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LAW REPORTS

Supreme Court of Canada

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1942

68663—1

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 Hon. Louis St-Laurent, K.C.

68663—1½

ERRATA

in Volume 1942

Page 80, at the foot, "for the appellant" should be "for motion"; and "for the respondent" should be "*contra*".

Page 87, f.n. (1) should be f.n. (2), and f.n. (2) should be f.n. (1).

Page 248, at the 41st line, after the word "Street", "(1)" should be added; and f.n. (1) should be "[1940] S.C.R. 40".

Page 249, f.n. (1) should be "(1940) 70 K.B. 353".

Page 312, at f.n. (6), "(1887)" should be "(1877)".

Page 319, at f.n. (1), "206" should be "306".

Page 379, at f.n. (7), "Western Power Co." should be "Western Canada Power Co.".

Page 408, at f.n. (2), "[1901] 3 D.L.R. 504" should be "[1941] 3 D.L.R. 504".

Page 420, f.n. (1) should be "[1922] 2 K.B. 742, at 752 and 754".

Page 428, f.n. (3) should be "(1866) L.R. 1 H.L. 93".

Page 434, at lines 29 and 30, "distinguished" should be "distinguishable".

Page 435, at the second line of the head-note, "as" should be "is".

Page 470, f.n. should be "[1941] S.C.R. 278".

Page 476, at the 3rd line of the second paragraph of the head-note, "was one of agency, with" should be "was not one of agency with".

Page 499, at the 4th line, "seaworthiness" should be "unseaworthiness".

Page 503, at the 9th line, "Lord Isher" should be "Lord Esher".

Page 504, at the 3rd line, "must" should be "cannot".

Page 504, at line 15, "(3)" should be "(3))".

Page 511, lines 6, 7, 8, should have been in small type, as they form part of the extract from Scrutton.

Page 518, f.n. "[1941] 3 W.W.R. 1" should be "[1942] 3 W.W.R. 1".

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.

Atlantic Smoke Shops Limited v. *Conlon and others.* [1941] S.C.R. 670. Leave to appeal granted, 18th May, 1942.

Coca-Cola Company v. *Pepsi-Cola Company.* [1940] S.C.R. 17. Appeal and cross-appeal dismissed, 19th March, 1942.

Ganong v. *Belyea.* [1941] S.C.R. 125. Appeal dismissed with costs.

International Harvester Company v. *Provincial Tax Commission et al.* [1941] S.C.R. 325. Special leave to appeal granted, 19th March, 1942.

Lockhart v. *Canadian Pacific Ry. Co.* [1941] S.C.R. 278. Appeal dismissed with costs, 5th August, 1942.

Minister of National Revenue v. *Dominion Natural Gas Company.* [1941] S.C.R. 19. Special leave to appeal refused, 19th March, 1942.

Montreal Light, Heat and Power Consolidated v. *Minister of National Revenue.* [1942] S.C.R. 89. Special leave to appeal granted, 27th July, 1942.

Price v. *Dominion of Canada General Insurance Company.* [1941] S.C.R. 509. Special leave to appeal refused, 19th March, 1942.

Reference as to Validity of the Debt Adjustment Act, Alberta. [1942] S.C.R. 31. Special leave to appeal granted, 18th May, 1942. Appeal dismissed, 2nd Feb., 1943.

Ripstein v. *Trower and Sons Limited.* [1942] S.C.R. 107. Leave to appeal granted, 18th May, 1942.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

J. O. HÉROUX AND MONTCALM ST-GERMAIN (DEFENDANTS) ..... } APPELLANTS;

AND

LA BANQUE ROYALE DU CANADA (PLAINTIFF) ..... } RESPONDENT.

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* Oct. 29, 30.
* Nov. 8.

O. E. ST-GERMAIN AND MONTCALM ST-GERMAIN (DEFENDANTS) ..... } APPELLANTS;

AND

ALLAN S. NICHOLSON AND ALBERT E. CATES (PLAINTIFFS) ..... } RESPONDENTS.

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

Practice and procedure — Judgment — Execution — Moveable property — Bailiff's sale—Seizure super non possidente—Validity of seizure and sale—Whether adjudicataire acquires title—Right of owner of property to revendicate it against adjudicataire—Articles 665 and 668 C.C.P.—Article 2268 C.C.

Judicial seizure and sale of moveable property not in the possession of a judgment debtor will not deprive the true owner of his title and will not confer on the *adjudicataire* a title which cannot be defeated and which he may oppose to the revendication of the true owner: neither in the doctrine nor in the jurisprudence can be found any expression of opinion to the contrary.

In order to justify the application of articles 665 and 668 of the Code of Civil Procedure and of article 2268 of the Civil Code, there must have been a lawful seizure and sale of moveable property, in which case only can it be said that "the thing has been sold under the authority of law."

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

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ST-GERMAIN v. NICHOLSON.

When, under a writ of execution of a judgment, moveable property has been sold at a bailiff's sale, the owner of such property has the right to revendicate it against the *adjudicataire,* when the seizure has taken place *super non possidente:* there having been no valid seizure under the writ of execution, the *adjudicataire* has acquired no title to the property.

No opinion is expressed as to whether moveable property seized in the possession of the judgment debtor, although he be not the owner, may be revendicated by the true owner, after the judicial sale has taken place, against a purchaser who has paid the price (always saving the case of fraud or collusion).

Brook v. *Booker* (41 Can. S.C.R. 331; Q.R. 17 K.B. 193) foll.

APPEALS from two judgments of the Court of King's Bench, appeal side, province of Quebec, reversing the judgments of the Superior Court, Boulanger J. and maintaining the respondents' seizures in revendication of moveable property sold at a bailiff's sale.

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

Gustave Monette K.C., L. Dussault K.C. and *D. Goulet* for the appellants.

Louis Morin K.C. for the respondents.

The judgment of the Court was delivered by

RINFRET J.—These two cases were heard together, on the same evidence, both in the Superior Court and in the Court of King's Bench (appeal side). They were submitted to this Court on the same argument; and the reasons for judgment apply to both.

The question is whether the owner of moveable property may revendicate it against the *adjudicataire* at a bailiff's sale, when the seizure has taken place *super non domino et non possidente.* In the Superior Court, it was held that the seizure in revendication was not open to the owner; but, in the Court of King's Bench, the majority of the judges held otherwise and maintained the seizure in revendication.

The plaintiffs-respondents, Nicholson and Cates, lumber merchants of Toronto, alleged that they were owners of lumber at Kanasuta, in Northern Quebec, and that their

lumber was sold in execution of a judgment obtained by the Quebec Workmen's Compensation Commission against James Charron and H. M. Charron, who had neither the property nor the possession of the lumber; that the sale was fraudulent; that all its proceedings were irregular, illegal and entirely null and void; and they asked that the sale be annulled and set aside; that they be declared the owners of the lumber and that the seizure in revendication thereof, which accompanied the action, be maintained.

Under the same circumstances and for the same reasons. The Royal Bank of Canada claimed possession against the *adjudicataires* of certain machinery seized in the mill at Kanasuta in execution of the same judgment obtained by the Quebec Workmen's Compensation Commission.

The writ of execution *de bonis*, on the authority of which the moveable property in question was seized, issued from the Superior Court, in the city of Quebec, in favour of the Quebec Workmen's Compensation Commission against James Charron and H. M. Charron, who are described in the writ as

> formerly doing business under the name and style of North Western Lumber Company and having a place of business at Kanasuta, Temiskaming, logging and shipping operations, Kanasuta, Temiskaming, P.Q.

The command contained in the writ was

> de prélever des biens mobiliers des dits employeurs (i.e., James Charron and H. M. Charron) dans votre district la somme de $527.35 courant, étant le montant de la dite dette, pénalités et des dépens pour lesquels la requérante est autorisée à exécuter comme susdit.

In 1937, the Charrons organized a limited company under the name of The North Western Timber Company Limited. This new organization, on the 26th of April, 1938, leased a mill from the respondent, The Royal Bank of Canada. The machinery now revendicated by the bank was included in that lease.

In 1939, the new company entered into a contract to sell to the respondents, Nicholson and Cates, 500,000 feet of sawn wood. The lumber was sawn and put in piles. The respondents Nicholson & Cates fulfilled all their obligations to the letter; and, in April, 1939, the operations under the contract were completed and the lumber was ready for shipment.

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The Court of King's Bench found that it was clearly established that the bank was the owner of the mill equipment; and the lease, already referred to, was made by the bank to the North Western Timber Company Limited.

The Court of King's Bench also found it to have been clearly established that the lumber seized in this case was cut by the North Western Timber Company, from logs belonging to it, for the respondents Nicholson and Cates, under a contract dating back to the 13th January, 1939, and that it had been delivered to the latter and paid for by them to the North Western Timber Company Limited prior to the bailiff's sale, which took place on the 25th of April, 1939.

As a matter of fact, it appears to us that the Court could have gone further and found, on the evidence, that the delivery had taken place prior to the seizure itself made by the plaintiff.

There can be no doubt that, at the time of the seizure, both respondents were respectively the owners of the moveable property which they revendicate and that such moveable property was in the legal possession of the respondents, while in the physical possession of the North Western Timber Company Limited.

The trial revealed that, after 1937, the Charrons, or their partnership, known under the name and style of the North Western Lumber Company, had not done any business at that place and, moreover, that they never had a mill in the province of Quebec.

The writ of execution itself, as already pointed out, described them as

> formerly doing business together under the name and style of North Western Lumber Company.

In 1939, and more particularly at the time of the seizure, the North Western Timber Company Limited was alone doing business. It had rented the mill from the bank, and it was that company which had entered into the contract with the respondents Nicholson and Cates, the Charron partnership firm having no interest therein.

It would appear that these facts were well known to the local people, and, in particular to the bailiff, M. St-Germain, and to the appellant Héroux, who was the postmaster in the locality.

At the bailiff's sale, the mill equipment belonging to the bank, the value of which approximately was $5,000, was adjudicated to the respondent Héroux for the insignificant sum of $70; and the lumber belonging to Nicholson and Cates, the value of which was approximately $9,000, was adjudicated to the appellant St.-Germain (brother of the bailiff) for the likewise insignificant sum of $200.

The judgment of the Superior Court, after having found that the essential formalities necessary for the validity of the seizure and sale appeared to have been complied with, and that there was no evidence of any collusion between the *adjudicataires* and the bailiff, and that there was equally no evidence of fraud, bad faith, or irregular dealings on their part, held that, the *adjudicataires* having paid the price in the regular way and having thereby become full and complete owners of the moveable property adjudged to them at the judicial sale, and the proceeds of the sale having been regularly remitted by the bailiff to the parties entitled to them, the *adjudicataires* were protected by article 668 of the Code of Civil Procedure by force of which

> Without prejudice to the recourse of the party aggrieved against the seizing creditor and those acting on his behalf, no demand to annul or rescind a sale of moveable property under execution can be received against a purchaser who has paid the price, saving the case of fraud or collusion.

The Superior Court admitted that the judicial sale could have been set aside if it had been established that no valid and regular seizure and sale had taken place; but it found that these conditions had not been established in the present case.

The majority of the Court of King's Bench, on appeal, accepted the proposition of law that

> the provisions of article 668, C.P., are predicated upon the assumption that the seizure itself was valid;

but it held that, in the premises, the seizure was absolutely null, because

> in virtue of article 613 C.C.P. a creditor may seize in execution the moveable property of his debtor in such debtor's possession and, therefore, the mandate of a bailiff in charge of a writ of execution does not extend to the seizure of any moveables of which the debtor is neither the owner nor in possession.

The Court further stated that the jurisprudence of the province of Quebec has repeatedly confirmed the rule that

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Rinfret J.

the seizure and the sale of property made *super non domino et non possidente* are absolutely null; and it referred to its own decision in *Brook* v. *Booker* (1).

It may be well to note at the outset that this is a case of the judicial seizure and sale of moveable property and that anything said in connection therewith may not be taken as necessarily applying to a judicial seizure and sale of immoveable property.

Article 613 C.C.P. on which the judgment appealed from is based reads as follows:

> 613. A creditor may seize in execution the moveable or the immoveable property of his debtor, in such debtor's possession, as well as any corporeal moveables in the possession of the creditors or of third parties who consent thereto.

For the purpose of this case, it is sufficient to note that, under that article of the Code, the creditor may seize in execution the moveable property of his debtor which is "in such debtor's possession." The remainder of the article may be disregarded here.

Thus the moveable property which may be seized in execution by a creditor must be the property of his debtor, and it must be in his debtor's possession. Such is the requirement of the Code; and the writ of seizure issued by the court in favour of the Quebec Workmen's Compensation Commission against the Charrons specifically orders "de prélever des biens mobiliers des dits employeurs" (that is to say: of the Charrons) the charges and the costs mentioned in the writ.

However, it is not to be denied, notwithstanding the clear wording of article 613 C.C.P., that it must be read in conjunction with other articles of the same Code and also with the articles of the Civil Code which may be found to have a bearing upon the subject. Of course, counsel for the appellants relied on this obvious argument and pointed to article 668 C.C.P., above reproduced, and also to article 665 C.C.P.:

> 665. The adjudication of moveable property under execution transfers by law the ownership of the things thus adjudged.

and then to article 2268 C.C. reading in part as follows:

> If the thing has been sold under the authority of law, it cannot, in any case, be revendicated.

(1) (1907) Q.R. 17 K.B. 193.

It is contended that, by force of these several articles, the moveable things, though belonging to the respondents, may no longer be revendicated, because they were purchased by the appellants at a sale made "under the authority of law" and that

> no demand to annul or rescind a sale of moveable property under execution can be received against a purchaser who has paid the price, saving the case of fraud or collusion;

and they point to the fact that no fraud or collusion has here been found.

The respondents, however, argue that, in order to allow articles 665 and 668 of the Code of Civil Procedure and article 2268 of the Civil Code to have their full play, there must have been a lawful seizure and judicial sale of moveable property, and that such is the only proper meaning to be attributed to these articles. That interpretation is clearly in accordance with ordinary principles of construction.

Indeed, in *Brook* v. *Booker* (1), as late as 1907, a sale by a bailiff pretending to act under a writ of execution of moveable things of which no lawful seizure had been made was held not to be "a sale of moveable property under execution," within the meaning of art. 668 C.C.P.; and an action to annul or rescind it was held, therefore, to lie against the *adjudicataire* who had paid the price. That judgment was confirmed in this Court (2) and Sir Charles Fitzpatrick, the then Chief Justice, delivering the judgment (with which all the other judges concurred), referred to the several articles of the Code above mentioned and said:

> I appreciate the importance of giving effect to the maxim "En fait de meubles, possession vaut titre" (article 2268 C.C.) and of maintaining the validity of a judicial sale; and I freely concede that irregularities of procedure should not invalidate the title of a purchaser in good faith of moveables at a judicial sale (art. 668 C.C.P.). But there is another principle of at least equal importance which is a necessary part of the judicial system of every British country, to this effect, that no man shall be deprived of his property except by consequence of the law of the land. The general principle of law is (art. 1487 C.C.) that the sale of a thing which does not belong to the seller is null. By way of exception to this general rule arts. 1490 and 2268 C.C. provide, in effect, that corporeal moveables sold under authority of law cannot be reclaimed. The commentators on the articles in the Code Napoleon, which correspond with the articles of the Quebec Civil Code—there being no article in the

(1) (1907) Q.R. 17 K.B. 193. (2) (1908) 41 Can. S.C.R. 331.

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French Code which corresponds with art. 668 C.C.P.—say that this exception to the general rule is based upon the maxim *en fait de meubles, possession vaut titre.*

And the learned Chief Justice referred to Planiol, vol. I, nos 1119 and 1124; and, pointing to the fact that, in the *Brook* case (1), there was no legal seizure, he added:

Consequently no "sale under execution" (art. 668 C.C.P.) or "under authority of law" (arts. 1490 and 2268 C.C.) ever took place.

This Court held, accordingly, that there having been no valid seizure under the writ of execution, the *adjudicataire* had acquired no title to the property and the sale to him should be rescinded.

Brook v. *Booker* (1) is, therefore, an authority binding on this Court to the effect that, in order to justify the application of arts. 665 and 668 of the Code of Civil Procedure and of art. 2268 of the Civil Code, there must have been a lawful seizure and sale, in which case only can it be said that " the thing has been sold under the authority of law."

In our view, this point does not require to be further elaborated. Interpreting the law in the light of *Brook* v. *Booker* (1) and of the jurisprudence in the province of Quebec, it must be held that the *adjudicataire* cannot hold moveable property, even if acquired through execution by a bailiff, if such moveable property was seized *super non possidente.*

It may be that art. 668 C.C.P. goes the length of declaring that moveable property seized in the possession of the judgment debtor, although he be not the owner, may not be revendicated by the true owner, after the judicial sale has taken place, against a purchaser who has paid the price (always saving the case of fraud or collusion). Such a consequence may result from the fact that the judgment debtor was found in possession of the moveable property at the time of the seizure and that, by force of art. 2268 C.C., *"en fait de meubles possession vaut titre";* that is to say, in the wording of the article:

Actual possession of a corporeal moveable, by a person as proprietor, creates a presumption of lawful title.

This may be left for decision when a case of such a nature is before the Court.

(1) (1908) 41 Can. S.C.R. 331.

But we can find nowhere, either in the doctrine or the jurisprudence, that judicial seizure and sale of moveable property not in the possession of a judgment debtor will deprive the true owner of his title and will confer on the *adjudicataire* a title which cannot be defeated and which he may oppose to the revendication of the true owner.

In this case, the true owners, The Royal Bank of Canada (of the machinery) and Nicholson and Cates (of the lumber seized and sold), were entitled to revendicate their property which was not found in the possession of the Charrons, of whom the bailiff was warned by the writ of execution itself that they *formerly* were doing business in partnership under the name of North Western Lumber Company. There was no lawful execution and adjudication of that moveable property within the meaning of arts. 665 and 668 C.C.P., because the property was not seized in the judgment debtor's possession; but, on the contrary, it was in the physical possession of the North Western Timber Company Limited and, in fact, in the legal possession of the respondents themselves. There was no sale "under the authority of law" such as to give effect to art. 668 C.C.P. and to art. 2268 C.C., and the appellant *adjudicataires* cannot, for those reasons, prevent the revendication of the true owners, the respondents.

We do not find it necessary to discuss any of the other points of irregularity, for the fact that the seizure was executed *super non possidente* is sufficient to declare the judicial sale, in the premises, absolutely null and void, in accordance with the pronouncement of the judgment *a quo*.

The appeal in each case should, therefore, be dismissed with costs.

Appeals dismissed with costs.

Solicitors for the appellants: *Donat Goulet* and *Léon Dussault.*

Solicitors for the respondents: *Morin & Morin.*

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* Nov. 4, 5, 6, 7, 10, 11.
* Dec. 8.

HIS MAJESTY THE KING (DEFENDANT) ..... APPELLANT;

AND

PARADIS & FARLEY INC. (SUPPLIANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Contract—Construction of wharf—Furnishing and driving steel piles into soil—Work completed—Petition of right—Claim by contractor for damages and additional compensation—Soil alleged to be of a different nature than indicated in plans and specifications—Unforeseen difficulties—Quantum meruit—Implied contract—Contract to be considered as law of parties—Statutory law—Exclusive jurisdiction of the Exchequer Court of Canada in matter of claims arising out of contract entered by the Crown—Additional compensation not allowed under section 48 of the Exchequer Court Act.

In 1936, the Minister of Public Works, acting on behalf of His Majesty the King in right of the Dominion of Canada, asked for tenders for the construction of a wharf at Rimouski, in the province of Quebec. Plans and specifications, prepared by the engineers of the Department of Public Works, were furnished to the tenderers; and a specific clause therein provided that the contractor would "be required to sign a contract similar to the form exhibited at the same time as the plans and specifications." The respondent's tender for $365,750.18, being the lowest, was accepted by Order in Council passed on the 10th of February, 1937; and, on the 23rd day following, a contract was entered between the Crown and the respondent embodying the terms and conditions under which the works would be performed. The major item of the contract was the furnishing and driving into the soil of a number of steel piles of interlocking type. The respondent performed the entire work. In May, 1938, the respondent claimed by petition of right from the appellant a further sum of $160,000 for damages and additional compensation. The claim was based on the ground that the unit price tendered by the respondent would have been sufficient to cover the work, leaving a reasonable profit, if the soil into which the piles had to be driven had been as described in the plans and specifications, which were declared to be part of the contract; but the respondent alleged that it encountered a certain material called "hard pan" and many large boulders therein embedded, thus necessitating extra work and putting the respondent to very large additional expenses. The respondent's claim was, as alleged, for compensation for work not foreseen in the agreement and performed "hors du contrat," under an implied contract, i.e., for works accepted by the Crown for which no compensation has been paid, on a "quantum meruit" basis. The Exchequer Court of Canada maintained the respondent's petition of right, holding that the latter was entitled to a sum of $119,597.22; but deducted one-third of that amount owing to loss of time, delay and incompetence

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

attributable to the respondent. Both parties appealed to this Court, the Crown to have the claim dismissed and the respondent to have the amount awarded in the Court below increased.

Held, reversing the judgment of the Exchequer Court of Canada, that, in view of the terms of the contract, which is the law of the parties and by which this Court is bound, the respondent's petition of right should be dismissed. The respondent tendered to furnish and drive the piles in a soil the nature of which it agreed to investigate, and which the appellant did not guarantee, but merely indicated with some reserves as being of a certain kind or nature. The works to be performed by the respondent were fully covered by the contract and the obligation of the respondent was not to drive piles in a *specified* soil, but in a *specified place*. The risk was upon the respondent, and having assumed it, it must necessarily bear all the consequences, financial and others, if it misjudged the works to be performed and miscalculated the cost of the enterprise. Expenses incurred for unforeseen difficulties must be considered as being included in the amount of the tender, and the respondent had the legal obligation to execute the contract for the price agreed upon, in the same way as would have been its undisputable right to benefit, if the soil had been more favourable and easier than foreseen.

Held, further, that the contentions of the Crown could also be upheld upon statutory law: the Exchequer Court of Canada, under section 18 of the *Exchequer Court Act,* has exclusive original jurisdiction in all cases in which the claim arises out of a contract entered into by or on behalf of the Crown; and section 48 of that Act limits the jurisdiction of that Court and does not allow it to grant any additional compensation.

Held, further, that, assuming that the claim of the respondent was not covered by the contract, it would still fail; for then it would have to be founded on an implied contract; and the agreement itself contains a clear declaration of the parties that "no implied contract of any kind whatsoever, by or on behalf of His Majesty, shall arise or be implied from anything in this contract contained."

Decision of the Judicial Committee of the Privy Council in *The King* v. *Vancouver Lumber Co.* (50 D.L.R. 6) has no application to this case, inasmuch as a form of contract, similar to the one subsequently signed by the respondent, had been annexed to the plans and specifications.

APPEAL and CROSS-APPEAL from the judgment of the Exchequer Court of Canada, maintaining the respondent's petition of right and awarding a sum of $79,731.48.

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

Ls. St-Laurent K.C., Valmore Bienvenue K.C. and *Amédée Caron K.C.* for the appellant.

Thomas Vien K.C. and *Léon Faribault K.C.* for the respondent.

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The judgment of the Court was delivered by

TASCHEREAU J.—In 1936, the Minister of Public Works acting on behalf of His Majesty the King, asked for tenders for the construction of a wharf at Rimouski, in the province of Quebec. Plans and specifications prepared by the engineers of the Department were furnished to the tenderers, and by Order in Council passed on the 10th of February, 1937, the respondent's tender for $365,750.18 was accepted as being the lowest. On the 23rd of February of the same year, a contract was entered into between the appellant and the respondent, embodying the terms and conditions under which the works would be performed.

In May, 1938, the contractor Paradis & Farley Inc., respondent in the present case, claimed by petition of right from His Majesty the King the sum of $160,000 for damages and for additional compensation. The Exchequer Court of Canada accepted the argument submitted by the respondent, that the plans and specifications were misleading, that the soil, in which a certain number of piles were to be driven, was of a different nature and harder than indicated in the boring sheets prepared by the Department, and that a certain portion of the works performed was not covered by the contract. The learned trial judge reached the conclusion that, for these additional works, not included in the amount of the tender, the contractor was entitled to $119,597.22. Of this amount, however, he deducted one-third, because he thought there had been loss of time, delay and incompetence attributable to the suppliant. As a result of this deduction, judgment was given for $79,731.48 with interest and costs. Both parties now appeal to this Court, His Majesty the King to have the claim dismissed, and the respondent to have the amount awarded in the Court below increased.

