred; and it must contain a list of the assets of the farmer, an estimate of their productive value and of the present and prospective capacity of the farmer to meet his obligations, together with any corroborative evidence of the value which the farmer may furnish. The proposal must be in writing and signed by the farmer or his duly authorized agent.

Certain rules are prescribed for convening the meetings of creditors, the procedure at those meetings and the proportion of the number of creditors which are to form the majority required to carry a proposition or a decision at such meetings.

Certain other rules are prescribed to regulate the procedure if the proposal filed with the Official Receiver fails to receive the required approval of the creditors; and an application is made to him by the farmer, or any creditor, requesting the review by the Board.

The only other regulation to which it is necessary to refer is rule no. 42, whereby

> The Official Receiver may, in the case either of a proposal, assignment, or receiving order, apply to the court for directions.

The perusal of the material sections of the Act and of the rules and regulations made thereunder fails, therefore, to disclose any jurisdiction vested in the Board of Review, except to formulate a fresh proposal upon the written request of a creditor or of the debtor, where the Official

Receiver has reported "that a farmer has made a proposal, but that no proposal has been approved by the creditors."

The Board may formulate the new proposal; it may amend it; and, if approved by the creditors and the debtor, it is then filed in court and becomes binding on the debtor and all the creditors; or if the creditors or the debtor decline to approve the same, the Board may nevertheless confirm it, in which case it is filed in court and becomes binding upon all the creditors and the debtor.

The Board may, upon receiving a request to formulate a proposal, direct any one or more of its members on its behalf to investigate any or all circumstances and report to the Board. The Board must base its proposal upon the present and prospective capacity of the debtor to perform the obligations prescribed and the prospective value of the farm; and, for the purposes of the performance of its duties and functions, the Board has the powers of a commissioner appointed under the Inquiries Act.

Finally, the Board may decline to formulate a proposal in any case where it considers it cannot do so in fairness and justice to the debtor or the creditors.

The powers above mentioned are all enumerated in s. 12 of the Act and its subsections. It will be seen that they have to do with the inspection and investigation of all the circumstances surrounding the solvency of the farmer, his present and prospective capability to meet his liabilities and to perform his obligations, the productive value of his farm, and the formulation of a proposal based upon these several considerations which can be made consistently with all fairness and justice to the debtor or the creditors.

But nowhere is there to be found vested in the Board of Review the power to determine as a question of law the applicability of the *Farmers' Creditors Arrangement Act* to a person whose quality and status as a "farmer" is disputed, or where it is objected, by some party having an interest in the matter, that the applicant for a proposal does not come within the definition of the Act.

That the applicant should be a farmer to whom the Act applies is a condition precedent to the validity of a request that the Board should endeavour to formulate a proposal and is a prerequisite of its competency in the matter. The consequence must be that, if such a request is made

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to a Board of Review and if the status of the farmer in respect to whom a proposal is requested from the Board, either by one of the creditors, or by the debtor, be disputed, it is not within the province of the Board to decide that dispute; and the courts of justice are the proper forum where the matter must be debated and determined.

By force of subs. 4 of s. 12 of the Act, it is only upon the report of the Official Receiver "that a farmer has made a proposal" and the proposal has not been approved by the creditors, that the jurisdiction of the Board begins, at the written request of a creditor or of the debtor, and that jurisdiction is confined to the matters stated in the Act and analysed above.

It should only be added that, of course, the Official Receiver himself has no authority to decide whether the person filing the proposal is a "farmer who is unable to meet his liabilities" within the meaning of the legislation, if that point be disputed by the interested parties; and, in that case, the Receiver should avail himself of the provision contained in rule 42, whereby he may "apply to the court for directions."

Now, the Court referred to in the *Farmers' Creditors Arrangement Act* and upon whom jurisdiction is conferred by the Act, in the case of an assignment, petition, or proposal of the nature contemplated by the Act is, by s. 5,

> in the province of Quebec, the Superior Court of the judicial district where the farmer resides, and, in the other provinces, the county or district court.

Section 5, however, enacts that the courts so designated

> shall have exclusive jurisdiction in bankruptcy subject to appeal, as provided in section 174 of the Bankruptcy Act.

This provision means that an order or decision of the court competently made under s. 5 may, under certain conditions, be appealed to the appeal court, and therefrom to the Supreme Court of Canada.

Section 5 further provides that the Superior, County, or District Court judge, acting under it,

> shall exercise the powers vested in the Registrar by s. 159 of the *Bankruptcy Act*.

If we refer to s. 159, we find that the Registrars of the Superior Courts exercising bankruptcy jurisdiction have power and jurisdiction, subject to the General Rules limiting the power conferred by that section,

(*a*) to hear bankruptcy petitions and to make receiving orders and adjudications thereon, where they are not opposed;

(*b*) to hold examinations of debtors;

(*c*) to grant orders of discharge, where the application is not opposed;

(*d*) to approve compositions, extensions, or schemes of arrangement, where they are not opposed;

(*e*) to make interim orders in case of urgency;

(*f*) to make any order, or exercise any jurisdiction which by any rule in that behalf is prescribed as proper to be made or exercised in chambers;

(*g*) to hear and determine any unopposed or *ex parte* application;

(*h*) to summon and examine any person known or suspected to have in his possession effects of the debtor, or to be indebted to him, or capable of giving information respecting the debtor, his dealings or property;

(*i*) to hear and determine appeals from the decision of the trustee allowing or disallowing a creditor's claim, where such claim does not exceed five hundred dollars.

There are, therefore, two important points to be borne in mind with regard to s. 5, and they are:

1. That the exclusive jurisdiction conferred upon the court therein designated is a "jurisdiction in bankruptcy"; and

2. That the powers vested in the court as a result of the inclusion of s. 159 of the *Bankruptcy Act* are, generally speaking, powers limited to matters and applications *ex parte,* or "not opposed."

It follows that the court specified in s. 5 cannot rely on its powers under s. 159 of the *Bankruptcy Act* to found jurisdiction upon the questions we are now discussing, for the appellant clearly denies the status of "farmer" to the respondent Community and opposes its right to make a proposal under the *Farmers' Creditors Arrangement Act;* and, indeed, it urges that the Act is not in any way applicable to this particular Community.

If, therefore, it is contended that, in the province of British Columbia, a county or district court alone and exclusively has jurisdiction in respect to the questions of status raised in the present case, such contention must rely on the first paragraph of s. 5, whereby a wider jurisdiction is conferred upon these courts, subject to appeal as therein stated.

But, in s. 5, the enactment is that the courts there mentioned "shall have exclusive jurisdiction in bankruptcy." The insertion of the words "in bankruptcy" cannot be taken to have been made without object.

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According to the interpretation section of the Act (s. 2), for the purposes of this legislation, the word "'court' means the court having jurisdiction under the Act"; and it would follow that wherever in the successive sections of the Act, reference is in terms made to "the Court," it means that jurisdiction on the particular matter mentioned in those sections is specifically vested either in the Superior Court, if the matter be in Quebec, or, if it be in the other provinces, it is vested in the county or district court. With regard to any matter specially dealt with in those sections, there can be no doubt as to where jurisdiction lies.

But, because of the qualifications implied in the addition of the word "in bankruptcy," it is not as easy to define the jurisdiction conferred upon these courts by the first paragraph of s. 5.

It is clear that the "court" mentioned in ss. 6*a*, 8, 10, 10*a*, 11, 12, and such other sections where a similar reference is made, and equally the "court" mentioned in the rules and regulations and, in particular, in regulation no. 42, or in form C and, for that, generally speaking, in the other forms in the appendix to the rules and regulations, is intended to designate the Superior Court in Quebec and the county or district court in the other provinces. It is not as evident that the latter courts are given exclusive jurisdiction on all other matters having relation to the application and the administration of the Act.

If the status as such of an alleged farmer making a proposal for a composition, extension of time, or scheme of arrangement and filing it with the Official Receiver is put in question by an interested party, the Official Receiver deeming it necessary or opportune to "apply to the court for directions" will, of course, by force of rule 42, apply in British Columbia to the County or District Court of the judicial district where the farmer resides; but the question in the present case is whether, assuming the interested party himself of his own initiative decides to contest the status of the applicant as farmer and to dispute the latter's right to make a proposal under the Act, he will necessarily have to institute his proceedings in the County or District Court; and whether he is deprived of the right—

which he would otherwise have in ordinary cases—of invoking the general jurisdiction of the Supreme Court of the province.

The words "jurisdiction in bankruptcy" are, of course, well known to Canadian bankruptcy law. They can be found throughout the interpretation clause and the several sections of the *Bankruptcy Act*. It would seem that the court which is invested with original jurisdiction in bankruptcy under the latter Act is given the competency to decide such questions, amongst others, as the following: whether a debtor has committed an act of bankruptcy; whether the person presenting a bankruptcy petition to the court is a creditor within the meaning of the Act, whether the debtor is able to pay his debts, whether an insolvent debtor may make an assignment of all his property for the general benefit of his creditors instead of being subject to a receiving order, whether a proposal made by an insolvent debtor should be approved or refused and upon what terms, whether an order already made should be reviewed, rescinded or varied.

As the *Farmers' Creditors Arrangement Act* may be regarded as a chapter of the *Bankruptcy Act*, as that Act

> shall be read and construed as one with the *Bankruptcy Act* * * * and the provisions of the *Bankruptcy Act* and Bankruptcy Rules shall, except as in that Act provided, apply *mutatis mutandis* in the cases hereunder, including meetings of the creditors

(sec. 2, subs. 2), I think I may conclude that the status of a farmer and the question whether he is entitled to invoke the benefit of the *Farmers' Creditors Arrangement Act* are included within the words "jurisdiction in bankruptcy" and that, therefore, these matters, under the Act, are within the exclusive jurisdiction of the Superior Court in Quebec and of the County and District Court in the other provinces.

It does not necessarily follow, however, that the Supreme Courts of these provinces are divested by the Act of their supervisory authority over an official such as the Official Receiver or a board such as the Board of Review with which we are now dealing.

It may be a question whether the Parliament of Canada may oust the Supreme Court of a province of that well recognized jurisdiction; but that jurisdiction is exercised through the writs of prohibition, mandamus, or certiorari·

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and that question does not arise in this case as none of those writs were resorted to here.

The appellant contends that it may also be exercised by declaration and injunction.

It need only be mentioned that the *Farmers' Creditors Arrangement Act* does not purport to exclude the jurisdiction of a provincial Supreme Court through one of these proceedings, except in so far as it may be implied from the use in sec. 5 (1) of the words "exclusive jurisdiction." The extent of that implication may be left for wider examination in a case where the point comes up squarely for decision.

In the premises, the situation as it presents itself, is that, as a matter of fact, two county courts in British Columbia, the county court of Yale, holden at Penticton, June 26th, 1929, and the county court of West Kootenay, holden at Nelson, June 28th, 1929, have issued orders

> that the said Christian Community of Universal Brotherhood Limited is hereby permitted to make application and is entitled to take advantage of the said *Farmers' Creditors Arrangement Act, 1934,* and amendments thereto (and) that the said Official Receiver, Walter Gordon Wilkins, is hereby permitted to accept the said proposal of the Christian Community of Universal Brotherhood Limited under the said *Farmers' Creditors Arrangement Act, 1934,* and amendments thereto.

It was explained that the Official Receiver deemed it more prudent to apply to two courts on account of the doubt which existed as to within which judicial district the respondent Community could be said to have its "residence."

The Appellate Division of the Supreme Court of Alberta, in the case of *Kettenbach Farms' Ltd.* v. *Henke* (1), relying on the decision of the Privy Council in *Board* v. *Board* (2), and quoting from it the statement:

> Nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so,

held that a Superior Court has always a supervisory authority over inferior courts and over tribunals which are not judicial, for the purpose of seeing that they do not go beyond their jurisdiction, unless such authority is taken away by competent legal authority.

Chief Justice Harvey, delivering the judgment of the Alberta Court, added:

(1) (1937) 19 C.B.R. 92. (2) [1919] A.C. 956.

There is no suggestion in the *Farmers' Creditors Arrangement Act, 1934,* or any other Act to which our attention has been directed, that the Board of Review is not to be subject to such supervisory authority; and, in view of the multitude of cases that come before it, it naturally must proceed generally upon a simple *prima facie* case of jurisdiction being established; and no special provision is made in the Act for the disposition of a contest on the point.

With due respect, it would appear that section 5 of the Act was there overlooked, as it can hardly be contended that the courts named in that section are not given the required authority to dispose of a contest of the character contemplated.

Such was the decision of the Court of Appeal of Saskatchewan in the case of *Great West Assurance Company* v. *Beck* (1). It was held there that the district judge has jurisdiction to determine whether a debtor who has made a proposal to the Official Receiver under the Act is a "farmer" within the meaning of that Act; and that a creditor, in applying under sec. 11 (1) of the Act for leave to proceed, may properly and conveniently do so on the ground that the debtor who has filed the proposal is not a "farmer."

In that case, the language of section 12 (4) of the Act was pointed to; and it was said that that

language implies that the question of whether or not a debtor who has made a proposal is a farmer should be determined before the Official Receiver reports to the Board of Review.

The same court, in *Lefebvre* v. *Lefebvre* (2), held that the discretion given by sec 11 to the district court judge to grant leave to a creditor to commence or continue proceedings against a debtor, after the latter has filed a proposal under the Act, is unfettered; and, although it was stated that such discretion should be exercised with the greatest of care, it was added however, that, when it has been exercised, it should not lightly be interfered with on appeal.

I have already said that, in my view, the status of the applicant as a farmer must be determined, or accepted, at some point before the Official Receiver has become functus and before the jurisdiction of the Board can arise, because the Official Receiver has no authority to make a report to the Board unless that status exists (*Samijama* v. *The King* (3)), and it is undoubtedly within the spirit of the

(1) [1940] 2 W.W.R. 552. (2) [1940] 2 W.W.R. 578.
(3) [1932] S.C.R. 640.

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Act that the question of status should be decided by one of the courts named in sec. 5. It is a familiar principle that where a specific remedy is given, it excludes, generally speaking, a remedy of any other form than that given by the statute (See: Earl of Halsbury, L.C., in *Pasmore* v. *Oswaldtwistle Urban Council* (1))

In the *Barickman* case (2), the appeal was from a decision of a county court, on the question whether the applicant corporation could be considered as a "farmer" within the meaning of the Act, and it is significant that no one questioned the jurisdiction of the county court judge to decide the point.

In *Prudential Insurance Company of America* v. *Liboiron* (3), the Court of Appeal of Saskatchewan, in an ordinary action otherwise within the jurisdiction of the Court of King's Bench of that province, where the defendant moved to set aside the action on the ground that he had filed a proposal under the Act and the action was brought without the leave provided for by sec. 11 (1) of the Act having been obtained, held that the court had jurisdiction to inquire into and determine objections to the validity of the proposal, including the objections that the defendant was not a person authorized by the Act to make a proposal. There, it was decided that the jurisdiction of the Court of Appeal was not excluded by sec. 5 (1) of the Act in the circumstances of that case, and that the onus was then on the defendant to show, not only that he had filed a proposal, but that he was a person authorized to do so, i.e., a farmer unable to meet his liabilities as they become due. The Court referred to *National Trust Company* v. *Powers* (4) and disagreed with *Gaul* v. *Charbonneau* (5) on the question of jurisdiction, though agreeing with the latter judgment on the question of onus.

In the *Liboiron* case (3), the Court of Appeal held that, assuming the defendant to be a farmer, she had failed to discharge the onus of showing that she was entitled to file a proposal, viz.: one who was insolvent.

In the course of his judgment, Chief Justice Turgeon stated that there may be various reasons why a plaintiff

(1) (1898) 67 L.J. Q.B. 633 at 637.
(2) [1939] S.C.R. 223.
(3) [1940] 3 W.W.R. 556.
(4) [1935] O.R. 490.
(5) [1937] O.W.N. 601.

may wish to proceed against a person who has filed a proposal. If his contention was, as it was there, that the defendant was not authorized by the Act to file such a proposal and that the proposal was, therefore, a nullity, two courses were open to him:

> He may commence his action, as these plaintiffs have done, or take a further step in an action already commenced, leaving it to the defendant to move to set the proceeding aside. If the question of the defendant's status under the Act is determined in favour of the defendant, the action or other proceeding will, of course, be set aside. If the question is determined in favour of the plaintiff, he will be allowed to continue his action. This was the procedure followed in Ontario in *National Trust Company* v. *Powers* (1) and in *Fofton* v. *Shantz* (2).

Incidentally, it may be pointed out that such was also the course followed in *Diewold* v. *Diewold,* decided by this Court (3).

Chief Justice Turgeon continued:

> But the other course, the course of applying to the district court judge under s. 11 (1) before taking his action, or commencing his further proceeding, is also open to the plaintiff.
>
> * * *
>
> Where, however, the right of the defendant to file a proposal is not questioned, and consequently the validity of the proposal is assumed, but the plaintiff believes that, for some reason, he ought to have leave to proceed against the respondent without waiting for the final disposition of the proposal, he must apply for such leave to the district court judge who, alone, has power to grant it. In such a case, an action commenced without such leave would of necessity be set aside.

If the above reasoning be applied to the appellant in the present case, it should be said that the appellant had two courses open to it: Either it should have applied to the county court for permission to continue its Debentures Holders' action already commenced, or it should have further proceeded with that action until the Community had applied to have it set aside on the ground that it had filed a proposal.

But there was not in the *Liboiron* case (4), as there is here, the feature that a county court had already given permission to the applicant and to the Official Receiver to proceed under the *Farmers' Creditors Arrangement Act.*

I do not overlook the appellant's argument that, unless the applicant is a farmer, the Act has no application to him whatsoever, and anything which he purports to do

(1) [1935] O.R. 490.
(2) [1937] O.R. 856.
(3) [1941] S.C.R. 35.
(4) [1940] 3 W.W.R. 556.

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under it, and any proposal made or filed by him is a nullity, and the jurisdiction of the Superior Courts is in no way interfered with.

The appellant's contention is that, until a proposal within the meaning of the Act is filed with the Official Receiver, the statute has not been taken advantage of and there is no foundation for any proceedings under it, and anything purported to be done under the Act is a nullity. It further says that the county courts' orders show on their face that no proposal had been filed with the Official Receiver at the time when they were made, as by these orders the respondent Community is permitted to make application under the Act and the Official Receiver permitted to accept the proposal.

But the point is that the scheme of the Act is to submit these questions to the decision of the courts named in sec. 5; and the legislature entrusted these courts with a jurisdiction which includes the jurisdiction to determine whether this preliminary set of facts existed, as well as the jurisdiction, on finding that it does exist, to allow the Receiver or the Board to proceed further or to do something more.

In the present case, however, there is a special situation. As already stated, the appellant's Debentures Holders' action was instituted before the respondent Community applied to the Official Receiver under the *Farmers' Creditors Arrangement Act* and before the county court orders were issued.

The Debentures Holders' action is still pending; and the Receiver appointed in that action by the Supreme Court of British Columbia is still carrying on his duties. The effect of the Receiver's appointment by the Supreme Court was to put all the property and assets of the Community under the authority of that court. In such circumstances, its jurisdiction in respect of the assets of the respondent Community and with regard to the proceedings then pending before it could not be interfered with by the mere application of the Official Receiver to the county courts under the *Farmers' Creditors Arrangement Act.*

On the face of the orders issued by those courts, they were simply *ex parte* orders, without any of the material and pertinent facts being put before the county court judges and in the absence of all the other parties interested in the matter.

Having regard to the particular situation, I entirely agree on this point with the reasoning and with the conclusion of my Lord the Chief Justice. It cannot be that the intention of Parliament was to give to the county court the competency to interfere with the possession of the Receiver appointed by the Supreme Court, which, in effect, would amount to an interference with the possession of the Supreme Court itself.

In the result, the appeal should be allowed and the judgment of the trial judge should be restored with costs throughout.

CROCKET J.—This appeal arises out of an alleged proposal for a composition, extension of time or scheme of arrangement under the *Farmers' Creditors Arrangement Act,* made by the respondent, the Christian Community of Universal Brotherhood, Limited, on June 23rd, 1939, and a later request, purporting to be made under the provisions of the said Act on August 1st, 1939, by one, Joseph Peter Shukin, "the vice-president of the above mentioned farmer," to the Board of Review under the said Act to

> endeavour to formulate an acceptable proposal for a composition, extension of time or scheme of arrangement herein.

The appellant had commenced in the Supreme Court of British Columbia in May, 1938, a debenture holders' action against the respondent Community for a foreclosure or sale of certain property and assets of the Community mortgaged to the appellant on December 3rd, 1925, to secure a bond issue of $350,000 in respect of which the Community was then in default to the extent of $170,000. The writ in that action was issued on May 18th, 1938, in pursuance of leave granted by Manson J., and on the same day the Supreme Court by order of the same judge appointed a receiver of all the undertaking and property and assets of the defendant comprised in and subject to the said deed of trust and mortgage, to whom the same was ordered to be forthwith delivered, subject to permission to the defendant to carry on under the supervision of such Receiver the ordinary businesses of its general stores, flour mills, jam factory, brickyard and sawmills and planing mills in British Columbia, with liberty to the defendant and the Receiver to apply to that court for directions from time to time.

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That action was pending and the Receiver, one G. L. Salter, a chartered accountant and authorized trustee in bankruptcy, was acting as an officer of the Supreme Court of British Columbia therein for the purpose of enforcing the security created by the respondent corporation's deed of trust and mortgage, when the latter filed its alleged proposal on June 23rd, 1939, with the Official Receiver under the *Farmers' Creditors Arrangement Act* for the judicial district in which presumably the Community had its residence and which, it may be inferred, included the counties of Yale and West Kootenay, as the judges of both these County Courts purported to have made analogous orders, one on June 26th, 1939, and the other on June 28th, 1939, upon the application of one Walter Gordon Wilkins, who is described therein simply as an Official Receiver under the *Farmers' Creditors Arrangement Act*, purporting to permit the Community to make application under the *Farmers' Creditors Arrangement Act* and the said Official Receiver "to accept the said proposal." Mr. Wilkins was asked by counsel for the respondent before the trial judge (Mr. Justice Robertson) if he could tell him

> Were these applications and orders made by Their Honours Judge Kelly and Judge Nesbitt at the time you had the application?

to which he replied,

> Well, in answer to that I would say I received a tentative application to start with and during the course of a few weeks the order was built up and then I applied to Judge Kelly,

and in cross-examination said that he could not tell whether he had given any notice of his application to either of the two County Court judges. I suppose from the record, as it comes to us, it must be taken that the Community's alleged proposal had been actually filed on June 23rd, notwithstanding that the orders of both County Court judges purported to permit the Community "to make application under and is entitled to take advantage of the provisions of the said *F.C.A. Act, 1934*," and the said Official Receiver "to accept the said proposal."

In any event, the Community filed its request to the Board of Review on August 1st, 1939, from which it must be assumed, if we are to have any regard for the provisions of the Act, that the Official Receiver had called a meeting of the interested creditors and submitted the proposal

with the required statement of its affairs for their consideration, and that the proposal had not been approved, for there is in the record an exhibit, which purports to be a notice to Mr. Salter, the Receiver for the appellant Trust Company, that the Board would deal with the Community's written request for the formulation of "an acceptable proposal for a composition, extension of time or scheme of arrangement of the affairs of the said farmer" at the court house at Nelson, B.C., on September 26th, 1935, (which presumably is an error for 1939)—which they could only do under the provisions of s. 12 in the event of the original proposal not having been approved by the creditors.

The appellant on September 16th, ten days before the time fixed for the hearing before the Board of Review, commenced this action in the Supreme Court of British Columbia against the Community and the Board, claiming a declaration that the Community was not a farmer within the meaning of the *Farmers' Creditors Arrangement Act* and that the Board of Review had no jurisdiction to take any proceedings or consider the request for the formulation of an acceptable proposal under that Act, and on the same date an interim injunction was granted restraining the defendants and each of them until the trial of the action or until further order from taking any further steps under the Act with respect to the applications or liabilities of the Community. This injunction was dissolved on October 20th, 1939, by Mr. Justice Fisher on the ground that it was premature, and on December 15th, 1939, Mr. Justice Robertson, who tried the action, gave judgment declaring that the respondent, the Christian Community of Universal Brotherhood, Limited, is not a farmer within the meaning of the *Farmers' Creditors Arrangement Act,* statutes of Canada, 1934, ch. 53, as amended by statutes of Canada, 1935, ch. 20, and statutes of Canada, 1938, ch. 47, and giving liberty to apply for an injunction as against the Board of Review in the event of its deciding to proceed with the request for review. From this judgment both defendants appealed to the Court of Appeal, with the result that the appeal was allowed and the trial judgment set aside with costs.

It had been argued in behalf of the Community before the learned trial judge that the decision of this Court in

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Barickman Hutterian Mutual Corp. v. *Nault* (1) was conclusive upon the question of the Community being a farmer within the meaning of the Act. His Lordship, however, carefully compared the facts of that case with those of the present and pointed out that while the corporation in the *Barickman* case (1), as the owner of the farm lands, managed and directed the farming and owned all the produce of the farms, and that no one else had or could have any legal interest therein, in the present case it was the tenants of the Community, whose principal occupation was farming or the tillage of the soil, and not the corporation itself, and thus distinguished it from the case relied upon by the Community, and held that the decision of this Court in the former case could not be relied upon by the respondent corporation as an authority for its contention in the present action, and made the declaration prayed for that the Community was not a farmer within the meaning of the Act.

Macdonald, C.J., in his reasons for judgment in the Court of Appeal, with which McQuarrie, J., agreed, adopted a dictum of Martin, J., in *Great West Life Assurance Co.* v. *Beck* (2), that whether or not a debtor, who has made a proposal, is a farmer should be determined before the Official Receiver reports to the Board of Review, and that if the Official Receiver was in doubt as to the status of the debtor, he might apply to the County Court judge for direction under rule 42 of the rules and regulations made by the Governor in Council under s. 15 of the Act, and he held that the County Court judge had jurisdiction to decide that question and that the above mentioned orders made by the two County Court judges were

> not things of naught, whatever might be said of the right to vacate them by appropriate proceedings.