The major item of the contract was the *furnishing* and *driving* into the soil, at an average depth of 42½ feet below the river bed, of a number of steel piles of interlocking type, on a double parallel row of 700 feet long and 100 feet wide. The unit price for this specific work, tendered by the suppliant, was $1.95 per sq. ft., and it is submitted that this price was based upon the assumption that the soil into which the piles were to be driven, was of "sand, gravel, few stones, loose clay, stiff and sticky clay, tough

clay," as revealed by the boring plans and specifications which were declared to be part of the contract. The driving of these piles into a relatively soft material, as described in the boring indications, did not, it is claimed by the respondent, involve work of a very difficult nature and the unit price of $1.95 was sufficient to cover the furnishing and the driving of the piles, leaving a reasonable profit.

But the respondent submits that instead of encountering the material it had been led to expect, it encountered what is called "hard-pan," a substance dry in its natural state, devoid of lubricating properties, and plentifully interspersed with large boulders therein embedded, requiring continuous driving for very long periods, and in certain occasions drilling and blasting. And it follows that having done the work after protesting, the respondent was put to very large additional expenses. The claim is not for compensation for works contemplated by the parties and covered by the contract, but is for compensation for other works not foreseen in the agreement, performed "hors du contrat," under an implied contract; it is for works accepted by the Crown for which no compensation has been paid on a "quantum meruit" basis.

I think I should dispose now of the contention that this claim could be based on "tort" arising out of the fact that the information given was erroneous and misleading. Although the learned counsel for the respondent did not particularly press this point, he nevertheless stated that he did not abandon it. It is settled, I believe, that there cannot be an action in "tort" against the Crown unless it be founded on a statute, and none has been cited to us that could substantiate this claim. On this point the case of *Bishop* v. *MacLaren* (1), decided by the Judicial Committee, has no application; and although there is some similarity between that case and the one at bar, there is also the essential difference, that their Lordships had to deal with claims arising between subject and subject, and that we have now to consider a petition against His Majesty.

It is particularly on the ground of "quantum meruit" for works unforeseen in the agreement that the respondent submits its case, and it is on that ground also that the learned trial judge allowed an additional compensation.

(1) [1937] 2 D.L.R. 625.

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The specifications contained the following clauses which are the most important and most relevant to the present issue:—

2. (*b*) Steel sheet piling.—Driving interlocking steel sheet piling, where and as shown on plan and as shall be directed by the Engineer.

4. Soundings and borings.—Soundings, levels and borings have been carefully taken but intending contractors are required to take, before they tender, the soundings, levels and borings they may deem necessary to satisfy themselves as to the accuracy of the information conveyed by plans and specifications.

Should the contractors find, on the site of the proposed work, any obstruction not shown on the plan, they shall remove such obstruction at their own cost.

The Contractors are warned that they shall be held entirely responsible and liable for any increase in the cost of the proposed work, if obstructions have to be removed to permit the driving of the steel sheet piles in correct alignment where and as shown on the plan.

Tenderers are hereby given notice that it shall be taken for granted that the above has been given due consideration in the preparation of their tender.

6. (3) The unit price tendered shall include the cost of purchasing, transporting, painting, driving and boring the piles, and the cost of the removal of obstructions impeding the driving of the piles, if any.

35. As it is known that driving will be unusually severe, before the Engineer gives authority for the use of any type of steel piling for this work he will require to be provided with satisfactory evidence as to the driving qualities of the section suggested derived from actual experience in practice.

37. Notwithstanding this, the contractor shall be entirely responsible for the correctness and accuracy to the satisfaction of the Engineer, in spite of all difficulties including risk of piles meeting obstructions of any kind in the course of the pile driving.

Tenders and general conditions
(for unit prices)

4. Contract.—The contractor would be required to sign a contract similar to the form exhibited at the same time as the plans and specifications.

7. No claim for extra work or materials of any nature will at any time be recognized or entertained by the department unless the contractor has first obtained a written order therefor from the Engineer.

10. Parties intending to tender for these works are especially requested to visit the place and site of the proposed work, and make their own estimates of the facilities and difficulties attending the execution of the work, including the uncertainty of weather and all other contingencies.

37. No claim for extras will be entertained by the department on account of unforeseen difficulties in the carrying out of the work herein specified.

As already stated, an Order-in-Council was passed on the 10th of February, 1937, accepting the tender of Paradis & Farley Inc., and on the 23rd day of February,

1938, a contract was signed between the suppliant and His Majesty the King. In the contract there are the following clauses:—

4. The works shall be constructed by the contractor, and under his personal supervision, of the best materials of their several kinds and finished in the best and most workmanlike manner and in the manner required by and in strict conformity with this contract, the said specifications and special specifications and the plans and drawings relating thereto, and the working or detailed drawings which may from time to time be furnished (which said specifications and special specifications, plans and drawings are hereby declared to be part of this contract), and to the complete satisfaction of the Engineer.

45. It is distinctly declared that no *implied* contract of any kind whatsoever by or on behalf of His Majesty shall arise or be implied from anything in this contract contained, or from any position or situation of the parties at any time, it being clearly understood and agreed that the express contracts, covenants and agreements herein contained and made by His Majesty are and shall be the only contracts, covenants and agreements upon which any rights against His Majesty are to be founded.

And the last two clauses of the contract read as follows:—

56. This contract is made and entered into by the contractor and His Majesty on the distinct understanding that the contractor has, before execution, investigated and satisfied himself of everything and of every condition affecting the works to be executed and the labour and material to be provided, and that the execution of this contract by the contractor is founded and based upon his own examination, knowledge, information and judgment, and not upon any statement, representation, or information made or given, or upon any information derived from any quantities, dimensions, tests, specifications, plans, maps or profiles made, given or furnished by His Majesty or any of His officers, employees or agents; and that any such statement, representation or information, if so made, given or furnished, was made, given or furnished merely for the general information of bidders and is not in anywise warranted or guaranteed by or on behalf of His Majesty; and that no extra allowance will be made to the contractor by His Majesty and the contractor will make no claim against His Majesty for any loss or damage sustained in consequence of or by reason of any such statement, representation or information being incorrect or inaccurate, or on account of unforeseen difficulties of any kind.

57. In the event of any inconsistency between the provisions of this contract and the provisions of the specifications forming part hereof the provisions of the specifications shall prevail.

The stand taken by the Crown is that the borings and plans were only indicative of the works which were to be performed, and that the tenderer, under the terms of the specifications, was required to take the necessary soundings, levels and borings to satisfy itself as to the accuracy

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of the information conveyed by the appellant. It is further alleged that there cannot be any additional compensation on a basis of "quantum meruit," the works executed having been contemplated by the parties and covered by the contract. The obligation assumed by the contractor was not to drive the piles in a specified soil, but to drive them in a specified place, "where, and as shown on the plan," whatever the unforeseen difficulties might be.

I accept the view that the works performed by the respondent were fully covered by the contract, and that the obligation of the suppliant was not to drive piles in a specified soil, but to drive them in a specified place. The words in the specifications "where and as shown on the plan" mean clearly that the respondent is obligated to drive these piles in a certain area determined in the plans for the price of $1.95 per sq. ft. It was understood that tenderers were required to take the soundings, levels and borings

> they may deem necessary to satisfy themselves as to the accuracy of the information conveyed by plans and specifications.

In another clause, it is stated:

> The unit price tendered shall include the cost of purchasing, transporting, painting, driving and boring the piles, and the cost of the removal of obstructions impeding the driving of the piles, if any.

And, further, there is a warning that the driving will be "unusually severe" and another clause in which we find that

> the unit rate to include all charges for supplying, handling, placing, driving, drilling, and tarring the piling used;

and that the work will have to be done

> in spite of all difficulties including risk of piles meeting obstructions of any kind in the course of the pile driving.

It was agreed, that the prices would be held rigidly inclusive, and would cover all contingencies that may happen, and it is obviously for that purpose that clause 37 of the specifications stipulated that

> no claim for extras would be entertained by the department on account of unforeseen difficulties in the carrying out of the works herein specified.

As I have already pointed out, it is true that the borings indicate the soil as being "sand, gravel, few stones, loose

clay, stiff and sticky clay, tough clay," but, the tenderers were requested to visit the place and make their own estimates of the facilities and difficulties attending the execution of the works, including all contingencies whatever. It is also said in the specifications, that if the suppliant did find any obstructions not shown on the plans, it is its obligation to remove them at its own cost. And in order to facilitate its task, additional information was made available as to the conditions of the soil, but one of the officers of the suppliant refused this information, stating that he had a perfect knowledge of the soil at that particular place. Then, comes clause 56 of the contract in which it is stated that the information given in the plans and the boring sheet is not "guaranteed or warranted by or on behalf of His Majesty," and a further stipulation that the contractor will make no claim against His Majesty "for loss or damage sustained or on account of unforeseen difficulties of any kind."

It has been suggested that the contract contains clauses that should be considered as inexistent, because they go beyond the authority given by the Order in Council. This particularly applies to clause 45 which declares that no implied contract

> shall arise from any position or situation of the parties at any time,

and also to that part of clause 56 which says

> that any statement, representation or information, if so made, given or furnished, was * * * merely for the general information of bidders, and not in anywise warranted or guaranteed by or on behalf of His Majesty.

This would leave the respondent free to rely on an implied contract to claim on a "quantum meruit" basis, and would considerably reduce the devastating effect of clause 56, which in a milder form is also found in the specifications.

It seems quite useless to examine if all that has been said on this matter by the Judicial Committee in *The King* v. *Vancouver Lumber Co.* (1) finds any application here, because the tender duly signed by the respondent contains a specific clause which precisely covers the point and defeats the objection:—

> Contract.—The contractor will be required to sign a contract similar to the form exhibited at the same time as the plans and specifications.

(1) (1919) 50 D.L.R. 6.

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The signing of a contract exhibited with the plans and specifications, was a condition of the tender and, therefore, all its clauses were duly authorized by the Order in Council of February the 10th and are binding upon the parties, who had a complete knowledge of its contents.

The suppliant tendered to furnish and drive these piles in a soil the nature of which it agreed to investigate, and which the appellant did not guarantee, but merely indicated with the reserves above mentioned, as being of "sand, gravel, few stones, loose clay, stiff and sticky clay, tough clay." The risk was upon the suppliant, and having assumed it, it must necessarily bear all the consequences, financial and others, if it misjudged the works to be performed and miscalculated the cost of the enterprise. Expenses incurred for unforeseen difficulties must be considered as being included in the amount of the tender, and the respondent has the legal obligation to execute the contract for the price agreed upon, in the same way as would have been its undisputable right to benefit, if the soil had been more favourable and easier than foreseen.

The Court is bound by the terms of the contract, which is the law of the parties. And there is also the statutory law which supports the stand taken by the Crown, and which to my mind has the effect of thoroughly destroying the suppliant's submission. The Exchequer Court of Canada, under section 18 of the *Exchequer Court Act,* has exclusive original jurisdiction in all cases in which the claim arises out of a contract entered into by or on behalf of the Crown. And section 48 of the same Act limits the jurisdiction of the Court, and does not allow it to grant any additional compensation. This section reads as follows:—

> 48. In adjudicating upon any claim arising out of any contract in writing, the Court shall decide in accordance with the stipulations in such contract, and shall not allow
>
> (*a*) compensation to any claimant on the ground that he expended a larger sum of money in the performance of his contract than the amount stipulated for therein;

Having come to the conclusion that the works performed are covered by the contract, it seems impossible to allow any additional compensation, without doing violence to the unequivocal terms of this section.

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For these reasons, the respondent cannot succeed; but even if the claim of the respondent were not covered by the contract, it would still fail, for it would have to be founded on an implied contract; and, on this point it is unnecessary to discuss the case of *Nova Scotia Construction* v. *The Quebec Streams Commission* (1) in view of the clear declaration of the parties in the agreement,

that no implied contract of any kind whatsoever, by or on behalf of His Majesty, shall arise or be implied from anything in this contract contained.

It follows that the appeal should be allowed, the petition of right dismissed as well as the cross-appeal, with costs throughout in both issues.

Appeal allowed and cross-appeal dismissed with costs.

Solicitor for the appellant: *Valmore Bienvenue.*

Solicitors for the respondent: *Vien, Faribault & Trudeau.*

PATERSON STEAMSHIPS LIMITED (PLAINTIFF) ..... APPELLANT;

AND

THE SHIP *NEW YORK NEWS* (DEFENDANT) ..... RESPONDENT.

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* March 12, 13.
* Oct. 20.

PATERSON STEAMSHIPS LIMITED (COUNTER-DEFENDANT) ..... APPELLANT;

AND

QUEBEC AND ONTARIO TRANSPORTATION COMPANY, LIMITED (COUNTER-CLAIMANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Collision—Whether either one or both ships at fault—Duties of captains of ships—Whether ships followed courses agreed upon according to signals given by both—Fog and danger signals—Prompt and instant answer to signal—Delay of over half a minute before answering signal—Moderate speed in fog—Previous excessive speed—Whether contributing to collision—Rules of the Road for the Great Lakes—Rules 19, 21, 22, 28, 37.

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

(1) [1933] S.C.R. 220.

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The ship *New York News,* owned by the Quebec and Ontario Transportation Company, Limited, and the ship *Fort Willdoc,* owned by Paterson Steamships Limited, collided in Lake Superior, during a dense fog, the visibility being limited to between two and three hundred feet, while proceeding in opposite directions on or about the courses usually followed by ships bound from Port Arthur or Fort William down the Great Lakes, or vice versa. The collision happened at 5.30 a.m., nine miles west of Passage Island. That point was passed by the *Fort Willdoc* at 4.34 a.m., this distance of nine miles being therefore made by her in 56 minutes, at an average speed of more than nine miles an hour. At 5.15 a.m. a fog signal ahead, given by the *New York News,* was heard by the *Fort Willdoc,* whose engines were ordered to slow speed ahead; and, almost simultaneously, the *Fort Willdoc* blew one blast signal, thus indicating that she was directing her course to starboard. At about the same moment, the *New York News* gave a double blast signal, thus making known her intention to direct her course to port. If each had proceeded according to these signals, a collision would have been inevitable. After a period of between one-half and three-quarters of a minute following the double blast signal of the *New York News,* the *Fort Willdoc* gave herself a two-blast signal, thus signifying her compliance with the course declared by the *New York News.* Witnesses for the appellant testified that the master of the *Fort Willdoc* altered her course twenty-two degrees to port and proceeded at a reduced speed to meet the *New York News* starboard to starboard. During the above-mentioned interval of one half to three-quarters of a minute, the *New York News* went full astern on her engines, in order to avoid an inevitable collision, and her master testified that, when he heard the two-blast signal of the *Fort Willdoc,* it was then too late for him to conform to the course thus indicated. Subsequently both ships gave fog signals. Then, the *Fort Willdoc,* suddenly hearing a danger signal, reversed immediately her engines full speed astern, about one minute preceding the moment of the collision, but could not avoid coming into contact with the *New York News,* which was crossing her bow. Both ships came into collision, the stem of the *Fort Willdoc* hitting the port side of the *New York News* with the result that both suffered severe damages. The local judge in Admiralty for the province of Quebec, L. Cannon J., holding that the *New York News* was responsible for the collision, maintained the action brought by the *Fort Willdoc* against the respondent here and dismissed the counter-claim. The Exchequer Court of Canada, Maclean J., reversed that judgment and held that both vessels were equally at fault in bringing about the collision.

Held, Duff C.J. and Crocket J. dissenting, that the *New York News* was the only party to blame and therefore responsible for the collision and that the judgment of the local judge in Admiralty should be restored.

Held, also, as to the ground raised by the respondent that before the accident the *Fort Willdoc* was proceeding at an excessive rate of speed and thus contributed to the accident, that, assuming it to be so, this would have happened before 5.15 a.m. when the first blasts of the whistles were heard; and, in view of what occurred afterwards, that there is no possible relation between this previous speed

and the collision and that such speed could not have any bearing whatever upon the issue of liability in the present case. *The Pemaquid* (255 Federal Rep. 709) foll.—Duff C.J. and Crocket J. dissenting.

Per Rinfret, Hudson and Taschereau JJ.—The duties of each steamer approaching each other head to head or on the starboard of each other are indicated in rules 22 and 25 of the "Rules of the Road for the Great Lakes." In this case, both ships were not coming head to head, but were slightly on the starboard side of each other. The one-blast signal of the *Fort Willdoc* and the two-blast signal of the *New York News* were not cross-signals, as they were given almost simultaneously, and the captain of the latter so understood them. If at that moment, there has been any confusion, it was for a very short time, because immediately after the two-blast signal of the *Fort Willdoc,* her captain ordered her twenty-two degrees to port in order to meet starboard to starboard. The captain of the *New York News* admitted having heard this last signal; if it had been otherwise, it was his duty to give immediately the danger signal, which he did not give. There was perfect understanding by both ships as to how they would meet and if such understanding had been followed, there would have been no collision. The sole and determining cause of the accident was the failure of the *New York News* to follow the course agreed upon, and to proceed, without giving the necessary signals, in a direction unknown to the *Fort Willdoc* and which she had no reason to foresee.

Per Duff C.J. and Crocket J. (dissenting)—Both ships were to blame in proceeding at full speed in a dense fog contrary to rule 19 and both violated the same rule in not immediately reducing speed to bare steerage way on hearing fog signals, and not navigating with caution until they had passed each other; it is no defence for one ship to say that the fog signals of the other appeared to be far away.—Upon the facts, the *Fort Willdoc* was greatly in fault and such fault was a contributing factor in bringing about the collision—The average speed of the *Fort Willdoc,* more than nine miles an hour, in a dense fog, the visibility being limited to between two and three hundred feet, did not come within the category of "moderate speed", as explicitly required by rule 19 and as every consideration of good seamanship would dictate: the speed of a vessel shall not be so great as to render it impossible to stop within the "limits of observation."—Both ships in the circumstances here erred in not giving a danger signal promptly under rules 21 and 22.—Prompt action from both ships, i.e., instant action, was demanded under the circumstances. If the *Fort Willdoc* had instantly signified her compliance with the course declared by the *New York News,* the disaster might have been avoided.—A delay of over half a minute before giving a signal, in the conditions of the moment, was not a prompt answer within the meaning of the rules.—The evidence does not show anything in the nature of an agreement between the two ships, resulting from the exchange of signals, that they were to follow a course starboard to starboard; and the final manoeuvre of the *New York News* was justified under rule 37.

Judgment of the Exchequer Court of Canada ([1941] Ex. C.R. 145) reversed, Duff C.J. and Crocket J. dissenting.

APPEAL from the judgment of the Exchequer Court of Canada, Maclean J. (1), reversing the judgment of the

(1) [1941] Ex. C.R. 145.

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local judge in Admiralty for the province of Quebec, Lucien Cannon J. The trial judge held that the *New York News* was solely responsible for the collision and he maintained the action brought by the *Fort Willdoc* against the respondent and dismissed the latter's counter-claim. The President of the Exchequer Court of Canada allowed the appeal to that Court to the extent of declaring that both vessels were equally at fault in bringing about the collision and referred the matter to the Registrar of the Quebec Admiralty District to assess the damages. The owners of the *Fort Willdoc* appealed to this Court in order to have the judgment of the trial judge restored.

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

C. R. McKenzie K.C. and *Geo. Montgomery Jr.* for the appellants.

Lucien Beauregard K.C. for the respondents.

THE CHIEF JUSTICE (dissenting)—At the close of the argument of this appeal I had reached a provisional opinion that the judgment of the learned trial judge ought to be restored. I have since had an opportunity, however, of reading more critically the reasons of the learned President of the Exchequer Court in light of a more minute examination of the evidence and my conclusion is that the learned President of the Exchequer Court has given convincing reasons for holding, as he does, that the *Fort Willdoc* was gravely in fault and that this fault was a contributing factor in bringing about the collision.

The collision occurred on the morning of the 11th of September, 1938, and the ships concerned were the *New York News,* a steel ship of 2,310 gross tons of the canal type, having a length of 256 feet over all, which was on a voyage from Port Arthur to Montreal laden with grain; and the *Fort Willdoc,* a single screw steamship of 4,542 gross tons, having a keel length of 416 feet, which was proceeding light in the opposite direction from Port Colborne to Fort William. The maximum speed of the *New York News* loaded was seven knots and that of the *Fort Willdoc* was approximately eleven and one-half knots.

There was a dense fog, the visibility being limited to between two and three hundred feet, about one-half of the keel length of the *Fort Willdoc*.

The owners of the *Fort Willdoc* appeal and the only issue with which we are concerned is whether the judgment of the learned trial judge absolving the *Fort Willdoc* from all blame and putting the responsibility for the entire loss upon the *New York News* ought to be restored, and we are concerned, therefore, primarily with the navigation of the *Fort Willdoc*.

It appears from the evidence adduced on both sides that the collision happened at nine miles west of Passage Island, and, from an entry in the log of the *Fort Willdoc*, Passage Island was passed by her at 4.34 a.m., and from another entry in the same log the collision happened at 5.30 a.m. This distance of nine miles was therefore made in 56 minutes, or at an average speed of more than nine miles an hour. Obviously such a speed in a dense fog, the visibility being as I have mentioned, does not come within the category of moderate speed, as explicitly required by Rule 19 and as every consideration of good seamanship would dictate.

Admittedly the *Fort Willdoc* proceeded at full speed from 4.34 a.m. to 5.15 a.m., when it is said that the fog signal of the *New York News* was heard and the engines of the *Fort Willdoc* were ordered slow. In this interval the *Fort Willdoc* would have made 7·85 miles, there being no wind that could affect her speed, and, consequently, in the interval between 5.15 and 5.30, fifteen minutes, she made a distance of 1·15 miles. There is agreement among the witnesses called on behalf of the appellants that the engines of the *Fort Willdoc* were reversed for one minute preceding the moment of collision, and it seems a fair inference, therefore, that during this interval the average speed of the ship was five miles per hour. The learned trial judge found that at the moment of impact, after her engines had been reversed for one minute, as I have said, her speed did not exceed two or three miles per hour. As the learned President of the Exchequer Court of Canada says, both ships were proceeding on or about the courses usually frequented by ships in Lake Superior, bound from Port Arthur or Fort William to eastern Canadian ports on the Great Lakes, and vice versa.

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The duties resting upon navigators in respect of the navigation of a ship, circumstanced as the *Fort Willdoc* was on the morning in question, are known by every seaman. Rule 19 explicitly provides that the vessel shall go "at a moderate speed". In the application of the rule it has been treated as imposing a limitation by which the speed of the vessel shall not be so great as to render it impossible to stop within the "limits of observation". In the case of the *Fort Willdoc* that would mean, in the conditions prevailing on the occasion in question, roughly within the limits of half her length. The reason for the rule is well known. Sounds are notoriously deceptive in a fog and the vessel is, therefore, without any reliable clue of the position of other vessels in proximity to her. The *Fort Willdoc,* as we have seen, proceeded at full speed for 56 minutes—in other words, in reckless disregard of the obligations imposed upon her master by the existing conditions. At 5.15 the *Fort Willdoc* first heard a fog signal ahead and upon hearing this signal her engines were ordered from full speed to slow speed ahead. At about the same time the *Fort Willdoc* blew one blast and this, of course, would indicate that she was directing her course to starboard. The impression of the captain and mate seems to have been that the vessel approaching from ahead was on the starboard bow of the *Fort Willdoc* and it is admitted by the mate that, having regard to the true positions of the ships, the proper action would have been to blow two whistles and to direct her course to starboard. This, the mate said, would have been done, if they had known the true positions. They surmised, however, that the *New York News* was far off and that it was quite safe to give the single blast signal. As the learned President says, the signal was not one that was seriously considered, because of this mistaken surmise.

At the same moment that the *Fort Willdoc* gave her single blast signal the *New York News* gave a double blast signal. These two inconsistent signals obviously disclosed a situation of danger—one ship declared she was directing her course to starboard, the other declared she was directing her course to port. If each proceeded according to the signal given by her a collision would be inevitable. I entirely agree with the learned President of the Exchequer Court of Canada that prompt action from both sides, that

is to say, instant action, was demanded. If the *Fort Willdoc* had instantly signified her compliance with the course declared by the *New York News,* it is possible that disaster might have been avoided. One thing was quite clear, that delay would add to the danger; yet this is precisely the fault into which the *Fort Willdoc* fell. She waited for a period which was between one-half a minute and three-quarters of a minute before apprising the *New York News* of her intentions. That which happened in the interval was what might have been expected, what the master of the *Fort Willdoc* might have realized would likely happen; the *New York News,* interpreting the signal from the *Fort Willdoc* as manifesting an intention to cross her bow, immediately went full astern on her engines. That was a natural and proper course, (if not the only course open to the *New York News*) as the learned President of the Exchequer Court of Canada, on the advice of his assessor, finds. When the master of the *New York News* heard the two-blast signal of the *Fort Willdoc* it was too late for him to conform to the course declared by this signal from the *Fort Willdoc,* as the learned President of the Exchequer Court of Canada, again on the advice of his assessor, finds.