If he was wrong in this view, he added,

> and an action for a declaration as to whether or not the appellant Christian Community is a "farmer" may be maintained in the Supreme Court, I would say, with the greatest respect for any contrary views, on the authority of *Barickman Hutterian Mutual Corp.* v. *Nault* (1), that it is a "farmer." This, of course, is the substantial question to be decided.

(1) [1939] S.C.R. 223. (2) [1940] 2 W.W.R. 542.

O'Halloran, J., held that the order of the judge of the proper County Court was an order of a court of competent jurisdiction under the *Farmers' Creditors Arrangement Act*, and that the Supreme Court of the province had no jurisdiction to ignore it or set it aside in a declaratory action.

With every respect, upon a consideration of the record and of the relevant provisions of the statute and regulations, I am of opinion that the learned trial judge had full jurisdiction to make the declaration which he did, and that his judgment was fully warranted by the evidence; and that the Court of Appeal therefore was not justified in setting it aside.

As its title, preamble and all its provisions and the rules and regulations thereunder clearly connote, the *Farmers' Creditors Arrangement Act* was designed by Parliament for the sole and exclusive benefit of farmers, who were unable to meet their liabilities as they became due. It is not questioned that no one, who was not a farmer within the definition prescribed by the Act ("a person whose principal occupation consists in farming or the tillage of the soil"), had any right to avail himself of its provisions to make a proposal either for a composition in satisfaction of his debts or an extension of time for payment thereof or a scheme of arrangement of his affairs, either by the Official Receiver or by the Board of Review. It seems to me, therefore, that if the respondent corporation was not a farmer, neither the Official Receiver nor the Board of Review nor either of the County Court judges had any authority whatsoever to bring the respondent corporation within the operation of that Act, and that any orders or reports purporting to recognize the respondent as a farmer must be held under the explicit provisions of the Act to have been wholly void and of no effect. The learned Chief Justice of British Columbia, pointing out that the two analogous orders of the County Court judges of the Counties of Yale and West Kootenay permitting the applicant to take advantage of the Act involves a decision that the applicant was a "farmer," himself states that that is the only basis upon which the orders could be made; and, as I have already stated, that the question of whether the Community was a farmer, was the substantial question to be decided on the appeal to the Appeal Court.

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I cannot, therefore, upon my part, comprehend how, if the Community was not a farmer within the meaning of the Act, the fact that a County Court judge had without authority and erroneously found that the respondent corporation was a farmer can possibly have the effect of ousting the jurisdiction of the Supreme Court to pronounce upon the validity of these proceedings and of removing from the custody and control of a special receiver appointed by the Supreme Court for the administration of the British Columbia assets and business of the respondent corporation for the realization of the moneys secured by the respondent's deed of trust and mortgage, and placing them in the exclusive control of either of the County Courts mentioned. The only possible construction of s. 6 of the Act, it seems to me, is that the right to make a proposal for a composition, extension of time or scheme of arrangement, is limited to a farmer, as above defined, and that the filing of a proposal by such a person with the Official Receiver is an essential pre-requisite of the jurisdiction of that official to act at all in any particular case in the same way that the filing of such a proposal is another essential pre-requisite under s. 11 (2) of the authority of any County Court in respect of the property of the appellant debtor.

In *Toronto Railway Co.* v. *Corporation of the City of Toronto* (1), an action had been brought by the railway company in the Supreme Court of Ontario for a declaration that the appellant's cars were personal property and as such were not liable for $8,775, sought to be levied as taxes thereon by the respondent. The trial court found that the plaintiff's cars were real estate and dismissed the action, and this judgment was affirmed by the Court of Appeal. On appeal to the Privy Council the Board held that the cars formed no part of the railway and were not fixed in any way to anything which was real estate and were, therefore, not assessable under the Ontario *Assessment Act*. It was argued that the decision of the Court of Appeal was *res judicata,* the question having been decided by the Revision Court appointed under the provincial *Assessment Act,* and the County Court judge on appeal from that decision. The Judicial Committee rejected this contention on the ground that the jurisdiction of the County Court is confined to the amount of assess-

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

ment and does not extend to validate an assessment unauthorized by the statute. Lord Davey in delivering the judgment of the Board said that the jurisdiction of the Court of Revision and of the courts exercising the statutory jurisdiction of appeal from the Court of Revision is confined to the question whether the assessment was too high or too low and that those courts had no jurisdiction to determine the question whether the assessment commissioner had exceeded his powers in assessing property which was not by law assessable.

In other words,

(His Lordship continued)

where the assessment was *ab initio* a nullity they had no jurisdiction to confirm it or give it validity.

The Board therefore advised His Majesty that the order of the Court of Appeal should be reversed and instead thereof a declaration should be made and an injunction granted as claimed by the statement of claim.

In *Donohue* v. *The Parish of St. Etienne* (1), which was an action before a Superior Court in the province of Quebec, under Article 50 C.C.P., to have the defendant's assessment roll declared null and void on the ground that it included the assessment of machinery as immovable property, this Court held that the plaintiff having been assessed for property, which was non-assessable under the *Assessment Act,* the valuation roll was void *ab initio* and that the case fell within the principle of the decision of the Privy Council in *Toronto Railway Co.* v. *City of Toronto* (2). The appeal from the Court of King's Bench, reversing the judgment of the Superior Court, dismissing the plaintiff's action, was consequently allowed. In that case, Duff, J., as he then was, said that he could see no reason why the principle of the *Toronto* case (2) was not applicable and that there should be a declaration in accordance with the view above expressed, viz: that the machinery in question was not assessable as immovable property. Anglin and Mignault JJ., held that the decision of the Privy Council in *Shannon Realties Ltd.* v. *Ville St. Michel* (3) was not in point and that the failure of the appellants

(1) [1924] S.C.R. 511. (2) [1904] A.C. 809.
(3) [1924] A.C. 185.

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to proceed under articles 430 and 662 of the Municipal Code did not preclude their maintaining an action under article 50 C.C.P., in order to have the valuation roll declared null.

In the *City of London* v. *Watt & Sons* (1), this Court held that s. 65 of the Ontario *Assessment Act* (R.S.O., 1887, c. 193) does not enable the Court of Revision to make valid an assessment which the statute does not authorize. Taschereau C.J., in delivering the judgment of the Court, held that that section of the Ontario *Assessment Act* does not make the roll as finally passed by the Court of Revision conclusive as regards a question of jurisdiction.

> If there is no power,
>
> (he said),
>
> conferred by the statute to make the assessment, it must be wholly illegal and void *ab initio,* and confirmation by the Court of Revision cannot validate it.

It is true that these three cases concern the exercise of statutory rights and powers provided for by provincial Assessments Acts, but if, as they all affirm, the unauthorized assumption of powers on the part of tribunals designated by such statutes makes their exercise null and void, and entitled the Supreme Courts of the provinces to try declaratory actions brought by those against whom it is sought to exercise such powers, why should the principles thus affirmed in these cases not apply similarly to the exercise of the explicitly limited rights and powers provided for by the *Farmers' Creditors Arrangement Act?* I can conceive of no reason why they should not. The whole tenor of the statute, it seems to me with all respect, negatives the suggestion that the Parliament of Canada intended to interfere with the inherent jurisdiction of the Supreme Courts of the various provinces to declare the nullity of wholly unauthorized proceedings and orders of all inferior statutory functionaries or tribunals at the suit of those whose property and civil rights such proceedings and orders purport to affect.

(1) (1893) 22 Can. S.C.R. 300.

I would, therefore, allow the appeal and restore the judgment of the learned trial judge with costs throughout against the respondent corporation.

Appeal allowed with costs.

Solicitors for the appellant: *Davis and Company.*

Solicitor for the respondent The Christian Community of Universal Brotherhood Limited: *C. F. R. Pincott.*

Solicitor for the respondent The Board of Review for the Province of British Columbia: *W. S. Owen.*

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* May 16.
* Oct. 7.

WILLIAM N. McKAY (COMPLAINANT) ....APPELLANT;

AND

J. CAMERON CLOW, G. HAZEL CLOW AND LUCY ADA McKAY (DEFENDANTS) .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL IN EQUITY OF PRINCE EDWARD ISLAND

Contract—Suit to have conveyance and agreement set aside—Alleged improvident transaction—Relationship of parties—Condition of health of grantor—Circumstances prior to and at time of execution of documents—Evidence—Findings by trial judge—Onus of proof as to full comprehension by grantor of what he was doing and as to pressure or undue influence—Whether grantor's execution was spontaneous act with free and independent exercise of will.

Complainant sued to have a deed of conveyance and an agreement, executed by him, set aside. The deed conveyed his farm to his daughter and her husband, reserving a life estate, without impeachment of waste, to complainant and his wife. By the agreement (of the same date as the deed), made by complainant and his wife of the first part and their daughter and her husband of the second part, complainant assigned to his daughter and her husband a one-half share of complainant's farm stock, implements, crops, furniture and other movables on the farm; the parties were to live together on the farm, as they had done theretofore, were to carry on farming operations jointly, to share equally expenses and profits; said daughter and her husband were to care for complainant and his wife during their lives, their support and maintenance to be from their share of profits and to be in a manner in keeping with the farm's earnings; and on the death of complainant and his wife or the survivor of them, all their interest in said farm stock, etc., were to belong to the daughter and her husband. Complainant alleged that the documents were executed by him in advanced age, at a time when he was infirm

* PRESENT:—Rinfret, Crocket, Davis, Hudson and Taschereau JJ.

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and of weak understanding and unable to resist the threats and importunities of defendants (complainant's wife, his daughter and her husband) or some or one of them; that they were executed without independent legal or other disinterested advice at a time when complainant was under defendants' influence; that they were executed improvidently, and without any power of revocation; that the consideration was grossly inadequate; and that the contents thereof did not express complainant's wishes. The trial judge made findings against complainant's contentions and dismissed the suit. His judgment was affirmed on appeal (on equal division of the court) and complainant appealed to this Court.

Held (Davis and Hudson JJ. dissenting): The appeal should be allowed, and the deed and agreement cancelled.

Per Rinfret, Crocket and Taschereau JJ.: Having regard to the evidence as to complainant's condition of health, the relationship of the parties, their feelings towards each other as shown by their conduct, and all the facts and circumstances leading up to and in connection with the execution of the documents, the documents, in their contents and effect, were such as to create doubt and suspicion as to their genuineness, so as to make it the duty of those who practically took the whole benefit thereunder to satisfy a court of equity that complainant not only fully comprehended what he was doing when he executed them but that he was not subjected to any pressure or undue influence in connection therewith; and the documents, read in the light of the evidence concerning the relations and feelings between the parties and the complainant's condition of health, did not show a fair and just and reasonable transaction on an equal footing, nor that complainant's execution of them was (as found by the trial judge) his "spontaneous act with a free and independent exercise of his will," but pointed quite to the contrary conclusion.

The established rule of equity is that, whenever it appears that any party to a transaction, from which he or she derives some large or immoderate benefit, occupies such a position in relation to his or her supposed benefactor as to give the recipient a dominating influence over him, that benefit is presumed to have been obtained by the exercise of some undue influence on the part of the recipient. In all such cases, whatever be the nature of the transaction, whether a gift *inter vivos* or a contract alleged to have been made for a good and sufficient consideration, the onus of proof lies on the party who seeks to support it, to show that the transaction by which the benefit is granted was the free, independent and unfettered expression of the grantor's mind.

Per Davis and Hudson JJ. (dissenting): It is unnecessary to decide whether the deed, in view of the collateral agreement, can strictly be said to be a voluntary conveyance to which the rule that the onus rests on the grantees to justify the transaction applies, because in both courts below the deed has been treated as a voluntary conveyance and complainant has had whatever advantage there was in that interpretation. The case was essentially one of fact for the trial judge, who had the advantage, so important in a case of this sort, of seeing and hearing all the parties to the impeached transaction. To reverse his findings in such a case this Court should have to be

convinced that he was wrong; and the evidence as a whole was far from convincing that there was any solid ground upon which this Court should interfere.

APPEAL by the complainant from the judgment of the Court of Appeal in Equity of Prince Edward Island affirming (on equal division of the Court) the judgment of the trial judge, Saunders J., Master of the Rolls, dismissing the complainant's suit, in which the complainant asked that a certain deed of conveyance of the complainant's farm to the defendants Clow (husband and wife, the latter being a daughter of complainant) (reserving a life estate without impeachment of waste to complainant and his wife), and also a certain agreement (of the same date as the deed) between the complainant and his wife (who was a defendant in the action) of the first part and the said defendants Clow of the second part, be set aside and cancelled; or in the alternative that said documents be reformed and rectified.

The formal judgment at trial adjudged and declared that the said deed of conveyance and agreement were established and were to stand as valid and subsisting (except that an amendment was directed in the habendum of the deed of conveyance, by striking out the words "as joint tenants and not" before the words "as tenants in common," so that the defendants Clow be tenants in common and not joint tenants).

The facts in dispute sufficiently appear, and the documents in question are sufficiently described, in the reasons for judgment in this Court now reported. The appeal to this Court was allowed with costs, Davis and Hudson JJ. dissenting.

J. J. Johnston K.C. for the appellant.

W. L. Scott K.C. for the respondents.

The judgment of the majority of the Court (Rinfret, Crocket and Taschereau JJ.) was delivered by

CROCKET J.—This is an appeal from the judgment of the Court of Appeal in Equity of Prince Edward Island, in a suit brought by the appellant, Willam N. McKay, by a bill of complaint in the Court of Chancery, praying that a deed of conveyance dated February 26th, 1936, from

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the complainant to the respondents, and an agreement of the same date between the same parties be set aside and cancelled, or in the alternative that the said deed and agreement be reformed and rectified, so as to express the true agreement between the parties concerned, and that the true intention of the appellant might be carried into effect.

The deed in question, which was executed by the complainant and his wife, of the first part, R. Reginald Bell, Barrister, of Charlottetown, of the second part, and J. Cameron Clow and G. Hazel Clow, his wife, of the third part, purported, in consideration of the sum of one dollar paid by the grantees to the grantor, William N. McKay, to grant unto the said Bell, his heirs and assigns, all the complainant's farm land situate at Murray Harbour North, on Lot 63, in King's County, containing 177 acres more or less, with all the rights, privileges, appurtenances, etc., belonging thereunto, to have and to hold the same unto the said Bell and his heirs, to the use of the said complainant and his wife

for and during the term of their and each of their natural lives without impeachment of waste, and from and after the decease of the said William N. McKay and Lucy Ada McKay or the survivor of them to the use of the said J. Cameron Clow and G. Hazel Clow, their heirs and assigns forever as joint tenants and not as tenants in common.

The complainant was the exclusive owner of the land described, his wife having no interest therein other than her right of dower, the barring of which was the apparent reason for her joining in the execution of the deed. J. Cameron Clow and G. Hazel Clow, upon whom the deed purports to bestow the remainder in fee simple as joint tenants, are husband and wife, the latter being the daughter of the complainant and his wife, to whose use for the term of their or each of their natural lives Mr. Bell and his heirs were to hold the granted land.

The agreement in question purported to assign and transfer to Clow and his wife a one-half share in all the farm stock and implements

now owned by the parties of the first part, including all horses, cattle, hogs, sheep, poultry, carts, wagons, sleighs, harness; agricultural, farming and dairy implements and machinery, and all crops now on said premises, and a one-half interest in all household furniture and other movables in, on and about said farm premises.

The parties named therein as parties of the first part are the complainant and his wife, though admittedly all the property described in the agreement was also exclusively owned by the complainant himself, and his wife had no legal title thereto.

This agreement, which seems to have been executed immediately after the deed, recites that the said parties of the first part (the complainant and his wife) had

in consideration of natural love and affection and for services rendered the said parties of the first part by deed of even date herewith granted their farm of one hundred and seventy-seven acres to the said parties of the second part, subject to a life interest in favour of the parties of the first part;

that the said parties had

agreed to carrying on farming operations jointly on the said farm with equal rights and liabilities as to profits to be made and expenditures to be *received* [?];

and that

the said parties of the first part have agreed to give to the parties of the second part a one-half interest in all the stock, crop, farming implements, household furniture and all other movables and equipment about and on the said premises.

It then proceeds to assign the one-half interest to Clow and his wife, as already stated, and to provide that

the parties hereto agree to carry on farming operations jointly so that all expenses incurred and expenditures made and all profits derived henceforth in connection with the carrying on of said farming operations shall be divided equally, share and share alike;

that

all the parties hereto are to take part in the working and operation of the farm and to give all their time thereto and to work to the best of their ability for the successful operation of the farm and the mutual benefit of all concerned;

that Clow and his wife

are to have a home in the dwelling on said premises and all the parties are to live together as heretofore;

that Clow and his wife

are to *care for* the said parties of the first part during their lives and the life of the survivor, *their support and maintenance to be from their share* of profits of the farming operations and to be in a manner in keeping with the earnings of the farm;

and that

on the death of the parties of the first part or the survivor of them, all the interest of the said parties of the first part in the stock, crop, implements, furniture and other movables shall thenceforth belong to the parties of the second part.

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The bill of complaint alleged, *inter alia*, that for many years previous to the execution of the deed and agreement the complainant resided with his wife and daughter on the said farm; that for some years previous to the execution of the said documents the complainant was physically and mentally ill and compelled to undergo treatment at the hospital for his physical and mental ailments and continued under these disabilities for a long period of time; that during this period of illness Clow married his daughter, Hazel, and came to live with his wife on the said farm; that at the time of the execution of these documents and for a considerable period preceding same the complainant was very ill and greatly deranged in his mind and altogether unable to transact business; that the defendants, taking advantage of his helpless physical and mental condition, kept importuning him to make over his property to them so that they would have the ownership, management and control of the same; that the complainant finally agreed with the defendants that he and Clow should carry on the operations of the farm jointly, and that there should be an equal division of the net profits of the farm between himself on the one part and the defendants on the other, and that the complainant would pay half the expenses and the defendants the other half of the expenses of running the farm and household, but that he never agreed to give any of the defendants any interest or ownership, present or future, in the farm or the stock, crop, farming implements, furniture or other personal property in and about the farm. The bill of complaint further alleged that the deed and agreement were executed by the complainant in advanced age at a time when he was infirm and of weak understanding and unable to resist the threats and importunities of the three defendants or some or one of them; that they were executed without independent legal or other disinterested advice at a time when the complainant was under the influence of the defendants; also that they were executed improvidently and without any power of revocation; that the consideration was grossly inadequate; and that the documents were prepared by solicitors selected and paid by the defendants, who gave the instructions for same without any consent on the part of the complainant, and the contents of which did not express the wishes or desires of the complainant.

The appellant at the time of the execution of the documents was in his seventieth year and his wife a few months older. They had been married upwards of fifty years and had three daughters, of whom Hazel was the youngest. The other two were married and were living in the United States with their husbands and children. Clow married Hazel in September, 1930, when, it seems, he was 34 and she 28, after a courtship of about four years, and went at once to live with her parents on the farm at Murray Harbour North, which had been the home of the appellant through his whole married life, though originally it was a farm of but 77 acres, on which his father and grandfather had lived before him. He and Hazel continued to make their home there until the execution of the deed and agreement referred to, and have since done so, as have also both Mr. and Mrs. McKay, except for a visit of a few weeks, which Mr. McKay himself made to his oldest daughter, Mrs. French, at Medford, Mass., in 1936.

The suit came on for trial before Mr. Justice Saunders, Master of the Rolls, in December, 1938. The trial judgment, delivered October 2nd, 1939, directed an amendment of the deed of conveyance by striking out the words "as joint tenants and not" in the habendum thereof, and adjudged and declared that in all other respects the said deed should stand as a valid and subsisting conveyance to the uses and purposes therein mentioned, and also that the agreement made between the complainant and his wife, of the first part, and the defendants, J. Cameron Clow and G. Hazel Clow, his wife, of the second part, on the same date, stand as a valid and subsisting agreement between the parties thereto.

The complainant thereupon appealed to the Court of Appeal in Equity, consisting of Chief Justice Mathieson and the Vice-Chancellor, Mr. Justice Arsenault. The Chief Justice gave judgment in favour of dismissing the appeal, simply stating in doing so that he agreed with the reasons of the Master of the Rolls, as set forth in his judgment. The Vice-Chancellor, on the contrary, was of the opinion that the appeal should be allowed and that there should be a decree that the deed be declared void and delivered up to be cancelled. The two judges in appeal having thus differed in opinion, the judgment of the Master of the Rolls was confirmed without costs.

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It is from this judgment that the complainant now appeals to this Court.

It is best, I think, first to deal with the construction and legal effect of the two impeached documents, the actual execution of which by all the parties thereto is not questioned.

As to the deed, which is under the Short Form Act (P.E.I. Statutes, 1894, Cap. XI), there can be no doubt that it evidences an intention on the part of the complainant—provided he understood it and comprehended what he was doing when he executed it—to irrevocably renounce his exclusive ownership and control of the described land and to make his wife a joint tenant thereof with him so long as both should live, and that, in the event of his death, his wife should continue to hold and enjoy the exclusive possession and control of the property until her own death, whereupon it should pass to the use of J. Cameron Clow and G. Hazel Clow, their heirs and assigns, forever, as joint tenants with right of survivorship. If valid, the deed conveys a present vested estate to the Clows, as well as to Mrs. McKay.

Having regard to the relationship of the parties and to the purpose for which and the consideration upon which it is now claimed the deed was executed, it is singular, to say the least, that it should state the consideration at one dollar paid by the grantees to the grantor, William N. McKay, and set out as well the usual covenants, warranting title, quiet possession, etc., and guaranteeing the execution of such further assurances of the said lands as may be necessary, as being entered into between "the said grantor" and "the said grantees," (presumably the beneficial grantees), one of whom was "the said grantor" himself.

As for the collateral agreement, it is one which must be examined with the closest attention in the light of the relationship existing between the parties concerned and all the facts and circumstances leading up to and in connection with its execution, if its true import and effect as respects those who signed it is to be fully realized.

The agreement, if valid, at once vested in Clow and his wife the absolute ownership of an undivided one-half share in all the live stock, farming and dairy implements and

machinery, as well as all crops then on the farm premises, and in "all household furniture and other movables in, on and about said farm premises" with a covenant that on the death of the complainant and his wife, or the survivor of them, that the other one-half share in all the personal property specified shall "thenceforth belong to" them also. In addition to this, it provides that all four (the donors and the donees alike) shall "carry on farming operations jointly," and that all expenses incurred and all profits derived henceforth in connection with such joint operation shall be divided equally, share and share alike, and also that all four shall "take part in the working and operation of the farm," and "give all their time thereto," and "work to the best of their ability for the successful operation of the farm and the mutual benefit of all concerned." Furthermore, the agreement secures for Mr. and Mrs. Clow "a home in the dwelling on said premises," in which "all the parties are to live together as heretofore." It is difficult to discover in any of these provisions any benefit or advantage for the complainant (the owner of the property) as against Mr. and Mrs. Clow, which he had not enjoyed during the nearly five and one-half years he had provided a home and subsistence for them after their marriage, while both were supposed to be taking their proper part in the working of the farm with himself and his wife, unless it is to be inferred that during that period they had not in fact been doing so. And Clow himself admits that in the year 1935 it became his regular habit, after assisting in the morning milking, to leave the place for the day and not return until night, usually taking with him the automobile which Mrs. McKay gave his wife as a wedding gift. Apart from this the only obligation towards the complainant the agreement places on Clow and his wife is that which is expressed in its penultimate paragraph, viz.: that they "are to *care for* the said parties of the first part during their lives and the life of the survivor,"—and this with the significantly drastic qualification that "their support and maintenance [is] to be from their share of profits of the farming operations and to be in a manner in keeping with the earnings of the farm." Yet it has been suggested that this one-sided agreement constitutes in equity a good and sufficient maintenance agreement.

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With all due respect, it seems to me that the two instruments themselves betray such incongruities and inconsistencies as cannot fail to raise doubt and suspicion of their genuineness, and, having regard to the relationship of the parties, to make it the duty of those, who practically take the whole benefit thereunder, to satisfy a Court of Equity that the grantor or donor (or donors if the complainant's wife was in truth a donor as well as her husband), not only fully comprehended what he was doing when he executed the deed and agreement, but that he was not subjected to any pressure or undue influence at their hands in connection therewith.

One rather remarkable feature of the agreement is the joining of Mrs. McKay as a joint owner with the complainant of all the personal property, the one-half share of which it purports to assign, notwithstanding the undeniable fact, already pointed out, that she had no legal title, so far as the evidence discloses, to any part of it, unless her husband's joining with her in the execution of the agreement *ipso facto* made her a joint owner with him. Although she was obviously concerned in the other terms of the agreement regarding the joint operation of the farm by all four, and might, therefore, naturally be expected to join in its execution, it can hardly be said, I think, that the fact of her being joined with her husband as parties of the first part itself, either made her a joint owner with her husband of all the stock, crop, farming implements, household furniture and other personal property on or about the farm premises, or vested in her a distinct but undivided one-half share therein. It may be that, if the complainant at all comprehended the effect of what he was doing when he joined his wife in the execution of such a document, he would, as his counsel suggested, in strictness of law be estopped from afterwards claiming that his wife was not part owner of the personal estate, which she purported with him to assign, but that would not give her the right to represent herself, as she did, as part owner of all the personal estate, one-half of which she purported with her husband to assign to the parties of the second part (her son-in-law and daughter).

Another thing of marked significance about the agreement is that its first recital regarding the conveyance to

Clow and his wife of the farm land and the consideration for that conveyance does not accord with the statement in the deed itself. The deed says that that conveyance was made in consideration of the sum of one dollar then paid by the grantees to the grantor, while the first recital of the agreement declares that it was "in consideration of natural love and affection and for services rendered." This recital also alleges that the deed granted *their* farm (that is, Mr. and Mrs. McKay's farm) "to the said parties of the second part," which is also a contradiction of the deed itself, and of the undisputed fact that the complainant was the exclusive and absolute owner thereof. Furthermore, the principal paragraph of the agreement, which purports to assign and transfer to the parties of the second part a one-half share in all the personal property therein specified, distinctly states that all this personalty is "now owned by the parties of the first part," and that the assignment is made "in consideration of the premises [the three recitals already mentioned] and of the natural love and affection of the said parties of the first part for the parties of the second part."