I am unable to agree with the contention of the appellants that there was anything in the nature of an agreement between the *Fort Willdoc* and the *New York News* resulting from the exchange of signals that they were to follow a course starboard to starboard. The learned trial judge finds there was and bases it upon an admission which he derives from the evidence of the captain and crew of the *New York News.* The evidence of the captain describes the course of events as I have given them. When he heard the two-blast signal of the *Fort Willdoc* it is true he understood it to be an answer to his own two-blast signal and he understood, he says, the meaning of it according to the rules, but that is a very different thing from an admission that he was a party to an agreement that he would conform to the course indicated by that signal. Apparently he was not. During the delay between the first inconsistent signals and the two-blast signal of the *Fort Willdoc* conditions had so altered that it was impossible for the captain of the *New York News* to conform to the course suggested by the *Fort Willdoc's* signal, if he had desired to do so. All this

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would follow in the natural and ordinary course from the *Fort Willdoc's* one-blast signal and her delay in giving her two-blast signal, as the master of the *Fort Willdoc* might have realized. The learned President of the Exchequer Court of Canada says:—

> The one blast of the *Fort Willdoc* meant to the *New York News* that the *Fort Willdoc* was starboarding and would likely cross the bow of the *New York News,* and the delay of forty seconds, nearly three-quarters of a minute, in assenting to the passing signal of the *New York News* was obviously calculated to confuse and embarrass the *New York News,* because in the meanwhile it would be natural for her to assume that the *Fort Willdoc* was crossing to starboard. Even the first mate of the *Fort Willdoc* appears to have thought that the pause of forty seconds was excessive.
>
> * * *
>
> On hearing the one blast of the *Fort Willdoc* the *New York News* went full speed astern on her engines for a time, and her stern would therefore have a tendency to back to port thus throwing her bow to starboard, while stopping her headway. Up to this time the *New York News* could not have been proceeding at more than about three knots. The *New York News* had assumed for forty seconds that the *Fort Willdoc* intended to cross her port bow and she went astern at full speed, to stop her headway and to swing her head to starboard, and my assessor advises me this was good seamanship, and, I think, that must be so. Then, after a delay of more than half a minute, the *New York News* heard her own two-blast signal answered but it was then too late for her to get her head back to port sufficiently to clear the bow of the *Fort Willdoc.* It may be granted that the *New York News* had heard and understood the *Fort Willdoc's* two-blast signal but it must be remembered that by this time the *New York News* was going full speed astern on her engines and her bow would be beginning to swing to starboard. My assessor tells me that it would take a little time for a loaded ship to steady by her head and recover herself from a natural swing to starboard caused by her engines going full speed astern, and before this recovery to port could happen the *Fort Willdoc* appeared close to the port bow of the *New York News,* and to me that seems just what happened.

I agree with the learned President of the Exchequer Court of Canada that the *New York News* was in fault in not giving the danger signal instantly on hearing the single-blast signal from the *Fort Willdoc.* But on the other hand, it was the duty of the captain of the *Fort Willdoc,* as the learned President of the Exchequer Court of Canada has pointed out, under Rules 21 and 22, to give the danger signal and go astern on his engines, as the *New York News* did. I agree with the learned President of the Exchequer Court of Canada that the delay of a period of between one-half a minute and three-quarters of a minute was a considerable delay in the conditions of the moment; and

that it is impossible to say that this signal was given "immediately" after the signal of the *New York News*, or "promptly", within the meaning of Rule 25.

I find myself in some difficulty in accepting the evidence on behalf of the *Fort Willdoc* that she ran about three minutes hard aport after her two-blast signal. During that period she altered her course to port not more, at all events, than twenty-two degrees, as the learned trial judge found. The assessor of the learned President advised him that this is hardly believable and I do not think the evidence of the *Fort Willdoc* on this point is satisfactory. I agree, moreover, with the conclusions expressed in the following passage:—

> The conclusions I have reached are the following: Both ships were violating Rule 19 in proceeding at full speed in a dense fog. Both ships also violated Rule 19 in not immediately reducing speed to bare steerage way on hearing the fog signal of another vessel less than four points from right ahead, and navigating with caution until they had passed each other; in such a state of facts it is no defence for one ship to say that the fog signals of the other appeared to be far away.
>
> * * *
>
> There came a time when the *New York News* considered that the ships were not approaching each other head and head, or nearly so, but were sufficiently on the starboard of each other that she decided to give two blasts of her whistle, which meant a signal to pass starboard to starboard, and to this the *Fort Willdoc* expressed assent and signified her willingness and intention to direct her course to port, but the *Fort Willdoc* was at fault, as I have already stated, in not having promptly responded with her answered signal. Rule 21 requires every vessel receiving a signal from another to respond promptly with the same signal, or to sound the danger signal as provided in Rule 22. Rule 22 states that when ships are approaching each other and there is a failure on the part of either ship to understand the course or intention of the other, the one in doubt shall immediately signify the same by the prescribed danger signal, and both ships shall be immediately slowed to bare steerage way, and, if necessary, stopped and reversed until the proper signals are given, answered, and understood, or until the ships shall have passed each other.

I agree with the learned President of the Exchequer Court of Canada that the final manoeuvre of the *New York News* was justified under Rule 37.

The appeal should be dismissed with costs.

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

TASCHEREAU, J.: The plaintiff-appellant, the Paterson Steamships Limited, is the owner of the ship *Fort Willdoc*, and the defendant-respondent owns the *New York News*.

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On the 11th of September, 1938, at 5.30 a.m., both ships were following their usual courses, nine miles west of Passage Island, near the head of Lake Superior, and came into collision, the stem of the *Fort Willdoc* hitting the port side of the *New York News* opposite her no. 1 hatch, with the result that both suffered severe damage.

The *New York News* which is a full canal type steel vessel with a gross tonnage of 2,310, was on a voyage from Port Arthur to Port Colborne and Montreal, loaded with a cargo of 122,000 bushels of wheat. The *Fort Willdoc,* a grain carrier, is a ship of 4,542 gross tonnage and was proceeding light to Port Arthur.

The local judge in Admiralty for the province of Quebec, Mr. Justice Lucien Cannon, sitting in Montreal and assisted by Victor Chartier, assessor, held that the *New York News* was responsible for the collision, maintained the action, brought by the *Fort Willdoc,* against the respondent, and dismissed the counter-claim. In the Exchequer Court of Canada (1), the learned President allowed the appeal to the extent of declaring that both vessels were equally at fault in bringing about the collision in question, and referred the matter to the Registrar of the Quebec Admiralty District to assess the damages. The owners of the *Fort Willdoc* now appeal to this Court and submit that the judgment of the learned trial judge should be restored.

The evidence reveals that at about 5.15 a.m., fifteen minutes before the collision, while the two ships were proceeding in a dense fog, both gave simultaneously passing signals, the *New York News* a two-blast signal, and the *Fort Willdoc* a one-blast signal. From forty to forty-five seconds "after the sound had died down", and the "echo had gone", Captain Baker, the master of the *Fort Willdoc* blew a two-blast signal, altered the course of his ship twenty-two degrees to port, and proceeded at a reduced speed to meet the on-coming *New York News* starboard to starboard.

The *New York News* had also slowed down to a speed barely sufficient for steerageway, and while both ships were giving fog signals, the *Fort Willdoc* suddenly heard a danger signal coming from the *New York News.* She immediately reversed her engine full speed astern, but

(1) [1941] Ex. C.R. 145.

could not avoid coming into contact with the *New York News* which was crossing her bow, and which now had her engine full speed ahead in order, as her Captain says in his evidence, "to try and clear the other".

Under the "Rules of the Road for the Great Lakes" (no. 25) it is the duty of each steamer approaching each other head and head to pass on the port side, and the pilot of either steamer may be first in determining to pursue this course and shall give as a signal of his intention one short and distinct blast of his whistle, which the pilot of the other steamer shall answer promptly by a similar blast of his whistle. But if the courses of the steamers are not head and head, but on the starboard of each other, the pilot so first deciding must immediately give two short and distinct blasts of his whistle, which the pilot of the other steamer must answer promptly by two blasts of his whistle, and then the two ships must pass on the starboard side of each other. If there is any misunderstanding, then, under Rule 22, the pilot in doubt must immediately signify his doubt by giving the danger signal of five or more short and rapid blasts of the whistle, and if both vessels have approached within half a mile of each other, they must immediately be slowed down to a speed barely sufficient for steerageway.

Both ships were not coming head and head, but were slightly on the starboard side of each other. The one-blast signal of the *Fort Willdoc* and the two-blast signal of the *New York News* were not cross signals, as they were given simultaneously and it is thus that Captain Ferguson of the *New York News* understood them. In his evidence, he says:—

> A. No, there were no cross signals. They were both at the same time.

If at the moment of these simultaneous signals there has been any confusion, it was surely for a very short time, because immediately after the two-blast signal of the *Fort Willdoc,* her Captain ordered her twenty-two degrees to port in order to meet starboard to starboard. The Captain of the *New York News* heard this last signal and understood it as meaning that the ships would meet starboard to starboard according to Rule 25. He says in his evidence:—

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Q. Then, when the two-blast signal was given by the *Fort Willdoc,* that was in answer to your first two-blast signal?
A. I heard that.
Q. And that was an answer, was it not?
A. I presume it was.
Q. Therefore, when he answered your two-blast signal with a two-blast signal, that would mean to you, under the rules, would it not, starboard to starboard?
A. Starboard to starboard.
Q. To pass starboard to starboard?
A. Yes.

If it has been otherwise, it was his duty to give immediately the danger signal which he did not give. To my mind, there was a perfect understanding by both ships as to how they would meet, and I am in complete agreement with the learned trial judge when he says, and finds as a fact:—

> This second two-blast signal from the *Fort Willdoc* was clearly heard and well understood by the *New York News;* there was no cross signal or any misunderstanding between the two ships at the time. The Captain of the *New York News* and the members of the crew definitely admitted this fact.

It is true that later a danger signal was given by the *New York News* three or four minutes after the last signal had been given by the *Fort Willdoc,* but it was then too late, and at a moment when the collision was unavoidable.

It seems clear that if the understanding which has been proven and admitted by the Captain of the *New York News* had been followed, there would have been no collision, both ships meeting starboard to starboard. The sole and determining cause of the accident was the failure of the *New York News* to follow the course agreed upon, and to proceed, without giving the necessary signals, in a direction unknown to the *Fort Willdoc* and which she had no reason to foresee.

As pointed out by the trial judge, the *New York News* did not follow the "Rules of the Road of the Great Lakes" nor did she steer the course agreed upon with the *Fort Willdoc.* There was ample evidence to justify the findings of the learned trial judge, who did not act on any wrong ground of law or conclusion of fact.

The respondent contends that before the accident the *Fort Willdoc* was proceeding at an excessive rate of speed, and thus contributed to the accident. If so, this would be before 5.15 a.m. when the first blasts of the whistles were

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heard. I can see no possible relation between this previous speed and the collision, and I believe that it can have no bearing whatever upon the issue of liability in the present case. As it was said in the case of *The Pemaquid* (1),

(1) (1918) 255 Federal Rep. 709.

A steamer which before she came on sight, in a fog, of a meeting vessel, which she knew was approaching, had stopped and reversed, and was actually going astern at the time of collision, cannot be held in fault because of her previous speed.

Taschereau J.

I come to the conclusion that the *New York News* is the only party to blame and that she is responsible for this accident. I would allow the appeal, maintain the action of the *Fort Willdoc,* dismiss the counter-claim and restore the judgment of the local judge in Admiralty with costs throughout.

CROCKET J. (dissenting).—I agree with the learned President of the Exchequer Court of Canada and would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Montgomery, McMichael, Common & Howard.*

Solicitors for the respondents: *Beauregard, Laurence & Brisset.*

IN THE MATTER OF A REFERENCE AS TO THE VALIDITY OF THE DEBT ADJUSTMENT ACT, 1937, STATUTES OF ALBERTA, 1937, CHAPTER 9, AS AMENDED, AND AS TO THE OPERATION THEREOF.

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* June 24, 25, 26.
* Dec. 2.

Constitutional law—Debt Adjustment Act, Alta., 1937, c. 9 (as amended)—Constitutional validity—Object, effect, pith and substance, of the legislation—Whether laws of general application—Repugnancy to Dominion legislation—Invasion of field of legislation reserved to the Dominion—B.N.A. Act, ss. 91, 92.

The Debt Adjustment Act, 1937, Statutes of Alberta, 1937, c. 9 (as amended in 1937 (3rd session), c. 2; 1938, c. 27; 1938 (2nd session), c. 5; 1939, c. 81; and 1941, c. 42), is *ultra vires* in whole. Its effect is to take away from all creditors who are the owners of debts or liquidated demands that, apart from the Act, would be presently

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

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enforceable by law, their rights in respect of their enforceability by action or suit, and to substitute for such rights the chance of obtaining, by the arbitrary determination of a public authority, the Debt Adjustment Board (the appeal given therefrom is merely one from the arbitrary determination of one authority to the arbitrary determination of another), permission to enforce them. Such an enactment is something more than one relating to procedure; it strikes at the substance of the creditor's rights. The Act is repugnant to the provisions of Dominion statutes (instances mentioned) relating to matters within the exclusive jurisdiction of the Dominion Parliament, provisions creating or directly giving rise to or recognizing obligations in the nature of debts or liquidated demands. To establish any such authority, with its powers of selection, involving a considerable power of regulation of classes of business and undertakings over which the *B.N.A. Act* gives to the Parliament of Canada exclusive control, is incompetent to the provincial legislature.

The prohibitory provisions of the Act in question against proceedings by way of execution, etc., without the Board's permit, is *ultra vires* by reason of considerations of much the same character as those aforesaid. The Board is authorized to refuse a permit in any particular case. The pith and substance of the legislation is to establish a provincial authority empowered to exercise a discriminatory control. While in form it is legislation in relation to remedy and procedure, yet, in attempting to regulate the remedial incidents of the right in manner aforesaid, it must, when read in light of its context in the Act, in substance be regarded as a step in a design to regulate the right itself.

As to companies incorporated by the Dominion, companies with objects other than provincial objects, in relation to the incorporation, status and powers of which companies the Dominion Parliament has, under s. 91 of the *B.N.A. Act,* exclusive power to legislate:—It is true that, where the business of the company is subject to provincial legislative regulation, the provincial legislature may legislate in such a manner as to affect the business of the company by laws of general application in relation to the kind of business in which the company engages in the province—but the enactments now in question, authorizing interference with the affairs of creditors in manner aforesaid, are not a general law in this sense.

The matters dealt with by s. 26 of the Act are so related to the subject-matter of *The Farmers' Creditors Arrangement Act* as to be withdrawn from provincial jurisdiction by force of the last paragraph of s. 91 of the *B.N.A. Act.*

Also the Act constitutes an attempt to invade the field reserved to the Dominion under Bankruptcy and Insolvency.

Assuming that, by apt legislation strictly limited to enactments relating exclusively to matters within the legislative jurisdiction of a province, a Board might lawfully be constituted having some of the powers which the Debt Adjustment Board receives under the Act, yet, in any view of that question, it is impossible in the Act to disentangle what a provincial legislature might competently enact from the principal enactments of the Act constituting the Board with authority to exercise powers that the legislature is incompetent to confer upon

it; and indeed, if this were possible and the Act could be re-written excluding what is *ultra vires* from what (on said assumption) might be *intra vires,* there can be no probability that the legislature would have enacted the Act in this truncated form. The competent elements of the legislation, if such there be, not being severable from the incompetent enactments constituting the Board with the powers conferred upon it, the Act is, as a whole, *ultra vires.*

Crocket J. dissented, holding: The Act (as amended as aforesaid) is not *ultra vires,* in whole or in part, except in so far as its provisions may be found to conflict with any existing Dominion legislation strictly relating to any of the classes of subjects specially enumerated in s. 91 of the *B.N.A. Act* or as being necessarily incidental to the particular subject-matter upon which the Parliament of Canada has undertaken to legislate as falling within one or other of the said enumerated heads. The whole purpose of the Act in question is to regulate and control the enforcement of contractual obligations for the payment of money so as to safeguard during a period of financial stress the interests of unfortunate resident debtors who, owing entirely to general depreciation of values through abnormal economic conditions, find themselves in such a position that the stringent enforcement of creditors' claims might entail irreparable loss upon them. Its provisions are predominantly directed to procedure in civil matters in provincial courts. The right to sue in provincial courts is a civil right in the province, whether the claim sought to be enforced arose in the province or not. The Act is one of general application in the province, within the meaning of the authorities. None of its provisions are directed to insolvency legislation nor to banks or banking legislation, nor to the contracts of Dominion companies, carrying on business either within or without the province, though they may affect these subjects and these rights collaterally as a necessary incident to the attainment of the objects of the Act. While it was held in *Attorney-General for Alberta and Winstanley* v. *Atlas Lumber Co. Ltd.,* [1941] S.C.R. 87, that s. 8 of the Act conflicted with certain Dominion legislation strictly and necessarily relating to head 18 of s. 91 of the *B.N.A. Act* (Bills of Exchange and Promissory Notes) and that the latter must prevail, it does not follow that the Act in question must be held to be wholly *ultra vires* merely because it affects or may affect Bankruptcy or Insolvency, Banks and Banking, Interest or any other subject enumerated in s. 91 upon which the Dominion Parliament has purported to legislate as falling within one or more of those classes of subjects. "Bills of Exchange and Promissory Notes" is the only class of contracts specifically mentioned in s. 91 of the *B.N.A. Act,* and this specific enumeration may well be said to expressly withdraw that class of contracts from the exclusive jurisdiction of the province in relation to s. 92 (13), "Property and Civil Rights in the Province." (*Citizens Insurance Co.* v. *Parsons,* 7 App. Cas. 96; *Attorney-General of Ontario* v. *Attorney-General for Canada,* [1894] A.C. 189; *Ladore* v. *Bennett,* [1939] A.C. 468, and other cases, cited).

REFERENCE by His Excellency the Governor General in Council, pursuant to the authority of s. 55 of the *Supreme Court Act* (R.S.C., 1927, c. 35), to the Supreme Court of Canada, of the following questions for hearing and consideration, namely:

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(1) Is The Debt Adjustment Act, 1937, being chapter 9 of the Statutes of Alberta, 1937, as amended by chapter 2 of the Statutes of Alberta, 1937 (3rd session), chapter 27 of the Statutes of Alberta, 1938, chapter 5 of the Statutes of Alberta, 1938 (2nd session), chapter 81 of the Statutes of Alberta, 1939, and chapter 42 of the Statutes of Alberta, 1941, *ultra vires* of the Legislature of Alberta, either in whole or in part, and if so, in what particular or particulars or to what extent?

(2) Is the said Act as amended operative in respect of any action or suit for the recovery of moneys alleged to be owing under or in respect of any bill of exchange or promissory note?

(3) Is the said Act as amended operative in respect of any proceedings taken to enforce any judgment obtained in any action or suit for the recovery of moneys owing under or in respect of any bill of exchange or promissory note?

(4) Is the said Act as amended operative in respect of any action or suit for the recovery of money or interest thereon, or both, not being money or interest alleged to be owing under or in respect of any bill of exchange or promissory note, whether or not such money or interest is secured upon land situated in the said province, in the following cases, namely, where such action or suit is for the recovery of,—

(*a*) the principal amount of such money and interest, if any, where the same are payable in the said province;

(*b*) the principal amount of such money and interest, if any, where the same are payable outside the said province;

(*c*) the interest only upon such money.

(5) If the answer to any of the parts (*a*), (*b*) and (*c*) of question 4 is in the negative, is the said Act as amended operative in respect of any proceedings taken to enforce any judgment obtained in any action or suit in respect of which such answer is given?

The respective Attorneys-General of the Provinces of Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskatchewan, and the Mortgage Loans Association of Alberta and the Canadian Bankers' Association were, pursuant to order of the Chief Justice of Canada, notified of the hearing of the Reference.

Aimé Geoffrion K.C. and *F. P. Varcoe K.C.* for the Attorney-General of Canada.

W. N. Tilley K.C., T. D'Arcy Leonard K.C., and *R. D. Tighe K.C.* for The Mortgage Loans Association of Alberta.

W. N. Tilley K.C., R. C. McMichael K.C. and *W. H. McLaws K.C.,* for The Canadian Bankers' Association.

J. W. deB. Farris K.C., W. S. Gray K.C. and *J. J. Frawley K.C.,* for the Attorney-General of Alberta.

J. M. Stevenson K.C. for the Attorney-General of Saskatchewan.

L. St-Laurent K.C. for the Attorney-General of Quebec.

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

THE CHIEF JUSTICE—By section 8, subsection 1 (*a*), of the *Debt Adjustment Act*, a legal right which the owner of it is entitled to enforce is converted into a conditional right, enforceable only by grace of a permit from the Board granting to the owner of it a dispensation from the incidence of the general rule.

This authority of the Board may be considered with reference to debts arising by virtue of statutes, or legal rules, that the legislature is powerless to repeal or vary, as well as with reference to creditors whose powers and status it is incompetent to impair, or whose undertakings, or business, the legislature is incompetent to regulate.

It is most important, I think, not to lose sight of the arbitrary nature of the Board's authority. The powers of the Board, it will be noticed, may be exercised by any single member of the Board, or by any person designated by the Board, with the approval of the Lieutenant-Governor in Council. *Ex hypothesi* the debt or liquidated demand, which the Board has to consider on any application for a permit, may be one which, but for the statute, would admittedly be enforceable by law; and in discussing the operation of the enactment I shall assume that we are dealing with a debt, or demand, admittedly so enforceable.

The statute prescribes no rule, or principle, by which the Board, or its designated agent, is to be guided in granting, or refusing, a permit; nor does it give any clue to the considerations upon which the Board is to act. I do not think that any Court can, with any confidence, form a judgment as to the reasons by which the Board will be guided, except that the Board may be assumed to act in accordance with its own conception of its duty in each particular case. It is the duty of the Board, under section 10 of the Act, to make such enquiries as it may deem proper into the circumstances, but that section makes it clear, I think, that it is for the Board exclusively to

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decide what are the considerations by which it ought to be influenced in granting, or refusing, an application for a permit, or adjourning the application for such period as it "may deem advisable under the circumstances." In effect the Board is empowered to exercise in each particular case an arbitrary determination. The appeal to a jury, given by the amending statute, on which it is to decide as a question of fact whether the determination of the Board is to stand, or is to be changed, merely gives an appeal from the arbitrary determination of one authority to the arbitrary determination of another. The consequence of all this is that all creditors who are the owners of debts, or liquidated demands, that, apart from the statute, would be presently enforceable by law, have their rights in respect of their enforceability by action, or suit, taken away, and for them they have substituted the possibility of obtaining from this authority permission to enforce them.

The distinction between right and remedy is often a useful distinction, but an enactment which takes away the remedy by action, which the law otherwise would give to the creditor in respect of his debt, and substitutes therefor the chance of obtaining, by the arbitrary act of a public authority, permission to enforce a remedy is, I think, something more than an enactment relating to procedure. It strikes, I think, at the substance of the creditor's rights. The enactment is repugnant to the provisions of Dominion statutes relating to matters within the exclusive jurisdiction of the Dominion Parliament, provisions creating or directly giving rise to, or recognizing, obligations in the nature of debts and liquidated demands: for example, certain provisions of the *Bills of Exchange Act,* section 125 of the *Bank Act,* and provisions in respect of calls made by a Dominion company upon the holders of unpaid shares (see section 44, *Companies Act*). Such instances could be multiplied.

There is another class of cases that I have just alluded to, the consideration of which leaves it, I think, very clear that in attempting to establish an authority of this character a provincial legislature is exceeding its authority. Section 91 of the *British North America Act* gives to the Parliament of Canada exclusive control over certain types

of business and undertakings. I particularly refer to two classes of business only. The first of these, that of banks, perhaps illustrates the point most strikingly. The lending of money is a principal part of the business of any bank. A debt arising from a loan by a bank to a customer will, speaking generally, fall within section 8 (1) (*a*), and the bank's right to enforce repayment is by the enactment conditioned upon the existence of a permit. It is in the power of the Board to refuse a permit in all such cases, or in the case of any particular debt. This power of selection seems to involve a considerable power of regulation of the business of the banks. It is, I think, incompetent to the legislature to establish any such authority. I think the case of banking is, perhaps, from this point of view, the most striking case, although the application of the authority of the Board to companies engaged in operating Dominion undertakings, such as Dominion railway companies and companies engaged in operating lines of ocean shipping, might well exceed the ambit of provincial authority.