The whole tenor of the agreement, when read with the deed and in the light of the entire testimony concerning the then existing relations between the parties and the complainant's physical and mental condition, far from showing a fair and just and reasonable transaction between the parties on an equal footing, and that the complainant's execution of the deed and agreement was his "spontaneous act with a free and independent exercise of his will," as the learned trial judge has found, points, in my respectful opinion, quite to the contrary conclusion.

Manifestly the relations existing between the respective parties before and at the time of the critical transaction and their motives and feelings towards each other cannot be satisfactorily determined in a case of this kind solely by the impressions which they have succeeded or failed to make upon the mind of the trial judge as to their comparative cleverness, competence or credibility by their demeanour upon the witness stand more than two years after the consummation of the transaction. A witness's true feeling and intention towards another at any particular time can surely more safely be inferred from his

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proven or admitted acts and conduct towards that person before, at the time of and after the transaction under investigation. While in many cases such an issue may be said to be a pure question of fact dependent entirely upon the credibility of witnesses and in such cases the trial judge's finding would ordinarily be held to be conclusive in the absence of any misdirection or misapprehension on his part, the trial finding, upon which the respondents so much rely, is, in my humble opinion, one which must be carefully reviewed in the present appeal, if well known principles of law and equity are not to be ignored.

That finding involves not only the relations and feelings of the parties to and towards each other, but it involves as well the interpretation of the two written instruments and the righteousness and reasonableness of their terms in the light of those relations and feelings.

Before dealing with the relations and feelings of the parties to and towards each other, it may be stated that it was proven conclusively by the hospital records and by medical testimony, and not denied by anybody, that prior to November, 1929, the complainant had suffered very severely from varicose ulcers and veins and eczema of both lower legs, for which he was treated in the Prince Edward Island hospital for nearly a month; that, though he was discharged from the hospital with the ulcers temporarily healed, he was readmitted in August, 1930, when he was found by the hospital physicians in consultation to be suffering from a condition of acute mental depression, diagnosed as melancholia, and that, though he was discharged and returned to his home on September 6th—four days before Clow married his daughter—his condition was entered as unimproved. Mrs. McKay admitted that she knew before he went into the hospital the second time that he was not all right in his head, and that he was sick in his mind in 1930, so much so that on one occasion, when she spoke of his carrying a rope about with him, she thought he might do away with himself, and that she kept watching him. She did, however, say that he looked better on his return from the hospital, and that from that time on he was in good health except that his legs at times were in bad shape. Clow in his evidence took the same position, though in the course of his cross-examina-

tion as to an assault that he made upon the complainant in 1934, he admitted he was a crippled old man at the time.

Mrs. McKay's aggressive and dominating influence over her husband and daughter, as well as her lack of affection and respect for the complainant, is apparent throughout her own entire testimony. Notwithstanding that for more than 20 years she had been investing and reinvesting moneys, which her husband had given her out of the profits of his farm and of the store, which years before he had established in connection with the farmhouse, but of which she had taken full charge, and had thus established quite a substantial independent estate of her own, out of which she was able herself to give her daughter, Hazel, an automobile as a wedding present, and that the latter had also invested and reinvested moneys derived from her father's property in a number of other mortgages, she described her husband not only as inconsiderate and stingy, throughout their whole married life, but as one who "would put his child on the road," and whose presence would "pretty near put a fear in you any time,"—"a terrible boss," who "made his own feel it," and of whom "we were in a dread all the time."

At the risk of prolonging what is, perhaps, already too lengthy a judgment, I quote the following extract from her cross-examination, as it appears on p. 218 of the appeal book, regarding Clow's coming to live on the place:—

Q. No arrangement was made, you say? A. No.

Q. You told Mr. Bell no arrangement made at the time, Hazel didn't want to leave so you invited him to stay, didn't you? A. I asked him to stay, yes.

Q. You asked him to stay; were you running the business at that time? A. Well, when I was doing the most of the work I wanted some help.

Q. You wanted some help? A. Hazel and I had the most to do, we wanted some help.

Q. It was you asked him to stay? A. Yes, I asked him to stay.

Q. You didn't want your daughter to live—you didn't want her to go down and live at this other place with his people? A. *I didn't want us to be separated and we will not be only by death.*

Q. So it was you insisted upon him staying there? A. Yes.

Q. All right. Now, your husband didn't want him to stay there you told us? A. He wanted his work.

Q. Did he want him there? A. He wanted his work.

Q. Did he want him living there? A. Well, I don't know that he objected only at times when they would disagree.

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Q. At times when they would disagree he told him he didn't want him, is that right? A. Well, I never heard the disagreement very much.

Q. Well, did you hear that your husband had told him, did you hear from him or from your daughter or from anybody that at times your husband didn't want him there? A. I don't know.

Q. You knew he was not wanted there? A. I knew he was not wanted there—

Q. By your husband, he was wanted by you? A. Yes.

Q. But he was not wanted by your husband? A. I suppose not.

Q. And of course then there was trouble, wasn't there? A. Sure.

Q. Sure there was trouble, oh, you bet! A. But there was trouble long before he came there.

Q. There was trouble? A. Yes.

Q. But the trouble got intensified because he didn't want him there and you did? A. Our lives were not safe there without a man.

Q. Your lives were not safe there without a man? A. No, they were not.

Having thus completely subordinated his own wishes to his wife's in a matter upon which she was so firmly set, one would have thought that this would have softened her feeling towards her aging and enfeebled husband, but unfortunately such was not the case. Her own evidence, far from exhibiting any disposition on her part to avoid further disagreement with him regarding the conduct of the farm, and to make things as comfortable as possible for him in the circumstances in the home, of which he was still supposed to be the head, indicates only constantly increasing animosity towards him. Of course she blamed this entirely upon his irritable and disagreeable nature. "You could live," she said, "but he would not agree to anything we wanted to do." She gave no particulars as to what these things were, which they wanted to do, but did mention two instances, where Clow and her daughter did things in open defiance of her husband's wishes and positive instructions. These were the sinking of the water pump in a location chosen by Clow and Mrs. McKay, and the use of a particular mare for the spreading of fertilizer. Both these instances appear to have occurred in the year 1934.

Without going into the unpleasant details of the last mentioned, as related by Mr. and Mrs. Clow, suffice it to say that it culminated in Clow assaulting the complainant in the stable doorway, clinching him and throwing him down on the stable floor on his back. His excuse was that the old man (who was then admittedly lame and

unable to fight) was standing in the stable doorway shaking his fists at him, after he (Clow) had taken out in Hazel's presence the mare he had just forbidden the latter to use for that purpose, and that he did not intend to hurt him, but only "to give him a fright," that he "thought a fright would do him good."

And here I should point out—and I do so with much regret—that the daughter's own evidence discloses that she herself on another occasion, before the execution of the documents, also assaulted her father and knocked him down. Her explanation is that he tried to stop her from taking another horse out of the stable, and that she pushed him and he fell down. Whether he tripped and fell on his face she said she could not remember. "Do you think," she was asked, "it was right to do that to your own father?" to which she answered, "Well, I was looking after the horse, so I think I had as much to do with the horse as he had." She said she reported that incident to her mother but could not remember what the latter said. Later she said she was taking the horse out to put it in a sleigh, but could not remember whether her husband was going with her or not.

All three respondents admitted that the relations between themselves on the one side and the complainant on the other were all the time getting worse and worse. It is not surprising, therefore, to read in Mrs. McKay's examination-in-chief that when four hired men came to the place to assist in haying operations in the season of 1935, that she refused to get dinner for any of them, as had been her custom in the past, and that they had either to return to their own homes for dinner or be fed at neighbouring houses; and that when the complainant brought one of these men to the house and particularly ordered her to get dinner for him that the complainant became irritated at her refusal.

This, of course, precipitated another altercation and Mrs. McKay declares that after they had their own dinner he caught her by the back of the neck and shoved her in the corner. "So I thought then," she declared, "it was time to do something and I went to a magistrate and had him bound over to the peace." This she said she did after hay-making. McKay in his evidence admitted that he had given his wife a shake on the occasion mentioned,

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and swore that he heard her call Clow to come to her assistance and that he heard Clow say she had "a chance now to pull him and why not do it." It is not denied that he was summoned before a magistrate at Montague, charged with assaulting his wife, or that the three respondents appeared in the magistrate's court against him, or that he was fined $5 and costs, or $15 or $16 in all, including their witness fees, and bound over to keep the peace for one year.

Notwithstanding the humiliation to which he had thus been subjected by his wife and daughter and son-in-law, and the advantage which they had thereby gained over him, the appellant was still the exclusive owner of the 177-acre farm and all the live stock, farming implements and other personal property upon it, and, unless he was prepared to abandon it entirely to the respondents, had no other recourse than to make his home in the farm house along with them during the approaching winter at least. One has only to read his wife's testimony together with his as to their attitude towards each other during that fall and winter, to see which of them was now the dominating spirit in the management, not only of the household, but of the entire farm. The ownership of the property had yet to be transferred. That was accomplished by the execution of the deed and agreement of February 26th.

Seventeen or eighteen days before the execution of these documents, on February 8th or 9th, around the noon hour, there was a fire in the dining room, which seems to have originated from a defective flue. According to Clow, there were three or four places where the fire came out between the bricks, and the plaster had to be removed from the wall and some of the floor boards taken up to extinguish the blaze. He himself was away, as he usually was during the day, at the time, but on his return he learned what had happened, and says that he stayed home that night and watched the flue, and that it was in such condition that he did not feel like sleeping in the house, and that he and Hazel didn't sleep "or at least there was always one of us awake that night in case the house should catch and we would be burned in it." He couldn't afford, he said, to lose his clothes should the house catch fire again, so the next morning he got all his clothes he didn't need in

his trunk—"all my best clothes"—as he later put it, and Hazel and he brought the trunk downstairs and put it outside. Mr. McKay was in the kitchen when they came down, and Clow's story is that when he and Hazel came back in, McKay wanted to know why he was taking this out. His answer was, "the house is not safe." Without any discussion whatever as to the safety of the house, according to Clow, McKay wanted to know then, "What did I want and stay," to which Clow answered he "would not ask him for anything."

Q. You told him you would not ask him for anything? A. The next thing he said to me, "You want it all."

Q. "You want all." Yes. A. Well, my answer to that was there was a long ways between it all and nothing. That was my answer.

Q. A long ways betwen it all——? A. And nothing, which I had been getting up till that time; so he still wanted to know what I would take, I said "I would not ask you for anything and I am not going to ask you for anything but if you will make me an offer, I will tell you whether I will accept it or not.

* * *

Q. What was his offer? A. Mr. McKay's offer was that he would give us one-half of everything on the place and at his death and Mrs. McKay's death we were to have the place, everything in connection with the farm, and the farm.

Q. Whose offer was that? A. Mr. McKay's. Now, I had not asked him for one thing.

Q. You had not asked him for one thing? A. And I told him that we would accept that offer.

Q. Right there that day? A. Yes, and we talked it over. And Mr. McKay thought that I would go right to work that day and I told him no, that we had to have this on paper, this offer, all fixed up in a legal way.

Q. Yes. Had to have this on paper, all fixed up in a legal way? A. He wanted to put it off till the next spring.

Q. Till the spring? A. I told him that would suit me. He wanted to have the thing postponed then till the next spring and I told him that would suit me but I would not do one day's work until the papers were signed.

Q. The papers were signed? A. So he spoke about,—I would not work until this agreement and all those things were signed. Well, he said it was too cold for him to go away for a lawyer and in the state his legs was in he could not get around very good. So Mrs. McKay, she suggested Will McLure.

Q. So Mrs. McKay—she suggested Will McLure—who was Will McLure? A. Our Magistrate in Murray Harbour North.

Q. Your Magistrate in Murray Harbour North? A. Now, we talked this over in the house there, I just can't give the exact words of what went on but after she suggested Will McLure, now I asked Mr. McKay——

Q. You asked Mr. McKay? A. Would he have William McLure.

Q. Would he have William McLure—? A. Come to the house. And he said he would. And I asked him would I go in that day when I was going to my mother's and ask Mr. McLure to come down, that he wanted him. And he said yes, to tell Will McLure to come down.

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From Mrs. McKay's evidence we learn, not only that she had told her husband the night before that Clow and Hazel were going to leave, but that she herself had made up her mind to leave with them, and that in the conversation that took place between Clow and her husband and herself in the kitchen when Clow brought his trunk down next morning, she made that clear to her husband. Also that, when Clow accepted Will's offer and he told him to go to work, she (Mrs. McKay) herself said "Not till that goes on paper."

Notwithstanding that Clow must have understood that the enfeebled old man wanted to postpone the putting of the alleged verbal agreement in proper legal form until the spring (when he could go and consult his lawyer), till Mrs. McKay "suggested Will McLure" (as Clow put it), or "that William McLure could do that as good as anyone," (as Mrs. McKay herself stated it), Clow obligingly stopped at McLure's on his way to his mother's home that very morning, and told McLure "that Will McKay wanted him." McLure went down to McKay's that day, as Clow says he found out when he returned from his mother's that night. "They told me," he said, "what they had told Mr. McLure to do." By "they" he explained he meant Mr. and Mrs. McKay and Hazel. Asked if they said what had gone on, he replied: "Well, they told me that they had told Mr. McLure the offer that Mr. McKay had made and that he was to draw up—to write this out to the best of his ability on a paper and to come back in a few days." Mr. McKay, he had explained, did not do "all the talking"—the three were there—"and Mr. McKay done some of the talking." In the meantime all fear that they might be burned up if they remained in the house any longer seems to have completely vanished from both Mr. and Mrs. Clow's minds. They all waited for McLure to come back with his "writing." He did come back in a few days. On this, his second visit, Clow was there, as well as Hazel and Mr. and Mrs. McKay, and, according to Clow, "Mr. McLure had a paper drawn up with things in it that they wanted in the business we were getting done,"—or, as he later described it, "about three sheets of paper wrote out"—and it was Mr. McLure and Mr. McKay "that done all the talking." He (Clow) had

nothing to say, "any more than when they would say anything he would agree with it." He did say that when Mr. and Mrs. McKay were describing the boundaries of the farm and talking it over, they both wanted something in the agreement, when it was drawn up, which would prevent any of his (Clow's) people, if anything should happen to him, from claiming during the life of Hazel anything that he would have there. If such an instruction were given it is quite evident that McLure paid no attention to it, for neither the deed nor the agreement contains any safeguard whatever against either the land or the personal property going outside the McKay family. As a matter of fact, McLure expressly denied that Mr. McKay told him it was not to go outside the McKay family. Moreover, McLure's statement to the defendant's counsel in his examination-in-chief regarding his instructions in connection with the proposed transfer was that Mr. and Mrs. McKay were going to give the half of the place to the son-in-law and daughter and the remainder at their death, and that they were to live together and work together on the halves. Having said this, he added, he went home and drew out the memorandum to the best of his ability. But before that he had told the parties that he would not have anything to do with the preparation of the necessary papers, that he was going to take what he had written as a memorandum to some lawyer to have it legally done, as he didn't consider himself capable. However, he did prepare a written memorandum, took it back to the McKay house and said he read it over and that they were all agreed.

According to Clow, Mr. McKay wanted to know how Mr. McLure was going to get to a lawyer, and Mr. McLure said he could have him (Clow) take him to Murray River and the two agreed on a time to go either one or two days after the memorandum had been read and agreed to. Clow called for McLure and took him to Murray River and thence by train to Charlottetown. On their arrival at Charlottetown Clow says McLure wanted to go to Mr. Lowther but as the latter was not in his office they went along the street and saw Bell & Mathieson's sign so they went in there. Clow says Mr. McLure had the memorandum of instructions with him, but he does not say whether

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or not he gave it to Mr. Bell, with whom he says McLure did the talking. Clow admitted that he paid McLure's expenses as well as Bell & Mathieson's bill out of his own pocket. The two returned to Murray Harbour North that night and Clow says he never saw McLure again until the latter came to McKay's to have the documents executed, when he and Hazel and Mr. and Mrs. McKay were all present. According to Clow, McLure read over the documents and explained anything that Mr. McKay asked him, to the best of his ability, and he says that after this Mr. McKay asked his wife if she was satisfied and would sign it, and that she said she would sign it after he did. At any rate, the documents were signed by all four. McLure took the deed away and gave Clow one duplicate of the agreement and left the other on the table for Mr. and Mrs. McKay. The deed was registered within a few days.

A most unfortunate circumstance regarding the written instructions, upon which the documents were supposed to be based, and one which would seem to throw added suspicion upon the whole transaction, is the complete failure of the record to explain the disappearance of the memorandum of instructions. McLure says he never saw it after he left Bell & Mathieson's office. Mr. Bell says that he remembered a sheet of paper with some memorandum on it concerning an agreement of settlement between Mr. and Mrs. McKay and Mr. and Mrs. Clow, and that he had no record of having that memorandum or whether it was left with him that day or not, and that since the commencement of the suit he had made a careful search through all the files and records at their office but had not been able to find it anywhere. As Mr. Justice Arsenault says in his reasons, there is no reflection whatever to be cast on Mr. Bell, who prepared the documents, but we are not told what was in the memorandum or what instructions were given by either McLure or Clow, or whether the documents correspond or were in conformity with what was contained in the memorandum, and Mr. McLure, who prepared it, could not recall what was in it.

The appellant's counsel in the course of his argument before us stated, and it was not denied, that Mr. McLure was one of the magistrates, who had in the previous autumn or fall convicted the appellant of the assault on his wife, and bound him over to keep the peace.

Then, having procured the execution of the deed and agreement in the manner and under the conditions and circumstances described by Mr. McLure, Clow and Mrs. McKay, the two last mentioned immediately proceeded to take complete charge of the farm, as their own evidence plainly shows, without accounting in any way to the complainant for any of the receipts or expenditures. They both said no profit had been made out of the so-called joint operation of the farm in the nearly three years that had elapsed to the time of the trial, on account of their having turned all their receipts into the improvement of the place through replacement of farm machinery, acquiring more live stock, repairing the barns, painting the house, etc., which they admitted doing themselves without consulting Mr. McKay. He was away, she said, most of the time with his stallion, earning $30 a day. She was asked, however, if he went home from court and this case stopped, would she permit him to take charge of everything? She answered that none of them could live with him.

When one recalls the representations of the executed agreement about the natural love and affection of the parties for each other and the undertaking of all four "to work to the best of their ability for the successful operation of the farm and the mutual benefit of all concerned," and considers the confusing character of the two impugned documents when read together, all this evidence of Mrs. McKay and Clow seems to me itself to demonstrate, not only the onesidedness and improvidence, but the falsity and sinister underlying purpose of the whole transaction.

Notwithstanding this testimony of the defendants themselves, the learned trial judge found that no evidence had been submitted to establish that any undue influence was used by the defendants or any of them to procure the execution of the two documents. Apparently he did so upon the assumption that the relationship of the parties and the circumstances leading up to the execution of the documents were not such as to create any doubt or suspicion as to their genuineness, and that the burden consequently rested upon the plaintiff to affirmatively prove that some undue influence was in fact exercised. He attached no importance to the fact that the defendants had the complainant bound over to keep the peace, to the latter's

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expressed desire to consult his own lawyer before signing any formal agreement, to the threat of all three to leave him in his helpless condition, if the agreement should not be put in legal form and signed, to the fact that Clow accompanied McLure to the solicitor's office when the instructions for the preparation of the required papers were given, and himself paid all the expenses in that connection, to the mysterious disappearance of the written memorandum of instructions, which McLure carried with him to the lawyer's office, or to the fact that neither the deed of conveyance nor the collateral agreement under seal contained any power of revocation. "The complainant," His Lordship said,

> trusted his friend [McLure] and was satisfied he would have things completed as he had instructed without any independent advisor. Why then the necessity of independent legal advice? Surely any sensible man has a right to have a well-considered business transaction such as the one under consideration completed without the necessity of engaging the services of any independent legal advisor.

The question, however, was not, whether the complainant had trusted a friend, but whether his execution of the deed and collateral agreement was the result of the domination of the mind of someone else, rather than the free, independent and unfettered expression of his own. Or, as Lord Chancellor Eldon expressed it in *Huguenin* v. *Baseley* (1):

> The question is, not, whether she knew what she was doing, had done, or proposed to do, but how the intention was produced: whether all that care and providence was placed round her, as against those, who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf.

As regards that vital question, the established rule of equity is that, whenever it appears that any party to a transaction, from which he or she derives some large or immoderate benefit, occupies such a position in relation to his or her supposed benefactor as to give the recipient a dominating influence over the latter, that benefit is presumed to have been obtained by the exercise of some undue influence on the part of the recipient. In all such cases, whatever be the nature of the transaction, whether a gift *inter vivos* or a contract alleged to have been made for a good and sufficient consideration, the onus of proof lies on the party who seeks to support it. The passages quoted in the appellant's factum from pages 103, 110 and

(1) (1807) 14 Ves. Jr. 273, at 300.

119 of vol. 29, Am. & Eng. Enc. of Law [2nd ed.], very accurately, I think, sum up the law as now recognized by the courts of law and equity alike in this country and of England upon this point.

Anglin J., as he then was, reviewed the leading authorities on this important question in 1908 in his trial judgment in *Smith* v. *Alexander* (1), and clearly pointed out that it is not merely where such well defined confidential relations as those of trustee and *cestui que trust,* guardian and ward, solicitor and client, or physician and patient exist between the beneficiary and the grantor that courts of equity cast upon the beneficiary the burden, not only of establishing clearly that the grantor fully understood and intended the transaction, but that he voluntarily and deliberately performed the act, knowing its nature and effect. He held that the contents and effect of the deed there in question themselves threw upon the defendants the burden of proving its validity, "that is to say, that it emanated from the pure, uninfluenced will of the plaintiff, after having the extent and effect of it fully explained to her," and that that burden the defendants had not discharged.

In *Beeman* v. *Knapp* (2), Mowat V.C. refused to uphold the validity of a deed made by an old man to his son, who had managed his father's farm for years, in consideration of a bond to maintain the grantor and his wife, because it was not shown to have been made freely and voluntarily after competent independent advice. "Considering the relation of the parties," he said (3),

> the transaction in question could only be sustained on evidence of the fullest information to the grantor as to these possible consequences of what he was doing; and evidence of his having had competent independent advice,

(citing *Sharp* v. *Leach* (4)). He pointed out that the son had alarmed his father in his old age by the threat of a law suit, and also that the son "had on his side the active and zealous influence of his mother." He further said:

> *Prima facie,* a conveyance of all a man's property in his old age, without any power of revocation, in consideration of a mere promise of maintenance, whether under seal or not, is extremely improvident.

(1) (1908) 12 Ont. W.R. 1144.
(2) (1867) 13 Grant's Chancery Rep. 398.
(3) At p. 405.
(4) (1862) 31 Beav. 491.

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In *Hopkins* v. *Hopkins* (1), the Divisional Court of Ontario, presided over by Chancellor Boyd, overruled a trial judgment and set aside a transfer of 300 shares of bank stock, which had been obtained from an elderly husband, who had suffered from heart disease and other infirmities and some weakening of mental faculties, by a younger wife, on the ground that upon the authorities there appeared to be "quite insufficient care taken to see that the donor understood what he was doing, and to guard him from acting improvidently and from surrendering weakly to the clamour of his wife." And this notwithstanding that a Mr. C., a Registrar of Deeds, who had been a solicitor, and had sometimes acted as such for the husband, testified that the latter made up his mind to assign the shares to his wife for the reason he had willed it to her, and it would be for only two or three months before he died and she might as well take the deed of it now. "The intervention of Mr. C.," said the Chancellor, "gave no assistance to the alleged donor; he did no more than give the matter legal form, and was not there as the adviser of the person who needed advice."

See also the judgment of Chancellor Spragge in *Lavin* v. *Lavin* (2), in which he carefully reviewed the leading authorities.

For my part, I can conceive of no case where independent and indeed highly competent legal advice would be more necessary than in the consideration and carrying out of such an involved and perplexing transaction as that which is the subject of this appeal.

The learned trial judge himself found that the deed, as executed, omitted a most important provision which, on the strength of Clow's own evidence, he found that McKay desired, viz.: that the deed and agreement should contain a proviso that the property was not to go outside the McKay family, though McLure denied there was any such instruction. What Clow had really sworn to was that it was only in the event of anything happening to him that both Mr. and Mrs. McKay wanted to be protected against any claim from the Clow family during the life of Hazel against anything that he would have there, or, as he attempted to put it in other words to his own counsel,

(1) (1900) 27 Ont. A.R. 658.
(2) (1880) 27 Grant's Chancery Rep. 567.

that, should he die before Hazel, the Clows were not to step in. Accepting, therefore, the statement of Clow, and rejecting the denial of McLure, His Lordship said his impression was that the insertion of a joint tenancy to Mr. and Mrs. Clow after the death of both Mr. and Mrs. McKay was an inadvertent mistake on the part of the lawyer, who had no definite knowledge of the wish and desire of the complainant and his wife in regard to this particular point. For this reason the trial court decreed that the words "as joint tenants and not" in the habendum of the deed should be expunged, so as to make them both tenants in common. Just how the proposed amendment would make the deed conform to the wishes and instructions of the grantor and his wife in so essential a particular I confess I am unable to understand. While a joint tenancy would, of course, mean that Clow's death before Hazel's would end his interest in the property, it would give him the whole absolutely in the event of Hazel's predeceasing him. On the other hand, a tenancy in common would vest in each a distinct, though undivided, half share, which would go to Clow absolutely, whether his wife predeceased him or not.

I would allow the appeal and direct that both the deed and the agreement be delivered up to be cancelled and that the appellant have his costs in the appeal to this Court.

The judgment of Davis and Hudson JJ. (dissenting) was delivered by

DAVIS J.—The action out of which this appeal came to this Court was commenced by the appellant by bill of complaint, dated July 8th, 1938, in the Court of Chancery of Prince Edward Island, against his wife and his daughter and his son-in-law, praying that a deed of conveyance dated February 26th, 1936, of his farm in Prince Edward Island and an agreement of the same date between the parties, be set aside, rescinded and cancelled.