What I have said is sufficient, in my opinion, to show that subsection (1) (*a*) of section 8 is *ultra vires*. I assume that debts and liquidated demands falling entirely (that is to say, exclusively) under the regulative authority of the province, as being "civil rights within the province", could be dealt with by a province by an enactment having the characteristics of section 8 (1) (*a*), but limited to such debts and demands. It is not necessary to decide it, but I assume that to be so. I do not think that section 8 (1) (*a*) can properly be construed as limited in its application to such debts and demands and it is, therefore, I think, entirely destitute of effect.

Subsection 1 (*b*) of section 8 presents a different question, but it is, in my opinion, *ultra vires* by reason of considerations of much the same character. It is no answer to say that the authority extends to all judgments; because the Board can arbitrarily refuse to grant a permit in any particular case. The Board is authorized to refuse a permit for a writ of execution where the debt sued upon is one which it has no power to regulate and to do so for any reason which to it may appear sufficient; and, of course,

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to discriminate in this respect between debts which it has power to regulate and debts in respect of which it has no such power.

We are not required to consider the authority of a provincial legislature to restrict the jurisdiction of the provincial Courts to giving declaratory judgments and to deprive them of the power to grant any consequential relief. This legislation affects the jurisdiction of the provincial Courts, but the pith and substance of it is to establish a provincial authority which is empowered to exercise the discriminatory control just mentioned. While in form this is legislation in relation to remedy and procedure, in substance this provision which attempts to regulate the remedial incidents of the right in this manner must, when it is read in light of the context in which it stands in this section 8 (1), be regarded as a step in a design to regulate the right itself.

There is a class of creditors occupying a special position which must be considered. I refer to companies incorporated by the Dominion. It is settled that in the case of companies with objects other than provincial objects, the exclusive power to legislate in relation to incorporation is vested in Parliament, and that by the joint operation of the residuary power under section 91 of the Confederation Act and the powers conferred upon Parliament in relation to the enumerated subject, the regulation of trade and commerce, this power extends to the status and powers of the company. True, where the business of the company is subject to provincial legislative regulation, the provincial legislature may legislate in such a manner as to affect the business of the company by laws of general application in relation to the kind of business in which the company engages in the province; but the provisions of this statute giving to the Board the authority to interfere with the affairs of creditors in the manner set forth in section 8 would not appear to be a general law in this sense.

A company, for example, incorporated by the Dominion with authority to carry on the business of lending money upon various kinds of security in the province, may find itself in a position, under the operation of subsections 1 (*a*) and (*b*) of section 8, in which it and other Dominion companies are precluded from enforcing their securities in

the usual way. In my view, such legislation is not competent and, accordingly, paragraphs (*c*), (*d*), (*e*) and (*f*) would appear to be incompetent, as well as paragraphs (*a*) and (*b*).

As regards interest, subsection (1) of section 8 is plainly repugnant to section 2 of the *Interest Act*. In truth, the scope of subsection (1) of section 8 is indicated by paragraph (*g*) thereof and by section 41 which withdraws from the operation of the Act debts owing to The Canadian Farm Loan Board or to The Soldiers' Settlement Board and proceedings for enforcing the payment of any such debts. I think we must conclude that subsection (1) must be treated as a whole, that is to say, that it is valid or invalid as a whole, and for the reasons I have given it is, I think, invalid. The provisions of subsection (3) limiting the application of section 8 in the manner there mentioned do not, it appears to me, affect the force of what has been said. The whole of section 8 is *ultra vires*.

As to section 26, the matters dealt with by this enactment, in my opinion, are so related to the subject-matter of *The Farmers' Creditors Arrangement Act* as to be withdrawn from provincial jurisdiction by force of the last paragraph of section 91.

There remains the contention of the Attorney-General of Canada that the statute as a whole constitutes an attempt to legislate in relation to bankruptcy and insolvency. I have very carefully considered this contention and the first thing that strikes one is that the effect of section 8 (1) is, as regards debts where the creditor and debtor reside in the province and the contract has been made in the province and the debt is payable in the province, that the creditor is deprived of his right to present a bankruptcy petition. As appears from what has already been said, section 8 (1) does not merely suspend the remedy—it takes away the remedy given by law and substitutes therefor a remedy dependent upon the arbitrary consent of the Board, or the arbitrary determination of a jury. As I have already said, this, in my opinion, strikes at the debt itself and I do not think that in any Court governed by this legislation it could be successfully contended that in respect of an obligation to which the statute applies there is a "debt owing" to the creditor, within the mean-

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ing of section 4 of the *Bankruptcy Act*. Moreover, I find it impossible to escape the conclusion that Part III contemplates the use of the Board's powers under section 8 (1) to enable it to secure compulsorily the consent of the parties to arrangements proposed by it for composition and settlement. Bankruptcy is not mentioned, but normally the powers and duties of the Board under Part III will come into operation when a state of insolvency exists. It is not too much to say that it is for the purpose of dealing with the affairs of debtors who are pressed and unable to pay their debts as they fall due that these powers and duties are created. Indeed the whole statute is conceived as a means of protecting embarrassed debtors who are residents of Alberta. Most people would agree that in this point of view the motives prompting the legislation may be laudable ones. But the legislature, in seeking to attain its object, seems to have entered upon a field not open to it. The statute, if valid, enables the Board (invested with exclusive possession of the key to the Courts) to employ its position and powers coercively in compelling the creditors of an insolvent debtor and the debtor himself to consent to a disposition of the resources of the debtor prescribed by the Board. In this way the statute seeks to empower the Board to impose upon the insolvent debtor and his creditors a settlement of his affairs, which the creditors must accept in satisfaction of their claims. I cannot escape the conclusion that the statute contemplates the use of the powers of the Board in this way. I think this is an attempt to invade the field reserved to the Dominion under Bankruptcy and Insolvency.

It may be that by apt legislation strictly limited to enactments relating exclusively to matters within the legislative jurisdiction of a province, a Board might lawfully be constituted having some of the powers which the Debt Adjustment Board receives under this legislation. As already intimated, it is unnecessary to express any opinion upon that. In any view of that question, it is impossible in this legislation to disentangle what a provincial legislature might competently enact from the principal enactments of the statute constituting this Board with authority to exercise powers that the legislature is incompetent to confer upon it; and indeed, if this were possible

and the *Debt Adjustment Act* could be re-written excluding what is *ultra vires* from what I assume might be *intra vires,* there can be no probability that the legislature would have enacted the statute in this truncated form. The competent elements of the legislation, if such there be, not being severable from the incompetent enactments constituting the Board with the powers conferred upon it, the statute is, as a whole, *ultra vires.*

It follows that the first interrogatory should be answered by stating that the enactment in question is *ultra vires* in whole. As regards the second, third, fourth and fifth interrogatories, it follows from the answer to the first that "the said Act as amended" is not operative in respect of any of the matters mentioned in those interrogatories.

CROCKET J. (dissenting)—This reference raises the question of the authority of the Legislature of Alberta to enact legislation dealing with the matters to which the provisions of the Alberta *Debt Adjustment Act* are directed. The answers to the general question (1) and the other four subordinate questions submitted manifestly depend upon the scope and extent of the legislative powers committed to the Legislatures of the Provinces of Canada by s. 92 of the *British North America Act,* as read in the light of s. 91 and the intendment of the whole Act regarding the distribution of legislative authority between the Parliament of Canada on the one hand and the Provinces on the other.

We must, I think, take it as settled that provincial legislation upon matters, which *prima facie* fall within one or more of the 16 classes of subjects enumerated in s. 92 of the *B.N.A. Act,* cannot be validly superseded by any Dominion legislation of the Parliament of Canada unless the latter is necessarily incidental to the exercise of the powers conferred upon it by one or other of the 29 specially enumerated heads of s. 91, that is to say, as Lord Tomlin expressed it in *Attorney-General for Canada* v. *Attorney-General for British Columbia* (1), in his summing up of the effect of the decisions of the Judicial Committee of the Privy Council regarding the interpretation and application of ss. 91 and 92, unless such legislation "strictly

(1) [1930] A.C. 111.

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relates to subjects of legislation expressly enumerated in s. 91" or is "necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91". See also *Citizens Ins. Co.* v. *Parsons* (1); *Cushing* v. *Dupuy* (2); *Tennant* v. *Union Bank of Canada* (3); *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada* (4), and *City of Montreal* v. *Montreal Street Railway* (5).

Another principle, which bears particularly on the construction of the words "Property and Civil Rights in the Province", as used in s. 92 (13), was also distinctly laid down by the Judicial Committee in the *Parsons* case (1) at p. 109, viz., that the words "Property and Civil Rights" are there used in their largest sense, and are not limited to such rights only as flow from the law, e.g., the status of persons. There is "no sufficient reason in the language itself", said Sir Montague Smith in the judgment of the Board, "nor in the other parts of the Act, for giving so narrow an interpretation to the words 'civil rights'." This, of course, as my Lord the Chief Justice pointed out in delivering the unanimous judgment of this Court on the *Reference re the Natural Products Marketing Act* (6), is subject to the limitations expressly arising from the exception of the enumerated heads of s. 91 and impliedly from the specification of subjects in s. 92. Sir Montague himself went on to say regarding the enumerated heads of s. 91:

> In looking at s. 91, it will be found, not only that there is no class including, generally, contracts and the rights arising from them, but that one class of contracts is mentioned and enumerated, viz., "18. Bills of Exchange and Promissory Notes", which it would have been unnecessary to specify if authority over all contracts and the rights arising from them had belonged to the Dominion Parliament.

Practically the same thing was said of the phrase "Administration of Justice", as used in 92 (14), by Street J., in delivering the judgment of himself and Falconbridge J., in *Reg.* v. *Bush* (7). The words of paragraph 14 of s. 92, he said,

(1) (1881) 7 App. Cas. 96.
(2) (1880) 5 App. Cas. 409, at 415.
(3) [1894] A.C. 31.
(4) [1894] A.C. 189.
(5) [1912] A.C. 333.
(6) [1936] S.C.R. 398, at 416.
(7) (1888) 15 Ont. R. 398.

confer upon the Provincial Legislatures the right to regulate and provide for the whole machinery connected with the administration of justice in the Provinces, including the appointment of all Judges and officers requisite for the proper administration of justice in its widest sense, reserving only the procedure in criminal matters,

as reserved by 91 (27) and subject to the provisions of ss. 96-100 relating to the appointment and payment of judges of Superior, District and County Courts and the constitution of a General Court of Appeal for Canada under s. 101. This pronouncement was distinctly and unanimously approved by this Court in a judgment delivered by the learned Chief Justice. See [1938] S.C.R., at p. 406, on the Reference regarding the validity of the provisions of the Ontario Adoption, the Children's Protection and the Deserted Wives' and Children's Maintenance Acts vesting certain functions in County Court and District Court Judges, and in Police Magistrates and Juvenile Court Judges (1).

The case of *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada* (2) seems to me to have a very special bearing upon the present case. It was cited along with *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (3) by Lord Tomlin in delivering the judgment of the Judicial Committee in *Attorney-General for Canada* v. *Attorney-General for British Columbia* (4), in support of the Board's statement that

It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the Provincial Legislature, are *necessarily incidental to effective legislation* by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91.

The 1894 case (5) involved the validity of an enactment of the Ontario Legislature relating to voluntary assignments, which the Board stated postponed judgments and executions not completely executed by payment to an assignment for the benefit of creditors under the Act. "Now there can be no doubt", the Board said,

that the effect to be given to judgments and executions and the manner and extent to which they may be made available for the recovery of

(1) *Reference re Authority to perform functions vested by the Adoption Act, the Children's Protection Act, the Children of Unmarried Parents Act, the Deserted Wives' and Children's Maintenance Act, of Ontario,* [1938] S.C.R. 398.
(2) [1894] A.C. 189.
(3) [1896] A.C. 348.
(4) [1930] A.C. 111, at 118.
(5) [1894] A.C. 189.

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debts are *primâ facie* within the legislative powers of the provincial parliament. Executions are a part of the machinery by which debts are recovered, and are subject to regulation by that parliament. A creditor has no inherent right to have his debt satisfied by means of a levy by the sheriff, or to any priority in respect of such levy. The execution is a mere creature of the law which may determine and regulate the rights to which it gives rise.

Their Lordships held that the provisions in question, relating as they did to assignments purely voluntary, did not infringe on the exclusive legislative power conferred upon the Dominion Parliament. "They would observe", the Lord Chancellor (Herschell), who delivered the judgment, continued,

> that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose *of preventing the scheme of the Act from being defeated.* It may *be necessary* for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the Provincial Legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the Provincial Legislature would doubtless be *then* precluded from *interfering with* this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the Provincial Legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.

The clear effect of this judgment, I think, is that legislation dealing with the effect of judgments and executions and the manner and extent to which they may be made available for the recovery of debts are *primâ facie* within the exclusive legislative powers of the Provinces as coming within 92 (13) and 92 (14) and that such provincial legislation must be held valid unless it is found to be inconsistent with the provisions of some existing Dominion legislation enacted in relation to one or other of the classes of subjects specially enumerated in s. 91, and *necessary* for the purpose of effecting the object to which such legislation is directed.

At the time of this decision there was no Dominion bankruptcy or insolvency legislation in force, the Dominion *Insolvent Act of 1875* having been previously wholly repealed.

I should like to refer to another case, which the Judicial Committee considered in 1898, that of *Attorney-General for*

the Dominion of Canada v. *Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia* (1), in which the Board heard an appeal from the judgment of this Court on a reference involving, *inter alia,* the validity of s. 4, Revised Statutes of Canada, c. 95, purporting to empower the grant of an exclusive right to fish in property belonging to the Provinces. It was held, affirming the judgment of this Court (2), that that enactment, so far as it purported to empower the grant of exclusive fishing rights over provincial property, was *ultra vires* of the Parliament of Canada. The clear ground of the decision was that the provision did not fall within the exclusive legislative jurisdiction of the Dominion under s. 91 (12). I quote the following passage from that judgment at p. 716:

> But whilst in their Lordships' opinion all restrictions or limitations by which public rights of fishing are sought to be limited or controlled can be the subject of Dominion legislation only, it does not follow that the legislation of Provincial Legislatures is incompetent merely because it may have relation to fisheries. For example, provisions prescribing the mode in which a private fishery is to be conveyed or otherwise disposed of, and the rights of succession in respect of it, would be properly treated as falling under the heading "Property and Civil Rights" within s. 92, and not as in the class "Fisheries" within the meaning of s. 91. So, too, the terms and conditions upon which the fisheries which are the property of the province may be granted, leased, or otherwise disposed of, and the rights which *consistently with any general regulations respecting fisheries enacted by the Dominion Parliament* may be conferred therein, appear proper subjects for provincial legislation, either under class 5 of s. 92, "The Management and Sale of Public Lands" or under the class "Property and Civil Rights". Such legislation deals directly with property, its disposal, and the rights to be enjoyed in respect of it, and was not in their Lordships' opinion intended to be within the scope of the class "Fisheries" as that word is used in s. 91.

As late as 1939 another case came before the Judicial Committee, which clearly involved the application of the same principles, and in which the Board in a judgment delivered by Lord Atkin affirmed a judgment of the Court of Appeal for Ontario, holding that certain parts of the *Ontario Municipal Board Act, 1932,* and the *Department of Municipal Affairs Act, 1935,* were *intra vires* of the Provincial Legislature. This was the case of *Ladore* v.

(1) [1898] A.C. 700.
(2) *In re Jurisdiction over Provincial Fisheries,* (1896) 26 Can. S.C.R. 444.

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Bennett (1), which arose out of the financial difficulties of four adjoining municipalities in the Province of Ontario and their amalgamation under the provisions of c. 74 of the Provincial Act of 1935 into one municipality under the name of the Corporation of the City of Windsor. Under the provisions of this Act the existing municipal corporations were dissolved and a special body called the Windsor Finance Commission was constituted with the same rights, powers and duties as by the provisions of Part III of the *Department of Municipal Affairs Act, 1935,* were conferred upon that Department, and the provisions of Part III of the latter Act were to apply to the new city. By the provisions of Part III the Ontario Municipal Board, if satisfied *inter alia* that a municipality had failed to meet its debentures or interest when due owing to financial difficulties, was given power *inter alia* to order postponement of or variation in the terms, time and places for payment of the whole or any portion of the debenture debt and outstanding debentures and other indebtedness and interest thereon, and variation in the rates of interest. A scheme having been formulated by the Windsor Commission pursuant to its powers and approved by the Ontario Municipal Board for funding and refunding the debts of the amalgamated municipalities, under which former creditors of the old independent municipalities received debentures of the new city of equal nominal amount to those formerly held, but with the interest scaled down in various classes of debentures, the Windsor Finance Commission was abolished by an amending Act of 1936, and its duties transferred to the Department of Municipal Affairs for Ontario. The plaintiff's action prayed *inter alia* for a declaration that the provisions of the *Ontario Municipal Board Act, 1932,* and the *Department of Municipal Affairs Act, 1935,* and amendments thereto, under which the funding and refunding debt scheme was effected, were *ultra vires* of the Provincial Legislature. It was contended that they invaded the legislative jurisdiction of the Dominion as to (1) bankruptcy and insolvency; (2) interest; and (3) because they affected private rights outside the Province.

On account of their peculiar applicability to the attack which is made against the validity of the Alberta *Debt*

(1) [1939] A.C. 468.

Adjustment Act in the present case, I quote the following passages from Lord Atkin's reasons:

It appears to their Lordships that the Provincial legislation cannot be attacked on the ground that it encroaches on the exclusive legislative power of the Dominion in relation to this class of subject. Their Lordships cannot agree with the opinion of Henderson, J.A., that there is no evidence that these municipalities are insolvent. Insolvency is the inability to pay debts in the ordinary course as they become due; and there appears to be no doubt that this was the condition of these corporations. But it does not follow that because a municipality is insolvent the Provincial Legislature may not legislate to provide remedies for that condition of affairs. The Province has exclusive legislative power in relation to municipal institutions in the Province: s. 92 (8) of the British North America Act, 1867. Sovereign within its constitutional powers, the Province is charged with the local government of its inhabitants by means of municipal institutions.

* * *

Efficient local government could not be provided in similar circumstances unless the Province were armed with these very powers, *and if for strictly Provincial purposes debts may be destroyed and new debts created,* it is inevitable that debtors should be affected, *whether the original creditors reside within or without the Province.* They took for their debtor a corporation which at the will of the Province could lawfully be dissolved, and of its destruction they took the risk.

* * *

It was suggested in argument that the impugned provisions should be declared invalid because they sought to do indirectly what could not be done directly—namely, to facilitate repudiation by Provincial municipalities of obligations incurred outside the Province. It is unnecessary to repeat what has been said many times by the Courts in Canada and by the Board, that the Courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping within the statutory field. A colourable device will not avail. But in the present case nothing has emerged even to suggest that the Legislature of Ontario at the respective dates had *any purpose in view other than to legislate in times of difficulty* in relation to the class of subject which was its special care—namely, municipal institutions. For the reasons given the attack upon the Acts and scheme on the ground either that they infringe the Dominion's exclusive power relating to bankruptcy and insolvency, or that they deal with civil rights outside the Province, breaks down. The statutes are not directed to insolvency legislation; they pick out insolvency as one reason for dealing in a particuler way with unsuccessful institutions; and though they affect rights outside the Province they only so affect them collaterally, as a necessary incident to their lawful powers of good government within the Province.

The question of interest does not present difficulties. The above reasoning sufficiently disposes of the objection. If the Provincial Legislature can dissolve a municipal corporation and create a new one to take its place, it can invest the new corporation with such powers of incurring obligations as it pleases, and incidentally may define the amount of interest which such obligations may bear. Such legislation, if directed

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bona fide to the effective creation and control of municipal institutions, is in no way an encroachment upon the general exclusive power of the Dominion Legislature over interest.

I should not have felt it necessary to deal with the foregoing cases at such length had it not been for the contention that the recent decision of this Court in *Attorney-General for Alberta and Winstanley* v. *Atlas Lumber Co. Ltd.* (1) is necessarily conclusive of the invalidity of the impugned enactment, not only with regard to actions on bills of exchange and promissory notes, but with regard to all matters which affect or may affect bankruptcy or insolvency, banks and banking, interest and all other subjects specially enumerated in s. 91. For my part, I cannot accept this contention. The Court there dealt only with an action on a promissory note and held in effect that the plaintiff was entitled to bring his action for the recovery of the moneys due thereon in consequence of the provisions of ss. 74, 134, 135 and 136 of the *Bills of Exchange Act*, R.S.C. 1927, c. 16, without the necessity of obtaining a permit enabling it to do so under the provisions of s. 8 of the provincial *Debt Adjustment Act*. The provisions of the impugned section of the provincial statute were held to conflict with these sections of the Dominion enactment as the Court construed the latter. While it was clearly enough laid down in the reasons for judgment that the impugned enactment of the provincial statute conflicted with existing Dominion legislation strictly and necessarily relating to enumerated head 18 of s. 91 and that the latter must for that reason prevail, it does not follow, I most respectfully think, that the provincial *Debt Adjustment Act* must be held to be wholly *ultra vires* of the Provincial Legislature merely because it affects or may affect bankruptcy or insolvency, banks and banking, interest or any other subject enumerated in s. 91, upon which the Dominion Parliament has purported to legislate as falling within one or more of those classes of subjects. As pointed out by Sir Montague Smith in the extract I have above quoted from his judgment in the *Parsons* case (2), " Bills of Exchange and Promissory Notes " is the only class of contracts which is specifically mentioned in s. 91, and there is no class (of subject) which includes " generally contracts and the rights arising from them ". It would

(1) [1941] S.C.R. 87. (2) (1881) 7 App. Cas. 96.

seem, therefore, that this specific enumeration of Bills of Exchange and Promissory Notes may well be said to expressly withdraw that class of contracts from the exclusive jurisdiction of the Province in relation to 92 (13), Property and Civil Rights.

Having regard, therefore, to the decisions and pronouncements of the Judicial Committee in the cases above referred to, which,—to borrow the language of my Lord the Chief Justice, in delivering the unanimous judgment of this Court in the *Natural Products* case (1), had their basis

> is the consideration mentioned in *Parsons* case (2) arising from the specification of particular subjects in section 91 and from the necessity to limit the natural scope of the words "in order to preserve from serious curtailment, if not from virtual extinction, the degree of autonomy, which, as appears from the scheme of the Act as a whole, the provinces were intended to enjoy",

—as he put it in the *Lawson* case (3),—I am constrained to differ from my brethren in the view that the provincial *Debt Adjustment Act* is wholly *ultra vires* for the reasons now given.

The whole purpose of the statute, as it plainly appears to me from an examination of all its provisions, is to regulate and control the enforcement of contractual obligations for the payment of money so as to safeguard during a period of financial stress the interests of unfortunate resident debtors, who, through no fault of their own, but entirely owing to the general depreciation of values brought about by abnormal economic conditions, find themselves in such a position that the stringent enforcement of their creditors' claims might entail irreparable loss upon them. Its provisions are predominantly directed to procedure in civil matters in provincial courts, in relation to the constitution and organization of which courts the provinces, within the limits already indicated, unquestionably possess sovereign legislative power, as each province does, in relation to property and civil rights within its territorial jurisdiction. It is not doubted that the right to sue in provincial courts is a civil right in the province, whether the claim sought to be enforced arose in the province or not. None of the provisions of the provincial statute are directed to insolvency legislation nor to banks or banking legislation,

(1) [1936] S.C.R. 398, at 410. (2) (1881) 7 App. Cas. 96.
(3) *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction,* [1931] S.C.R. 357, at 366.

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nor to the contracts of Dominion companies, carrying on business either within or without the province, though they may affect these subjects and these rights collaterally as a necessary incident to the attainment of the obvious object of the statute, viz., the granting of relief to hard pressed resident debtors. How, then, can it be said that the impugned statute is entirely beyond the constitutional competency of the province because it provides that no action for the recovery of money in respect of a liquidated demand or debt shall be commenced or continued, and no proceedings by way of execution, attachment, etc., taken, and no warrant of distress, chattel mortgage, conditional sale agreement or power of sale contained in a mortgage on land enforced against a resident debtor unless the Debt Adjustment Board issues a permit giving consent thereto?

This Court has quite recently applied the principle that Dominion and foreign corporations doing business in a province are subject to laws of general application in the province in matters falling within the classes of subjects enumerated in s. 92, notwithstanding these corporations may incidentally be affected in their business by some of the provisions of such provincial legislation. See *Royal Bank of Canada* v. *Workman's Compensation Board of Nova Scotia* (1); and *Home Oil Distributors Ltd.* v. *Attorney-General of British Columbia* (2). That this had previously been taken for granted would appear from the following passage, which I reproduce from the judgment of Duff, J., as our present Chief Justice then was, in *Lukey* v. *Ruthenian Farmers' Elevator Co. Ltd.* (3), cited by counsel for the Mortgage Loans Association of Alberta and the Canadian Bankers' Association, at pp. 71 and 72 as to the legislative power in relation to rights of Dominion corporations, the constitution of which is, of course, outside the purview of s. 92:

> Authority of the Dominion under the residuary clause fortified by that under 91 (2) embraces authority to provide for the constitution of companies falling within the class of joint stock companies * * * possessing independently of provincial legislation in each of the provinces the status of a juridical person, having the right to contract, and having the right to invoke the jurisdiction of the courts, *subject always, of course, to the measures passed by provincial legislatures of general application in relation to such civil rights.*

(1) [1936] S.C.R. 560. (2) [1940] S.C.R. 444.
(3) [1924] S.C.R. 56.

It is contended, however, that the impugned statute, by authorizing the Debt Adjustment Board to grant or refuse permits, gives it the unreasonable and arbitrary power to deny a creditor all access to the established courts of the Province. Whether the Board is given power arbitrarily and without investigation of the conditions and circumstances in any particular case or not does not, in my opinion, affect the constitutionality of the enactment. That has been laid down in so many cases as to admit of no doubt. It is emphasized particularly by Lord Herschell in his judgment in the 1898 case (1) at p. 713, and is strikingly illustrated by some of the passages I have quoted from Lord Atkin's judgment in *Ladore* v. *Bennett* (2). That consideration may possibly bear on the question as to whether the provincial enactment is a mere colourable device or mere pretence, by which the Legislature has sought to do indirectly what it could not do directly. Many attacks have been made against Dominion as well as Provincial legislation on this ground, and some of them have succeeded. Once, however, it becomes clear from an examination of the provisions of an enactment that it is within the constitutional competency of the enacting Legislature, the courts have no concern as to the reasonableness or injustice of those provisions. If an enactment is of such a palpably unfair character as to offend the public conscience, the remedy lies, not with the courts of the country, but with the people to whom the Legislature is responsible, or in the power of disallowance, the responsibility for the exercise of which the *B.N.A. Act* has placed in the hands of the Governor in Council. I may add that a study of the whole Act has convinced me that it was not the intention of the Legislature that the Debt Adjustment Board should exercise the powers committed to it without any investigation or consideration of the facts and circumstances in any case coming before it, and that I cannot agree with the suggestion that the appeal for which the Act provides was intended to be an appeal merely to a jury of laymen. The appeal is in point of fact to a judge of the Supreme Court sitting with a jury, which can only determine the issue under proper instruc-

(1) *Attorney-General for Canada* v. *Attorneys-General for Ontario, Quebec and Nova Scotia,* [1898] A.C. 700.
(2) [1939] A.C. 468.

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tions from the judge. See ss. 3 (*d*) and ss. 6, 9, 10, 21, 23, 33 and 36 (1), (3), (4), (5), (7), (8) and (10).

As to the suggestion that the Act was a colourable device to reach out at something which was beyond the competence of the Legislature, I need only refer, I think, to s. 39, which distinctly provides that the 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".

I differ also from my brethren in their conclusion that the *Debt Adjustment Act* is not an Act of general application in the Province of Alberta within the meaning of the authorities.

The impossibility of answering the first question in the terms in which it is framed with any degree of definiteness or assurance must, I think, be apparent when the settled principles as to the scope and extent of the legislative power of the provinces under the *B.N.A. Act* are borne in mind.

This question, in the form in which it is put, manifestly involves, not only the construction of every one of the numerous provisions of the *Debt Adjustment Act* itself, but a search for any Dominion enactments which may possibly be affected thereby, as well as the consideration in connection with each one of these latter enactments whether they strictly relate to the particular matters upon which the Dominion has purported to legislate, or are merely ancillary thereto. To adapt the language of Lord Watson in delivering the judgment of the Judicial Committee in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1), if I may presume to do so, the question, being in its nature academic rather than judicial, is "better fitted for the consideration of the officers of the Crown than of a court of law".

For these reasons, I can only answer question 1 as follows: No, except in so far as its provisions may be found to conflict with any existing Dominion legislation strictly relating to any of the classes of subjects specially enumerated in s. 91 of the *B.N.A. Act* or as being necessarily incidental to the particular subject matter, upon which the Parliament of Canada has undertaken to legislate as falling within one or other of the said enumerated heads.

(1) [1896] A.C. 348, at 370.

As the other four questions involve the same considerations as have prompted me to incorporate in my answer to question 1 the exception there indicated, I am unable to answer the other four questions without a similar qualification.

I therefore certify the foregoing as my opinion upon the questions submitted.

The opinions in respect of the questions referred to the Court were certified to His Excellency the Governor General in Council as follows:—

By the Court:—

In answer to the interrogatory numbered 1: The said Act as amended is *ultra vires* of the legislature of Alberta in whole.

In answer to the interrogatory numbered 2: The said Act as amended is not operative in respect of any of the matters mentioned.

In answer to the interrogatory numbered 3: The said Act as amended is not operative in respect of any of the matters mentioned.

In answer to the interrogatory numbered 4: The said Act as amended is not operative in respect of any of the matters mentioned.

In answer to the interrogatory numbered 5: The said Act as amended is not operative in respect of any of the matters mentioned.

By Mr. Justice Crocket:—

In answer to question 1: No, except in so far as its provisions may be found to conflict with any existing Dominion legislation strictly relating to any of the classes of subjects specially enumerated in s. 91 of the B.N.A. Act or as being necessarily incidental to the particular subject matter, upon which the Parliament of Canada has undertaken to legislate as falling within one or other of the said enumerated heads.

In answer to the other four questions: As the other four questions involve the same considerations as have prompted me to incorporate in my answer to question 1 the exception there indicated, I am unable to answer the other four questions without a similar qualification.

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* May 1, 2.
* Dec. 2.

IN THE MATTER OF THE TRUSTS UNDER THE WILL OF HENRY MARSHALL JOST, DECEASED

THE EASTERN TRUST COMPANY, SOLE SURVIVING EXECUTOR AND TRUSTEE UNDER THE WILL OF HENRY MARSHALL JOST, DECEASED (PLAINTIFF) ..... APPELLANT;

AND

MONTREAL TRUST COMPANY AND GRACE M. E. GAETZ, EXECUTORS OF THE WILL OF JOHN J. GAETZ, DECEASED; AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Administration of estates—Payment by executors of succession duties—Will giving bequests of specific sums and residuary bequest—Depreciation in value of estate owing to severe slump in stock market shortly after testator's death, causing insufficiency to pay bequests in full or anything on residuary bequest—Rates at which duties should be calculated—Duties paid based on net value of estate as at date of testator's death and at the rates appropriate to the different classes of beneficiaries, including the residuary legatee, as named in the will—Question whether payments made on wrong basis of computation under the circumstances and whether executors chargeable for overpayment.

The question on the appeal was whether the executors of a deceased's will, who had paid amounts claimed by certain provinces of Canada for succession duties, were justified in having paid those amounts, or whether the duties had been paid according to a wrong basis of computation under the circumstances and consequently there had been overpayment for which the executors were chargeable.

The deceased, residing in the province of Nova Scotia, died on August 25, 1929, leaving a large estate consisting almost entirely of listed stocks and shares. His will made bequests of specific sums, directed a certain fund to be set aside for certain life interests and afterwards to revert to his estate, and bequeathed the whole of the residue to a university in the province of New Brunswick. The will provided that no bequests (except income from said fund) be paid for three years after deceased's death, the expressed purpose being to allow the executors time to dispose of securities to the best advantage and not in a depressed market. The will contained no express instructions with regard to payment of succession duties.

Shortly after the executors entered upon their duties and before they had realized any portion of the estate the stock market took an unprecedented and severe slump and the value of securities constituting the estate fell very much below the inventory values, with the result that the estate has ever since been insufficient to pay the legacies in full; all the general legacies had to abate and there was no residue.

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

Between 1930 and 1936 the executors paid (from time to time as funds were available or were rendered available by sale of assets or by borrowings) to the Provinces of Nova Scotia, Ontario, Quebec and British Columbia the succession duties claimed to be payable in respect of all property passing under deceased's will. The payments were made on the footing that the amounts thereof constituted a charge upon the assets of the estate and that the executors were legally bound to pay them. The duties were paid on the basis of the net value of the estate as at the time of deceased's death and at the rates appropriate to the different classes of beneficiaries, including the residuary legatee, as named in the will.

The Supreme Court of Nova Scotia *in banco* held (15 M.P.R. 477) that the executors were not entitled to pay succession duties as so claimed; that they were entitled to pay succession duties based upon the rates applicable to the persons who receive property or beneficial interest in property from the estate and not at rates applicable to persons by whom no property or beneficial interest in property is received although such latter persons may have been named in the will.

The sole surviving executor appealed to this Court.

Held (*per* the Chief Justice and Hudson and Taschereau JJ.; Crocket and Kerwin JJ. dissenting): The appeal should be allowed. The executors were justified in having paid out of the assets of the estate the claims as made for succession duties.

The material statutory provisions considered were in the Nova Scotia *Succession Duty Act* (R.S.N.S., 1923, c. 18), the material statutory provisions in other provinces to whom duty was paid being substantially the same.

Per Hudson and Taschereau JJ.: The tax is primarily a property tax and is intended to be a direct burden on that property, varying in amount according to the relationship of the successor to the testator. The tax is intended to be determined by the state of things existing at the date of the deceased's death. Agreement expressed with the following holding by Hall J., dissenting, in the Court below: It is the purpose and intention of the Act that the two factors necessary to determine the duty—valuation and rates—shall be constant. Irrespective of market fluctuations, duty shall be levied upon the fair market value (less deductions) at the date of death. The rate is determined by the relationship or nature of the person for whose benefit property passed on the death. Computation is made by applying the appropriate rate to property passing to each person beneficially on the testator's death. The duty is paid on the basis of the distribution intended by the testator. The executor deducts the amount which was payable on each legacy under s. 10 (1) of the Act. He must do this in order to carry on the administration of the estate. He cannot discharge his functions as executor until he has freed the assets of the estate from the lien imposed for succession duties.

Per Crocket J. (dissenting): Property which "passes on the death of any person", within the meaning of the Act, means property which changes hands at the death; it vests in the executor, though he has no beneficial interest in it; it only actually "passes" to the beneficiary when it reaches him. It would be unreasonable and unjust

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to levy duty in respect of property that the beneficiary never received; and it should only be levied if the Act in the clearest terms directed it. S. 10 (1) of the Act cannot possibly be construed as imposing any liability upon the beneficiary for succession duties upon any property which he has not received. In view of the facts of this case, the executors were not justified in paying out of the assets of the estate the succession duties they did, and which included an amount in respect of the residuary gift, which they fully realized, at the time of payment of duties, was of no value.

Per Kerwin J. (dissenting): The tax is imposed in respect of property "passing on the death." The executor is not liable for the payment of it, though he is required (and is under penalty for failure) to deduct the duty before transferring to a legatee, etc., any property to which such person is entitled. Apart from this, the only one liable is the person to or for whose benefit any property passes, under s. 10 (1). It must be borne in mind that the Court is here dealing with general legacies of specific amounts, except, of course, the residuary bequest. The residuary legatee actually received nothing. It cannot be held that any legatee who actually received nothing, though the will mentioned a bequest of a large sum to him, should pay a tax. In the present case the executors acted unreasonably, particularly as they knew when they paid a great portion of the duties that the assets would not be nearly sufficient to pay all the legacies.

APPEAL by the sole surviving executor and trustee under the last will and testament of Henry Marshall Jost, late of Guysboro in the province of Nova Scotia, deceased, from the judgment of the Supreme Court of Nova Scotia *in banco* (1) dismissing (subject to a certain proviso) the appeal of the executors and trustees under said will from part of the judgment of Carroll J. (2).

The question on the present appeal was whether the executors, who had paid amounts claimed by certain Provinces of Canada for succession duties, were justified in having paid those amounts, or whether the duties had been paid upon a wrong basis of computation under the circumstances and consequently there had been overpayment for which the executors were chargeable.

For the purposes only of the appeal asserted from the judgment of Carroll J., the following facts were agreed upon:—

1. Henry Marshall Jost, the Testator, died August 25th, 1929, leaving a gross estate valued as at the date of death at $904,297.12 less known liabilities of $112,007.38, leaving a net value of $792,289.74. This estate consisted almost entirely of listed stocks and shares.

(1) 15 M.P.R. 477; [1941] 1D.L.R. 642.

(2) 15 M.P.R. 477 (at 477 to 492).

2. Probate of the Will was granted in due course to the Executors named therein, viz., The Eastern Trust Company, J. A. Fulton and George R. Hart (now deceased).

3. The Testator by his Will made bequests of specific amounts aggregating $482,150. In addition he directed that $150,000 be set aside in Government Bonds and the income therefrom paid to John J. Gaetz for life and that on the death of Gaetz the fund of $150,000 should fall into and become part of the residue of his estate: provided however, that if Gaetz's wife should survive him (which she did) she was to be paid $1,200 yearly for life.

By the Will the whole of the residue was bequeathed to the Regents of Mount Allison University.

4. Clause 79 of the Will reads as follows:

"It is my Will that no bequests be paid for three years after my demise except the half yearly income to my nephew John J. Gaetz or to his wife in the event of her surviving him. This provision is to allow the Executors time to dispose of my securities to the best advantage and not in a depressed market".

5. Shortly after the Executors entered upon their duties and before they had realized any portion of the estate, the stock market took an unprecedented and severe slump and the value of the securities constituting the estate fell very much below the inventory values with the result that the estate has ever since been insufficient to pay the legacies in full. All the general legacies will have to abate and there will be no residue to go to the Regents of Mount Allison.

6. Between the years 1930 and 1936 the Executors paid the following amounts in succession duties, which amounts included interest, viz:—

To the Province of Ontario	$ 77,031.50
To the Province of Quebec	22,928.86
To the Province of British Columbia	2,293.31
To the Province of Nova Scotia	62,798.73
	$165,052.40

7. The payment of these duties was made from time to time as funds were available or were rendered available by the sale of assets or by borrowings.

8. The succession duties thus paid are all the succession duties in the four named Provinces claimed to be payable in respect of all property passing under the Will of the Testator. No attempt was made prior to or at the time of payment to break down these duties and allocate them to the various legatees, nor were the legatees ever called upon to pay to the Executors the amount of succession duties claimed to be payable in respect of their respective legacies, but the amounts claimed as duties were paid by the Executors on the footing that they constituted a charge upon the assets of the estate and that they were legally bound to pay them.

Included in the bulk sums paid are succession duties claimed in respect of the residuary legacy which would have passed to Mount Allison University had it been possible to realize the assets at inventory price as at the death of the Testator.

9. On a rough break-down it is estimated that had the assets proved sufficient to pay all the legacies in full including the residuary gift to

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Mount Allison, the amount of succession duty in all four Provinces attributable to the property thus passing to Mount Allison would be approximately $79,271.17.

10. Succession Duty Returns were filed by the Executors with the Provinces of Ontario and Quebec in November, 1929, with the Province of Nova Scotia in September, 1931, and with the Province of British Columbia late in 1932 or early in 1933, and Statements of duty claimed were received by the Executors from the Provinces of Ontario and Quebec prior to the expiration of one year from the date of Testator's death.

11. The succession duties claimed by the Province of Ontario were paid in March, 1931, as to the amount of $74,876.49; and the balance, being payments in respect of the Gaetz legacy, was paid out of general income in the years 1932 and 1933.

12. The succession duties claimed by the Province of Quebec were paid as to $1,000 in 1930, and as to the balance in 1933.

13. The succession duties claimed by the Province of Nova Scotia were paid in the years 1935 and 1936.

14. The succession duties claimed by the Province of British Columbia were paid in the year 1934.

15. The Will of the Deceased contained no express instructions with regard to the payment of succession duties.

16. On March 11th, 1932, the Executors took out an Originating Summons for the determination of certain matters arising in connection with the Estate, and on August 3rd, 1932, His Lordship Mr. Justice Carroll by whom the motion had been heard granted an Order determining certain questions and directing that the determination of the remaining questions be deferred. Copies of the said Originating Summons and Order will be printed as part of the Case on Appeal.

17. By Order dated April 26th, 1938, and made by His Lordship Mr. Justice Carroll the hearing of the undetermined matters raised by the said Originating Summons was set for May 20th, 1938; and on July 29th, 1938, it was ordered that a Reference be held before Charles F. Tremaine, Esq., K.C., Special Referee. Copy of the Order for Reference will be printed as part of the Case on Appeal.

18. The hearing of the said Reference was proceeded with before Charles F. Tremaine, Esq., K.C., Special Referee, who on April 11th, 1939, filed an Interim Report, a copy of which will be printed as part of the Case on Appeal.

19. A hearing of the matters raised by the Interim Report was had before Mr. Justice Carroll in the presence of Counsel for all parties interested, and on or about the 13th day of March, 1940, he delivered his Decision on the various points at issue.

20. An Order for Judgment based on this Decision was granted on the 1st day of April, 1940.

21. The present appeal is from a portion of the said Decision and portion of the said Order for Judgment. The said Decision, Order for Judgment and Notice of Appeal therefrom will be printed as part of the Case on Appeal.

22. On the hearing before the said Referee, as well as upon the hearing before Mr. Justice Carroll it was agreed that it would not be necessary to prove the law of the Provinces of Quebec, Ontario and British Columbia as matters of fact, but that the said Referee and the said learned Judge

might have resort to the Statutes of the said Provinces for the purpose of determining the law of such Provinces respectively with regard to succession duties.

The appeal from the judgment of Carroll J. was in respect of his decision upon the question of payment of succession duties. In the formal order for judgment of Carroll J. the question was stated and answered as follows:

(4) Q. Were the Executors entitled to pay out of the assets of the estate to the Provinces of Nova Scotia, Quebec, Ontario and British Columbia the succession duties claimed by the said Provinces respectively in respect of property passing to the various legatees named in the Will or chargeable to such legatees respectively? A. No.

(A copy of the order was to be served on the referee aforesaid and it was ordered that he complete his enquiry into the accounts and report.)

In their notice of appeal from the judgment of Carroll J., the executors stated:

Part only of the said Decision and Order for Judgment are hereby appealed from, namely, such part or parts of the said Decision and Order for Judgment as hold or determine:

(*a*) That the Executors were not entitled to pay out of the assets of the Estate to the Provinces of Nova Scotia, Quebec, Ontario and British Columbia the succession duties claimed by the said Provinces respectively in respect of property passing to the various legatees named in the Will or chargeable to such legatees respectively; and/or

(*b*) That there has been overpayment of succession duties by the Executors or any breach of trust or other improper conduct by the Executors in connection with the payment of succession duties; and/or

(*c*) That the Executors are in any way responsible for any overpayment of succession duties.

The appeal to the Supreme Court of Nova Scotia *in banco* was dismissed (subject to a proviso) *per* Graham, Doull and Archibald JJ.; Hall J. dissenting. The formal order dismissing the appeal ordered:

That the appeal in regard to (*a*), (*b*) and (*c*) set out in the notice of appeal be dismissed subject to this proviso that the answer of the trial judge to question 4 as set out in the order for judgment be varied to read as follows:

"No. The executors are entitled to pay succession duties based upon the rates applicable to the persons who receive property or beneficial interest in property from the estate of the deceased and not at rates applicable to persons by whom no property or beneficial interest in property is received although such latter persons may have been named in the will".

and further ordered that a copy of the order, of the judgments delivered on the appeal, and of the order appealed

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from, be served on the Referee aforesaid, and that he complete his inquiry into the accounts and report; and that the Referee

in reporting upon the amount of succession duties payable in respect of property passing to the various legatees named in the Will or chargeable to such legatees respectively, shall make his finding thereon upon the basis of the judgments of the Honourable Mr. Justice Graham and the Honourable Mr. Justice Doull (as concurred in by the Honourable Mr. Justice Archibald) delivered herein on this appeal.

The present appeal was then brought to this Court. The appellant in its factum submitted

1. That the majority in the Court *in banco* erred in holding that the rate at which succession duties were calculated depended upon the relationship to the Testator of the persons who actually received the proceeds of the Estate on distribution rather than on the relationship of those who would have received such proceeds had the Estate realized inventory value and been distributed according to the directions contained in the Will.

2. That the majority in the Court *in banco* erred in holding that any change in value of the assets constituting the Estate taking place between the date of the death of the Testator and the date of distribution would change the amount of the succession duties payable.

3. That the majority in the Court *in banco* erred in holding in effect that there had been overpayment of succession duties by the Executors and that the Executors were liable to reimburse the Estate for any such overpayment.

4. That the majority in the Court *in banco* erred in not holding that the Executors were entitled to pay out of the assets of the Estate to the Provinces of Nova Scotia, Quebec, Ontario and British Columbia the succession duties claimed by the said Provinces respectively in respect of property passing to the various legatees named in the Will or chargeable to such legatees respectively.

C. B. Smith K.C. for the appellant.

No one for the respondents.

THE CHIEF JUSTICE—I have had an opportunity of considering the judgment of my brother Hudson and I concur with his conclusion.

CROCKET J. (dissenting).—I think this appeal should be dismissed. The question involved in the appeal to the Nova Scotia Supreme Court *en banc* from the decision of Carroll J., on an originating summons, concerned the propriety of the payment by the appellants as executors and trustees of and under the will of one, H. M. Jost, of succession duties in respect of the various bequests thereof.

The testator died on August 25th, 1929. His estate consisted almost entirely of listed stocks and shares, the market value of which, after making the statutory deductions, was placed at $792,289.74. The will directed the setting aside as a trust fund of $150,000, the income of which was to be paid for life to his nephew, J. J. Gaetz, and that on his death the fund should fall into and become part of the residue of the testator's estate with the proviso that, if Gaetz's wife should survive him (which she did), she was to be paid $1,200 yearly for life. It also made a number of specific bequests to other beneficiaries. These bequests, including the trust fund, aggregated $482,150. The whole of the residue was bequeathed to the Regents of Mount Allison University.

Clause 79 of the will read as follows:

> It is my Will that no bequests be paid for three years after my demise except the half yearly income to my nephew John J. Gaetz or to his wife in the event of her surviving him. This provision is to allow the Executors time to dispose of my securities to the best advantage and not in a depressed market.

The will contained no express instructions about payment of succession duties.

The executors filed succession duty returns for the Provinces of Ontario and Quebec with the proper officers in November, 1929. The returns for Nova Scotia, however, were not filed until September, 1931, while those for British Columbia were not filed until late in 1932 or early in 1933—after the expiration of a period of three years from the testator's death. Succession duties claimed by the Province of Ontario to the amount of $74,876.49 were paid in March, 1931, and further sums, it appears, amounting to $2,155.01, were paid to the Government of the Province of Ontario in respect of the Gaetz legacy in the years 1932 and 1933. As for the Quebec succession duties, it is simply stated in the case, as it comes before us, that the executors paid $1,000 in 1930 and the balance ($21,928.86) in 1933. The succession duties claimed by the Province of British Columbia ($2,293.31), were paid in the year 1934, and those claimed by the Province of Nova Scotia ($62,798.73), in the years 1935 and 1936. The total amount of succession duties thus paid by the executors, as set out in the case, was $165,052.40, which, it appears, included interest. Nothing is said about the

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filing of any succession duty returns for the Province of New Brunswick, though it is said in the agreed case submitted to the Supreme Court that

> included in the bulk sums paid are succession duties claimed in respect of the residuary legacy which would have passed to Mount Allison University had it been possible to realize the assets at inventory price as at the death of the testator,

and that

> on a rough break-down it is estimated that had the assets proved sufficient to pay all the legacies in full including the residuary gift to Mount Allison, the amount of succession duty in all four provinces attributable to the property thus passing to Mount Allison would be approximately $79,271.17.

So that of the total $165,052.40 paid for succession duties to the other four provinces, $79,271.17 was paid on account of the residuary bequest to the University of Mount Allison in the Province of New Brunswick.

It is said in the statement of facts, as agreed upon between the solicitor for the appellants and Mr. F. D. Smith, K.C., (who was appointed solicitor and counsel by the court *en banc* to oppose the appeal to that court, on account of no one having appeared to represent the defendant respondent), in explanation of the seemingly extraordinary situation regarding the payment of these succession duties, that

> shortly after the executors entered upon their duties and before they had realized any portion of the estate, the stock market took an unprecedented and severe slump and the value of the securities constituting the estate fell very much below the inventory values, with the result that the estate has ever since been insufficient to pay the legacies in full;

and that

> no attempt was made prior to or at the time of payment to break down these duties and allocate them to the various legatees, nor were the legatees ever called upon to pay to the executors the amount of succession duties claimed to be payable in respect of their respective legacies, but the amounts claimed as duties were paid by the executors on the footing that they constituted a charge upon the assets of the estate and that they were legally bound to pay them.