By the said deed of conveyance the appellant conveyed his farm (his wife joining to bar her right to dower) to his married daughter and her husband, who were living with him on the farm, but reserving a life estate, without impeachment for waste, in favour of himself and his wife

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and the survivor of them. By a collateral agreement of the same date, which his counsel agreed must be read with the deed of conveyance, the appellant and his wife and his daughter and his son-in-law agreed " to carrying on farming operations jointly on the said farm with equal rights and liabilities " as to profits and expenditures, and "all the parties hereto are to take part in the working and operation of the farm and to give all their time thereto and to work to the best of their ability for the successful operation of the farm and the mutual benefit of all concerned." The daughter and her husband, it was agreed, were to have a home in the dwelling on the farm " and all the parties are to live together as heretofore." The daughter and her husband agreed "to care for" the mother and father during their lives and the life of the survivor, " their support and maintenance to be from their share of profits of the farming operations and to be in a manner in keeping with the earnings of the farm."

The appellant, who was about seventy years of age at the time of the transaction, by his bill of complaint alleged that both documents, the deed of conveyance and the agreement between the parties,

> were executed by him in advanced age, at a time when he was infirm and of weak understanding, and unable to resist the threats and importunities of the defendants, or some or one of them; they were executed without independent legal or other disinterested advice, at a time when the complainant was under the influence of the defendants; the same were executed improvidently, and without any power of revocation; the consideration was grossly inadequate; the documents were prepared by solicitors selected and paid by the defendants, who gave the instructions for same without any consent on the part of the complainant, and the contents of which did not express the wishes or desires of the complainant.

The action went to trial before Saunders J., Master of the Rolls, and a great deal of evidence was taken. The husband (appellant) and his wife and their daughter and son-in-law were all present and gave evidence. The learned trial judge, in such a conflict of testimony as there was in the unfortunate family dispute, had the advantage, so important in a case of this sort, of seeing and hearing all the parties to the impeached transaction. The case was one of fact essentially for the trial judge to determine and he found on the facts in most definite language that the transaction was a fair and reasonable one. The trial judge said that the complainant gave his evidence in as rational

a manner as a man could possibly do, and that he regarded him as a man of more than ordinary intelligence and quite capable of transacting his business affairs, without any one being able to take advantage of him. Further, the trial judge said the complainant realized he was no longer able to do very much farm work and wished to make some proper provision for his wife and himself in their advancing years and took this method of consummating his wishes and desires; it was the spontaneous act of the complainant with a free and independent exercise of his will. "The evidence indicates conclusively," said the trial judge,

> that no advantage was taken of the complainant and that everything was done and completed as the complainant had requested. There was no duress or fraud practised on the complainant by any one. He knew full well what he wanted to do and what he did was his own offer, his own voluntary and deliberate act and no undue influence whatever was used.

The learned trial judge held that the deed of conveyance (with an amendment striking out the words "as joint tenants" and leaving the words "as tenants in common") and the agreement between the parties were valid and subsisting. No costs were allowed to any of the parties to the suit.

The appellant appealed to the Court of Appeal in Equity of Prince Edward Island. Only two judges sat in that Court on this appeal and they were divided in their opinions. Chief Justice Mathieson agreed with the reasons of the Master of the Rolls and would dismiss the appeal without costs. Arsenault J., Vice-Chancellor, in his judgment examined the evidence in great detail and concluded that the transaction was "so fraught with the elements of compulsion, if not with fraud and deceit," that the deed "executed under such suspicious circumstances" ought not to be allowed to stand. He would therefore have declared the deed void and have ordered it to be delivered up to be cancelled, but would have given no costs. The formal judgment of the Court of Appeal merely dismissed the appeal and confirmed the judgment of the Master of the Rolls (Saunders J.) without costs. From that judgment the appellant then appealed to this Court.

It is unnecessary to decide whether the deed of conveyance, in view of the collateral agreement, can strictly be said to be a voluntary conveyance to which the rule that the onus rests on the grantees to justify the transaction

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applies, because in both courts below the deed has been treated as a voluntary conveyance and the appellant has had whatever advantage there was in that interpretation of the deed.

This sort of case, in our opinion, is essentially one of fact for the trial judge who sees and hears the several members of the family who unfortunately find themselves in a bitter family controversy. It is very difficult, if not impossible, on a paper record of the evidence to form any conclusion as to the rights and wrongs of the various contentions advanced by the parties. To reverse the findings of a trial judge in such a case we should have to be convinced that he was wrong. Notwithstanding the very forcible argument of appellant's counsel, we are far from being convinced that there is any sound ground upon which this Court should interfere.

In our opinion, the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *J. B. Johnston.*

Solicitor for the respondent: *D. L. Mathieson.*

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* Feb. 18, 19, 20.
* Oct. 7.

ATLANTIC SMOKE SHOPS LIMITED (PLAINTIFF) ..... APPELLANT;

AND

JAMES H. CONLON, JOHN McDONOUGH AND THE ATTORNEY-GENERAL FOR NEW BRUNSWICK (DEFENDANTS) ..... RESPONDENTS;

AND

THE ATTORNEY-GENERAL FOR QUEBEC ..... INTERVENANT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Constitutional law—Tobacco Tax Act (N.B.)—Whether intra vires the province—Direct or indirect taxation within province—Whether tax equivalent to customs duty—Regulation of trade and commerce—Personal liability of agent for the tax—Tobacco Tax Act, 1940, (N.B.) 4 Geo. VI,, c. 44, ss. 2 (a) (d) (e), 3 (2) (3), 4, 5, 7, 8, 10, 20 (2)—B.N.A. Act, ss. 91 (2), 92 (2), 121, 122.

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

The *Tobacco Tax Act,* 1940 (N.B.), c. 44, provides, *inter alia,* that "every consumer of tobacco purchased at a retail sale in the province shall pay to" the province "for the raising of a revenue, at the time of making his purchase, a tax in respect of the consumption of such tobacco" (section 4); and the Act also provides that "every person residing or ordinarily resident or carrying on business in" the province "who brings into the province or who receives delivery in the province of tobacco for his own consumption or for the consumption of other persons at his expense or on behalf of or as agent for a principal who desires to acquire such tobacco for consumption by such principal or other persons at his expense * * * shall pay the same tax in respect of the consumption of such tobacco" (section 5). Section 10 provides that "a consumer shall be and remain liable for the tax imposed by the Act until the same has been collected." Under section 2 (*a*) "consumer" means not only any person who within the Province purchases tobacco for his own consumption, but also any other person who purchases tobacco in the Province as agent for his principal who desires to acquire such tobacco for consumption by such principal. It was also enacted (section 3 (2)) that only retail vendors licensed under the Act may sell tobacco at a retail sale in the province. Regulations made under the Act by Orders in Council were declared to have the force of statute (section 20 (2)). Regulation 6 provides that "every application for a (retail) vendor's license * * * shall contain an undertaking by the applicant to collect and remit the tax * * * and shall be in Form 2"; and when signing that Form, the applicant undertakes "to act as the agent of the Minister for the collection of the tax * * * and to account to the province * * * for all moneys so collected."

Held, by a majority of the Court, that the Act is within the constitutional powers of the province, except as to the provisions making the agent, who buys tobacco for his principal personally liable for the tax, which provisions are severable.

The Chief Justice and Mr. Justice Davis were of the opinion that the entire Act was *ultra vires* the province.

Mr Justice Rinfret and Mr. Justice Crocket were of the opinion that the entire Act was *intra vires* the province.

Mr. Justice Kerwin was of the opinion that section 5 and also the provisions making the agent personally liable for the tax were *ultra vires* the province.

Mr. Justice Hudson and Mr. Justice Taschereau were of the opinion that the Act was *intra vires* the province, except as to the personal liability of the agent for the tax.

APPEAL from the judgment of the Supreme Court of New Brunswick, appeal division (1), which held that the *Tobacco Tax Act,* (N.B.) was *intra vires* the province.

The question in issue in this case is the constitutionality of "An Act to provide for imposing a tax on the consumption of tobacco" (1940, (N.B.) 4 Geo. VI,

(1) (1940) 15 M.P.R. 278; [1941] 1 D.L.R. 416.

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c. 44), hereinafter referred to as *The Tobacco Tax Act.* The appellant caused a writ to issue in the Chancery Division of the Supreme Court of New Brunswick claiming an injunction restraining the respondents Conlon and McDonough, and each of them, from entering upon the store premises of the appellant, in the city of Saint John, or from accosting, questioning, or otherwise interfering with customers of the appellant while on those premises, or on the streets adjacent thereto, with reference to any purchase of tobacco, or the payment of any tobacco tax under the authority of the Act above mentioned, or the regulations under it.

The parties agreed upon the following statement of facts:

That the plaintiff, Atlantic Smoke Shops Limited, is a corporation duly incorporated by letters patent issued under the *Companies Act* of the Dominion of Canada and having its head office at the city of Saint John in the province of New Brunswick.

That on the eleventh day of May, A.D. 1940, the legislature of the province of New Brunswick purported to enact a statute, being chapter 44, 4 George VI, cited as *The Tobacco Tax Act.* The said Act came into force on the 1st day of October, A.D. 1940, by proclamation of the Lieutenant-Governor in Council.

That under the authority of the said Act the Lieutenant-Governor in Council purported to make regulations styled "Regulations Under *Tobacco Tax Act.*"

That on the fifteenth day of October, A.D. 1940, the said Atlantic Smoke Shops Limited opened a store on the northeast corner of Waterloo and Peters streets in the said city of Saint John, and thereafter carried on and now carries on therein the business of selling tobacco, including cigars and cigarettes.

That the said plaintiff carried on and now carries on its said business without having obtained any license so to do under the *Tobacco Tax Act* or the said regulations.

That in its said store the said plaintiff has since the fifteenth day of October, A.D. 1940, sold and is now selling at retail sale tobacco, including cigars and cigarettes, manufactured in provinces of Canada other than the province of New Brunswick, to persons defined by section 2 (*a*) of the said *Tobacco Tax Act* as "Consumers" or "Consumers of Tobacco," without collecting the tax imposed by the said Act.

That the defendant, James H. Conlon, was on the coming into force of said *Tobacco Tax Act* appointed to the office of Tobacco Tax Commissioner, being the office created under the regulations hereinbefore referred to and has since occupied and now occupies said office.

That on the second day of November, A.D. 1940, and from time to time thereafter, the defendant John McDonough, an inspector appointed under the said Act, and others, all acting under the instructions of the other defendants, entered upon the plaintiff's said premises and proceeded to question customers of the plaintiff as to whether they had paid the provincial tax on the tobacco purchased by them from the plaintiff, to ask them to produce their tobacco tax receipts and to demand their

names and addresses. The said defendant John McDonough and other persons so entering the said premises as aforesaid refused to leave the same when requested so to do by the plaintiff, and claimed that they were entitled to remain therein and to question the said customers of the plaintiff by virtue of certain provisions of the said *Tobacco Tax Act* and the regulations made thereunder.

That by reason of the said actions of the defendants the said business of the plaintiff has been and is now being injuriously affected.

The question for the opinion of the Court was expressed in these terms:

The question for the opinion of the Court is whether the *Tobacco Tax Act,* or any of the provisions thereof, and/or the regulations made thereunder or any of them, and in what particular or particulars or to what extent are *ultra vires* of the legislature of the province of New Brunswick.

If the Court shall be of opinion that the said Act and Regulations are wholly *intra vires* this action shall be dismissed.

If the Court shall be of opinion that the said Act and Regulations are wholly *ultra vires,* judgment shall be entered in favour of the plaintiff and against the defendants for an injunction order in the terms of the claim endorsed on the writ of summons herein.

If the Court shall be of the opinion that the said Act and Regulations, or any of them are *intra vires* in part and *ultra vires* in part, the Court shall make such order, by way of declaration and/or by way of substantive relief to the plaintiff, as it shall deem right and proper.

The stated case was submitted to the Supreme Court of New Brunswick, appeal division, which held unanimously (1) that the Act was within the constitutional powers of the province.

From that judgment, the Atlantic Smoke Shops Limited appealed to this Court by special leave granted by the Appeal Division of the Supreme Court of New Brunswick.

The legislature of the province of Quebec has adopted in 1940 a statute, 4 Geo. VI, c. 15, entitled the *Tobacco Tax Act,* which is somewhat similar in its provisions to the New Brunswick statute. The Quebec Act has been held *intra vires* the province by the Superior Court, Trahan J. (2), which judgment was affirmed by the Court of King's Bench, appeal side (3). In view of that fact, the Attorney-General for the province of Quebec was allowed to intervene, on this appeal by order of this Court, in order to support the constitutionality of the New Brunswick Act.

The material provisions of the *Tobacco Tax Act* of New Brunswick are the following:

2. (*a*) "Consumer" or "Consumer of Tobacco" means any person who within the Province, purchases from a vendor tobacco at a retail

(1) (1940) 15 M.P.R. 278; [1941] 1 D.L.R. 416.
(2) (1940) Q.R. 78 S.C. 377. (3) (1941) Q.R. 70 K.B. 101.

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sale in the Province for his own consumption or for the consumption of other persons at his expense or who, within the Province, purchases from a vendor tobacco at a retail sale in the Province on behalf of or as agent for a principal who desires to acquire such tobacco for consumption by such principal or other persons at the expense of such principal.

* * *

(*d*) "Purchaser" means any person who, within the Province, purchases from a retail vendor tobacco at a retail sale in the Province.

(*e*) "Retail Sale" means a sale to a consumer for purposes of consumption and not for resale.

(*f*) "Retail Vendor" means any person who, within the Province, sells tobacco to a consumer.

* * *

3. (2) No persons shall sell any tobacco in the Province at a retail sale unless he holds a retail vendor's license issued to him under authority of this Act and such license is in force at the time of sale.

(3) No wholesale vendor shall sell any tobacco in the Province for resale in the Province to a person who is not a vendor duly licensed under this Act.

* * *

4. Every consumer of tobacco purchased at a retail sale in the Province shall pay to His Majesty the King in the right of the Province for the raising of a revenue, at the time of making his purchase, a tax in respect of the consumption of such tobacco, and such tax shall be computed at the rate of ten per centum of the retail price of the tobacco purchased.

5. Every person residing or ordinarily resident or carrying on business in New Brunswick, who brings into the Province or who receives delivery in the Province of tobacco for his own consumption or for the consumption of other persons at his expense or on behalf of or as agent for a principal who desires to acquire such tobacco for consumption by such principal or other persons at his expense shall immediately report the matter to the Minister and forward or produce to him the invoice, if any, in respect of such tobacco and any other information required by the Minister with respect to the tobacco and shall pay the same tax in respect of the consumption of such tobacco as would have been payable if the tobacco had been purchased at a retail sale in the Province at the same price.

* * *

7. No retail vendor shall advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this Act will be assumed or absorbed by the retail vendor or that it will not be considered as an element in the price to the consumer or, if added, that it or any part thereof will be refunded.

8. The tax shall be collected, accounted for and paid to the Minister by such persons, at such times and in such manner as the regulations may prescribe.

* * *

10. A consumer shall be and remain liable for the tax imposed by this Act until the same has been collected.

* * *

20. (1) For the purpose of carrying into effect the provisions of this Act according to their true intent or of supplying any deficiency therein the Lieutenant-Governor in Council may make such regulations, not inconsistent with the spirit of this Act, as are considered necessary or advisable, and without limiting the generality of the aforegoing the Lieutenant-Governor in Council may make regulations:

* * *

(2) Such regulations may from time to time be repealed, amended or varied and, if repealed, may be re-enacted, and such regulations shall have the same force and effect as if enacted by this Act and shall be published in the Royal Gazette.

The material Regulations made under the Act are the following:

6. Every application for a vendor's license, other than a wholesale vendor's license, shall contain an undertaking by the applicant to collect and remit the tax in accordance with the provisions of the Act and these Regulations and shall be in Form 2 of the Schedule to these Regulations, as near as may be. The applicant shall state in his application for a license an estimated amount of his normal monthly Tobacco Sales.

Form 2 contains the following:

I/We, upon acceptance of License to Retail Tobacco, agree and undertake to act as the Agent of the Minister for the collection of the Tax imposed by said Act and to account to the Province of New Brunswick for all moneys so collected as provided by the Act and regulations.

The other material Regulations are:

9. No person, other than the holder of an itinerant salesman's license issued under the provisions of Regulation 11, shall, either as principal or agent, sell tobacco at retail at any place other than a place of business designated in a valid, subsisting license, issued to such person; Provided that nothing in this or the next preceding Regulation shall be construed to prohibit or restrict the solicitation of orders for or the sale of tobacco by a licensed wholesale vendor to a licensed retail vendor at any place.

* * *

12. No person shall sell tobacco at retail elsewhere than a named place of business, either as principal or as agent, without having obtained an itinerant salesman's license. No person shall sell tobacco at retail elsewhere than a named place of business through an agent or salesman unless such agent or salesman is the holder of a valid subsisting itinerant salesman's license.

* * *

19. Every licensed retail vendor is hereby constituted an agent of the Minister for the collection of the tax and shall collect the tax from the consumer at the time of purchase of tobacco by the consumer.

* * *

22. The retail vendor or his agent shall deliver to every purchaser, at the time of the sale, a receipt for the tax collected and no sale shall be made unless such receipt is given.

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30. No person shall purchase tobacco at retail without paying the tax or accept delivery of same without receiving from the retail vendor a receipt for such tax in accordance with the provisions of the Act and these Regulations.

The grounds of appeal raised by the appellant before this Court were as follows:

1. The Act is not legislation upon the matters assigned to the legislative jurisdiction of the province by sec. 92 of the *British North America Act,* but is in fact legislation upon matters within the exclusive legislative jurisdiction of the Dominion of Canada by virtue of sec. 91 of the *British North America Act.*

2. The Act purports to impose a tax for the raising of a revenue for provincial purposes, but such tax is neither,

(*a*) a direct tax, nor

(*b*) a tax within the province

as authorized by subsection 2 of sec. 92 of the *British North America Act.*

3. The tax is not confined in its effect to the province of New Brunswick nor to the persons upon whom it is levied.

4. The Act infringes upon the exclusive legislative jurisdiction of the Dominion of Canada to impose customs and excise duties.

5. The Act purports, in violation of the provisions of sec. 121 of the *British North America Act,* to impose a tax upon articles grown, produced or manufactured in another province of Canada when introduced into New Brunswick for purposes of consumption.

6. The licences provided for in the Act in question are not within the category of shop, saloon, tavern, auctioneer or other licenses in order to the raising of a revenue for provincial, local or municipal purposes under sec. 92 subsection 9 of the *British North America Act.*

7. The Regulations are invalid because the statute which authorizes them is wholly *ultra vires.*

W. F. Chipman K.C. and *J. F. H. Teed K.C.* for the appellant.

Peter J. Hughes K.C. for the respondents.

Aimé Geoffrion K.C. and *R. Genest K.C.* for the Attorney-General for Quebec.

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

THE CHIEF JUSTICE—It is necessary first to ascertain the characteristics of the tax, the validity of which is in question. The charging sections are sections 4 and 5 which must be read in light of the meanings attached to the phrases therein employed by the interpretation section. Sections 4 and 5 are as follows:—

4. Every consumer of tobacco purchased at a retail sale in the Province shall pay to His Majesty the King in the right of the Province for the

raising of a revenue, at the time of making his purchase, a tax in respect of the consumption of such tobacco, and such tax shall be computed at the rate of ten per centum of the retail price of the tobacco purchased.

5. Every person residing or ordinarily resident or carrying on business in New Brunswick, who brings into the Province or who receives delivery in the Province of tobacco for his own consumption or for the consumption of other persons at his expense or on behalf of or as agent for a principal who desires to acquire such tobacco for consumption by such principal or other person at his expense shall immediately report the matter to the Minister and forward or produce to him the invoice, if any, in respect of such tobacco and any other information required by the Minister with respect to the tobacco and shall pay the same tax in respect of the consumption of such tobacco as would have been payable if the tobacco had been purchased at a retail sale in the Province at the same price.

The material provisions of the interpretation section are 2 (*a*), (*d*) and (*e*), which are in the following words:—

2. (*a*) "Consumer" or "Consumer of Tobacco" means any person who within the Province, purchases from a vendor tobacco at a retail sale in the Province for his own consumption or for the consumption of other persons at his expense or who, within the Province, purchases from a vendor tobacco at a retail sale in the Province on behalf of or as agent for a principal who desires to acquire such tobacco for consumption by such principal or other persons at the expense of such principal.

(*d*) "Purchaser" means any person who, within the Province, purchases from a retail vendor tobacco at a retail sale in the Province.

(*e*) "Retail Sale" means a sale to a consumer for purposes of consumption and not for resale.

Section 8 provides that the tax shall be collected, accounted for and paid to the Minister by such persons, at such times and in such manner as the regulations may prescribe. The statute provides for the licensing of vendors and *inter alia* by section 3, subsection (2) that no person shall sell tobacco at a retail sale unless he holds a retail vendor's license.

The regulations, which have the force of statute (section 20, subsection 2)) provide (Regulations 5 and 6, Form II) that every application for a retail vendor's license shall contain an undertaking by the applicant to collect and remit the tax. The undertaking, in the Form, is that the applicant undertakes to act as agent for the Minister for the collection of the tax and to account to the province for all moneys so collected. On the license is printed a notice that failure on the part of a vendor to collect and remit the tax renders him liable to a fine and to imprisonment in default of payment. There are two forms of licenses, an itinerant salesman's license and

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a license to carry on the business of a retail vendor at a named place of business. The effect of Regulations 9 and 12 is that no person shall, either as principal or agent, sell tobacco at retail, other than a person having a license in one or other of these forms.

The regulations contain important provisions touching the payment of the tax. By Regulation 19 the licensed retail vendor is

> hereby constituted an agent of the Minister for the collection of the tax,

and the Regulation also provides that the retail vendor

> shall collect the tax from the consumer at the time of purchase of tobacco by the consumer.

By Regulation 22 the retail vendor, or his agent, shall deliver to every purchaser at the time of the sale a receipt for the tax collected, and it also provides that no sale shall be made unless such receipt is given. By Regulation 30 it is enacted that

> no person shall purchase tobacco at retail without paying the tax,

and it is further provided that no person shall "accept delivery" of tobacco

> without receiving from the retail vendor a receipt for such tax.

The condition of the obligation to pay under section 4 is that the tobacco in respect of which the liability arises has been purchased at a retail sale. It is true the section describes the purchaser as "consumer," but consumer means, as we have seen, a person purchasing tobacco at a retail sale for his own consumption, or for the consumption of other persons at his expense. It is a condition of a legal purchase at a retail sale that the tax be paid and of a lawful delivery of the tobacco to a purchaser that a receipt of the tax be also delivered to him by the seller. There can be no legal purchase without the payment of the tax; there can be no legal sale without the delivery of a receipt for the tax. In the ordinary case, sales will be cash sales. The price demanded will be the "price to the consumer," to use the words of section 7; that is to say, the price to the purchaser, which includes the amount of the tax, a sum which is earmarked as such, of course, by the delivery of the receipt. In a practical sense, as far as the purchaser is concerned, it is part of the price he pays for his tobacco. As regards the vendor, it is the

sum for which he is accountable to the government and, in fact, it comes out of the "price to the consumer"—the price to the purchaser.

In other words, the payment of the tax is not only a condition of legal purchase; it is an integral element in the transaction of sale and purchase passing from the purchaser to the vendor as part of the price to the purchaser.

Moreover, the real security to the government for the payment of the tax is the vendor's responsibility. True enough, the statute declares that the consumer continues to be liable until the tax is collected, but the real sanction for the obligation of the purchaser lies in the fact that he cannot lawfully, or in practice, get his tobacco without paying the tax. There is no provision for keeping account of consumption. On the other hand, the vendor is obliged, as licensee, to keep account of his purchases, of his sales, of the tobacco he has on hand from time to time. Not only is his default in performing his duty to collect the tax a punishable offence, he must account for his stamps and as agent, under a contractual duty to collect the tax, he is directly responsible if he has made a sale of tobacco without performing that duty. The character of the tax, I think, can best be determined by considering the ordinary case and in the ordinary case, that is to say, in all but exceedingly few cases, the sale of tobacco by a licensed retail vendor will be carried out in the manner contemplated by the Act and the tax will be simply a predetermined fraction of the price to the purchaser which is paid to the vendor and by him remitted to the government. It seems to me to be proper to describe such a tax as a tax on tobacco in respect of the commercial dealing between the retail vendor and the purchaser.

As regards section 5, the tax is imposed upon the importer of tobacco who imports it for his own consumption, or the consumption of others at his expense and that, I think, is a tax on tobacco in respect of the import of it for consumption.

To turn now to the legal questions involved. Section 5 imposes an import duty applying to imports from other parts of Canada, as well as from places outside of Canada. Although not collected in a manner in which customs duties are collected by the Dominion Government in this country, it is of the nature of a duty of customs.

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In the *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co.* (1), Lord Macmillan, speaking for the Lords of the Judicial Committee, said:—

> In Wharton's Law Lexicon "Customs" are defined as "duties charged upon commodities on their importation into or exportation out of a country," and a similar definition is given in Murray's New English Dictionary.

I shall revert to section 5 after discussing the tax imposed by section 4.

The enactment in section 4 and the ancillary enactments in the statute and regulations are justified on the ground that they constitute legislation in relation to direct taxation within the province within the meaning of section 92 (2). The question whether the tax is an excise duty of the class falling within the exclusive authority of the Parliament of Canada to impose can be considered more conveniently with section 5.

If I may say so without presumption, the subject of direct and indirect taxation as it affects the application of section 92 (2) has been put in a very clear light in the judgment delivered by Lord Thankerton on behalf of the Lords of the Judicial Committee in the *Attorney-General for British Columbia* v. *Kingcome Navigation Co. Ltd.* (2). At p. 55 it is said, after a review of some of the previous decisions of the Judicial Committee, these decisions, in their Lordships' opinion, make clear that if the tax is demanded from the

> very person who it is intended or desired should pay it, the taxation is direct.

His Lordship proceeds to point out that in the case of typical direct taxes, the taxation on property and income, for example, mentioned by Lord Cave in the *City of Halifax* v. *Fairbanks Estate* (3), such taxes

> are imposed in respect of the particular taxpayer's interest in property or the taxpayer's own income, and they are a peculiar contribution upon him, and it is intended and desired that he shall pay it, though it is possible for him, by making his own arrangements to that end, to pass the burden on in the sense of the political economists.

Such taxes are contrasted with those as regards which the taxing authorities are indifferent as to who ultimately bears the burden, such as taxes in respect of transactions and

(1) [1930] A.C. 357, at 364. (2) [1934] A.C. 45.
(3) [1928] A.C. 117.

taxes in respect of some dealing in commodities, such as their import or sale. The words of the judgment are these:

> * * * where the tax is imposed in respect of a transaction, the taxing authority is indifferent as to which of the parties to the transaction ultimately bears the burden, and, as Mill expresses it, it is not intended as a peculiar contribution upon the particular party selected to pay the tax. Similarly, where the tax is imposed in respect of some dealing with commodities, such as their import or sale, or production for sale, the tax is not a peculiar contribution upon the one of the parties to the trading in the particular commodity who is selected as the taxpayer.

I have said sufficient to show why, in my opinon, the tax imposed by section 4 is a tax in respect of a dealing with tobacco, the sale and purchase of it, and this dealing falls, I think, within the class of dealings with commodities envisaged by such passages in their Lordships' judgment.

On behalf of the respondent it is said that this is a tax in respect of consumption and that it stands in the same category as that in question in the *Attorney-General for British Columbia* v. *Kingcome Navigation Co. Ltd.* (1). The tax in question there was payable by every person who consumes fuel oil in the province in respect of the fuel oil consumed and at the rate of one-half cent a gallon. Every person consuming fuel oil was obliged to keep such books and records and furnish such returns as might be prescribed by the regulations, the failure to do so being a punishable offence. The amount of the tax was recoverable by action and in every such action the burden of proving the quantity consumed by the defendant was upon him. There are no such provisions in the statute before us. The tax is not payable by the consumer as such. It is payable by the purchaser, or the agent of the purchaser, and the statute itself contemplates that neither of them may be the consumer. No liability attaches to the consumer as such. To repeat, in the practical administration of the Act there can be no manner of doubt that the payment of the tax and the delivery of the receipt take place as acts in the transaction of sale and purchase. The matter of consumption never comes into question.

On behalf of the respondent it is argued that the purchase from the retail vendor is a purchase for consumption because the tobacco cannot lawfully be sold by the purchaser unless he takes out a vendor's license which

(1) [1934] A.C. 45.

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insures that he can never sell except at a loss. There is no limit, however, as to the quantity which may be purchased from a retail vendor and any purchaser is entitled to obtain a license as a retail vendor and the license fee is only fifty cents. However, as a rule, tobacco sold at retail, in the ordinary sense, is purchased with the intention that it will be consumed by the purchaser, or his friends or associates, and the vast majority of the purchases of tobacco at retail will be purchased for immediate consumption.

It does not at all follow from this that the tax is a tax in respect of consumption, especially when it is so obviously a tax in respect of the sale and purchase. There is nothing in the statute, truly, which can fairly be said to give to the tax the character of a tax in respect of consumption, except the declaration of the legislature to that effect and some collateral provisions which are relied upon as supporting the contention that such is its character.

I do not think too much importance can be attached to the declaration of the legislature that the tax is payable in respect of consumption. The *British North America Act* "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" (*Bank of Toronto* v. *Lambe* (1), *City of Halifax* v. *Fairbanks' Estate* (2). Nor was it probably contemplated that the "tangible dividing line" between direct and indirect taxation could be shifted at will by the declarations of the legislature as to its expectations, or intentions, in respect of the ultimate incidence of a tax. It is especially important, I think, in the application of Mill's test not to be led away by legislative declarations, or collateral legislative provisions, imparting to the legislation a form calculated to give a colour of legality to the legislative effort.

I return now to section 5. As I have said it imposes a duty in respect of import. Such a duty is one of those mentioned in the passage quoted from Lord Thankerton's judgment (3) as being not imposed as a peculiar contribution upon one of the parties and as being, consequently,

(1) (1887) 12 A.C. 575, at 581. (2) [1928] A.C. 117, at 124.
(3) *Attorney-General for British Columbia* v. *Kingcome Manufacturing Co. Ltd.* [1934] A.C. 45.

an indirect tax. It seems clear, moreover, to be a tax within section 122. There were customs duties levied on manufactured tobacco by the provinces at the time of Confederation. The Dominion has always imposed customs duties in respect of imports of tobacco and it would seem an extraordinary thing if each one of the provinces could impose such duties upon persons who import for their own consumption and who should be obliged to pay this duty after paying the duty imposed by the Dominion; and equally extraordinary in the case of raw tobacco imported by an importer in Montreal, who has paid the customs duty upon it and manufactured it there, that it should, on shipment into New Brunswick to a consumer, be subjected to a further import duty in that province. The importation which brings section 5 into operation seems clearly to be a dealing in tobacco within the meaning of the judgment quoted above. So also, I think, the tax imposed by section 4 is an excise duty within the contemplation of that judgment. At pp. 58, 59, Lord Thankerton says:—

> In their Lordships' opinion the customs or excise duties on commodities ordinarily regarded as indirect taxation, referred to in the judgments in *Fairbanks'* case (1) and the *McDonald Murphy Lumber Co.'s* case (2), are duties which are imposed in respect of commercial dealings in commodities, and they would necessarily fall within Mill's definition of indirect taxes. They do not extend, for instance, to a dog tax, which is clearly direct taxation, though the machinery of the excise law might be applied to its collection, or to a license duty, such as was considered in *Lambe's* case (3). Customs and excise duties are, in their essence, trading taxes, and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted.

The tax imposed by section 4 fulfils the conditions of this "definition of customs and excise duties," as the judgment describes this passage. The distinction between the New Brunswick statute and the provisions of the British Columbia Fuel-Oil Act, with which the judgment is concerned, is brought out very clearly in the part of the judgment I now quote at p. 59:—

> Turning then to the provisions of the Fuel-Oil Act here in question, it is clear that the Act purports to exact the tax from a person who has consumed fuel-oil, the amount of the tax being computed broadly according to the amount consumed. The Act does not relate to any commercial transaction in the commodity between the taxpayer and some one else.

(1) [1928] A.C. 117. (2) [1930] A.C. 357.
(3) (1887) 12 A.C. 575.

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Their Lordships are unable to find, on examination of the Act, any justification for the suggestion that the tax is truly imposed in respect of the transaction by which the taxpayer acquires the property in the fuel-oil nor in respect of any contract or arrangement under which the oil is consumed, though it is, of course, possible that individual taxpayers may recoup themselves by such a contract or arrangement; but this cannot effect the nature of the tax. Accordingly their Lordships are of opinion that the tax is direct taxation within the meaning of s. 92, head 2, of the British North America Act.

I should add that section 5, in my opinion, comes within the ban of section 121. I do not think either the decision in the *Gold Seal* case (1), or the observations in the judgments, are in any way in conflict with this.

The duty imposed by section 5, as I have already observed, being a duty imposed by a provincial legislature, is, of course, not collected through the machinery of the customs, but levied in New Brunswick prior to Confederation it would have been levied as a customs duty; and considered even from the point of view of its application to goods imported from other provinces, it is of the nature of a customs duty, if the expression is properly applicable in such circumstances. Section 5 is moreover, in my opinion, an enactment in regulation of trade and commerce within the ambit of the exclusive authority in relation to that subject vested in the Dominion by section 91.

I should add that the tax under section 4 is payable by the purchaser's agent where the purchase is made by an agent. On the principle of the *Manitoba Grain* case (2), this provision appears to be invalid.

For these reasons, I think the appeal should be allowed.

RINFRET J.—The question in this case is about the constitutionality of "An Act to provide for imposing a tax on the consumption of tobacco" (c. 44 of the Acts of New Brunswick, 1940), hereinafter referred to as *The Tobacco Tax Act.*

The appellant caused a writ to issue in the Chancery Division of the Supreme Court of New Brunswick claiming an injunction restraining the defendants, and each of them, from entering upon the store premises of the appellant, in the city of Saint John, or from accosting, questioning, or otherwise interfering with customers of the appellant while on those premises, or on the streets adjacent thereto, with

(1) (1921) 62 Can. S.C.R. 424. (2) [1925] A.C. 561.

reference to any purchase of tobacco, or the payment of any tobacco tax under the authority of the Act above mentioned, or the regulations under it.

The parties concurred in stating the questions arising for the opinion of the Court as follows:

The appellant is a Dominion company having its head office in the city of Saint John, in the province of New Brunswick.

On May 11, 1940, the legislature of the province of New Brunswick enacted *The Tobacco Tax Act,* which came into force on October 1st, 1940, by proclamation of the Lieutenant-Governor in Council.

Certain regulations were made under the authority of the Act.

On October 15, 1940, the appellant opened a store, in the city of Saint John, and thereafter carried on, and now carries on, therein the business of selling tobacco, including cigars and cigarettes, without having obtained any license so to do under *The Tobacco Tax Act,* or the regulations.

In its store, the appellant sells at retail sale tobacco, including cigars and cigarettes, manufactured in provinces of Canada other than the province of New Brunswick, to persons defined, by section 2 (*a*) of the said *Tobacco Tax Act,* as " consumers " or " consumers of tobacco," without collecting the tax imposed by the said Act.

The respondent James H. Conlon was, on the coming into force of the said *Tobacco Tax Act,* appointed to the office of Tobacco Tax Commissioner, it being an office created under the regulations.

On November 2, 1940, and from time to time thereafter, the respondent John McDonough, an inspector appointed under the Act, and others, while acting under the instructions of the other respondents, entered upon the appellant's premises and proceeded to question customers of the appellant as to whether they had paid the tax on the tobacco purchased by them, to ask them to produce their tobacco tax receipt and to demand their names and addresses. They refused to leave the premises when requested so to do by the appellant, and claimed that they were entitled to remain therein and to question customers by virtue of the said *Tobacco Act* and the regulations made thereunder.

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By reason of these actions of the respondents, the business of the appellant has been and is now injuriously affected.

The question for the opinion of the Court is whether the *Tobacco Tax Act,* or any of the provisions thereof, and the regulations made thereunder, or any of them, are *ultra vires* of the legislature of New Brunswick; and, if so, in what particular, or particulars.

It was agreed that, if the Court should be of the opinion that the Act and the regulations were wholly *intra vires,* the appellant's action should be dismissed. If the Court should be of opinion that the Act and the regulations are wholly *ultra vires,* judgment should be entered in favour of the appellant and against the respondents for an injunction order in the terms of the writ of summons herein. If the Court should be of opinion that the Act or regulations, or any of them, are *intra vires* in part and *ultra vires* in part, the Court should make such Order by way of declaration or of substantive relief to the appellant, as shall be deemed right and proper.

The special case was submitted to the Appeal Division of the Supreme Court; and, after argument heard, the judgment of that Court was delivered by the Chief Justice of the province of New Brunswick, in which Grimmer and Richards JJ. concurred.

The Court unanimously held that the Act was within the constitutional powers of the Province.

After having quoted the material sections of the Act, the learned Chief Justice stated that the regulations had not been attacked, except upon the ground that, the Act being *ultra vires,* they fell with it.

He proceeded to enumerate the grounds of objection to the validity of the Act:

(1) That the transaction was not within the Province;

(2) That it was an attempt to impose a tax upon interprovincial or international transactions;

(3) That dealers in tobacco could not without their consent be constituted agents for the Crown for the collection of a tax, as it would constitute them public officers;

(4) That the tax was indirect as falling upon transactions in commodities especially;

(5) That it was an indirect tax as being in essence a sales tax;

(6) That the taxation of an agent was vital to the scheme of the Act and that taxation so imposed upon an agent gave him a right to be indemnified by his principal, thus indirectly imposing the tax upon the principal.

Dealing first with grounds of objection 1 and 2, the judgment failed to see that the legislature had attempted to impose a customs duty upon the importation of tobacco into the Province, contrary to the contention of counsel for the appellant. In the opinion of the Appeal Division, the legislation did not purport to affect any person who was outside of the Province, nor the commodity when it was not within the Province. In fact, it did not affect the commodity at all.

As to objection no. 3, the Court thought that it also failed and that it must be competent for the legislature to provide for collectors of revenue, if that revenue derives from a direct tax.

Objections 4 and 5 were taken together. In the Court's opinion, they raised the only real point in the case, viz.: Whether the statute imposes direct or indirect taxation.

The attempt made to treat the Act as imposing a stamp tax and thus bringing it within *Attorney-General for Quebec* v. *Queen Insurance Company* (1), and *Attorney-General for Quebec* v. *Read* (2), was disregarded. It was said by the Court that what was called a "stamp" in argument is not a stamp at all. It was not regarded as such nor intended to be affixed to anything. It was simply a receipt for payment; and Regulation 20 was referred to.

As to the attempt of counsel for the appellant to assimilate the tax to a sales tax, and, therefore, to an indirect tax, the Court thought that transmissibility is the proper test for the present case. On this ground, reference was made to *Attorney-General for Manitoba* v. *Attorney-General for Canada* (3), where the tax was on persons selling grain for future delivery; and to *Attorney-General for British Columbia* v. *Canadian Pacific Railway* (4), where the Privy Council stated that fuel-oil, being a marketable commodity, those who purchased it, even for their own use, acquired a right to take it into the market;

(1) (1878) 3 A.C. 1090.
(2) (1884) 10 A.C. 141.
(3) [1925] A.C. 561.
(4) [1927] A.C. 934.

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and that, therefore, a tax levied on the first purchasers of fuel-oil came within the general principle which determines that the tax is an indirect one.

Reference was also made by the learned Chief Justice to *Rex.* v. *Caledonian Collieries Ltd.* (1), which dealt with a percentage tax imposed on mine owners on the gross revenue of coal mines, and where it was held that the general tendency of the tax upon the sums received from the sale of the commodity which the mine owners produced was that they would seek to recover it in the price charged to the purchaser, and that, although, under the particular circumstances, the recovery of the tax be economically undesirable or practically impossible, nevertheless the general tendency of the tax remained. The effect of the Privy Council decision in *Lower Mainland Dairy* v. *Crystal Dairy* (2), and of the decision of this Court in *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (3), was also examined; and the Court found that the cases were not in the same category as the present case.

The Court then discussed the judgment of Lord Thankerton in *Attorney-General for British Columbia* v. *Kingcome Navigation Company* (4), where the noble Lord reviewed previous judgments of the Board and said that:

> These decisions made clear that if the tax is demanded from the very persons who it is intended or desired should pay it, the taxation is direct, and that it is none the less direct, even if it might be described as an excise tax, for instance, or is collected as an excise tax.
>
> * * *
>
> The ultimate incidence of the tax, in the sense of the political economist, is to be disregarded, but where the tax is imposed in respect of a transaction, the taxing authority is indifferent as to which of the parties in the transaction ultimately bears the burden, and, as Mill expresses it, it is not intended as a peculiar contribution upon the particular party selected to pay the tax. Similarly, where the tax is imposed in respect of some dealing with commodities, such as their import or sale, or production for sale, the tax is not a peculiar contribution upon that one of the parties to the trading in the particular commodity who is selected as the taxpayer.

Of the *Fuel Oil Tax Act* of British Columbia, Lord Thankerton said that it was clear that the Act purported to exact the tax from a person who had consumed fuel-oil, the amount of the tax being computed broadly according to the amount consumed, and the Act did not relate

(1) [1928] A.C. 358.
(2) [1933] A.C. 168, at 176.
(3) [1931] S.C.R. 357, at 364.
(4) [1934] A.C. 45.

to any commercial transaction in the commodity between the taxpayer and someone else. Although it was, of course, possible that individual taxpayers may recoup themselves by the contract or arrangements under which the oil was acquired, this could not, in their Lordships' opinion, affect the nature of the tax.

The Appeal Division, in the present case, then pointed out that the differences between the Act considered by the Privy Council in the *Kingcome* case (1) and the case at present under review were two:

Firstly, the British Columbia tax was imposed upon the person "who has consumed fuel-oil"; the New Brunswick Act imposed the duty "before consumption of the commodity." It was shown that by actual consumption, under the British Columbia Act, the purchaser became the ultimate consumer. The Appeal Division thought that the same result was attained by the express provisions of sec. 3 (2) of the New Brunswick Act, which took away the right of resale from the purchaser from a retail dealer. The statute thereby made him the ultimate consumer. As a result of that action, it seemed impossible to conceive that the purchaser attempting to resell could have a market, unless he was prepared to sell the commodity at a definite loss.

Secondly, there was no definition of the word "consumer" in the British Columbia Act, and obviously there could be none, while section 2 (*a*) of the New Brunswick Act contained a definition and by it the consumer could purchase from a vendor by "means of an agent." The principal must be one who desires to acquire the tobacco for consumption by himself, or by other persons at his expense. The appellant contended that the tax necessarily paid by the agent would be "passed on" to the principal, which would bring the transaction within the trading cases to which reference has already been made. To this argument, the Court thought the answer was: "That there is not, and cannot be, a sale by the agent to his principal." True, the agent, if he had not the required money in advance, would be entitled to be indemnified by his principal; but indemnity is not sale. "*Qui facit per alium facit per se*" applies. This is only part of the machinery of the Act. *Forbes* v. *Attorney-General of Manitoba* (2).

(1) [1934] A.C. 45. (2) [1937] A.C. 260.

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Summing up, the learned Chief Justice came to the conclusion that the tax was not imposed upon the vendor, it was not imposed upon the goods; it was imposed upon the consumer, and measured and valued by the extent of his purchases. The consumer paid the tax at the time of the sale to him. The vendor paid no tax; and the tax could not by any possibility enter as a factor into the price charged by him. That there was a perception of the tax at the moment that the commodity passed from the vendor to the buyer did not make it a sales tax. It seemed to fall within the class of excise taxes which may be levied by a provincial legislature. But it was immaterial how it was described; the incidence of the tax fell upon and was borne by the ultimate consumer and could not be passed on.

For these reasons, the Court held that the Act was within the constitutional power of the Province.

From that judgment, Atlantic Smoke Shops now appeals to this Court by special leave granted therefor by the Appeal Division of the Supreme Court of New Brunswick; and the Attorney-General of the province of Quebec intervenes to support the constitutionality of the New Brunswick Act, in view of the fact that the legislature of Quebec has adopted a similar statute.

The *Tobacco Tax Act* now in question enacts, in sec. 3, that

(2) No person shall sell any tobacco in the Province at a retail sale unless he holds a retail vendor's license issued to him under the authority of this Act and such license is in force at the time of sale;

(3) No wholesale vendor shall sell any tobacco in the Province to a person who is not a vendor duly licensed under this Act.

By section 4, it is enacted that

4. Every consumer of tobacco purchased at a retail sale in the Province shall pay to His Majesty the King in the right of the Province for the raising of a revenue, at the time of making his purchase, a tax in respect of the consumption of such tobacco, and such tax shall be computed at the rate of ten per centum of the retail price of the tobacco purchases.

By section 5:

5. Every person residing or ordinarily resident or carrying on business in New Brunswick, who brings into the Province or who receives delivery in the Province of tobacco for his own consumption or for the consumption of other persons at his expense or on behalf of or as agent for a principal who desires to acquire such tobacco for consumption by such principal or other persons at his expense shall immediately report the matter to the Minister and forward or produce to him the invoice, if

any, in respect of such tobacco and any other information required by the Minister with respect to the tobacco and shall pay the same tax in respect of the consumption of such tobacco as would have been payable if the tobacco had been purchased at a retail sale in the Province at the same price.

In the Act, "Consumer" or "Consumer of tobacco"

means any person who, within the Province, purchases from a vendor tobacco at a retail sale in the Province for his own consumption or for the consumption of other persons at his expense or who, within the Province, purchases from a vendor tobacco at a retail sale in the Province, on behalf of or as agent for a principal who desires to acquire such tobacco for consumption by such principal or other persons at the expense of such principal. (Section 2*a*).

"Purchaser" means any person who, within the Province, purchases from a retail vendor tobacco at a retail sale in the Province (Section 2*d*).

"Retail sale" means a sale to a consumer for purposes of consumption and not for resale (Section 2*e*).

"Retail vendor" means any person who, within the Province sells tobacco to a consumer (Section 2*f*).

By section 7:

7. No retail vendor shall advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this Act will be assumed or absorbed by the retail vendor or that it will not be considered as an element in the price to the consumer or, if added, that it or any part thereof will be refunded.

By section 9:

9. The Minister may make such allowance as the Lieutenant-Governor in Council may determine to vendors for their services in collecting the tax.

And finally, by section 10:

10. A consumer shall be and remain liable for the tax imposed by this Act until the same has been collected.

For the purpose of carrying into effect the provisions of the Act, the Lieutenant-Governor in Council was authorized to make such regulations, not inconsistent with the spirit of the Act, as were considered necessary, or advisable (section 20); and, amongst other things, for

(*a*) providing for the affixing of stamps on tobacco or on the packages in which it was sold, before or at the time it is sold to the consumer, as evidence of the tax having been paid;

and it is enacted that such regulations shall have the same force and effect as if enacted by the Act and that they shall be published in the *Royal Gazette* (section 20-2).

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Of the regulations so made, only the following should be quoted:

19. Every licensed retail vendor is hereby constituted an agent of the Minister for the collection of the tax and shall collect the tax from the consumer, etc.

23. The retail vendor shall account for and remit the amount of tax collected to the Tobacco Tax Commissioner within ten days immediately following the calendar month during which any sale has taken place and shall with his remittance forward to the Tobacco Tax Commissioner a statement containing the information required by Form 4 in the Schedule of these regulations.

Retail vendors are required to make an application for the license to sell at retail. That application is signed by them and the form so signed contains the following undertaking:

I/we hereby make application for a license as indicated above under the provisions of The Tobacco Tax Act, 1940.

I/we, upon acceptance of license to retail tobacco, agree and undertake to act as the agent of the Minister for the collection of the tax imposed by said Act and to account to the Province of New Brunswick for all moneys so collected, as provided by the Act and Regulations.

The form of license itself contains the following prescriptions:

Penalty as prescribed by the Act.

Failure on the part of a vendor to collect the tax renders him liable to a fine of not less than ten or more than five hundred dollars, and costs; and, in default of payment, to imprisonment to a term not exceeding three months.

The form of tobacco tax return provides for the deduction of a commission of 3%, being the allowance to the vendor for his services in collecting the tax; and it contains the following:

Enclosed find the sum of $ * * * which is the amount of Tobacco Tax collected by me during the month of after deductions being made as described above.

And attached to the return is a declaration which has to be signed by the vendor to the effect that the remittance is a true return of all taxable sales made during the last preceding months, and that the return herein truly represents all tax imposable by law accruing upon such sales or transactions as are chargeable under the *Tobacco Tax Act*.

The attack made upon that Act by the appellant and the grounds of appeal from the Appeal Division of the Supreme Court of New Brunswick, which upheld the Act, are:

(1) The Act is not legislation upon the matters assigned to the legislative jurisdiction of the provinces by sec. 92 of the *British North America Act;*

(2) The Act purports to impose a tax for the raising of a revenue for provincial purposes, but it is neither

(*a*) a direct tax, or

(*b*) a tax within the Province,

as authorized by subsection 2 of section 92;

(3) The tax is not confined in its effect to the province of New Brunswick, nor to the persons upon whom it is levied;

(4) The Act infringes upon the exclusive legislative jurisdiction of the Dominion Parliament to impose customs or excise duties;

(5) The Act purports, in violation of the provisions of section 121 of the *British North America Act,* to impose a tax upon articles grown, produced or manufactured in other provinces of Canada when introduced into New Brunswick for purposes of consumption;

(6) The licenses provided for in the Act in question are not within the category of shop, saloon, tavern, auctioneer or other licenses in order to the raising of a revenue for provincial, local or municipal purposes under section 92, subsection 9, of the *British North America Act.*

(7) The Regulations are invalid because the statute which authorizes them is wholly *ultra vires.*

It is to be observed, as already pointed out in the reasons for judgment of the Appeal Division, that the regulations are not brought into question except in so far as they are authorized by the statute and that they will have to be found *ultra vires* only if the statute itself is held unconstitutional. They may, therefore, be disregarded for the purpose of the present discussion; and that disposes of ground of appeal no. 7.

Ground no. 1 is only a general statement of the objections of the appellant, the details of which are enumerated in grounds 2, 3, 4, 5 and 6. Those, therefore, are the grounds which have to be examined in order to decide the present appeal.

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It is alleged in ground of appeal no. 2 that the tax imposed is not a direct tax, contrary to the powers of a provincial legislature under head 2 of sec. 92.

"Direct taxation" alone may be imposed by a Province, and it must be "taxation within the Province".

It was said by this Court, in *City of Charlottetown* v. *Foundation Maritime Limited* (1):

> It is no longer open to discussion, on account of the successive decisions of the Privy Council, that the formula of John Stuart Mill (Political Economy ed., 1886, vol. II, p. 415) has been judicially adopted as affording a guide to the application of section 92, head 2 (*Fairbanks* case (2)). Mill's definition was held to embody "the most obvious indicia of direct and indirect taxation" and was accepted as providing a logical basis for the distinction to be made between the two (*Bank of Toronto* v. *Lambe* (3)). The expression "indirect taxation" connotes the idea of a tax imposed on a person who is not supposed to bear it himself but who will seek to recover it in the price charged to another. And Mill's canon is founded on the theory of the ultimate incidence of the tax, not the ultimate incidence depending upon the special circumstances of individual cases, but the incidence of the tax in its ordinary and normal operation. It may be possible in particular cases to shift the burden of a direct tax, or it may happen, in particular circumstances, that it might be economically undesirable or practically impossible to pass it on (*The King* v. *Caledonian Collieries* (4)). It is the normal or general tendency of the tax that will determine, and the expectation or the intention that the person from whom the tax is demanded shall indemnify himself at the expense of another might be inferred from the form in which the tax is imposed or from the results which in the ordinary course of business transactions must be held to have been contemplated.

The definition of John Stuart Mill, above referred to, states:

> Taxes are direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such as the excise or customs.

Now the appellant contends that the tax we are now examining comes under the definition of an indirect tax because it is imposed upon the taxpayer with respect to, and by reason of, his entering into a commercial transaction or trade in commodities; also because it taxes all agents who purchase tobacco on behalf of their principals or who bring tobacco into the province of New Brunswick on behalf of their principals.