The question stated for the opinion of the learned trial judge on the originating summons was:

> Q. Were the Executors entitled to pay out of the assets of the estate to the Provinces of Nova Scotia, Quebec, Ontario and British Columbia the succession duties claimed by the said Provinces respectively in respect of property passing to the various legatees named in the will or chargeable to such legatees respectively?

To this he answered "No". On appeal to the Supreme Court *en banc,* as I have said, no one appeared to oppose, and that court, having assigned Mr. Smith to that duty, the agreed statement of facts referred to was submitted and argued, pro and con, with the result that the appeal was dismissed by Graham, Doull and Archibald JJ.; Hall J. dissenting. The case now comes to us on appeal from this judgment and was here heard *ex parte.*

It was stated by counsel for the appellant that the sole question for determination is whether or not the executors paid the duties computed on a wrong basis, and as the case was presented to the Nova Scotia court on the said agreed statement of facts, that may be true in a sense. But, as I read the written reasons of both Graham and Doull JJ., for the majority judgment, I gather that in their view the real question was whether the executors were entitled to charge the assets of the estate with the entire amount of these payments as calculated and allocated by themselves as succession duties payable by them in respect of property passing to the various legatees named in the will within the meaning of the *Succession Duty Act* of Nova Scotia, notwithstanding the fact that the executors knew when they paid these duties that the property was insufficient to pay the specific bequests in full, and that there could be no residue.

Graham J., after referring to the relevant provisions of the Act, as set out in the judgment of his brother, Doull, distinctly held that property which "passes on the death of any person" within the meaning of the *Succession Duty Act* means property which changes hands at the death; that it vests in the executor, though he has no beneficial interest in it; that it only actually "passes" to the beneficiary when it reaches him; that it would be unreasonable and unjust to levy duty in respect of property that the beneficiary never received, and that it should only be levied if the Act, in the clearest terms, directed it. In this I fully agree with that learned judge.

Doull J., with whom Archibald J. concurred, considered particularly the effect of s. 10 (1) in the light of s. 2 (1) of the interpretation clause, and s. 11 (1). Section 10 (1) provides that every person

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to or for whose benefit any property passes on the death of any other person shall be liable for the duty upon so much of the property as so passes to him.

Section 11 (1) enacts that

* * * an executor * * * shall not transfer or deliver such property to the person so entitled without deducting therefrom the duty for which such person is liable.

In effect he concluded that, whether s. 10 (1) was itself a sufficient indication, the whole intendment of the Act, as regards the payment of succession duties, in respect of the passing of personal property to specific or residuary legatees, was that such succession duties should not be paid where the property does not pass to the intended beneficiaries. "The argument against the executors," he said,

is that the liability to pay the succession duty rests upon the legatees, and that there can be no liability upon any particular legatee unless he received some portion of the estate. I think that this contention is correct, although * * * the matter is not quite so simple as might appear from that statement.

Later, after discussing the particular sections I have mentioned, he said:

As the case stands now before the Court, the only question is whether the executors paid these duties on a proper basis. There is nothing in the Act requiring them to pay the duties before they can ascertain what the legacies are going to be. For example, they certainly should not pay succession duty on an estate of $1,000,000 until it appeared that the case was not one where there was $1,000,000 of debts.

And further:—

Now, assume that the estate at the death of the testator had a fair market value of $800,000, and that $150,000 was an outright gift to one legatee in priority to all other gifts and assume that before payment could be made or the security sold, the estate had shrunk to $150,000. In such a case duty is payable on $800,000 but it is payable by the one legatee and not by the following legatees, who receive nothing. Even the preferred legatee would be required to pay only to the extent of the property which he receives.

Applying this to the present case, Mount Allison University received nothing and pays nothing. It should not appear on the list of persons to whom property passes. The property must be assessed at the value at the date of testator's death, but the only way of working this out is finding the amount to which each legatee will be entitled and to affix to that amount its proper proportion of the total value at the date of testator's death. The residuary legatee received nothing and does not come into the calculation.

This was quite evident to the executors before they made any payment of succession duty and if by paying duty on a bequest to a charity outside of the province for which there will be no funds, the

succession duty, which must be borne by the others, has been increased by applying a rate not applicable to those others, the executors are clearly responsible.

There are no figures before the Court of Appeal, but I understand that, by assuming that a gift passed to Mount Allison University or by assuming that legatees other than John J. Gaetz obtained their gifts in full, the succession duty was considerably increased. If so, I see no reason why the executors should not be chargeable with the difference.

Whether or not the expression " so much of the property as so passes to him " (the beneficiary), as used in s. 10 (1), can properly be said to exclude any personal property, such as share certificates,—which in strictness of law as well as in point of fact do not pass to anybody on the owner's death, and certainly not to the executors of the deceased's estate until the executors are appointed and the transfer of the certificates is legally completed,—there can, I think, be no doubt that this particular provision cannot possibly be construed as imposing any liability whatever upon the beneficiary for succession duties upon any property which he has not received.

I agree with the conclusion of the majority judges that the executors, in view of the facts of this case, were not justified in paying out of the assets of the estate the succession duties they did, and which admittedly included an amount of approximately $79,000 in respect of the gift to the Regents of Mount Allison University, that they fully realized at the time was of no value whatsoever.

The appeal, in my opinion, should be dismissed.

KERWIN J. (dissenting).—The Nova Scotia *Succession Duty Act* is chapter 18 of the Revised Statutes of 1923. By section 3:

> For the purpose of raising a revenue for Provincial purposes, * * * there shall be levied and paid for the use of the Province a duty * * * at the rates hereinafter specified upon all property hereinafter mentioned * * * which passes on the death of any person who shall hereafter die, the duty to be according to the fair market value of such property at the date of the death of the deceased.

The definition of the expression " passing on the death " does not assist in the consideration of the present appeal, but subsection 2 of section 3 lists what shall be included in " property passing on the death." By section 5,—

> In determining the aggregate value of property the fair market value shall be taken as at the date of the death of the deceased of all property passing on his death.

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By section 6,—

In determining the dutiable value of property the fair market value shall be taken as at the date of the death of the deceased of property subject to duty.

By section 7,—

the property on which succession duty shall be levied and paid under this Chapter at the rates hereinafter specified shall be as follows:

and then follows what is really a list of the dutiable property.

Subsection 1 of section 9 reads in part as follows:

9. (1) If any property subject to duty passes on the death of any person, either in whole or in part, to or for the benefit of the grandfather, grandmother, father, mother, husband, wife, child, grandchild, daughter-in-law or son-in-law of the deceased, the same or as much thereof as so passes shall be subject to duty as follows:

If the aggregate value of the property passing on the death of such person—

(*a*) exceeds twenty-five thousand dollars but does not exceed seventy-five thousand dollars to a duty at the rate of two dollars and fifty cents for every one hundred dollars of the dutiable value;

The expression " to or for the benefit of " occurs in other subsections and explains the wording in subsection 1 of section 10:

10. (1) Every person to or for whose benefit any property passes on the death of any other person shall be liable for the duty upon so much of the property as so passes to him.

The tax is thus imposed in respect of property " passing on the death ". The executor or trustee is not liable for the payment of it, although he is required to deduct the duty before transferring to a legatee, etc., any property to which such person is entitled, failing which the executor or trustee is made liable to a penalty equal to twice the amount of the duty. Apart from this, the only one liable is the person to or for whose benefit any property passes under section 10.

It is true, the fair market value of the property is to be taken as at the date of the death of the deceased. It must be borne in mind that we are dealing with general legacies of specific amounts, except, of course, the residuary bequest. The Regents of Mount Allison University, while expecting to receive a substantial sum, actually received nothing, and it cannot be intended that they still would be liable for succession duty taxes. The University, of course, was outside Nova Scotia, but it cannot be held that an indi-

vidual legatee resident in Nova Scotia, who actually received nothing although the will mentioned a bequest of a large sum, should pay a tax.

I am of opinion that in the present case the executors acted unreasonably, particularly as they knew when they paid a great portion of the duties that the assets would not be nearly sufficient to pay all the legacies. Clause 4 of the original order of Mr. Justice Carroll, of August 3rd, 1932, provides:—

> 4. That in the administration of the said Estate the said Executors have acted honestly and reasonably and ought fairly to be excused for any breach of trust that may have heretofore arisen in the administration of the said Estate and for omitting to heretofore obtain directions of the Court in connection with any matter arising in the administration of the said Estate, and the said Executors and each of them be hereby wholly relieved from any personal liability for any such breach of trust or failure to take directions of the Court.

Any breach of trust that may have arisen before that order and from which therefore, by its terms, the executors ought fairly to be excused, should be held not to apply to the payment of succession duty, as that question was not raised in the originating summons on which the order was based.

The appeal should be dismissed.

The judgment of Hudson and Taschereau JJ. was delivered by

HUDSON J.—The testator, Jost, died leaving a large estate consisting almost entirely of stocks and shares. By his will he directed that $150,000 should be set aside as a trust fund to provide an annuity for a nephew, and, following this, there were numerous bequests of specific sums to various persons and institutions, and finally a general residuary bequest to the Regents of Mount Allison University.

Soon after the executors entered on their duties, there was a serious depreciation in the value of the assets, so that it appeared that there must be an abatement in the legacies of specific sums and that there would be no residue. Notwithstanding this depreciation of assets, the executors paid succession duties on the basis of the value of the estate at the time of death and at the rates appropriate to the different classes of beneficiaries, including the Regents of Mount Allison University, as named in the will. This action of the executors was questioned, and the Supreme

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Court of Nova Scotia *in banco* has ruled, quoting from the formal judgment of the Court:

> The executors are entitled to pay succession duties based upon the rates applicable to the persons who receive property or beneficial interest in property from the estate of the deceased and not at rates applicable to persons by whom no property or beneficial interest in property is received, although such latter persons may have been named in the will.

The majority of the judges in the Court *in banco* held the view that the rate at which the duties are to be calculated is dependent upon the relationship of the persons who receive the proceeds of the estate on distribution rather than on the relationship of those who would have received such proceeds had the estate realized inventory value and been distributed according to the directions contained in the will.

The question thus raised is important, as it affects the administration of the Succession Duties Acts in all of the Canadian provinces.

Portions of this estate for taxation purposes were in four different provinces but, as the material statutory provisions in each of these provinces are substantially the same, it will be sufficient to consider those of Nova Scotia, from which province this appeal comes to us. The Nova Scotia Act is chapter 18 of the Revised Statutes of Nova Scotia, 1923. It provides:

Section 3:

> (1) For the purpose of raising a revenue for Provincial purposes, and save as is hereinafter otherwise expressly provided, there shall be levied and paid for the use of the Province a duty (called Succession Duty), at the rates hereinafter specified upon all property hereinafter mentioned which has passed on the death of any person who has died on or since the 1st day of July, A.D. 1892, or which passes on the death of any person who shall hereafter die, the duty to be according to the fair market value of such property at the date of the death of the deceased.
>
> (2) Property passing on the death of the deceased shall be deemed to include for all purposes of this Chapter the property following, that is to say:
>
> (*a*) property of which the deceased was at the time of his death competent to dispose;
>
> * * *

Section 5:

> In determining the aggregate value of property the fair market value shall be taken as at the date of the death of the deceased of all property passing on his death, including the value of property situate out of Nova Scotia, and a deduction or allowance shall be made of the deductions and allowances hereinafter mentioned in respect of dutiable value.

Section 9 (1):

If any property subject to duty passes on the death of any person, either in whole or in part, to or for the benefit of the grandfather, grandmother, father, mother, husband, wife, child, grandchild, daughter-in-law or son-in-law of the deceased, the same or as much thereof as so passes shall be subject to duty as follows:—

the rates applicable to the different classes being then specified. Section 10 (1) provides:

Every person to or for whose benefit any property passes on the death of any other person shall be liable for the duty upon so much of the property as so passes to him.

Section 11 (1):

No executor shall in the first instance be personally liable to pay the duty on any property which passes on the death of the deceased and to which any person is beneficially entitled, but an executor or other person in whom any interest in any property so passing or the management thereof is at any time vested, shall not transfer or deliver such property to the person so entitled without deducting therefrom the duty for which such person is liable.

Then follows a penalty for failing to observe this duty. Section 13 (1) provides:

Unless otherwise in this Chapter provided, the duty imposed by this Chapter shall be due at the death of the deceased and payable within eighteen months thereafter * * *

Section 16 (1):

Every person to or for whose benefit any property passes on the death of any other person and every executor shall, within three months after the death of the deceased or such later time as may be allowed by the Treasurer, make and file with the Treasurer a full, true and correct statement under oath giving—

(*a*) a full inventory in detail of all the property which passed on the death of the deceased and the fair market value thereof on the date of his death, including all property that passed on his death and which is situate out of Nova Scotia;

(*b*) the several persons to or for whose benefit the same passes, their places of residence and the degrees of relationship, if any, in which they stand to the deceased.

Then follow provisions for settling the values in accordance with the provisions of the statute.

If we exclude for the moment consideration of the provision contained in section 10 (1), it would appear quite clear that the tax imposed by the statute is intended to be determined by the state of things existing at the date of death of the deceased. The value of the assets is to be ascertained as of that date and the duty is then due, although the date for payment is postponed for eighteen months.

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The corresponding provisions in the New Brunswick Act were under consideration by the Judicial Committee in the case of *The King* v. *Lovitt* (1), and it was stated by Lord Robson, at page 223:

> Although called a succession duty, the tax here in question was laid on the corpus of the property, and the statute made its payment a term of the grant of ancillary probate. By s. 6 the executor is required to give a bond for its due payment, and if he fails to do so the probate granted to him is cancelled. He is directed to deduct the duty before handing over the property; to pay it forthwith to the Receiver General of the province; and if a foreign executor transfers the stock of any company in the province liable to duty, on which the duty has not been paid, he is to pay it, and the company permitting such transfer shall also become liable.
>
> These provisions shew that the Act under consideration assimilates the tax to the probate duty. It is imposed as part of the price to be paid by the representatives of a deceased testator for the collection or local administration of taxable property within the province, and, in the view of their Lordships, it is intended to be a direct burden on that property, varying in amount according to the relationship of the successor to the testator.

It is quite clear, then, that the tax is primarily a property tax and, as stated by Lord Robson, it is intended to be a direct burden on that property, varying in amount according to the relationship of the successor to the testator. In Lord Robson's view, the tax is assimilated to a probate or estate duty in contrast to the legacy and what is called in the English Act succession duty, where by express provision the legatee or beneficiary need not pay until the time arrives for distribution, and then on the value as at the date of such distribution.

The provision in the New Brunswick statute corresponding to section 10 (1) of the Nova Scotia Act, imposing personal liability, was not relevant to the question under discussion in the *Lovitt* case (2) and does not seem to have given rise to any comment there. However, it is this section which creates some serious difficulty here. The argument is this: that in section 10 (1) obviously the words "passes on the death" must refer to the actual passing of property into the hands of the beneficiary, as otherwise a beneficiary would be personally liable for a duty in respect of property which he had not received and might never receive, a result so manifestly unfair and unreasonable that the Legislature could not possibly have so intended.

(1) [1912] A.C. 212. (2) [1912] A.C. 212.

The majority of the judges in the Court below avoid this situation by construing the words "passes on the death" as used in section 10 (1), and the words "passing on the death" in section 3 (1), as applicable only to the time when the property was distributed to the beneficiaries.

A section of the British Columbia *Succession Duty Act* corresponding to section 10 (1) of the Nova Scotia Act was under consideration by the British Columbia Court of Appeal in the case of *In Re Drummond Estate* (1); and the majority of that Court faced the difficulty and dealt with it in the following way (page 265):

> Mr. Symes submitted that, at this stage, in the administration of the estate, the executors only were liable to pay the duty, the beneficiaries under the will not being "liable for payment" until their interests vested. I cannot agree. Section 10 (2) of the Act reads: "Every person domiciled or resident in the Province to whom property situate within the Province subject to any duty imposed by this Act passes shall be personally liable for the duty."
>
> The obligation is limited to persons domiciled or resident in the Province. They are personally liable for payment of the duty on any property passing to them by the will. If the word "passed" had been used this contention might be sound, assuming it was not defined in the interpretation section. We have a definition of the word "passing" or "passing on death" in section 2 of the Act. Without quoting it is clear that it is not restricted to property finally vesting in the beneficiary upon distribution of the estate. The word "passes" is used in other sections of the Act in a sense inconsistent with the view that it means a vested interest.
>
> It was submitted that the Legislature could not have intended that the beneficiaries should be liable to pay the duty before they received the property or money upon which the tax is levied, as it might later transpire from various causes that their shares might disappear or their value be diminished. By section 11 however the duties are made payable at the death although in working out the Act and in the administration of the estate it is not, I assume, demanded (or in fact ascertained) at that time. The beneficiaries are personally liable for payment where the property passes by operation of the will even though it may not be demanded at that time.

The definition of "passing on the death" in section 2 (1) of the Nova Scotia Act and corresponding sections of the other Provincial Acts is as follows:

> 2. (1) In this Chapter, unless the context otherwise requires:
>
> (*a*) the expression "passing on the death", or a similar expression, means passing either immediately on the death or after an interval either certainly or contingently and either originally or by way of substitutive limitation, whether the deceased was at the time of his death domiciled in Nova Scotia or elsewhere.

which gives no real assistance in disposing of the difficulty.

(1) [1936] 4 D.L.R. 264; 50 B.C.R. 485.

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The direct application of section 10 (1) here is not the question. The duty in respect of the residuary bequest has been paid. The complaint is that it has been overpaid, inasmuch as the rate applicable to a bequest to the residuary legatee in this case would be somewhat higher than the rate payable by more preferred beneficiaries and the burden thus imposed on them would be greater to that extent. The situation is anomalous, but that is not sufficient in itself to override the language of the statute. Reference here might be made to the remarks of Lord Hanworth in the case of *Attorney-General for Ontario* v. *National Trust Company* (1):

> * * * suppose on the facts of the present case that the value of the property at the time of the gift had been $260,000, and that had dwindled down to $10,000 at the time of the death, there would have been a hardship upon the donee, who would then have been compelled to pay duty as upon a value 26 times that to which the property had diminished at the time of the death. The tax would have been payable, but the gift would provide no sufficient resources from which to pay it.

I agree with what was said by Mr. Justice Hall in the last paragraph of his dissenting judgment in the Court below:

> The object and meaning of The Succession Duty Act must be gathered from the words of the statute. It is the purpose and intention of the Act that the two factors necessary to determine the duty—valuation and rates—shall be constant. Irrespective of market fluctuations, duty shall be levied upon the fair market value (less deductions) at the date of death. The rate is determined by the relationship or nature of the person for whose benefit property passed on the death. Computation is made by applying the appropriate rate to property passing to each person beneficially on the death of the testator. The duty is paid on the basis of the distribution intended by the testator. The executor deducts the amount which was payable on each legacy under section 10 (1). He must do this in order to carry on the administration of the estate. Succession Duties are "a first lien upon the property in respect to which they are payable until they are paid", and the executors cannot discharge their functions as executors until they have freed the assets of the estate from this lien and have paid the duties.

and would allow the appeal and answer affirmatively the question submitted in the summons, costs to be paid out of the estate.

Appeal allowed; costs throughout of all parties to be paid out of the estate.

Solicitor for the appellant: *C. B. Smith.*

(1) [1931] A.C. 818, at 823.

DOMINION SQUARE CORPORATION (PLAINTIFF) ..... APPELLANT;

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*Feb. 5.
*Mar. 3.

AND

ALUMINUM COMPANY OF CANADA (DEFENDANT) ..... RESPONDENT.

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

Lease—Notice by lessee of intention to terminate lease—Expressed condition that "no such notice shall take effect prior to" a certain date—Meaning of the words "take effect"—Intention of the parties.

The respondent leased from the appellant certain premises in Montreal for a term of ten years commencing on the 1st of May, 1939, the annual renting being $46,931 payable by monthly instalments. The notarial lease contained the following clause: "Notwithstanding the term of the present lease as hereinbefore provided, the Lessee shall have the right: 1. To terminate the same for the whole or for any portion of the said tenth floor by giving to the Lessor, on the 1st day of any month from 1st November to 1st May, inclusive, in any year during the continuance of this lease, one year's written notice of its intention so to do, and one year from the date of such notice or notices this lease shall become null and void and without effect in so far as the space covered by such notice or notices is concerned, it being expressly understood that no such notice shall take effect prior to the 1st day of November, nineteen hundred and forty (1940)." The respondent, by letter dated 4th of January, 1940, gave the appellant twelve months' notice as from the 1st of February, 1940, of its intention to terminate the lease in full on the 31st January, 1941. The appellant refused to accept this notice on the ground that, according to the above-mentioned clause, the lease could not be terminated before the 1st November, 1941. The controversy in this case turns upon the meaning of the last phrase of that clause, the appellant contending that the meaning was that no notice could commence to operate as a notice prior to the 1st of November, 1940, with the result that the lease could not come to an end before 1st November, 1941; while the respondent contended that that phrase should be construed as meaning that "no such notice shall take effect" in terminating the lease prior to the first day of November, 1940", and that notice of cancellation could be given at any time up to 1st November, 1939, so that the lease could come to an end on or after the 1st November, 1940. The trial judge upheld the construction put forward by the appellant; but the appellate court, Barclay J. dissenting, reversed that judgment.

Held, the Chief Justice dissenting, that the construction indicated by the respondent is more in conformity with the intention of the parties as gathered from the words used by them in drawing up the clause and, therefore, the judgment appealed from should be affirmed.

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

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APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec, reversing a judgment of the Superior Court, E. M. McDougall J., which had condemned the respondent to pay to the appellant the sum of $43,997.80.

The material facts of the case and the question at issue are stated in the above head-note and in the judgments now reported. The issues between the parties were submitted to the trial judge in a stated case under the provisions of article 509 C.C.P. The respondent vacated the leased premises on the 1st July, 1940, and admitted an indebtedness of $17,599.12 in accordance with its view that the lease was to terminate on the 1st February, 1941; while the appellant claimed an additional sum of $26,398.68, in accordance with its view that the lease was to terminate only on the 1st November, 1941.

W. A. Merrill K.C. and *A. Stalker K.C.* for the appellant.

Aimé Geoffrion K.C. for the respondent.

THE CHIEF JUSTICE (dissenting)—The appellants and respondents entered into a notarial lease, dated the 13th of February, 1939, before L. Joron, N.P., whereby the respondents leased from the appellants certain premises on the tenth floor of the Dominion Square Building in Montreal. The term was for ten years commencing on the 1st of May, 1939, and ending on the 30th of April, 1949, the annual rental being $46,931, payable in equal consecutive monthly instalments in advance, on or before the tenth day of each month. The lease contains this clause:—

> Notwithstanding the term of the present lease as hereinbefore provided, the Lessee shall have the right:
>
> 1. To terminate the same for the whole or for any portion of the said tenth floor by giving to the Lessor, on the 1st day of any month from 1st November to 1st May, inclusive, in any year during the continuance of this lease, one year's written notice of its intention so to do, and one year from the date of such notice or notices this lease shall become null and void and without effect in so far as the space covered by such notice or notices is concerned, it being expressly understood that no such notice shall take effect prior to the 1st day of November, nineteen hundred and forty (1940).

On the 4th of January, 1940, the lessees gave notice as follows:—

> In accordance with such provisions we hereby give four months' notice of our intention to terminate, at the expiration of said four months from

this date, the lease for not to exceed twenty-five per cent of the tenth floor, and we also give you twelve months' notice, as from 1st January, 1940, of our intention to terminate the lease in full on 31st January, 1941.

The lessors accepted the four months' notice to cancel twenty-five per cent of the leased space, but disputed the right of the lessees to terminate the lease before the 1st of November, 1941.

Proceedings were taken in the Superior Court and at the trial Mr. Justice McDougall gave judgment in favour of the plaintiffs, the Dominion Square Corporation. This judgment was reversed in the Court of King's Bench, Mr. Justice Barclay dissenting.

The controversy turns upon the effect of the words

it being expressly understood that no such notice shall take effect before the first day of November, 1940.

The appellants contend that the meaning of these words is that no notice under this clause shall be effective or shall "take effect" as a notice, or that no notice under this clause shall be effected, prior to the first of November, 1940.

The respondents, on the other hand, put forward this construction: "No notice shall take effect" in terminating the lease "prior to the first day of November, 1940".

If this is what the parties meant, it is not easy to understand why, in a formal notarial document, they should not have said so in plain terms, as for instance: "No such notice shall have the effect of terminating the lease prior to the first of November, 1940".

The real point is what is the subject to which the sentence relates? Is it the constitution of the notice, or the termination of the lease? If it was the latter is it conceivable that the words as they stand would have been employed? I cannot believe it.

Mr. Geoffrion argues that if the idea to be expressed was that no such notice was to be operative as a notice prior to the first day of November, 1940, the stipulation would have read "no such notice should be given prior to that date". But the subject with which the draftsman is dealing is the constitution of the notice as notice. The omission of the words "as notice" is not, I think, such a serious departure from good habits of English speech as

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to create any real obscurity. At least I have no doubt that of the rival constructions put forward that advanced by the appellants is distinctly the more probable one.

Happily we are not obliged to rely upon verbal criticism alone. There are two considerations which appear to me to be conclusive.

First of all, the clause provides explicitly that any notice to be operative under it must be given in one of the months from the first of November to the first of May, inclusive, in any year of the term; that obviously includes the year 1939, when no notice could be given which could terminate the lease earlier than the first of November, 1940. Such being the case, the stipulation in question on the respondents' construction is without practical value, or effect. On that construction it provides for something which was already provided for in unmistakable terms, and on the other hand, the appellants' construction qualifies the language of the principal provision and has the practical effect of ensuring to the lessor the continuance of the lease until, at least, one year from the first of November, 1940.

Then it was argued by Mr. Geoffrion that the words in question were intended only to clarify. It is difficult to accept this argument. But for those words, the stipulation would be too clear for dispute. If clarification had been the conscious purpose of the draftsman, I can have no doubt that more explicit language would have been employed. The parties would have said in the plainest way that the lease was not to be terminated before the first of November, 1940. Such words would have been otiose, but there could be no possible dispute as to their meaning. If the contention is right, then the respondents, with the purpose of clarifying a stipulation that, as it stood, could have only one exclusive meaning and effect, have taken the singular course of introducing words which three judges are satisfied clearly mean the opposite of what they, the respondents, intended.

The appeal should be allowed and the judgment at the trial restored.

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

KERWIN J.—The sole point for determination in this appeal is the proper construction of a clause in a lease

from the appellant to the respondent, dated February 13th, 1939, which lease commenced on May 1st, 1939, and was for ten years. The clause is as follows:—

> Notwithstanding the term of the present lease as hereinbefore provided, the Lessee shall have the right:
>
> 1. To terminate the same for the whole or for any portion of the said tenth floor by giving to the Lessor on the 1st day of any month from 1st November to 1st May, inclusive, in any year during the continuance of this lease, one year's written notice of its intention so to do, and one year from the date of such notice or notices this lease shall become null and void and without effect in so far as the space covered by such notice or notices is concerned, it being expressly understood that no such notice shall take effect prior to the 1st day of November, nineteen hundred and forty (1940).

The real dispute hinges upon the last few lines. McDougall J., the judge of first instance, and Barclay J. in the Court of King's Bench, agreeing with the contention of the appellant, were of opinion that the expression "take effect" had reference to the date upon which the notice would commence to operate as a notice, while the majority of the Court of King's Bench considered that it referred to the expiration of the one year's written notice provided for by the earlier part of the clause. In my view the latter construction is the correct one.

It will be noticed that when the parties referred to the time when the notice should commence to operate, they mentioned at the outset the "giving" of the notice while in the particular part under discussion they use the expression "take effect". Furthermore, when dealing with the result of the notice, they say that "one year from the date of such notice or notices this lease shall become * * * without effect". Certainly the word "effect" in that connection has reference to the termination of the notice and I can see no reason why the same meaning should not be given to the same word when used later in the clause.

It was urged that it would be unreasonable to suppose that the appellant would grant a lease for ten years and then agree to a provision whereby the respondent might put an end to it on November 1st, 1940, by giving a notice on November 1st, 1939, a little over nine months after the execution of the document. It was also pointed out that by the first part of the clause the notice could not be given earlier than November 1st, 1939, as it had to be given on the first day of any month from 1st November to

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1st May inclusive, in any year during the continuance of the lease. Granting that, without the inclusion of the latter part of the clause that would be the proper construction of the first part, it may easily have been that the clause ends as it does at the suggestion of the appellant in order to make sure that there would be no controversy on the point. As to both arguments, I can only say that the parties' intention must be gathered from the words used and that the construction indicated above is the one that appears to me to carry out the intention as expressed.

The appeal should be dismissed with costs.

HUDSON J.—A lease of premises in Montreal from the appellant to the respondent contained the following clause:

Notwithstanding the term of the present lease as hereinbefore provided, the Lessee shall have the right:

To terminate the same for the whole or for any portion of the said tenth floor by giving to the Lessor, on the 1st day of any month from 1st November to 1st May, inclusive, in any year during the continuance of this lease, one year's written notice of its intention so to do, and one year from the date of such notice or notices this lease shall become null and void and without effect in so far as the space covered by such notice or notices is concerned, it being expressly understood that no such notice shall take effect prior to the 1st day of November, nineteen hundred and forty (1940).

The controversy between the parties arises from the concluding words of this provision:

it being expressly understood that no such notice shall take effect prior to the 1st day of November, 1940.

The appellant contends that a notice served under this provision "takes effect" as soon as it is given and, therefore, could not be given prior to the 1st of November, 1940. On the other hand, the respondent contends that the notice would not "take effect" within the meaning of this provision until the expiry of the time provided for in the notice.

Mr. Justice McDougall who heard the matter in the first instance held that the appellant's construction was the true one, but his decision was reversed on appeal to the Court of King's Bench, appeal side.

It is clear that the notice when given had some effect. It was an election, probably an irrevocable election, to

determine the lease at the time specified. But the purpose of the notice was to determine the lease and this purpose would not be achieved until the expiry of the time specified. Until then the desired effect would not take place. Meanwhile, the relationship of landlord and tenant between the parties continued undisturbed.

It is an everyday occurrence that a person resigns an office, his resignation to "take effect" on a certain day. A government makes an order to "take effect" a month hence. An illustration of this use of the expression is found in the Scottish case of *Fullarton James* (1). In that case it was provided by a statute that a trustee entitled to resign his office might do so by signing a minute of resignation in the form of Schedule A, and that the resignation should be held to "take effect" at a specified time after the date of intimation. A trustee gave notice of his resignation in the form prescribed by the statute, which was *de presenti.* Subsequently, before the expiry of the time prescribed by the statute, he attempted to withdraw the resignation. The Court held that it was not competent for him to do so.

After much consideration, I conclude that the natural meaning of the words "take effect" in this instance is "producing the desired effect", namely, the termination of the lease. With respect, I cannot find in the surrounding circumstances anything to justify a departure from the ordinary meaning attributable to the words. Mr. Justice Galipeault in the court below states the position very fairly as follows:—

> Il est bien difficile de savoir ce que les parties ont eu en vue lorsqu'elles ont convenu, et il se peut qu'elles aient songé à des situations qui ne nous viennent pas maintenant à l'esprit, qu'elles aient cru rendre plus explicite, ou qu'elles aient même stipulé inutilement, ce qui n'est pas rare, qu'ellles aient fait redondance, mais en l'absence de toute preuve, de toute explication, encore une fois, pourquoi ne pas donner aux expressions leur sens ordinaire, leur sens propre, pourquoi déclarer ambigu ce qui est parfaitement clair?

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Merrill, Stalker & Howard.*

Solicitors for the respondent: *Geoffrion & Prud'homme.*

(1) (1895) 23 Sess. Cas. 105.

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*Feb. 3.
*Feb. 23.

HIS MAJESTY THE KING.....APPELLANT;

AND

PIERRE DÉCARY .....RESPONDENT.

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

Criminal law—Appeal—Jurisdiction—Whether dissenting judgments in a court of appeal disclosed a dissent on a question of law within the meaning of section 1023 of the Criminal Code.

The respondent, a divisional registrar appointed under regulations, enacted by order in council under powers conferred by a Dominion Act of 1940, concerning National War Services, was found guilty and convicted on two charges of having committed offences in contravention of some provisions of these regulations. On an appeal by the respondent, the appellate court, by a majority of three to two, quashed the verdict and the conviction. The judgment of the majority of the Court declared the verdict to be unreasonable for reasons resulting from *inter alia* an examination of the relative values of the testimony adduced by the Crown and the testimony given by the accused. The judgment did not rest upon any view of the majority upon a question which was a question of law alone. The judgment of one of the dissenting judges was simply to the effect that he was "of the opinion that the appeal should be dismissed", while the other dissenting judge held that there should be a new trial, without stating, either expressly or by implication, that such conclusion was based upon an opinion that the majority proceeded upon any error in point of law alone. On the appeal to this Court by the Attorney-General for Quebec, the respondent moved to quash such appeal.

Held that no jurisdiction lies in this Court to entertain the appeal: neither of the judgments of the two dissenting judges of the appelllate court discloses a dissent on a question of law within the meaning of section 1023 of the Criminal Code.

MOTION by the respondent to quash an appeal to this Court by the Attorney-General of Quebec from a judment of the Court of King's Bench, appeal side, province of Quebec, which had quashed a verdict of guilty and the conviction of the respondent on charges of having committed offences in contravention of regulations concerning National War Services.

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. for the appellant.

G. Fauteux K.C. for the respondent.

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

The judgment of the Court was delivered by

THE CHIEF JUSTICE—As is well known, appeals to this Court in criminal cases are regulated by the Criminal Code. By section 1023 of the Code it is enacted:—

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

"The 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.

Turning to section 1013, that section provides:—

A person convicted on indictment may appeal to the court of appeal against his conviction,

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

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

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

The respondent, Pierre Décary, was tried upon a charge preferred by the Attorney-General of the province of Quebec before the Hon. Mr. Justice Lazure and a jury on the 10th of June, 1941. The charge contained three counts, of which it is only necessary to quote the first and third:—

(1) A Montréal, district de Montréal, du 1er du mois d'octobre 1940 au 23 du mois d'avril 1941, Pierre Décary, régistraire de division, nommé en vertu des Règlements de 1940 sur les Services Nationaux de Guerre, Jean Tarte et Mike Maloley et autres personnes inconnues ont comploté ensemble et les uns avec les autres pour frauduleusement, en demandant, exigeant, obtenant, recevant et acceptant, directement ou indirectement, des argents de personnes soumises aux Règlements de 1940 sur les Services Nationaux de Guerre ou d'autres pour elles, nuire à l'application et à la mise en vigueur des dits règlements.

* * *

(3) A Montréal, district de Montréal, du 1er du mois d'octobre 1940, au 23 du mois d'avril, Pierre Décary, régistraire de division, nommé en vertu des Règlements de 1940 sur les Services Nationaux de Guerre, a provoqué et excité Jean Tarte et Mike Maloley à commettre et leur a conseillé et leur a fait commettre l'offence suivante, savoir: de faire des offres, propositions, dons, prêts, promesses, d'offrir et de donner des compensations, rémunérations, directement et indirectement, à lui-même, fonctionnaire et personne chargée de l'application des Règlements de 1940

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sur les Services Nationaux de Guerre, et ayant à remplir des fonctions qui s'y rapportent, dans le but d'obtenir frauduleusement pour des tiers, un ordre d'ajourner l'appel pour le service militaire.

Contre la forme du Statut en tel cas fait et pourvu, et contre la Paix de Notre Souverain Seigneur le Roi George Six, sa Couronne et Sa Dignité.

The respondent was found guilty and convicted on both of these two counts. He appealed from this conviction and the court of appeal, by a majority of three to two, quashed the verdict and the conviction.

It is convenient, I think, to set forth the grounds upon which the judgment of the majority of the court of appeal rests, as they appear in the formal judgment:—

Attendu que l'appelant invoque à l'appui de son appel divers moyens basés uniquement sur des questions de fait, d'autres sur des questions de fait et de droit et aussi sur des questions de droit seulement;

Attendu que l'appelant soutient, en particulier, que le verdict n'est pas raisonnable et n'est pas supporté par le poids de la preuve; qu'à sa face même, ce verdict, comportant une recommandation à la clémence de la Cour, est un verdict déraisonnable résultant d'un compromis illégal entre les jurés qui avaient des doutes sur sa culpabilité et ne lui en ont pas donné le bénéfice; que le seul témoignage incriminant rendu contre lui ne pouvait, à raison de l'ensemble de la preuve et plus particulièrement de son propre témoignage, servir de base à un verdict de culpabilité, et qu'à raison des circonstances et de la façon dont ce seul témoignage incriminant a été donné, il y lieu de l'écarter entièrement et qu'il ne peut servir de base raisonnable à un verdict de culpabilité;

Attendu que de toute la preuve rapportée par la Couronne devant le jury, le seul témoignage pouvant incriminer l'appelant est celui du témoin Jean-Louis Tarte dont les affirmations sont nettement, catégoriquement et spécifiquement niées par l'appelant;

Attendu qu'il ressort du verdict, tel que libellé, que le doute que devait nécessairement produire dans l'esprit des membres du jury ce conflit de témoignages, n'a pu être complètement éliminé et qu'il y a lieu, en pareil cas, pour la Cour, saisie du présent appel, d'étudier, peser et apprécier la preuve et de lui donner sa véritable interprétation et son plein effet;

Attendu que les circonstances qui ont précédé et entouré le témoignage de Jean-Louis Tarte, telles qu'elles sont dévoilées par le dossier donnent à ce témoignage un caractère particulier et qui en affecte la force probante à un point tel, qu'en face des dénégations claires, explicites et convaincantes de l'appelant, il serait déraisonnable d'asseoir un verdict de culpabillité contre lui sur l'un ou l'autre des deux chefs d'accusation qui lui sont reprochés;

As appears from the enactments of section 1023, quoted above, the Attorney-General's right of appeal from a judgment of the court of appeal, setting aside the conviction of an accused, is limited to some ground which raises a question of law on which there has been a dissent in the court of appeal. It is well settled by the decisions of this

Court that such ground must raise a question of law in the strict sense and that it is not a competent ground of appeal if it raises only a mixed question of fact and law.

Counsel for the respondent moved to quash the appeal of the Attorney-General from the judgment of the court of appeal alleging that there was no dissent in the court of appeal upon any such question of law and, consequently, that there is no competent ground of appeal available to the Attorney-General.

After fully considering the able argument presented by Mr. Fauteux, on behalf of the Attorney-General, our conclusion is that for the reasons advanced by Mr. Geoffrion the Attorney-General has no right of appeal in this case.

There were two judgments delivered by learned justices of the court of appeal which were in disagreement with the conclusion of the majority, and the point to be considered is whether or not either of these judgments discloses a dissent on a question of law within the meaning of section 1023 of the Criminal Code.

It is convenient, first of all, to notice that the judgment of the majority of the Court does not proceed upon the ground that there was no evidence in support of the accusations before the jury in the sense that it was within the power of the trial judge, and, therefore, of course, his duty, to direct a verdict of not guilty to be entered. The judgment obviously proceeds under section 1013 (*b*), or (*c*), which gives a right of appeal upon leave to the court of appeal on any ground which involves a question of fact alone or a question of mixed law and fact, or on any other ground which appears to the court of appeal to be a sufficient ground of appeal. The judgment pronounces the verdict to be unreasonable for reasons resulting from *inter alia* an examination of the relative values of the testimony adduced by the Crown and the testimony given by the accused. It is quite plain that the judgment does not rest upon any view of the majority upon a question which is a question of law alone.

Turning now to the judgments of the minority, Mr. Justice Hall simply says:—

> I am of the opinion that this appeal should be dismissed.

Plainly there is here no dissent upon any question of law.

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Mr. Justice Walsh, in the reasons delivered by him for his conclusion that there should be a new trial, does not say, either expressly or by implication, that this conclusion is based upon an opinion that the majority proceeds upon any error in point of law alone.

It is plain, therefore, that the record discloses no material enabling the Attorney-General to bring his appeal within the conditions prescribed by the enactments of the Criminal Code, and the appeal must, consequently, be quashed.

Appeal quashed.

1942

* Feb. 4.
* Feb. 23.

CONSTANTIN LAPHKAS .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

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

Criminal law — Automatic slot machine — Amusement only provided — Results determined by skill of operator — No element of chance or mixed elements of chance and skill—Whether service-vending machine —Common gaming house—Criminal Code, R.S.C., 1927, c. 36, sections 226, 229 and section 986, par. 4, as amended by 2 Geo. VI, 1938, c. 44, s. 46.

The appellant had in his premises an automatic slot-machine for the amusement of the public known under the name of "Evans Ten-Strike Miniature Bowling". Section 986 (4) of the Criminal Code enacts that, "if any house, room or place is found fitted or provided with * * * any automatic or slot machine used or intended to be used for any purpose other than for vending merchandise or services, * * * there shall be an irrebuttable presumption that such house, room or place is a common gaming house". The appellant was convicted of having kept a common gaming house, and the appellate court affirmed the conviction, holding that, under that section, all slot machines, including those vending amusement, were illegal.

Held, reversing the judgment appealed from (Q.R. [1942] 1 K.B. 1), that the machine found in the appellant's premises was providing a harmless amusement to the operator and that, for the purpose of determining this appeal, the word "services" should be construed as including "amusement." If a narrower interpretation of the word "services" was given, it would then be a criminal act, for instance, to keep in a hotel a music-recording slot machine, and this is not the letter nor the spirit of the law. Therefore, the conviction of the appellant should be quashed.

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

Rex v. *Levine* ((1939) 72 Can. Cr. Cas. 312) followed.

Roberts v. *The King* ([1931] S.C.R. 417), *Rex* v. *Perlick* ((1939) 72 Can. Cr. Cas. 365), *Rex* v. *Granda* ((1941) 74 Can. Cr. Cas. 344), *Rex* v. *Collins* ((1939) 71 Can. Cr. Cas. 272) discussed.

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APPEAL, upon leave to appeal to this Court (1), from the judgment of the Court of King's Bench, appeal side, province of Quebec (2), affirming the conviction of the appellant for the offence of having illegally kept a common gaming house. By the judgment now reported, the appeal was allowed, the conviction quashed and the slot machine seized was ordered to be returned to the appellant.

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

J. Crankshaw K.C. for the appellant.

G. Fauteux K.C., A. Pagé and *A. Macnaughton* for the respondent.

The judgment of the Court was delivered by

TASCHEREAU J.—The appellant was convicted by the Recorder of the city of Montreal, of having on the 28th day of March, 1941, illegally kept a common gaming house at number 2060 Bleury street, Montreal.

The judgment was upheld by the Court of King's Bench, appeal side, province of Quebec, and the appellant on application to a judge of the Supreme Court of Canada, under the provisions of section 1025 of the Criminal Code, was granted leave to appeal to this Court, the judgment of the Court of King's Bench, appeal side, province of Quebec, being in conflict with a judgment of the Court of Appeal of Ontario (*Rex* v. *Levine* (3)).

The record reveals that the accused had in his premises an automatic slot machine for the amusement of the public, known under the name of "Evans Ten-Strike Miniature Bowling". It is put in motion by placing a large five cent piece in a slide, which, under the pressure of the operator,

(1) *Reporter's note:* Leave to appeal to this Court was granted, on an application by the appellant, by Taschereau J. in chambers, under section 1025 Cr. C., the judgment then to be appealed from being in conflict with the decision of the Court of Appeal of Ontario in *Rex* v. *Levine*, 72 Cr. C.C. 312.

(2) Q.R. [1942] 1 K.B. 1.

(3) (1939) 72 Cr. Can. Cas. 312.

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establishes an electrical current in the machine. A ball is then released, and a mechanical player receives it coming from a wooden chute and automatically holds it in its hand. The operator places the player in the desired position, and then pushes a button which releases the ball that strikes the pins at the other end of the alley. The number of pins knocked down by the ball is registered after every two plays, and automatically the pins are placed in front of the player who repeats the same operation five times, playing with two balls each time. The machine adds the total number of the pins knocked down during the game and indicates the final score.

The skill of the operator in aiming at the pins is the determining factor of the success of the operation; and it is clear from the evidence and the examination of the machine itself produced as an exhibit in the case, that in the playing of the game there is no element of chance, or mixed elements of chance and skill. A skilful operator will obtain far better results.

The relevant sections of the Criminal Code are the following:—

226. A common gaming house is—

(*a*) a house, room or place kept by any person for gain, to which persons resort to for the purpose of playing at any game of chance, or at any mixed game of chance and skill.

* * *

229. Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house, common gaming-house, or common betting-house, as hereinbefore defined.

There can be no doubt that under these two sections, the appellant operating or keeping in his premises this innocent machine for the amusement of the public could not be convicted. (*Roberts* v. *The King* (1)). But the respondent relies on section 986, paragraph 4 of the Criminal Code as amended in 1938, chap. 44, section 46, and which reads as follows:—

4. Slot machines.—In any prosecution under section two hundred and twenty-nine any automatic or slot machine used or intended to be used for any purpose other than for vending merchandise or services shall, and any such machine used or intended to be used for vending merchandise shall, if the result of one of any number of operations of it is, as regards the operator, a matter of chance or uncertainty or if as a consequence of any given number of successive operations it yields different results to

(1) [1931] S.C.R. 417.

the operator or if on any operation it discharges or emits any slug or token, other than merchandise, be deemed to be a means or contrivance for playing a game of chance notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance and if any house, room or place is found fitted or provided with any such machine there shall be an irrebuttable presumption that such house, room or place is a common gaming house.

It is in virtue of this subsection that the appellant has been convicted.

The Court of King's Bench, appeal side, province of Quebec, had dealt with similar cases since the amendment of 1938, and relied upon its former decisions to dismiss the appeal in the present case.

In *Rex* v. *Perlick* (1), the court of appeal had to consider a "Target Skill" which was alleged to be useful in developing revolver shooting. The court reached the conclusion that under section 986 (4) of the Criminal Code, this apparatus not being used or intended to be used for the vending either of merchandise or services was illegal, and that its possession created an irrebuttable presumption that the place where such a machine was kept was a common gaming house. It also held that the shooting at a stationary target which affords no return other than amusement, may not be called a "service" within the meaning of section 986, paragraph 4, Cr. C.

In that case, Mr. Justice Hall said:—

> The effect of this new paragraph (986-4) is that every automatic or slot machine, except those vending merchandise or services, is presumed to be a gambling device.

In *Rex* v. *Granda* (2), the same court dealing with a Pin Ball Slot Machine expressed identical views.

The Court of Appeal of Saskatchewan, in *Rex* v. *Collins* (3), had then already given its decision as to the legality or illegality of this Pin Ball Slot Machine. Although it dismissed the appeal on the ground that this machine was a game of chance yielding Collins a gain, it expressed views as to the interpretation of section 986, paragraph 4, Cr. C., which were adopted by the court of appeal of Quebec.

The result of the above pronouncements and of the judgment of the court of appeal of Quebec, now before this Court, is that section 986, paragraph 4, of the Criminal Code declares all slot machines vending amusements illegal,

(1) (1941) 74 Cr. Can. Cas. 344. (2) (1939) 72 Can. Cr. Cas. 365.
(3) (1939) 71 Cr. Can. Cas. 272.

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and that there is an irrebuttable presumption that a room or place where such a machine is found is a common gaming house.

With the greatest respect, I cannot agree with these judgments, and I believe that the opposite views adopted by the Court of Appeal of Ontario in *Rex* v. *Levine* (1) should be upheld.

In the present case, we have to deal with a machine that provides a harmless amusement to the operator, and I believe that for the purpose of determining this case the word "services" includes "amusement". This word must not be given the narrow interpretation that some courts have attempted to give to it, and its meaning must not be limited to cover only certain necessaries of life like lavatories and telephones. If such an interpretation were accepted, it would then be a criminal act, for instance, to keep in a hotel or a restaurant a gramophone reproducing music or vocal sounds after a five cent piece has been deposited in a slot. I am satisfied that this is not the letter nor the spirit of the law. This recording machine, and the one seized in the present case, do sell "services", in the sense that they furnish innocent recreation for the benefit and advantage of the public.

I fully agree with the interpretation given by the Chief Justice of Ontario in the *Levine* case (2):—

> The word "service" or "services" is properly used as meaning "help" or "benefit" or "advantage" conferred. I do not know why amusement, which is all that is got by the operation of the machine in question, may not properly be spoken of as a "help" or a "benefit" or an "advantage". In one way and another many wise people spend a good deal of time and money in obtaining amusement, and to a normal person it is almost one of the necessaries of life. In my opinion it does no violence to the language of the statute in question to say that an automatic machine that does nothing but amuse is a machine used, or intended to be used, for vending services.

This machine selling services is excluded from the application of the Act, and is not the kind of a machine which is the object of the new enactment, and the possession of which creates the "irrebuttable presumption" which is found in the amendment.