(1) [1932] S.C.R. 589, at 594.
(2) [1928] A.C. 117, at 125.
(3) [1887] 12 A.C. 575, at 582
(4) [1928] A.C. 358.

Of course, the question of the nature of the tax is one of substance. It does not turn only on the language used by the legislature which imposed it; and in testing the validity of the statute, the first requisite is to ascertain the real nature of the tax imposed.

It may be admitted as a principle, which generally proves to be true, that a tax upon a person with respect to his consumption of some commodity within the Province is direct taxation and *intra vires,* even although, in some instances and circuituously, he is enabled to pass the burden on to someone else.

It may be assumed that, generally speaking, a tax upon a person with respect to a commercial transaction, such as a sale or purchase, based upon and with respect to the price of the commodity, is indirect taxation and *ultra vires* of a province, even although, in some instances, the party taxed may not pass the burden to anyone else.

In the *Kingcome* case (1), the tax was imposed on the consumer of fuel oil according to the quantity which he consumed within the province. It was held that this was direct taxation and *intra vires.* The British Columbia Act, in their Lordships' view, did not relate to any transaction in the commodity between the taxpayer and some one else.

Here, the appellant argues that the tax is upon the purchaser of commodities, imposed at the time of the purchase, and with respect to the commodity purchased; and that it is accordingly an indirect tax and *ultra vires.* He relies on a long line of decisions of the Privy Council upholding this principle.

If we turn to the New Brunswick statute, we find that the charging section (sec. 4) imposes the tax only on the consumer of tobacco, in respect of the consumption of such tobacco, and computed at the rate of ten per centum of the retail price of the tobacco purchased.

The statute makes it clear that the only person who it is intended or desired should be taxed is the consumer. It is just as much a consumption tax as was the British Columbia tax in the *Kingcome* case (1).

For the purpose of deciding whether such a tax is a direct or an indirect tax, it does not matter that the tax is imposed before or after consumption of the commodity.

(1) [1934] A.C. 45.

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The point is that the tax is imposed in respect of the actual consumption, that the legislature intends that it should be a tax with respect to consumption and that the language of the statute is so guarded that, except in extremely exceptional and almost inconceivable cases, it makes it impossible for the consumer to pass it on to someone else, or, in the words of Mill, to "indemnify himself at the expense of another."

In fact, the statute is framed in such a way that the legislature has indicated its intention that the person on whom the tax is imposed will bear it himself; and it has taken every precaution to prevent the consumer from indemnifying himself at the expense of another. This must be inferred both from the form in which the tax is imposed and from the results which, in the ordinary course of business transactions must be held to have been contemplated. Indeed, it may not only be inferred from the statute itself, but it is there expressly so stated.

The consumer who is taxed is a person who, within the province, purchases tobacco at a retail sale, in the province, for consumption of himself, or of other persons at his expense. By definition, "purchaser" means a person within the Province purchasing from a retail vendor at a retail sale in the Province. A "retail vendor" means a person, within the Province, selling tobacco to a consumer, and that is to say: a person who holds a retail vendor's licence, issued to him under the authority of the Act, and whose licence is in force at the time of the sale. And, also by definition, a "retail sale" means a sale to a consumer for purposes of consumption and not for resale.

The right of the consumer to resell is taken away by the provisions of the Act, thus meeting the possibility suggested by Viscount Haldane, in *Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.* (1). It was stated in that case that

> it may be true that, having regard to the practice of the respondents, the oil they purchase is used by themselves alone and is not at present resold. But the respondents might develop their business so as to resell the oil they have bought. The principle of construction as established is satisfied if this is practicable and does not for its application depend on the special circumstances of individual cases.

(1) [1927] A.C. 934.

In the present case, this possibility has been provided against; and no legal resale by the consumer may take place within the province. Not only that; but the fact that the tax is imposed upon a consumer purchasing at a retail sale, in view of the definition of the words "retail sale" in the Act, means that the tax is imposed only in respect of a "sale to a consumer for purposes of consumption and not for resale"; and it follows that if some alleged consumer purchased tobacco with the concealed intention of reselling it, he might, as a consequence, become open to a penalty for violating the Act; but he would not, within the precise terms of the Act, come under the provisions of the charging section (sec. 4), and conceivably he might not render himself liable to the tax.

Here, on account of the prescriptions of the Act, the possibility of a resale cannot be said to be according to the common understanding of men; and the legislature, by its statute, has taken every means to provide against that possibility. *The King* v. *Nat Bells Liquors Ltd.* (1).

It is the general tendency of the legislation that must be considered, and exceptional cases must be ignored. The suggestion made by the appellant that the purchaser may go outside the province and resell there can hardly be entertained. Section 4, read with sections 2 (*a*) and 2 (*e*), imposes the tax on one who purchases in the Province for consumption there. The purchaser may exceptionally go outside and consume the tobacco sold in the province; but this would be an exceptional case resulting from the free act of the purchaser once he has become the absolute owner of the tobacco; and this isolated case cannot make of the statute one imposing a tax outside the province.

The effect of the tax is intended to be confined to the province of New Brunswick. It is imposed upon the consumers of tobacco in New Brunswick; and it does not pretend to have any effect at all outside the province.

But it is argued that the tax is indirect because the Act taxes the agent with respect to his transaction on behalf of his principal; and the Privy Council's decisions in *Cotton* v. *The King* (2), and in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (3), and in *Provincial Treasurer of Alberta* v. *Kerr* (4), are relied on.

(1) [1922] 2 A.C. 128, at 135, 136.
(2) [1914] A.C. 176.
(3) [1925] A.C. 561.
(4) [1933] A.C. 710.

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The Act taxes the "consumer"; and, by definition, "Consumer" includes a person who

> within the Province, purchases from a vendor tobacco at a retail sale in the Province for his own consumption or for the consumption of other persons at his expense or who, within the Province purchases * * * on behalf of or as agent for a principal who desires to acquire such tobacco for consumption by such principal or other persons at the expense of such principal.

And the Act further says that a consumer, and therefore an agent, in the circumstances within the definition,

> shall be and remain liable for the tax imposed by this Act until the sale has been collected.

From a practical point of view, it may be said that this feature of the Act, so far as it is made a point against its constitutionality, is almost negligible.

Under the Act, the

> tax shall be computed at the rate of ten per centum of the retail price of the tobacco purchased.

(section 4). The circumstance no doubt contemplated by the Act, when a person would purchase tobacco "on behalf of or as agent for a principal," would be where the purchaser sends a messenger to a tobacco store, with the object of buying for him the tobacco which he intends to consume. The purchasers meant to be so covered are purchasers of tobacco "at a retail sale," and "for consumption" by the principal. In ninety-nine cases out of a hundred, the tax, in such cases, would amount to something between ten to fifty cents, the latter being an extreme suggestion. It is to be assumed that, in almost every case, the messenger would have received his principal's money to pay both for the tobacco and for the tax. The amount of the tax, at all events, would be but a trifle; and the instances where it may happen that the messenger would advance the money would be extremely scarce. I would be very loath to declare a provincial statute unconstitutional on such a slim objection.

Moreover, it is very doubtful whether the occurrence in such a case could really be described as "passing on." This, to my mind, is not the kind of "passing on" deemed to be, in the decided cases, the characteristic of an indirect tax. The "agent," in this instance, would not be paying for himself, but for and on behalf of the principal.

There would be, as a consequence, no enhancement of the actual cost as between the agent and his principal.

Moreover, should this feature of the Act be found unconstitutional—which, in my view, it should not—it is severable, and it may not be allowed to defeat either the whole Act or its principle. The objection would be met by deleting the provision concerning agents in the definition of "consumer." As the tax must be paid immediately "at the time of making the purchase," no valid retail sale may be made without the tax being paid at once, and there is no perceivable object in enacting that the agent will remain responsible for it.

I have now discussed the grounds of appeal nos. 1, 2 and 3. The others do not require elaborate consideration.

As to ground no. 4, I cannot agree that the Act infringes upon the exclusive legislative jurisdiction of the Parliament of Canada to impose customs and excise duties. Section 5 of the Act is relied on for the appellant's argument on this point. It provides that a

> person residing or ordinarily resident or carrying on business in New Brunswick, who brings into the province or who receives delivery in the province of tobacco for his own consumption or for a principal who desires to acquire such tobacco for consumption by such principal or other persons at his expense, shall immediately report the matter to the Minister and forward or produce to him the invoice in respect of such tobacco, etc. * * * and shall pay the same tax in respect of the consumption of such tobacco as would have been payable if the tobacco had been purchased at a retail sale in the province at the same price.

In regard to this, it should be observed that it affects only persons residing, or ordinarily resident, or carrying on business in New Brunswick. But it is argued that, since it covers such a person

> who brings into the province, or who receives delivery in the province

of tobacco from outside, the tax is an attempt to impose customs duties, which are of the exclusive competency of the Dominion Parliament.

I do not think that it is a customs duty within the meaning of those words as they are generally understood.

Under section 5, the tax is not collected at the border of New Brunswick, or before the tobacco is allowed to enter the territory of the Province. That section covers

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the case of a resident of New Brunswick, or of a person carrying on business therein, who brings into the Province tobacco

for his own consumption, or for the consumption of other persons at his own expense.

The consumer of tobacco is not called upon to pay the tax before the tobacco comes into the province, or before he receives possession of the tobacco. He pays after delivery, or after he has come into possession. Surely there must be a moment when property entering a province becomes property in the province subject to be taxed by the province.

To my mind, section 5 has no other purpose than to equalize between purchasers in the Province and purchasers residing in New Brunswick who happen to have purchased tobacco outside of it. It may be styled legislation incidental to the scheme of *The Tobacco Tax Act;* it cannot be regarded as imposing a customs duty.

Then, as ground of appeal no. 5, the appellant urges that the Act purports, in violation of the provisions of section 121 of the *British North America Act,* to impose a tax upon articles grown, produced or manufactured in any one of the provinces, when introduced into the province of New Brunswick for purposes of consumption.

Under the provisions of the Act, tobacco enters perfectly free into the Province; but the consumer is taxed in connection with the consumption of a commodity which is in the consumer's possession in the Province. The legislature has assumed that one who acquires for the purpose of consumption will consume. The exceptional cases where he might change his mind after introducing into the province the tobacco he has purchased for consumption are legitimately ignored by the legislature.

It would seem further that section 121 of the *British North America Act* only aims at the prohibition of customs duties when the articles of the growth, produce or manufacture of any one of the provinces are carried into any other province (*Gold Seal Ltd.* v. *Dominion Express Company & The Attorney-General of the province of Alberta* (1). On the occasion of their importation from other provinces, the admission into the province must be free

(1) (1921) 62 Can. S.C.R. 424.

and that is to say that no tax or duty can be imposed as a condition of such admission (*The King* v. *Nat Bell Liquors Ltd.* (1)).

Incidentally, it need hardly be said that the invalidity of secton 5 could not affect the rest of the statute (*Toronto Corporation* v. *York Corporation* (2)).

The last ground of appeal is that the license required from the vendors is not one authorized by Head 9 of sec. 92 of the *British North America Act.*

It has been repeatedly held that the licenses specifically enumerated in Head 9 of section 92 are not the only licenses which provincial legislatures may provide for. It has been held also that the words "other licenses" in sub-head 9 are not limited to licenses *ejusdem generis* (*Brewers & Malsters Association* v. *Attorney-General for Ontario* (3); *Attorney-General for Manitoba* v. *Manitoba License Holders Association* (4); *Shannon* v. *Lower Mainland Dairy Products Board* (5)). Provincial legislatures can provide for licenses not only for the purpose of revenue, but also for the purpose of regulating matters within their powers. For example, they have the power of requiring licenses as an incident of any of their other powers, apart from the power to require licenses merely for the purpose of raising a revenue.

A license can, therefore, be required by a Province as a means of collecting a tax which is valid, or as a means of compelling those who are entrusted with the duty of collecting a tax to comply with that duty. Such is the case here. It may be said, as a matter of fact, that the license required under *The Tobacco Tax Act* is a means of enabling the Province to possess a list of the names of the agents who are entrusted with the collection of the tax.

In the *Kingcome Navigation* case (6), the statute there considered also provided for a license.

Under all the circumstances, I think that the judgment appealed from was right and *The Tobacco Tax Act* was competently enacted by the legislature of the province of New Brunswick.

(1) [1922] 2 A.C. 128.
(2) [1938] A.C. 415.
(3) [1897] A.C. 231.
(4) [1902] A.C. 73.
(5) [1938] A.C. 708.
(6) [1934] A.C. 45.

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The appeal should, therefore, be dismissed with costs, except that there will be no costs to the Intervenant, the Attorney-General of the province of Quebec.

CROCKET J.—I agree with my brother Rinfret and the judgment of the Appeal Division of the Supreme Court of New Brunswick that *The Tobacco Tax Act,* as enacted by the Legislature of that Province, is wholly *intra vires.*

My brother Rinfret has so methodically and exhaustively dealt with the various points involved in the appeal as argued before us that, agreeing with him, as I do, in all his conclusions thereon, I find it difficult to state my own reasons for arriving at the same conclusion without reiterating much of what he has so pointedly said. However, in the circumstances, I feel, even at that risk, I should do so.

Apart from the objection that the vendors' licenses provided for by the statute are not licenses within the meaning of s. 92 (9) of the B.N.A. Act, all the grounds upon which its constitutional validity was challenged here, as in the court below, centre around the question as to whether the tax thereby imposed is a direct tax within the meaning of s. 92 (2) of that Act.

As to the nature or form of the tax imposed, the appellant of course contends that it is an "indirect," rather than a "direct" tax, for the reason that it arises out of a commercial or trading transaction, to which the intended taxpayer is a party, and that it therefore falls within the meaning of the so-called trading cases, which were so strongly relied upon to support the appeal, as well as for the reason that upon the true construction of s. 2 (*a*) the tax is imposed, not only upon the purchasing prospective consumer, but alternatively upon his agent in making the purchase for him. As to the cases thus relied upon, it will be found on examination that they all proceed upon the ground that, although a tax purports to be imposed upon one party to a commercial or trading transaction, its real nature is determinable by the practicability of its being passed on to other persons by means of a resale and thus absorbed in the purchase price obtained on its resale. The pronouncement of Viscount Haldane in *Attorney-General for British Columbia* v. *Canadian Pacific*

Railway Company (1) was especially relied upon in this regard, as stated by my brother Rinfret.

In the present case, as Baxter C.J., in the court below distinctly held, and as clearly appears from the very careful analysis my learned brother here has made of the relevant provisions of the New Brunswick Act, this possibility has been definitely eliminated by the statute itself.

Not only does s. 3(2) expressly enact that

> no person shall sell any tobacco in the province at a retail sale unless he holds a vendor's license issued to him under authority of this Act and such license is in force at the time of sale,

but clause (*e*) of s. 2 declares that "retail sale" means a sale to a consumer for the purposes of consumption and not for resale. Furthermore, s. 4 in the most explicit terms imposes the tax on the consumer in respect of the consumption of the tobacco purchased, and makes it payable at the time the purchaser makes his purchase. It is true that the word "consumer," as defined in s. 2 (*a*), includes, not only a person, who purchases tobacco at a retail sale in the Province for his own consumption or for the consumption of other persons at his expense, but one who purchases the tobacco

> on behalf of or as the agent for a principal, who desires to acquire such tobacco for consumption by such principal or other persons at the expense of such principal,

and that s. 10 provides

> that a consumer shall be and remain liable for the tax imposed by this Act until the same has been collected.

So far, however, as purchases made in the Province are concerned, it is plain that the tax must be paid at the time of the purchase, and that if the tax is not then paid no purchase can lawfully be made, so that s. 10 cannot very well be intended to apply to the purchase of any tobacco within the Province. It is obviously intended to apply to the provisions of s. 5 in any case where a person residing or ordinarily resident or carrying on business in the Province may be found to have brought into the Province or have received delivery in the Province of tobacco purchased outside the Province for his consumption, when he is required to report the fact to the Minister and then to pay the same tax in respect of the consumption of such

(1) [1927] A.C. 934, at 938.

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tobacco as would have been payable if the tobacco had been purchased at a retail sale in the Province at the same price.

In any event, as I read the relevant provisions, the tax is imposed upon the consumer in respect of his own consumption of it or the consumption of it by other persons at his expense, whether the tobacco be purchased by him personally or by someone whom he has requested to make the purchase for him, either within or without the Province. It cannot reasonably, in my opinion, be held to be a tax imposed upon any other person than upon the consumer himself in respect of tobacco purchased for his own consumption or consumption by other persons at his expense. It was surely never intended to make a servant or a messenger, who might be sent by his employer to buy a package of tobacco or cigarettes for consumption by his employer or his employer's friends at his employer's expense, liable for the tax so explicitly imposed by the statute in respect of the consumption of the tobacco thus purchased. The fact that the purchase is made for the master and intending consumer by a servant or messenger does not make the purchase any less the purchase of the master, either at law or according to the common understanding of men, than if the master—the intending consumer—went to the retail store to make it personally. No purchase being possible without payment of the tax, there could in the ordinary course of events be but few instances where a master would send a servant or messenger to a retail vendor's shop to buy tobacco for him without giving him the money to pay both the tax and the price of the tobacco. It would only be in a case where the intending consumer at the moment found himself without the necessary money that there would be any likelihood of the messenger himself paying either the tax or the purchase price with any other than the consumer's own money. In such a contingency the master might borrow the necessary money from someone else, or possibly the servant might himself for the time being lend the money to his master, if he had the change in his own pocket. Constructively at least the money paid to the vendor would none the less be the master's. The tax itself would not amount at the most in such a case to more than five or ten cents, for the

statute provides for the computation of the tax to the nearest cent (one-half cent being considered as one cent) at the rate of ten per centum of the retail price of the tobacco purchased.

For my part I would, like my brother Rinfret, be very loathe to hold that the mere fact of the purchase being made by a servant or by a special messenger under such exceptional circumstances could have the effect of converting what is otherwise so plainly a direct tax upon a consumer in respect of his own consumption of tobacco, and thus within the constitutional power of a Provincial Legislature, into an indirect tax entirely beyond the legislative power of any of the Provinces.

The statute intends the payment of but one tax in respect of each separate purchase of tobacco in the Province. This, as I have said, it definitely requires to be paid at the time the purchase is made by or in behalf of the prospective consumer. If the servant or messenger in the circumstances I have indicated, either for his own or for his master's convenience, voluntarily makes the payment for his master with his own money or with money borrowed by him for the purpose, it surely cannot well be said that he thereby becomes the "consumer" within the meaning of the charging section of the statute, and that the statute imposes the tax upon him and not upon his master as the prospective consumer. The statute certainly does not compel the servant or agent to pay the tax if the master or employer does not provide him with the money for the purpose. It would in such circumstances be purely a voluntary payment upon his part wholly incompatible with the legal conception of a tax. It seems to me that there would be quite as much reason for saying that if the prospective consumer, not having the money in his pocket at the moment, borrowed it from a servant or from anybody else, went to the vendor's shop himself, made the purchase and paid the tax with the borrowed money, the lender, and not the purchaser, would thereby become the consumer and the taxpayer.

Even if the alternative provision contained in s. 2 (*a*) concerning the purchase within the province from a retail vendor by an agent for his principal for consumption by the latter or by other persons at his expense must be con-

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strued as constituting the servant or agent, and not the principal, for whom the purchase is made, the intended taxpayer in such circumstances as above suggested, the servant or agent would not surely find it any less practicable or possible to pass on the tax to his master by means of a resale to him, than the master would to pass it on by the same means to anybody else—in the face of the express statutory prohibition against any resale in any manner whatsoever. Perhaps I should in this connecton mention s. 7 in addition to the other sections I have referred to. This section, so far as all retail vendors are concerned, precludes as effectually as any statutory provisions can the absorption of the tax in the retail price or its recoupment in whole or in part to the purchaser.

Reading all the material sections together, it is impossible, I think, to conceive how the Legislature could more effectually have indicated its intention that this tax should be demanded from the very persons, who it intended or desired should pay it. This is the essential characteristic of "direct," as distingushed from "indirect" taxation, and constitutes the true criterion for determining whether a particular tax falls under the former or the latter category, as expounded by John Stuart Mill in his well known treatise on Political Economy, and adopted by the Judicial Committee of the Privy Council in *Bank of Toronto* v. *Lambe* (1) and in *Cotton* v. *Rex* (2), and other cases, and so distinctly reaffirmed by Lord Thankerton in the recent case of *Attorney-General for British Columbia* v. *Kingcome Navigation Co.* (3), as to the meaning of the term "direct taxation" in s. 92 (2) of the *British North America Act.* In the face of the various provisions of the statute itself, how can it logically be said that the tax imposed by the impugned statute is a tax which the Legislature intended should be borne by any other person than the prospective consumer himself, or that it is a tax, the general tendency of which is to enhance or in any way affect the retail price of tobacco either within or without the Province? The definite provisions of the statute itself in my judgment make the question as to the general tendency of the tax quite irrelevant, unless indeed one is disposed to question the good faith of the Legislature and regard the whole

(1) (1887) 12 A.C. 575. (2) [1914] A.C. 176.
(3) [1934] A.C. 45.

scheme of the statute as a mere pretence or colourable arrangement in order to disguise what is claimed to be "indirect taxation," which is not within its legislative powers, as "direct taxation," which is. For my part I am not disposed to do so.

With all respect, the only ground to my mind upon which any argument could possibly be based in support of the contention that the tax imposed by the Act is not a direct tax within the competency of the Provinces under the provisions of s. 92 (2) of the *British North America Act* is that of the inclusion of the alternative provision regarding purchases by agents in the definition of "consumer" in s. 2 (2) of the impugned statute. The most that can be said as to this is that the language of the alternative clause may be confusing. Seeing that no retail purchase could lawfully be made within the Province without the tax being immediately paid, this clause would appear to have no perceivable object and to be quite unnecessary to the levying of the intended tax. For this reason the draftsman would have been well advised, in my opinion, to omit it. It could be deleted at any time without affecting the vital object of the Act.

As to s. 5, it is directed only against persons ordinarily resident or carrying on business in New Brunswick, who might otherwise seek to avail themselves of favourable opportunities to buy their tobacco outside the Province and thereby easily evade the tax, which s. 4 so plainly intends to apply to all consumers alike in the Province. Its only and perfectly obvious purpose is to close such an inviting opening to such persons as might be inclined to dodge the intended tax by such convenient means. The section merely places such persons on the same footing in respect of their consumption of tobacco purchased by or for them outside the Province as all "consumers," who buy their tobacco within the Province. It does not purport in any sense to prohibit any one from buying tobacco outside the Province, but makes it clear that when one does so and brings it into the Province or receives delivery of it in the Province for his own consumption he does not thereby free himself of liability to pay the same tax in respect of its consumption as if he had bought it at a retail store within the Province at the same price. Surely if the charging section

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of the statute is itself within the legislative competency of the Province, such a purely subsidiary section—having no other perceivable object than the prevention or the evasion or defeat of the intended tax—cannot well be held to be beyond it.

As to the contention that the intended tax is in reality a customs or excise duty and consequently an "indirect tax," and that its attempted imposition therefore infringes the exclusive legislative jurisdiction of the Dominion Parliament in relation to the creation or alteration of such duties, as expressly conferred by s. 122 of the B.N.A. Act, precisely the same objection was made in the *Kingcome* case (1) regarding the imposition of the fuel oil tax by the British Columbia *Fuel Oil Tax Act,* 1930, c. 71, as amended by the statute of 1932, c. 51, upon every consumer of fuel oil according to the quantity which he has consumed. The Judicial Committee overruled the objection as inconsistent with its own decisions, "which,"—to quote the language of Lord Thankerton—

> go back to the year 1878, and settled that the test to be applied in determining what is "direct taxation," within the meaning of s. 92, head 2, of the Act of 1867 is to be found in Mill's definition of direct and indirect taxes.

That is surely conclusive as to this ground of appeal.

It is argued as well that s. 5 of the New Brunswick statute contravenes s. 121 of the B.N.A. Act, as interposing an obstacle to the free admission of tobacco as an article

> of the growth, produce or manufacture of any one of the Provinces into each of the other Provinces,

within the meaning of that enactment.

This section came before this Court for interpretation for the first time in 1921, in the case of *Gold Seal Ltd.* v. *Attorney-General for Alberta* (2), on the question of the constitutional validity of an enactment of the Parliament of Canada contained in ch. 8, 10 Geo. V, 1919, prohibiting the importation of intoxicating liquor into those Provinces, where its sale for beverage purposes is forbidden by provincial law. The case was heard by Sir Louis Davies, C.J., and Idington, Duff, Anglin and Mignault, JJ. Duff, J., dealing with the construction of s. 181, held that

(1) [1934] A.C. 45.
(2) (1921) 62 Can. S.C.R. 424, at 439.

the phraseology adopted, when the context is considered in which the section is found, shows that the real object of the clause is to prohibit the establishment of customs duties affecting interprovincial trade in the products of any Province of the Union.

Anglin, J., expressed the view that the impugned legislation was not obnoxious to s. 121 of the B.N.A. Act.

The purpose,

he said,

of that section is to insure that articles of the growth, produce or manufacture of any Province shall not be subjected to any customs duty when carried into any other Province. Prohibition of import in aid of temperance legislation is not within the purview of the section.

Mignault, J., thought that

the object of s. 121 was not to decree that all articles of the growth, produce or manufacture of any of the Provinces should be admitted into the others, bnt merely to secure that they should be admitted "free," that is to say, without any tax or duty imposed as a condition of their admission.

The essential word here,

he continued,

is "free," and what is prohibited is the levying of customs duties or other charges of a like nature in matters of interprovincial trade.

The clear effect of these three several pronouncements as read together, it seems to me, is that the words "admitted free," as used in s. 121, mean admitted free of customs duties, and for that reason, and that reason only, even an express prohibition of the import of intoxicating liquor from one province to another in aid of provincial temperance legislation is not within the purview of the section. That is precisely how the head-note of the case states the decision of the court on the construction of the section relied on as invalidating the legislation there in question. Whether or not that decision means that the section only applies to Dominion legislation, it plainly implies, I most respectfully think, that the Parliament of Canada may validly go so far as to expressly prohibit the admission from one Province to another of any article of the growth, produce or manufacture of another Province, so long as the prohibition does not involve the imposition of a customs duty. If that be so in respect of the application of the section to Dominion legislation, how can this Court now consistently hold that a provincial enactment, which

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neither prohibits nor in any sense obstructs nor restrains, as between vendor and purchaser, the passage of any such article from one Province to another, does fall within the purview of the intended ban? No one contends or could well contend that intoxicating liquor is not quite as much an article of the growth, produce or manufacture of one or more of the Provinces of Canada as tobacco. Surely s. 121 of our Constitutional Act was never intended to have one meaning in its application to Dominion legislation and quite another meaning in its application to provincial legislation. And for my part I cannot see how the fact that in the *Gold Seal* case (1) the court was considering an enactment of the Parliament of Canada in relation to the importation of intoxicating liquor from one Province to another can justify us in completely discarding the construction so explicitly placed on s. 121 of the B.N.A. Act in that case, and now construing the words "admitted free," as used therein, in such a sweeping sense as that contended for in support of this appeal.

If we were being called upon to interpret the section for the first time, and if I may say so with all respect, I should be disposed to regard it in precisely the same light as Mignault, J., so clearly expounded it in the passage I have quoted, and to hold that it was inserted in the Imperial Act

> merely to secure that they (articles of the growth, produce or manufacture of any of the Provinces) should be admitted "free" (in each of the other Provinces), that is to say, without any tax or duty imposed *as a condition of their admission,*

and that

> what is prohibited is the levying of customs duties or *other charges of a like nature* in matters of interprovincial trade.

This treats the section as applicable to Dominion and provincial legislation alike, and in no way concerns the distributon of legislative powers as between the Dominion and the Provinces. It recognizes on the one hand the exclusive power of the Dominion to create and impose both customs and excise duties, and on the other the exclusive right of the Provinces to impose direct taxation within the Province for the purpose of raising revenue for provincial purposes, so long as the imposition of such duties

(1) (1921) 62 Can. S.C.R. 424, at 470.

or taxes by either authority does not constitute an obstacle to the admission of articles grown, produced or manufactured in any one or more of the Provinces into any other Province in the sense of imposing any condition to such *admission.* For the reasons already stated, I cannot see how the New Brunswick *Tobacco Tax Act* imposes any condition whatever to the importation or admission into that Province of tobacco, whether it be the produce of any other Province of Canada or of any foreign country.

The tax or charge contemplated by s. 5 is a tax or charge which, I repeat, is not payable until after the tobacco has been brought into the Province by the prospective consumer or received by him within the Province for consumption by himself or others at his expense. Indeed the tax is neither leviable nor in any manner recoverable until after the intending consumer has reported to the Provincial Secretary-Treasurer the fact that he has brought the tobacco into the Province or received delivery of it within the Province for that purpose, and the price paid for it to the outside vendor.

The objection that the statute's requirements regarding vendors' licenses are *ultra vires* of the Legislature as not falling within the purview of s. 92 (9) of the B.N.A. Act, is equally untenable for the reasons so convincingly stated by my brother Rinfret.

I agree with him that the appeal should be dismissed with costs against the appellant, but with no costs to the intervenant, the Attorney-General of the Province of Quebec.

KERWIN J.—Speaking generally, the tax in question is, in my opinion, a direct tax for the raising of a revenue for provincial purposes within the meaning of head 2 of section 92 of the *British North America Act.* The mere insertion, by the legislature, of the phrase in section 4 of the Act "a tax in respect of the consumption of such tobacco" is not conclusive but upon consideration it appears to me that the tax is imposed upon the very person it is intended should bear it and who, in the ordinary course, will not be able to pass it on. The "consumer" of tobacco purchasing it at a retail sale in the Province is ordered to pay the tax at the time of

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purchase, and the vendor is made the collecting agency for the Province. In my view the tax is not imposed on one of the parties to a sale of tobacco in respect of that transaction, and the fact that it is imposed before consumption (instead of after consumption as in the *Kingcome* case (1)) is not of importance if my conclusion as to the true nature and tendency of the tax is correct.

In two respects the statute is partially *ultra vires*. The attempt by that part of the definition of "consumer" or "consumer of tobacco" to impose the tax on an agent must, I think, fail as being indirect taxation. However, the principal is liable for the tax and the part relating to the agent is clearly severable.

Section 5, which is also severable, is *ultra vires* because it infringes the provisions of section 121 of the *British North America Act*. The statute before this Court in the *Gold Seal case* (2) was a Dominion enactment and there is nothing in any of the judgments inconsistent with this conclusion. It is true that the person who brings into New Brunswick tobacco for his own consumption reports the matter to the Minister but the fact that the entry into the Province may, or always will, precede the reporting and payment of the tax, makes it none the less an impost upon the production or manufacture of another province if the tobacco in question falls within that class. If, of course, the tobacco is brought from a foreign country, the tax directed to be paid by section 5 is a customs duty and beyond the powers of a provincial legislature. The main purpose of the statute is to impose direct taxation within the Province but it is not ancillary to that purpose to attempt to regulate external trade in a particular commodity or to impose a customs duty thereon. A provincial legislature is not authorized thus to seize a power that was expressly withheld from it.

With the two exceptions mentioned, the statute is *intra vires* and as the repugnant provisions are severable, the plaintiff appellant, which carries on the business of selling tobacco in New Brunswick, is unable to succeed in its action which by the judgment *a quo* stands dismissed. The appeal should be dismissed but there should be no costs.

(1) (1934) A.C. 45.
(1) (1921) 62 Can. S.C.R. 424, at 470.

HUDSON J.—I have had an opportunity of reading the judgment prepared by my brother Rinfret and agree with the conclusions at which he has arrived, except on one point, that is, the personal liability imposed on an agent. This, I think, oversteps the limits of Provincial legislative jurisdiction but, with this qualification, I would dismiss the appeal.

TASCHEREAU J.—The Supreme Court of New Brunswick, Appeal Division, held that the *Tobacco Tax Act* and regulations thereunder are constitutional. The Atlantic Smoke Shops Limited now appeals to this Court, and the Attorney-General for the province of Quebec (where a law substantially similar has been enacted) having been allowed to intervene, joins with the Attorney-General for New Brunswick, and submits that the Act is *intra vires* of the province.

The Act which was enacted on the 11th of May, 1940, came into force on the first day of October of the same year by Proclamation of the Lieutenant-Governor in Council.

The appellant has a retail store in the city of Saint John and carries on the business of selling tobacco, including cigars and cigarettes, and has refused to obtain the license required by the Act. It has also neglected to collect the tax imposed upon every purchaser.

The appellant submits that this tax is not a direct tax, nor a tax within the province; that the Act infringes upon the executive legislative jurisdiction of the Dominion to impose customs and excise duties, and that the license provided for is not within the category of licenses for which, under section 92, subsection 9, of the *British North America Act,* the provinces have legislative powers.

The principal sections of the Act which have to be considered are the following:—

Section 4, which is the taxing section, reads:—

> Every consumer of tobacco purchased at a retail sale in the province shall pay to His Majesty the King in the right of the province for the raising of a revenue, at the time of making his purchase, a tax in respect of the consumption of such tobacco, and such tax shall be computed at the rate of ten per centum of the retail price of the tobacco purchased.

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The word "consumer" is defined as follows:—

2. In this Act, unless the context otherwise requires

(*a*) "Consumer" or "Consumer of Tobacco" means any person who within the Province, purchases from a vendor tobacco at a retail sale in the Province for his own consumption or for the consumption of other persons at his expense or who, within the Province, purchases from a vendor tobacco at a retail sale in the Province on behalf of or as agent for a principal who desires to acquire such tobacco for consumption by such principal or other persons at the expense of such principal.

The Act further provides that the purchaser must purchase from a retail vendor who must obtain a license issued from the proper authorities; and a retail sale is defined as being a "sale to a consumer for purposes of consumption and not for sale." Every licensed retail vendor is constituted an agent of the Minister for the collection of the tax, and he must collect it from the purchaser upon whom the tax is imposed, at the time the purchase is made within the Province.

The provinces draw their powers to impose direct taxation from section 92, subsection 2 of the *Britsh North America Act,* and in order to determine whether this particular tax is direct or indirect, the rule many times adopted by this Court and by the Judicial Committee of the Privy Council has once more to be applied.

In *City of Charlottetown* v. *Foundation Maritime Limited* (1) Mr. Justice Rinfret, delivering the judgment of the Court, analyzed the various pronouncements on this matter and said:—

> At the time of the passing of the Act,—and before,—the classification of the then existing species of taxes into these two separate and distinct categories was familiar to statesmen. Certain taxes were then universally recognized as falling within one or the other category. The framers of the Act should not be taken to have intended to disturb "the established classification of the old and well known species of taxation." (*City of Halifax* v. *Fairbanks' Estate* (2)).
>
> Customs or excise duties were the classical type of indirect taxes. Taxes on property or income were commonly regarded as direct taxes.
>
> These taxes had come to be placed respectively in the category of direct or indirect taxes according to some tangible dividing line referable to and ascertainable by their general tendencies. (*Bank of Toronto* v. *Lambe* (3)).

As to the taxes outside these classifications

> the meaning of the words "direct taxation" as used in the Act, is to be gathered from the common understanding of these words which pre-

(1) [1932] S.C.R. 589, at 593. (2) [1928] A.C. 117, at 125.
(3) (1887) 12 A.C. 575, at 582.

vailed among the economists who had treated such subjects before the Act was passed.

It is now settled that the tax is direct, if it is demanded from the very person who it is intended or desired shall pay it, and it is indirect, if it is demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.

It is also the general tendency of the legislation that has to be considered, although in exceptional cases the person made liable by the law to pay the tax may succeed in passing it on, and indemnify himself upon a resale of the commodity. (*Attorney-General for British Columbia* v. *Canadian Pacific Railway* (1); *Rex.* v. *Caledonian Collieries Limited* (2)). When the ultimate incidence of the tax, in its ordinary and normal operation, is uncertain, then the tax is indirect, because the question whether the tax is direct or not cannot depend upon those special events which may vary at the time of payment. (*Attorney-General for Quebec* v. *Read* (3); *Attorney-General for British Columbia* v. *Kingcome* (4)).

In the case submitted to this Court, (I will deal later with the clause making the agent personally liable) the tax is clearly imposed upon the purchaser of tobacco, who is the last purchaser. It is a purchasing tax, not imposed on the transaction of the commodity, but upon every purchaser at the time of making his purchase at a retail sale in the Province. This purchaser is the person intended by the Legislature to pay the tax, and he does pay it at the time of the purchase. Under section 10 of the Act, he is made liable for the tax imposed until it has been collected. There is no expectation or intention that this purchaser from whom the tax is demanded shall pass it on and indemnify himself, and that someone else than the person primarily taxed will pay it eventually.

The appellant has cited the case of the *Attorney-General for British Columbia* v. *Canadian Pacific Railway* (1), where it was decided that a tax imposed upon every person purchasing fuel oil within the Province for the first time after its manufacture, was an indirect tax, and therefore *ultra vires*. The Judicial Committee came to the conclusion that fuel oil is a marketable commodity, and that

(1) [1927] A.C. 934, at 938.
(2) [1928] A.C. 358, at 361, 362.
(3) (1884) 10 A.C. 141, at 143.
(4) [1934] A.C. 45, at 52.

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those who purchase it for the first time after its manufacture, even for their own use, acquire the right to take it into the market and indemnify themselves at the expense of others. This, therefore, brought the tax within the principles which made it an indirect tax.

In the present case, it is the last purchaser who is taxed and it is, therefore, quite impossible that the tax can be passed on. In the case already cited of the *Attorney-General for British Columbia* v. *Kingcome* (1), the Judicial Committee upheld the validity of the second fuel oil tax enacted by the province of British Columbia. The Legislature imposed a tax upon every consumer of fuel oil according to the quantity consumed. It was held that the tax was direct taxation, because it was demanded from the very person who it is intended or desired should pay it. As the tax does not relate to any commercial dealing with the commodity, it does not fall within the category of customs and excise duties which are within the legislative powers of the Dominion.

In that case, Lord Thankerton expresses himself as follows:—

> It is clear that the Act (fuel act) purports to exact the tax from a person who has consumed fuel oil, the amount of the tax being computed broadly according to the amount consumed. The Act does not relate to any commercial transaction in the commodity between the taxpayer and someone else. Their Lordships are unable to find, on examination of the Act, any justification for the suggestion that the tax is truly imposed in respect of the transaction by which the taxpayer acquires the property in the fuel oil nor in respect of any contract or arrangements under which the oil is consumed, though it is of course possible that individual taxpayers may recoup themselves by such a contract or arrangement; but this cannot affect the nature of the tax. Accordingly, their Lordships are of opinion that the tax is direct taxation within the meaning of section 92, head 2, of the *British North America Act*.

I have no doubt that this tax is a direct one, and, therefore, within the powers of the Legislature of New Brunswick.

The next point raised is that the tax is not a tax within the Province. The argument is that the Legislature is attempting to tax a non-resident of the province of New Brunswick with respect to his consumption of tobacco outside the Province. The Act provides that the tax is levied only when the purchaser purchases in the Province. It is undoubted that it is within the powers of the Legislature

(1) [1934] A.C. 45.

to tax any person found in the Province, whether that person is therein domiciled or not, if taxed directly. *Bank of Toronto* v. *Lambe* (1); *Forbes* v. *Attorney-General for Manitoba* (2)).

The purchaser pays the tax at the time and place he purchases the commodity. Although this tax has been called a consumption tax, it is more a purchasing tax which is paid by the last purchaser who is deemed to be the consumer. As section 2 (*a*) of the Act says, "consumer" means any person who within the Province purchases * * * for his own consumption. As the purchase is made within the Province, it seems clear that the taxation is imposed within the Province, even if by exception the tobacco purchased is consumed in a different Province. It is only in exceptional cases resulting from the act of the purchaser that the tobacco may be consumed outside the Province.

The appellant has also raised the contention that this tax is *ultra vires* because it violates the disposition of section 121 of the B.N.A. Act, which says:—

> 121. All articles of the growth, produce, or manufacture of any one of the provinces shall, from and after the Union, be admitted free into each of the other provinces.

The argument of the appellant is that the Act purports to impose a tax upon articles produced or manufactured in another province of Canada when introduced into New Brunswick. In the submission of the appellant the objectionable clause of the Act is section 5, which reads as follows:—

> 5. Every person residing or ordinarily resident or carrying on business in New Brunswick, who brings into the Province or who receives delivery in the Province of tobacco for his own consumption or for the consumption of other persons at his expense or on behalf of or as agent for a principal who desires to acquire such tobacco for consumption by such principal or other persons at his expense shall immediately report the matter to the Minister and forward or produce to him the invoice, if any, in respect of such tobacco and any other information required by the Minister with respect to the tobacco and shall pay the same tax in respect of the consumption of such tobacco as would have been payable if the tobacco had been purchased at a retail sale in the Province at the same price.

This tax, in my opinion, is not a customs duty nor an excise tax. In *Attorney-General for British Columbia* v. *Kingcome* (3), Lord Thankerton said:—

(1) (1887) 12 A.C. 575, at 584. (2) [1937] A.C. 260.
(3) [1934] A.C. 45.

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Customs and Excise duties are in their essence, trading taxes and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted.

In the case of *Bank of Toronto* v. *Lambe* (1), Lord Hobhouse expressed himself in the following manner:—

It is not like a customs duty which enters into the price of the taxed commodity.

These customs duties impose a condition on the admission of the commodity before reaching the consumer, and as Mr. Justice Mignault says in *Gold Seal Limited* v. *Dominion Express Company* (2):—

I think that, like the enactment I have just quoted, the object of section 121 was not to decree that all articles of the growth, produce or manufacture of any of the provinces should be admitted into the others, but merely to secure that they should be admitted "free," that is to say without any tax or duty imposed *as a condition of their admission.* The essential word here is "free" and what is prohibited is the levying of customs duties or other charges of a like nature in matters of inter-provincial trade.

The tax contemplated by the Tobacco Act is imposed only once the importation is made, and such importation in the province of New Brunswick does not depend *upon the payment of the tax.* If we were to adopt the construction suggested by the appellant, no purchaser of a commodity coming from a different province could ever be taxed. When the commodity has entered into the Province, I see no valid reason why the purchaser could not be compelled to pay a tax to the provincial authorities.

It has also been submitted that the retail vendors are subject to the payment of a licence and that the licensing provisions found in the Act are not authorized by the *Britsh North America Act.* I fail to see how the appellant can succeed on this ground. The licenses provided for in section 92, subsection 9, of the *British North America Act* are not the only licenses in relation to which the various provinces may enact laws. They may provide for licenses not only for the purpose of raising a revenue, but they have also the right to require licenses as an incident to any one of their other powers.

The appellant has submitted also that the Tobacco Act purports to tax not only the principal but also the agent who, on behalf of his principal, purchases tobacco. The

(1) (1887) 12 A.C. 575, at 582. (2) (1921) 62 Can. S.C.R. 424, at 470.

appellant's argument is that the agent purchasing for his principal is by the law liable for the payment of the tax and that it is, therefore, possible that he may recoup himself in passing on the tax to his principal.

It will be remembered that under section 2, paragraph (*a*) of the Act, "consumer" means not only any person who within the Province, purchases tobacco for his own consumption, but also any other person who purchases tobacco in the Province as *agent* for his principal who desires to acquire such tobacco for consumption by such principal. This consumer, whether he is the principal or the agent, is personally liable for the payment of the tax, under section 10 which reads as follows:—

10. A consumer shall be and remain liable for the tax imposed by this Act until the same has been collected.

It is clear, therefore, that the agent who purchases tobacco for his principal is personally liable for the payment of the tax. To my mind, this disposition has the effect, when such a transaction is made, to make the tax an indirect tax.

In *Cotton* v. *The King* (1), the Judicial Committee after having construed the provisions of the *Quebec Succession Duties Act,* as entitling the collector of inland revenue to collect the duties on the estate from the person making the declaration (the notary) came to the conclusion that this tax was indirect. Lord Moulton said:—

How, then, would the Provincial Government obtain the payment of the succession duty? It could only be from someone who was not intended to bear the burden but to be recouped by someone else. Such an impost appears to their Lordships plainly to lie outside of the definition of direct taxation accepted by this Court in previous cases.

In *Burland* v. *The King* (2), the Judicial Committee discussed the *Cotton* case (1), thought that it could not be distinguished and reaffirmed the principle cited *supra.* Later, in 1924, in the reference by the Governor General in Council (3), the Supreme Court of Canada came to the conclusion that the *Grain Futures Taxation Act* of Manitoba purporting to impose a tax upon every person whether broker, agent or principal, entering into a contract for the sale of grain for future delivery, was *ultra vires*

(1) [1914] A.C. 176. (2) [1922] 1 A.C. 215.
(3) [1924] S.C.R. 317.

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of the legislature. At page 322, Sir Lyman Duff, the present Chief Justice of Canada, said:—

> The statute, therefore, in so far as it levies a tax upon principals in the transactions to which it applies, would, if the legislation were so limited, be in my opinion valid. I am unable, however, to perceive how, consistently with the decisions upon the subject, it is possible to sustain the tax upon brokers and agents as a legitimate exercise of the authority of the provinces in relation to direct taxation.

This case was submitted to the Privy Council, (*Attorney-General for Manitoba* and *Attorney-General for Canada* (1)) and the judgment of the Supreme Court was upheld. The same principles were applied in *The Provincial Treasurer of Alberta* v. *Kerr* (2). In that case, Lord Thankerton said:—

> Under the Alberta *Succession Duties Act*, the duties in question were imposed on the executors on their application for probate, and letters probate could not be issued without the consent of the Provincial Treasurer, whose duty was to secure payment of the duties or obtain security therefor by a statutory bond before giving such consent. There can be no doubt that normally the application for probate will be by executors, and the issue is whether the legislature intended or desired that an executor should pay the duties without any expectation that such executor should indemnify himself at the expense of some other person. In their Lordships' opinion, the determination of this issue depends on the answer to a simple test, which was applied in the cases of *Cotton* v. *Alleyn* (3), already referred to, namely, whether the executor is personally liable for duties. If the executor is so liable, then the tax is imposed on the executor, with the obvious intention that he should indemnify himself out of the beneficiaries' estate, and the taxation is indirect. If the executor is *not personally liable* for the duties, then the tax is truly imposed on the beneficiaries and the taxation is direct.

In the present case, the agent is made personally liable for the tax. It is imposed upon him but it was obviously the intention of the Legislature that he should indemnify himself at the expense of his principal. This makes the taxation indirect, and, therefore, *ultra vires*.

However, the invalidity of the section declaring the agent who buys on behalf of his principal personally liable for the tax, does not affect the rest of the statute which is severable, and which I find within the powers of the Legislature of New Brunswick (*Toronto Corporation* v. *York Corporation* (4)).

My conclusion is that the *Tobacco Tax Act* enacted by the province of New Brunswick is within the legislative

(1) [1925] A.C. 561.
(2) [1933] A.C. 710.
(3) [1922] 1 A.C. 215.
(4) [1938] A.C. 415.

powers of that Province, and that it is *intra vires*, except the sections making the agent who buys tobacco for his principal personally liable for the tax.

The appeal, should, therefore, be dismissed without costs to either party here and in the courts below.

Appeal dismissed, no costs.

Solicitors for the appellant: *Porter & Ritchie.*

Solicitor for the respondents: *Peter J. Hughes.*

Solicitor for the intervenant: *Rosario Genest.*

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CONSTITUTIONAL LAW—*Continued*

against a resident debtor in any case" unless the Board constituted by the Act and appointed by the Provincial Government issues a permit consenting thereto. In an action brought without a permit in the Supreme Court of Alberta against a resident debtor upon a promissory note, it was *held* that a defence pleading said Act could not prevail; that said s. 8 of the Act, in so far as it affects a right of action on a promissory note, is *ultra vires* the Provincial Legislature. (Judgment of the Appellate Division, Alta., [1940] 2 W.W.R. 437, affirming judgment of Ewing J., [1940] 1 W.W.R. 35, affirmed in the result). *Per* the Chief Justice and Kerwin J.: In so far as said legislation extends to actions upon bills of exchange and promissory notes, it is plainly repugnant to the enactments in ss. 74, 134, 135 and 136 of the *Bills of Exchange Act*, R.S.C., 1927, c. 16 (which, or substantially the same, enactments have been in the Act since 1890), which, read together, affirm the unqualified right of the holder of a note to sue upon it in his own name and to recover judgment from any party liable on it; and which enactments are necessarily incidental to the exercise of the powers conferred upon the Dominion Parliament by s. 91 (18) of the *B.N.A. Act*. On the passing of the *Bills of Exchange Act* the jurisdiction of a province, if it ever possessed any, to enact such legislation as s. 8 of said *Debt Adjustment Act* (in so far as it extended to actions upon bills and notes) was superseded because it could not be enforced without coming into conflict with the paramount law of Canada. It would not make any difference if said s. 8 were expressed in the form of limiting the jurisdiction of the courts of Alberta. In pith and substance such an enactment, if operative, imposes a condition upon suitors to whom it applies governing them in the exercise of their rights to enforce causes of action vested in them; and, if it contemplates such an action as the present one, it purports to qualify rights in respect of which the Parliament of Canada has legislative jurisdiction in virtue of s. 91 (18) of the *B.N.A. Act*, and has exercised that jurisdiction by affirming them unconditionally. (*Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1896] A.C. 348, at 359, 365, 366, and *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, [1894] A.C. 189, at 200-201, cited). *Per* Rinfret J.: The prohibition in said s. 8 of the Provincial Act goes to the right to sue—a substantive right; it is not a matter of mere procedure. Under said *Bills of Exchange Act* (ss. 74, 134, 135), the holder of a note has the right to sue thereon in his own name and to enforce payment against all parties

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liable. That right is enforcible by action in the provincial courts (*Board* v. *Board*, [1919] A.C. 956, at 962; also said provisions of the *Bills of Exchange Act* shew that Parliament intended the right to be enforcible by an action in court—the only method open to enforce payment and recover). With respect to matters coming within the enumerated heads of s. 91 of the *B.N.A. Act*, the Parliament of Canada may give jurisdiction to provincial courts and regulate proceedings in such courts to the fullest extent (*Valin* v. *Langlois*, 3 Can. S.C.R. 1, at 15, 22, 26, 53, 67, 76, 77, 89, and 5 App. Cas. 115, at 117-118; *Cushing* v. *Dupuy*, 5 App. Cas. 409, at 415). Said provisions of the *Bills of Exchange Act* relate directly to the matter of head 18 in s. 91 of the *B.N.A. Act;* and therefore defendants' contention, that the provincial legislation was not necessarily incidental to legislation with respect to bills and notes and therefore the Dominion legislation could not encroach on provincial powers to make laws in regard to matters under heads 13 and 14 of s. 92 of the *B.N.A. Act*, could not prevail (*Tennant* v. *Union Bank of Canada*, [1894] A.C. 31; *Cushing* v. *Dupuy*, 5 App. Cas. 409; *Proprietary Articles Trade Assn.* v. *Attorney-General for Canada*, [1931] A.C. 310, at 326-327). The right to sue or to enforce payment or to recover on a bill or note is of the very essence of bills of exchange; it is one of the essential characteristics of a bill or note; the matter falls within the strict limits of s. 91 (18) of the *B.N.A. Act;* it flows from the provisions establishing negotiability, which has become the primary quality of a bill or note and in which consist the true character and nature of these instruments; the provisions relating to the right to sue, to enforce payment and to recover before the courts are not incidental; they are the very pith and substance of the statute. The Dominion legislation is valid; the Alberta legislation, in so far as it applies against the institution of an action on a promissory note, is in direct conflict with it, is overridden by it, and is *ultra vires* on the ground that it attempts to take away from the Alberta courts a jurisdiction conferred on them by the Parliament of Canada with respect to a matter within the exclusive legislative authority of that Parliament; and to that extent it must be held inoperative (*John Deere Plow Company* v. *Wharton*, [1915] A.C. 330; *Board of Trustees of the Lethbridge Northern Irrigation District* v. *Independent Order of Foresters*, [1940] A.C. 513). Whatever jurisdiction there may have been in the province on the subject has been superseded by the Dominion legislation (*Attorney-General for Ontario* v. *Attorney-General for the Dominion et al.*,

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bility of the estate. Jane McE. died in March, 1940, and probate of her will was granted to the appellants, Robert J. McE. and Edith McE. who obtained registration of the land in their names as personal representatives. On June 19th, 1940, they transferred the land to themselves in their personal capacities, and, on the same day, they both joined in a transfer to Robert J. McE. who became the registered owner. The respondent, in September, 1940, launched before the Court of Appeal for Manitoba an application for *certiorari* in order to bring the proposal before that Court and have it quashed. The Court of Appeal ordered the issue of the writ and later on made an order declaring the proposal to be beyond the powers of the Board of Review and directing that it be quashed. *Held,* Davis J. dissenting, that the judgment of the Court of Appeal ([1941] 1 W.W.R. 129) should be affirmed. *Per* the Chief Justice: Upon the admitted facts of this case, the land in question, before the transfer of it to herself in October, 1936, was not the property of Jane McE. in the sense of the *Farmers' Creditors Arrangement Act.* Being beneficially entitled to the residue of her husband's estate, she was entitled to have the land, subject to the rights of the mortgagee, applied in payment of the debts of the estate; and as legal personal representative, it was her duty to see that this was done. As the estate was admittedly insolvent, she had no interest in the land which could lawfully be made available to satisfy her personal debts if she had any. Under such circumstances she could not properly transfer the land to herself. The purpose of such transfer was evidently prompted by the supposition that it might enable her to bring the land and the mortgage debt within reach of the machinery of the Act. With such facts before them, the Board of Review ought to have declined to act on the proposal made by John McE. on the ground that they were confronted by a manifest abuse of the statutory procedure; and, if the question had been raised by an application to the Court, it must inevitably have been held that by such devices the creditors of the estate could not be deprived of their rights.—Moreover, even assming that, the title to the farm being vested in Jane McE. in virtue of the certificate of title or of the transfer to her in October, 1936, it was her property in the sense of the *Farmers' Creditors Arrangement Act, 1934,* and that the mortgage debt could be deemed to be her debt for the purposes of the Act, the amendments of 1938 to that Act which, it was contended, brought her into privity of contract with the mortgagee, had no application, for the reason that section 19 of that Act, added

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thereto by statute of 1935, c. 20, provides that the "Act shall not, without the concurrence of the creditor, apply in the case of any debt incurred after May 1, 1935": the essential condition being that the property affected by the security shall have been the property of the debtor in the sense of the amending statute, consequently, the mortgage debt in this case never became (constructively) the debt of Jane McE. until long after that date.—A "debt" (if it be a mortgage debt) cannot be "incurred" in the sense of section 19 before the property or interest on which it is charged has become the "property" of the debtor within the contemplation of section 2 (*d*) of the statute. *Per* Rinfret, Crocket and Hudson JJ.—Under the circumstances of the case, Jane McE. was not entitled to file a proposal under *The Farmers' Creditors Arrangement Act,* for the reasons that she was not the owner of the land and that there was no privity of contract between her and the respondent company. She was in no way the "debtor" of the respondent within the requirements of the Act, even after the introduction of the amendment of 1938 to section 2 (*d*). The only debt appearing in the proposal formulated by the Board of Review was the respondent's mortgage account; that was not her debt, so much so that the respondent could not have sued her for it; it was not a "debt provable in bankruptcy" against her, or against her estate in bankruptcy: the sole object of the procedure being to obtain a reduction on the debt owing to the respondent by the estate. Therefore, under the circumstances of this case, the Board of Review had no jurisdiction to deal with the respondent's mortgage debt and more particularly to reduce the rate of interest on that mortgage; and the Board could not, consistently with the provisions of the Act, deal with Jane McE.'s request, or formulate a proposal, in complete disregard of the position and interest of the respondent.—Also, the provisions of section 2 (*d*) of the Act, as amended by c. 47 of 1938, defining the word "creditor" did not confer any greater jurisdiction upon the Board in the present case; the object of the amended definition has apparently enlarged the class of "creditors", but did not alter the status of the "debtor".—Moreover, section 19 of the Act, above referred to, finds application in this case: "the debt incurred," referred to in that section, is necessarily a debt personally incurred by an applicant and does not concern a debt which, though at present owing by the applicant farmer towards the creditor, had been incurred by a previous debtor (who may not have been a farmer) and at a date prior to the first day of May, 1935, as it is in the present case.—Therefore the proposals formulated by the Board of Review were

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that the respondent Community was a farmer. *Held,* that the respondent Community was not a farmer within the meaning of the *Farmers' Creditors Arrangement Act,* and, as such, entitled to a proposal for a composition of its liabilities under the provisions of that Act; and, also, that, under the circumstances of this case, the Supreme Court of British Columbia had jurisdiction to determine the questions raised by the appellant's action. *Barickman Hutterian Mutual Corporation* v. *Nault* ([1939] S.C.R. 223) disc. and dist. *Held,* also, *per* the Chief Justice and Davis and Hudson JJ., that, under the circumstances of this case, the Supreme Court of British Columbia had jurisdiction to entertain the appellant's action—It is not necessary, for the purpose of this appeal, to determine generally the jurisdiction of the County Court and of the Supreme Court, respectively, in relation to the statutory validity of a proposal filed by a debtor who is invoking the provisions of the statute.—In the present case, property of the respondent Community affected by the debentures was in the hands of a Receiver appointed by the Supreme Court. Whatever may be the effect of the general language of the enactment which purports to give to the County Court exclusive jurisdiction in bankruptcy, such general language cannot be read as giving to the County Court any control over the assets of the respondent Community, in the hands of the Receiver, which could be exercised without the consent of the Supreme Court; and it seems necessarily to follow that it would be within the jurisdiction of the Supreme Court to ascertain by an examination of the facts (if such a claim were made) whether or not the purported proceedings under the statute were competent proceedings,—whether or not, in other words, the County Court had acquired exclusive jurisdiction in relation to the debtors' assets by force of the statute. The Board of Review was about to consider a proposal to be formulated under s. 12 (4) (5) of the Act, and, in the case of a proposal being formulated and confirmed by the Board, questions might very well arise as to the position of the Receiver. S. 11, read literally and giving effect to it according to the full scope of its terms, without any qualification, would appear directly to affect the Receiver in any proceedings by him to realize property within the receivership (*e.g.,* in an action to collect a book debt charged by the debentures in suit). Only the very clearest language would justify the conclusion that Parliament intended in these circumstances to deprive the Supreme Court of the authority to decide for itself whether the filing of the Community's proposal had any statutory warrant. The words employed in the first paragraph of section 5 of the Act ought not to be read as excluding the jurisdiction of the Supreme Court to decide whether, in such circumstances as those in this case, its jurisdiction in respect of property in its possession, and in respect of proceedings in relation to that property pending before it, has been ousted. The trial judge had all the circumstances before him and, having regard to those circumstances, felt it his duty to pronounce upon the issue. The trial judge was right in exercising the jurisdiction he did exercise. He was not deciding upon any abstract question. It was important that the issue should be decided speedily, to avoid conflict of jurisdiction with resulting confusion and expense. As to the County Court orders (The recital shows that they were made on application for directions before the Community's proposal was filed—and *quaere* whether, until such filing, the Official Receiver has any status, or the Court any jurisdiction, on such an application): The farmer's right to file a proposal arises from provisions of the Act, not from any leave of the Court; the Act does not contemplate an application for such leave. The purpose of the procedure under Rule 42 is to enable the Official Receiver to obtain directions as to his own acts in the course of administration where the application of the Act, which is the foundation of the authority both of the judge and the Official Receiver, is assumed—it is not its purpose to empower the Court to make binding orders affecting the rights of third persons who are not parties to the proceeding. It does not follow that on an application for directions questions of right and jurisdiction may never be determined. The County Court has jurisdiction, speaking generally, to determine such questions in a summary way, and the hearing of an application for directions in a particular case may be a convenient and unobjectionable occasion for dealing with such questions, when proper care is taken to see that everybody concerned is fully represented and has full opportunity of bringing out the facts and presenting his case. The County Court orders in question should be treated as directions to receive and file proposals, and the statement therein that the Community is permitted to make application under, and is entitled to take advantage of, the provisions of the Act, must be regarded simply as introductory, expressing the judge's opinion *quantum valeat* with regard to matters upon which he had no authority to make a binding pronouncement. *Per* Rinfret J.—The principal powers of the Board of Review are enumerated in section 12 of the *Farmers' Creditors Arrangement Act* and its sub-

INCOME TAX—*Continued*

the Minister is unable to determine or obtain information required to ascertain the income within the Province of a corporation or joint stock company carrying on a trade or business within and without the Province." A regulation (applied in the present case) provided that the income liable to taxation "shall be taken to be such percentage of * * * the income as the sales within the Province bear to the total sales"; the sales being measured by the gross amount received from sales and other sources (certain kinds of receipts being excluded). Provision was made for a taxpayer objecting as to the application of such method to his business and for redetermining the taxable income by some other method of allocation and apportionment as the Commissioner might decide. On August 23, 1938, the Commissioner of Income Tax made assessments upon appellant in respect of its income for each of the years 1934, 1935, and 1936, applying the regulation above quoted. Appellant appealed unsuccessfully from the assessments, first to the Board of Revenue Commissioners and then to Anderson J. ([1939] 3 W.W.R. 129). It then appealed to the Court of Appeal for Saskatchewan, which held ([1940] 2 W.W.R. 49) that, on consideration of the relevant statutes, there was no right of appeal to it in respect of the assessment for 1934, and the appeal as to that assessment should be dismissed for want of jurisdiction; but that there was a right of appeal in respect of the assessments for 1935 and 1936; and that the assessments for 1935 and 1936 were defective in that they did not provide for allowance for deduction in respect of a reserve for bad debts, and should be set aside, and in making new assessments the question of such reserve should be reconsidered in the light of the reasons for judgment of the Court of Appeal; but that all other objections to the assessments failed. On appeal and cross-appeal to this Court: *Held* (*per* Rinfret, Crocket, Kerwin and Hudson JJ.): (1) There was a right of appeal to the Court of Appeal with respect to the assessments for 1935 and 1936, as held by the Court of Appeal; but there was also a right of appeal to the Court of Appeal with respect to the assessment for 1934. (Provisions of the following Saskatchewan Acts considered: *The Income Tax Act, 1932, c. 9,* and amending Act, 1934-35, c. 16; *An Act to amend The Treasury Department Act, 1934-35, c. 6; The Income Tax Act, 1936, c. 15;* and amending Acts, 1937, c. 8; 1938, c. 91 (s. 2); 1939, c. 9; *The Treasury Department Act, 1938, c. 8;* and amending Acts, 1940, c. 5, c. 6). (2) The application of the above quoted regulation was validly adopted in the method of assessment.

INCOME TAX—*Continued*

The regulation, and the authorizing statutory enactment, were *intra vires*. Their purpose was to reach by taxation only the income arising from the business in Saskatchewan, of non-resident companies which carry on business in Saskatchewan, and the purpose of their application in the present case was to reach by taxation only the income arising from appellant's business in Saskatchewan. And the adoption of such method was proper under the circumstances, as being the best available means to ascertain that income. (*Bank of Toronto* v. *Lambe,* 12 App. Cas. 575; *Attorney-General* v. *Till,* [1910] A.C. 50, at 72, cited). (3) The holding of the Court of Appeal that the assessments for 1935 and 1936 were defective as aforesaid and should be set aside, and the direction for reconsideration of the question of a reserve for bad debts, should be affirmed; but the same holding and direction should be applied in respect of the assessment for 1934. *Per* the Chief Justice and Davis and Taschereau JJ. (dissenting): The assessments were invalid because the regulation pursuant to which they purported to be made either did not apply to appellant or was beyond the powers of the Lieutenant-Governor in Council. The essence of appellant's profit making business is a series of operations as a whole (including manufacturing, etc.). Though that part of the proceeds of appellant's sales in Saskatchewan which is profit is received in Saskatchewan, yet it cannot be said that the whole of such profit "arises from" that part of its business which is carried on there within the contemplation of s. 21*a* (above quoted, of the Act of 1932—the same as s. 23 of the Act of 1936). The effect of the words "net profit or gain arising from the business of such person in Saskatchewan" in s. 21*a* is, for the purpose of s. 21*a*, to delete from the definition of "income" above quoted the words "or elsewhere." The policy of the Act, as shown by s. 21*a*, along with other provisions, is that the profits taxable under s. 21*a* as "arising from the business" of a non-resident "in Saskatchewan" are that part of the profits which is earned therein, and to remove from the incidence of income tax profits earned elsewhere, without regard to the place where those profits may have been received. (*Commissioners of Taxation* v. *Kirk,* [1900] A.C. 588, referred to as helpful in the elucidation of the Act now in question). In the present case the method of determination adopted, as put in the regulation, was to ascertain the ratio of the sales in Saskatchewan to the total sales and then apply that ratio to the income (profits). As determined by this method, the subject of taxation is a percentage of the sales in Saskatchewan, a percentage which is identical with the

MINES AND MINERALS—*Lapse and reinstatement of claims—Conditions of—Mineral claims staked and subsequently forfeited—Order of reinstatement by the Minister—Right of intervening applicant, who had restaked same claims, to mandamus to compel recording of his application by Mining Recorder—The Mineral Resources Act, 1931, c. 16, s. 10, 22 and Regulations 39, 54, 55, 66, 132.*]— Some mineral claims were, in 1937, staked and recorded and subsequently transferred into the name of Mun Syndicate, one of the appellants. By reason of the failure of the latter to comply with the conditions prescribed by the regulations under *The Mineral Resources Act* of Saskatchewan, these claims had become forfeited in the summer of 1938 and were thus open for restaking. Later, in the month of September, 1938, the prosecutor Studer, associated with two others, all of whom held miners' licenses, restaked the claims; and applications by them to have the claims recorded in their names, together with assignments thereof by his associates to him, were filed on October 12th, 1938, at the sub-recording office at Prince Albert and the necessary fee was paid. These applications reached the mining recorder at Regina on October 13th, 1938. The pertinent regulation provides that the date upon which the documents are "received in the office of the mining recorder shall govern, and shall be considered the date of the application." Meanwhile, the Mun Syndicate had become active and had secured from the Minister on October 11th, 1938, an order under section 22 of the Act and section 66 of the regulations, reviving their claims to the property. The order of reinstatement expressly stated that it was subject to section 22, which provides that the revesting of rights which have been forfeited or lost shall be subject to the rights intervening between the default and the order of the Minister. This order was then recorded, so that, when Studer's application arrived at the Mining Recorder's Office, the situation was that the Mun Syndicate again stood in the record as the holders of the claim in good standing, subject only to the conditions specified. The Mining Recorder, now the appellant Swain, rejected the applications of the prosecutor Studer on the ground already stated that the prior holders had been reinstated on October 11th, 1938. The prosecutor Studer then applied for a prerogative writ of *mandamus* to compel the appellant Swain, Mining Recorder, to record and enter the name of Studer as holder of the mineral claims in question, his expressed object being to obtain a record of his claims so that he would have the necessary status to maintain an action, against the reinstated claimants, to establish his rights. The trial judge granted the order applied for,

MINES AND MINERALS—*Continued* which judgment was affirmed by a majority of the Court of Appeal. *Held,* Davis and Kerwin JJ. dissenting, that the appeal should be allowed, the judgments of the courts below be set aside, and the writ of *mandamus* discharged, but, under the circumstances of the case, without costs to any party. *Per* Rinfret, Crocket and Hudson JJ.—The remedy sought on behalf of Studer was to compel the Recorder in his official quality to record his name as holder of the mineral claims, that is, to do a ministerial act, not to decide a dispute, much less to rule on the legality or propriety of an act of his Minister. The motion for *mandamus* was based on the assumption that Studer would not have an adequate remedy in an action commenced by writ, until he had been first duly recorded as a holder, which assumption has found acceptance in the courts below. But there is no reason in principle why a lack of entry of Studer's name should be a bar to an ordinary action to enforce any such rights as he is entitled to in the matter. Such rights were the very kind of rights which were intended to be preserved by section 22 of the *Mineral Resources Act,* and were preserved by the order of the Minister. *Per* Davis J. (dissenting)—The only remedy sought by the respondent Studer in this case was to have recorded in his name in the books of the Mining Recorder the restaking by him, or by those under whom he claimed, of the mining lands in question in this case, and Studer was entitled to such a remedy. These claims had become forfeited due to the absence of any record of the necessary assessment work required to keep the claims alive, subject to the provisions of section 22 of the statute. But the restaking or relocation was done by Studer after the default and before the order had been made under that section by the Minister. At least fifteen days were made available by the regulations for recording that staking and the fifteen days had not elapsed before the date of the Minister's order. Therefore, notwithstanding the Minister's order relieving against the forfeiture, the restaking of the claims in the interval entitle the licensee Studer to have a record of the staking made in the Recorder's Office. The order of the Minister was not only on its face but by the force of section 22 of the statute subject to that intervening right, while the refusal to record the staking was definitely put by the Mining Recorder upon the ground that "the former claims covering the same area had been reinstated." *Per* Kerwin J. (dissenting)—The respondent Studer, having staked claims that were at the time open, could not, under the circumstances, litigate his rights as against the members of the Mun Syndicate without first acquiring a record. Studer could not do

MOTOR VEHICLES—*Continued*

Dumont then launched *mandamus* proceedings directed against the Commissioner to compel him to return the said licenses. The trial judge dismissed the application; but, on appeal to the Court of Appeal, that judgment was reversed and *mandamus* was granted. After the judgment of the appellate court, the Commissioner of Police complied with the order and delivered up the licenses and number plates to the respondent Dumont. *Held,* affirming the judgment of the Court of Appeal (55 B.C.R. 298), that the facts of this case do not bring the appellant's action, suspending the respondent's licenses, within the authority of the Commissioners under the statute. The judgment against the respondent Dumont for costs in an action brought by himself in which no amount was recovered for damages, either in respect of personal injury or in respect of damage to property and in which no claim was made against Dumont for damages in excess of $100, does not bring the power of the Commissioner under section 84 (1) into operation. *Held,* also, that, the appeal on the question of the construction of the statute being entirely without merit and owing to the acquiescence of the Commissioner in the judgment of the appellate court, this appeal had no practical object; but it may be stated that there is no doubt that the Commissioner's authority is vested in him as the agent of the statute and that *mandamus* would lie to compel him to perform his statutory duty; but it is unnecessary for the court to decide whether in the circumstances of this case *mandamus* was the proper procedure. COMMISSIONER OF PROVINCIAL POLICE *v.* THE KING *ex. rel.* DUMONT **317**

3—*Highway Traffic Act, P.E.I., 1936, c. 2, ss. 84 (1) (a) (c), 8 (7)—Criminal Code (R.S.C., 1927, c. 36, as amended), s. 285 (4) (7)—Conviction under s. 285 (4), Cr. Code, of driving while intoxicated—Automatic suspension of driving license under s. 84 (1) (a) of said provincial Act—Refusal to grant license to convicted person during period fixed by said s. 84 (1) (a) — Appeal asserted under s. 8 (7) to County Court Judge from such refusal—Whether right to so appeal —Whether right of appeal from County Court Judge to Supreme Court, P.E.I.—Constitutional validity of s. 285 (7), Cr. Code—Constitutional validity of s. 84 (1) (a) (c) of said provincial Act, in view of s. 285 (7) Cr. Code.*]—By s. 84 (1) of *The Highway Traffic Act, 1936,* (c. 2), of Prince Edward Island, the license (to operate a motor vehicle) of a person who is convicted of driving a motor vehicle while under the influence of intoxicating liquor or drugs, "shall forthwith upon, and automatically with such

MOTOR VEHICLES—*Continued*

conviction, be suspended" for (*a*) 12 months for the first offence; and (s. 84 (1) (*c*)) "the Provincial Secretary shall not issue a license to any person during the period for which his license has been cancelled or suspended under this section." By s. 285 (7) of the *Criminal Code* of Canada (as amended by 3 Geo. VI, c. 30, s. (6), where a person is convicted, under s. 285 (4), of driving a motor vehicle while intoxicated, the court of justice may, in addition to any other punishment provided, prohibit him from driving a motor vehicle anywhere in Canada during any period not exceeding three years. The respondent, who had a license to operate a motor vehicle, good until February 28, 1940, was, on November 20, 1939, convicted under said s. 285 (4) of the *Cr. Code.* On May 28, 1940, he applied for an operator's license. His application was refused pursuant to said s. 84 (1) (*c*) of the *Highway Traffic Act,* as the period of automatic cancellation, under s. 84 (1) (*a*) upon said conviction, had not expired. From such refusal, respondent, asserting a right of appeal under s. 8 (7) of said *Highway Traffic Act,* appealed to a County Court Judge, who allowed the appeal and ordered issuance of a license. The Provincial Secretary appealed to the Supreme Court of Prince Edward Island *en banc,* which (15 M.P.R. 271) dismissed the appeal, holding that the County Court Judge had jurisdiction to make the order and that there was no appeal therefrom, and holding further that, by reason of the enactment of said s. 285 (7) of the *Cr. Code,* s. 84 (1) of said provincial Act had become *ultra vires.* The Provincial Secretary appealed (leave to do so being granted by said Supreme Court *en banc*) to this Court. *Held:* The appeal should be allowed and the order of the County Court Judge set aside. There was no right of appeal to the County Court Judge from the refusal of the Provincial Secretary to grant a license to respondent. Said s. 8 (7) of the *Highway Traffic Act* did not apply. The right of appeal given by s. 8 (7) is to a person aggrieved by refusal to grant a license or by revocation of a license under s. 8. The refusal in question was not a refusal under s. 8; nor was there revocation of license under s. 8. The law itself, s. 84 (1) of the Act, said that respondent, in the premises, was not entitled to a license. The Provincial Secretary was merely carrying out the law, and had no discretion. There was no provision authorizing an appeal to the County Court Judge under such circumstances; and his order was made without jurisdiction. The Supreme Court *en banc* should have so held, and set aside the order. It was not legally

MUNICIPAL CORPORATIONS—*Con.*

Act, section 92, paras. 8 and 15.]—The appellant was elected mayor of the town of Grand'Mère, in the province of Quebec, on July 2, 1935. At the time of his election and up to the commencement of this action, the appellant and the municipal corporation were bound by a contract entered between them on May 14, 1928, whereby, following a conveyance (effected on the same date by the appellant to the municipal corporation) of certain lots of land to be used as public streets, the adjoining lots, so long as they had not been sold by the appellant to third parties, were not to be "assessed on the valuation roll of the corporation at more than thirty-five dollars each". It was further agreed that the same conditions would apply to the unimproved lots which the appellant, within two years following the contract, would repossess for non-payment by the buyers of those lots. The respondent, in his capacity of elector, ratepayer and property-owner, instituted proceedings, under section 3 of the *Municipal Bribery and Corruption Act,* R.S.Q., 1925, c. 107, where conclusions were to the effect that the appellant "be declared disqualified for five years from the date of the judgment from holding any office in or under the council of the town of Grand'Mère." This action was dismissed by the Superior Court, which held that the appellant's relations with the municipality under the above contract were rather those of a creditor of the municipality for prestations for which the latter had made itself responsible and that they did not come within the provisions of the above-mentioned Act, the effect of which was to forbid any member of the municipal council to make a contract during his tenure of office, but not to prohibit his election to the council after such a contract had been in force for some time and the obligations resulting therefrom towards the council had been fully performed; in other words, it was held that the appellant had fully performed his obligations to the municipality prior to his election and that, therefore, the prohibition provided by section 3 of the Act did not disqualify him. This judgment dismissing the respondent's action was reversed by the appellate court, which set aside the construction given to the Act by the trial judge as well as all the other grounds invoked by the appellant. *Held,* affirming the judgment of the appellate court (Q.R. 66 K.B. 133), that the appellant has violated the provisions of section 3 of the above-mentioned Act. According to the evidence, he clearly had an interest in a contract with the municipal council to which he had been elected and of which he continued to be a member until the action was commenced; that contract existed throughout his tenure of office and during that time he derived appreciable benefits therefrom, and he cannot reasonably claim that he did not do so knowingly. As to the ground raised by the appellant, that the offence raised against him, having already been provided for by the provisions of section 161 of the Criminal Code, the latter overrides the provincial Act and makes it inoperative: *Held* that a mere comparison of the above-mentioned sections of both Acts shows that the two provisions do not relate to the same thing: the provincial Act prohibits the existence of any contract or employment relationship between a municipal council and a member thereof, while the Criminal Code prohibits any offers, proposals, etc., intended *inter alia* to influence the vote of such a member. The two sections are far from identical and, therefore, the provincial field is not in the present instance occupied by the Dominion field. Moreover, the provincial Act comes within the provisions of paragraphs 8 and 15 of section 92 of the B.N.A. Act and therefore its constitutionality cannot be successfully attacked. As to the other ground raised by the appellant that the municipal council, at the time of the occurrences forming the basis of the action, was governed by the *Cities and Towns' Act* (R.S.Q., 1925, c. 102), that section 123 of that Act covered the same offence as the one mentioned in section 3 of the *Municipal Bribery and Corruption Act* and that therefore the provision of section 123 of the first Act has the effect of setting aside the application of section 3 of the last Act. *Held* that the two Acts do not cover the same case and the provision of one Act does not exclude the provision of the other Act; section 123 of the first Act simply prohibits the nominating or electing to the office of mayor or alderman or the appointing to or holding of any other municipal office, while section 3 of the second Act makes of either one of these Acts an offence entailing not only disqualification from immediately holding the office to which the municipal elector was elected, but in addition disqualification "from holding any public office in the council or under the council thereof, for five years". The two provisions, far from conflicting, are complementary to each other. As to the other ground raised by the appellant, that, the contract he entered into with the municipality being a contract of sale and in view of the fact that section 227 (11) of the Municipal Code, which also contains a provision prohibiting the holding of municipal office by a member of the council who has a contract with the corporation, provides that the word "contract" does not include "the sale * * *