It is necessary, however, to add, as the Chief Justice of Ontario has pointed out, that certain machines vending merchandise and services may be illegal if for instance

(1) (1939) 72 Cr. Can. Cas. 312. (2) (1939) 72 Cr. Can. Cas. 312.

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they have gaming as their purpose. The vending of merchandise or services does not authorize the use of a slot machine that for other reasons would violate the dispositions of the Criminal Code. But this is not the case here. The machine which furnishes only amusement and which has no other purpose than vending services, does not come within the ban of the Act.

I am, therefore, of opinion that this appeal should be allowed, the conviction quashed and that the machine seized should be returned to the accused.

Appeal allowed, and conviction quashed.

THE MONTREAL LIGHT, HEAT & POWER CONSOLIDATED ..... APPELLANT;

AND

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

1941

*Nov. 3, 4.

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*Feb. 3.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income—Deductions—Outstanding bond issue—Disbursements or expenses incurred in refunding same and replacing it by a new bond issue bearing lower rate of interest—Whether they are "disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" within the meaning of section 6 (a) of the Income War Tax Act, R.S.C., 1927, c. 97.

The appellant company, in 1936, had $27,615,000 par value bonds maturing in 1951. In order to reduce the annual outgo for interest and exchange charges, it was decided to redeem a portion of that bond issue to an amount of $15,000,000 (the balance being redeemed out of proceeds of the sale of investments) and to replace the same by a new issue of bonds bearing a lower rate of interest. The result of the operation was to reduce the fixed interest charges by the sum of $275,000 per annum, a total saving of $303,119.18 being made, with a decrease in the exchange charges being added. In connection with the operation, the appellant company incurred certain disbursements and expenses amounting to $2,282,679.42 and proposed to amortize the same over the life of the new bonds, the amortized amount sought to be deducted in 1936 amounting to $104,596.04. In addition to that amount, there was a direct expenditure in that year of $79,166.64 representing the overlapping interest between the date of the calling of the old bonds and the date of their retirement, interest during that period of sixty days having been paid on both sets of bonds. The appellant company claimed the right

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

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to deduct these amounts from its taxable income for 1936, and further amounts for each year during the period of amortization. These deductions were disallowed by the Commissioner of Income Tax, whose decision was affirmed by the Minister of National Revenue. An appeal from this decision to the Exchequer Court of Canada was dismissed with costs.

Held, affirming the judgment appealed from ([1941] Ex. C.R. 21), Rinfret and Taschereau JJ. dissenting, that the above disbursements or expenses incurred by the appellant company were "not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income", within the meaning of section 6 (*a*) of the *Income War Tax Act.*

Per the Chief Justice—The sums borrowed by means of the original issue of debentures were capital, as distinguished from income, and the sums borrowed by the second issue of debentures for the purpose of retiring the earlier issue were also capital. The sums which the appellant company seeks to deduct are sums paid in respect of capital and they are not expenses incurred in the process of earning income in respect of which the appellant company is assessable.

Per Rinfret and Taschereau JJ. (dissenting)—The several elements of the operation performed by the appellant company are essentially linked together and inseparable. In order to pay a lower interest and to get rid of the exchanges, it was necessary to redeem the original bonds; and the expenses required to achieve that result were wholly, exclusively and necessarily laid out for the purpose of decreasing the fixed interest and exchange charges and, therefore, "for the purpose of earning the income". Accordingly, the disbursement or expense so incurred come strictly and literally within the class contemplated by section 6 (*a*) of the *Income War Tax Act* and should have been allowed as a legitimate deduction in computing the amount of the profits or gains of the appellant company within the meaning of that section.

APPEAL from the decision of the Exchequer Court of Canada, Maclean J. (1), dismissing an appeal by the appellant from a decision of the Minister of National Revenue which had affirmed an assessment levied against the appellant under the *Income War Tax Act.*

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

Geo. H. Montgomery K.C. and *Aimé Geoffrion K.C.* for the appellant.

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

THE CHIEF JUSTICE—The material facts may be stated in the words of the factum of the appellant company, as follows:—

(1) [1941] Ex. C.R. 21.

In the beginning of the year 1936 the appellant had outstanding $27,615,000 par value of Series "A" 5% bonds maturing in 1951, and payable both as to principal and interest at either Montreal, Toronto, New York or in London at the holder's option. Not only was the coupon rate unduly high at the time, having in view the credit standing of the Company, but the taxable earnings of the Company had been seriously reduced each year through the heavy exchange rates which the Company had been obliged to pay upon its half-yearly interest instalments. After consultation with the Company's investment bankers it was decided that the most economical way of reducing the annual outgo for interest and exchange charges would be by the issue of new bonds as follows:—

2½% Series due Feb. 1, 1937	$ 1,000,000
2½% Series due Feb. 1, 1938	1,000,000
2½% Series due Feb. 1, 1939	1,000,000
2½% Series due Feb. 1, 1940	1,000,000
2½% Series due Feb. 1, 1941	1,000,000
3½% 20-Year Sinking Fund, due Feb. 1, 1956	10,000,000
	$15,000,000

the balance of the funds for the purpose of retiring the issue of $27,615,000 principal amount of the outstanding 5% issue being provided by the sale of certain investments which the Company had in its treasury.

The result of the above operation, in so far as concerned the $15,000,000 refunded and replaced by a new issue, was to reduce the fixed interest charges by the sum of $275,000 per annum and the elimination of the three-way pay option and the substitution of Canadian pay only did away with the exchange charges and effected a total saving, based upon the experience of the previous nine years, of $303,119.18. The taxable income of the Company was increased by a corresponding sum.

The expenses incidental to this operation the Company sought to amortize over the life of the new bonds; the amortized amount sought to be deducted in the year 1936 amounting to $104,596.04. In addition to the amount so amortized in 1936 there was a direct expenditure in that year of $79,166.64, representing the overlapping interest between the date of the calling of the old bonds and the date of their retirement, interest during that period of sixty days having been paid on both sets of bonds. The appellant claimed the right to deduct this amount from its taxable income for the year 1936.

The operation in connection with which these disbursements were made was simply this: Capital was borrowed at an agreed rate of interest for the purpose of repaying to the creditors the existing debt in respect of borrowed capital for which the company was paying a more onerous rate of interest. From a business point of view the main object of the transaction was to secure a reduction in the rate of interest and thereby, of course, to increase profits. Every one of these expenditures was part of the cost of borrowing capital from the lenders who took up the new issue of bonds, or of repaying the borrowed capital to the

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holders of the existing bonds; in other words, part of the cost of acquiring borrowed capital, or of repaying borrowed capital. Such expenses do not appear to me to come within section 6 (*a*) as expenses incurred in the process of earning "the income"; which is the test to be employed in the application of that subsection. *Minister of National Revenue* v. *Dominion Natural Gas Co. Ltd.* (1).

The principle is illustrated in several cases, of which I mention two. In the *Arizona Copper Company* v. *Smiles* (2), a bonus which the taxpayer was obliged to pay on the repayment of borrowed capital before the maturity of the debt was described by the Lord President as

> a lump payment as one of the considerations stipulated for a loan of capital;

and was held to be

> entirely heterogenous to those outlays, the deduction of which is permitted to be necessarily incidental to the earning of profit,

and the bonus was held not to be deductible.

In *Texas Land and Mortgage Co.* v. *Holtham* (3), brokers' charges and other expenses of raising debentures were held not to be deductible.

Of course, there is a sense in which, as a rule, all expenditure properly made by a joint stock company, such as the appellant company, may be said to be an expenditure incurred for the purpose of earning profits, but the distinction between expenditures made in the actual process of earning profits and other expenditures made on account of capital, or otherwise, is one which it is absolutely essential to maintain, if the statute is to be workable.

I think, moreover, that these disbursements were made for a purpose which falls within the principle enunciated by Lord Cave in the *British Insulated and Helsby Cables Ltd.* v. *Atherton* (4); that is to say, the expenditures were made with a view to securing an enduring benefit, the reduction of the cost of borrowed capital over a period of at least fifteen years.

A reference is due to the argument of Mr. Geoffrion concerning the decision in *Texas Land and Mortgage Co.* v. *Holtham* (3) just mentioned. That case, he argues, is of no value because it rests on the decision in the *Anglo-*

(1) [1941] S.C.R. 19.
(2) (1891) 3 Tax Cases 149.
(3) (1894) 3 Tax Cases 255.
(4) [1926] A.C. 205, at 212.

Continental Guano Works v. *Bell* (1), and this last mentioned case is unfavourably criticized in *Farmer* v. *Scottish North American Trust, Ltd.* (2). Mathew J. in his judgment in the *Texas Land* case (3) says:—

> To increase its capital it (the taxpayer) raised money on debentures. The argument is that the cost of raising the money ought to be deducted from the profits in a particular year. We are clearly of opinion that that cannot be done.

Farmer's case (2) was the subject of much discussion in *The European Investment Trust Co. Ltd.* v. *Jackson* (4). In that case there was an advance of £10,000 to the taxpayer as a fixed loan with fixed interest running for a considerable period. Mr. Justice Finlay observed, at page 7, as regards this interest,

> it is obvious that that was treated as money paid—correctly treated, obviously—in respect of capital.

There were other advances made under an agreement from time to time to suit the convenience of the taxpayer and at varying rates of interest. Lord Justice Romer says at page 16:—

> In one sense, it is perfectly obvious that the moneys borrowed by the appellants from the Finance Corporation of America constituted capital; that is to say, they were capital sums as distinct from sums representing income.

He then goes on to point out that in *Farmer's* case (2) the House of Lords had to deal with the case of a trading company whose business it was to buy and re-sell investments at a profit, borrowed from a bank for the purpose of enabling it from time to time to purchase the investments which it was going to re-sell; and the House held that the moneys so borrowed were not sums employed as capital in the trade within the meaning of Rule 3, Sub-rule (*f*).

He proceeds to say:—

> In point of fact, the money which was held not to be capital—although it was capital, as I say, in the sense that it was not income—was, really, what is frequently referred to as circulating capital.

He adds:—

> It is impossible, I think, to treat the decision of the House of Lords as laying down that capital, which is used as circulating capital, is not capital within the meaning of sub-rule (*f*).

For this he gives two reasons: The House did not draw any distinction between circulating capital and fixed

(1) (1894) 3 Tax Cases 239.
(2) [1912] A.C. 118.
(3) (1894) 3 Tax Cases 255.
(4) (1932) 18 Tax Cases 1.

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capital and, what is important here, they did not overrule, although they commented upon the decision in the *Anglo-Continental Guano Works* v. *Bell* (1), where money which was borrowed and used as circulating capital was treated as capital within the meaning of sub-rule (*f*).

He then adds that the effect of the decisions mentioned is that the question in each case is a question of fact.

From all this it will be seen that the comments upon the *Anglo-Continental Guano Works Company's* case (1) in the House of Lords in *Farmer's* case (2) were directed to a point which has no bearing whatever on the decision in the *Texas Land Company's* case (3) and has no relevancy to any question which arises in this case. In the *European Investment Trust Company's* case (4) there was no dispute that the sum of £10,000 borrowed by the taxpayer as a fixed loan with fixed interest running for a considerable period was borrowed capital. The point with which the House of Lords in *Farmer's* case (2) and the Court of Appeal and Mr. Justice Finlay in the *European Investment Trust Company's* case (4) were concerned was whether, the business of the taxpayer being that of dealing in investments, temporary loans of fluctuating amount borrowed for the purpose of financing individual transactions from time to time, out of which the taxpayer made its profit, could be classed as capital used in the taxpayer's business, or as so connected with the process of earning profits that the interest paid could be treated as an expenditure in the process of earning profits.

I have no doubt that the sums borrowed by means of the original issue of debentures were capital, as distinguished from income, or that the sums borrowed by the second issue of debentures for the purpose of retiring the earlier issue were also capital. The sums which the appellant company seeks to deduct are sums paid in respect of capital, and on the principle of the decisions in the *Arizona Copper Company's* case (5) and the *Texas Land and Mortgage Company's* case (3) they are not expenses incurred in the process of earning income in respect of which the appellant company is assessable.

The appeal should be dismissed with costs.

(1) (1894) 3 Tax Cases 239.
(2) [1912] A.C. 118.
(3) (1894) 3 Tax Cases 255.
(4) (1932) 18 Tax Cases 1.
(5) (1891) 3 Tax Cases 149.

The judgment of Rinfret and Taschereau JJ. (dissenting) was delivered by

RINFRET J.—These two cases were heard together; the questions raised are identical and they may be disposed of upon the same reasons for judgment.

In each instance, the Exchequer Court of Canada dismissed an appeal from the decision of the Minister of National Revenue affirming an assessment levied against the appellant under the *Income War Tax Act;* and the question involved in the appeals is whether certain disbursements laid out and expended by the appellant in refunding an outstanding bond issue and replacing the same by a new issue of bonds at a lower rate of interest, for the purpose of effecting a saving in fixed charges, should be allowed as deductions on the assessment of the appellant for income tax for the years there in question.

In the case of the Montreal Light, Heat and Power Consolidated, the facts are as follows: In the beginning of the year 1936, the Company had outstanding $27,615,000 par value of Series "A" 5% bonds maturing in 1951 and payable both as to principal and interest at either Montreal, Toronto, New York or in London, at the holders' option.

The coupon rate was thought unduly high at the time, having in view the credit standing of the Company; and the taxable earnings of the Company had been seriously reduced each year through heavy exchange rates which the Company had been obliged to pay upon its half-yearly interest instalments. After consultation with the Company's investment bankers, it was decided that the most economical way of reducing the annual outlay for interest and exchange charges would be by the issue of new bonds (at 2½% and 3½%) for the total amount of $15,000,000, with due dates spread respectively on February 1st, 1937, 1938, 1939, 1940, 1941 and 1956 (N.B., the latter being the 20-year sinking fund bonds representing $10,000,000 of the total $15,000,000, and being the only bonds on which interest was to be paid at 3½%). The balance of the funds for the purpose of retiring the issue of $27,615,000, principal amount of the outstanding 5% issue, was provided by the sale of certain investments which the Company had in its treasury.

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The result of the operation, in so far as concerned the $15,000,000 refunded and replaced by the new issue, was the reduction of the fixed interest charges by the sum of $275,000 per annum and the elimination of the three-way pay option and the substitution for it of the payment of interest in Canadian money only. This elimination did away with the exchange charges and effected a total saving, based upon the experience of the previous nine years, of $303,119.18.

The taxable income of the Company was increased by a corresponding sum.

The expenses incidental to this operation are detailed in the record as follows:

(i) Premium paid upon retirement of the issue of old bonds.....		$1,104,600 00
(ii) Exchange premium paid upon retirement of the issue of old bonds.....		676,726 00
(iii) Expenses in connection with retirement of the issue of old bonds.....		25,753 42
(iv) Discount on issue of new bonds:		
$5,000,000 par value at 1½%.....	$ 75,000 00	
$10,000,000 par value at 4%.....	400,000 00	
		475,000 00
		$2,282,079 42

The Company proposed to amortize these expenses over the life of the new bonds, the amortized amount sought to be deducted in the year 1936 (the year about which this litigation arose) amounting to $104,596.04.

In addition to the amount so amortized in 1936, there was an expenditure in that year of $79,166.64 representing the overlapping interest between the date of the calling of the old bonds and the date of their retirement, interest during that period of sixty days having been paid on both sets of bonds. The appellant claimed the right to deduct this amount from its taxable income for the year 1936.

In the assessment which followed, the deduction of both the amortized amount and of the amount representing the overlapping interest was disallowed.

The above facts were all admitted.

In the case of Montreal Coke and Manufacturing Company, the following facts were all admitted:

In 1935 the Company had outstanding $3,457,000 par value of first mortgage 5½% bonds maturing in 1947 and payable, both as to principal and interest, in Canadian or

United States funds, at the holders' option. It was found that the coupon rate was unduly high at the time, having in view the credit standing of the Company and, moreover, that the taxable earnings of the Company had been seriously reduced each year through the heavy exchange rate which the Company had been obliged to pay upon its half-yearly instalments. After consultation with the Company's investment bankers, it was decided that the most economical way of reducing the annual outgo for interest and exchange charges would be by the issue of $1,200,000 of 3½% serial bonds maturing yearly from 1936 to 1940 inclusive, and $2,200,000 of 4% fixed term bonds maturing on September 16th, 1947. The prices obtained were 99½ and accrued interest for the 3½% serial bonds and 99 and accrued interest for the 4% fixed term bonds, or a discount of ½ of one per cent in the case of the serial bonds and 1% in the case of the fixed term bonds.

The result of the operation was to reduce the fixed interest charges, to eliminate the United States pay option and to substitute Canadian pay only, thus doing away with the exchange charge. This effected a total saving of over $40,000 per annum. The taxable annual income of the Company was increased by a corresponding sum.

The particulars of the disbursements made by the Company in connection with this operation were as follows:

(i) Interest on new bonds from September 16, 1935, to December 31, 1935, until when interest had to be paid on both the old and new bonds.....	$ 23,207 54
(ii) Various expenses on retiring the old bonds and issuing the new bonds.....	12,484 92
(iii) Discount on issue of new bonds.....	28,000 00
(iv) Premium paid upon retirement of issue of old bonds	69,140 00
(v) Exchange premium paid on retirement of old bonds	36,744 81
	$169,577 27

The first two items of expenses mentioned above were charged directly against the earnings for 1935. It was proposed to amortize the other items over the life of the new bond issue. Amortization over the twelve years life of the term bonds which the appellant expressed the willingness to do would represent an amount of $14,131.44, to be deducted annually. As already mentioned, the total saving would amount to something over $40,000 per annum, with a corresponding increase in taxable income.

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All the items were disallowed by the Minister in the assessment of the appellant for the income tax.

As to both assessments, the Minister of National Revenue decided that the deductions claimed by the appellant should not be allowed, because they were not in respect of disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income, as provided in sec. 6 (*a*) of the *Income War Tax Act*.

A further ground for the decision was found in sec. 6 (*b*) of the Act, whereby it is provided that

> a deduction shall not be allowed in respect of any outlay, loss or replacement of capital, or any payment on account of capital, or any depreciation, depletion or obsolescence, except as provided in this Act;

and that the amounts claimed by the appellant as deductions from its income represented cost to it on the redemption of its old bonds and the issuing of a new series of bonds. It was decided that they were, in fact, expenditures on account of capital which fell within the specific provisions of the said section 6.

In the case of Montreal Light, Heat & Power Consolidated, it was further decided that part of the deductions were properly disallowed in the exercise of the statutory discretion provided for in section 5 (*b*) of the Act, on the ground that

> a reasonable rate of interest has been allowed on borrowed capital used in the business of the taxpayer;

and section 6 (*g*) was further invoked. That section has reference to "taxes paid under the *Special War Revenue Act*."

Each appellant having filed a notice of dissatisfaction, the matter came up before the Exchequer Court of Canada, where the learned President gave judgment against the contentions of the appellants. He found that the

> savings reflected a corresponding increase in the net income of the appellants; that the action taken by the appellants would seem to be amply justified by sound business and accountancy practice, and the results would seem to have verified the expectations of the appellants.

The learned President further stated that the law in England is different and

> English decisions could have no application here * * * In the United States, expenses incurred in connection with the refunding or retirement of bond issues are governed by a set of rules issued by the Treasury Department in 1938, and it is probable that there, under such rules, the disbursements here would be allowed as deductions.

He was, however, of opinion that

substantially, what took place here was the redemption and renewal in part of an existing capital obligation from the proceeds of a fresh capital obligation * * * Therefore,

(he thought)

all the expenses in question must be held to have been essentially of a capital nature, an outlay made on account of capital * * * The original capital which was the proceeds of the old bonds was now in the form of fixed capital assets or working capital, and whatever was the net result of the financial operations that took place, they related to and were on account of the capital * * * even though, on equitable grounds, the appellants' view seems attractive and in many ways quite just.

Further, the learned judge said:

It did not increase the revenue but it decreased the fixed capital charges of the business, and could not, therefore, have been incurred exclusively to earn the net profits or gains to be assessed.

And later:

If the expenses incurred in raising a portion of the initial capital of a company by an issue of bonds is not permissible as a business deduction, and I do not think the contrary has ever been held, then it seems to me to follow that expenses incurred in redeeming, refunding or reducing that borrowed capital, even if the results be beneficial to the net revenues of the company concerned, constitute an outlay or payment on account of capital and falls within the prohibition of s. 6 (*b*), in computing the amount of the profits or gains to be assessed * * * The expenses were not, I think, wholly or exclusively incurred for the purpose of earning the annual net profit or gain of the trade or business of the appellant company. The principle is that it is expenses necessary to earn future profits that are allowable deductions, and this principle has been extended to include expenditure to avoid future trading expenses. The profits of a trade or business is the surplus by which receipts from the trade exceed the expenditure necessary for the purpose of earning the receipts.

For the above reasons, the appeal was, therefore, disallowed with costs.

For the purpose of the *Income War Tax Act*, "income" means the annual net profit or gain or gratuity, whether ascertained or capable of computation * * * as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person * * * from any trade, manufacture or business, as the case may be, etc.

(N.B. I have omitted such parts of the definition contained in section 3 of the Act as were not material in the premises).

"Income", as so defined, is, by force of section 5, subject to the following, amongst other, exemptions:

(*b*) Such reasonable rate of interest on borrowed capital used in the business to earn the income as the Minister in his discretion may allow notwithstanding the rate of interest paid by the taxpayer; but to the

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extent that the interest payable by the taxpayer is in excess of the amount allowed by the Minister hereunder, it shall not be allowed as a deduction and the rate of interest allowed shall not in any case exceed the rate stipulated for in the bond, debenture, mortgage, note, agreement or other similar document, whether with or without security, by virtue of which the interest is payable;

Then comes, in the Act, section 6 which is the main section to be considered here:

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 word "profit" or the word "gain" is not defined in the interpretation clause of the *Income War Tax Act*. It follows that, wherever it is used in the Act, it must be understood as being used according to its usual meaning in ordinary common language. As such, it means the amount by which the gross earnings exceed the expenses.

It is clear that, in the several sections of the Act under consideration, the word "gain" is used interchangeably for "profit".

There are two ways of increasing the profits from a trade or commercial or other calling: either by increasing the earnings while the expenses remain the same, or by decreasing the expenses while the earnings remain the same. Of course, if the expenses diminish at the same time as the gross earnings are increased, the profits will be correspondingly larger, and the proposition just mentioned is only made more evident.

Now, it seems to me, with due respect, that it is sufficient to look at the operations under discussion to reach the conclusion that the amounts for which the appellants claimed deductions come strictly and literally within that class of disbursements or expenses which are contemplated by section 6 (*a*) and which, by application of the section, are to be considered as deductions which should be allowed in computing the profits or gains. To paraphrase the words of Sir Montague Smith, in *Lawless* v. *Sullivan* (1):

The intention of the Legislature should be clearly shown to justify an interpretation of the word "income" which would require that, in

(1) (1881) 6 App. Cas. 373, at 379.

the account for the year, the items of profit only should be included and the expense excluded, although but for the operations which occasioned the expenses, the apparent profits could not have been made.

As stated in Shaw and Baker, "The Law of Income Tax," at page 147:

> The profits are to be arrived at on ordinary commercial principles subject to such provisions as require a departure from such ordinary principles, e.g., the prohibition of certain deductions.

And, at page 183:

> The general rule as regards trade expenses is that a deduction is permissible which is justifiable on business and accountancy principles; but this rule is affected by certain specific statutory provisions. To the extent that ordinary business and accountancy principles are not invaded by statute, they prevail.

See also Halsbury, vol. 17, at p. 149, par. 309 and at p. 155, par. 316.

Now, what took place in the present instance is that the interest on the bonds was found unduly high, and the exchange rates were equally heavy in the circumstances; and that both these items of expenses had such an effect on the gross earnings of the Company that they seriously diminished the net profits or gains. It was evident that, if the interest and exchange charges could be made lower, "for the purpose of earning the income" (which, in the Act, is defined as meaning "the annual net profit or gain"), the net profit or gain would be accordingly higher.

With that purpose in view, each company adopted the plan recommended by its investment bankers: the outstanding bonds on which 5% per annum had to be paid were redeemable at a certain premium. They were redeemed at the prescribed premium; and they were replaced by bonds bearing a lower interest. Moreover, the new bonds by which they were redeemed were made payable only in Canada; and, as a result, the exchange rates were no longer payable on the bonds. Thus the Company saved the excess of interest as between the old and the new bonds, and it also saved entirely the amount required to pay the exchange rates.

The capital liability remained exactly the same as it was before. The expenses incurred were not made out of capital; the gross earnings of the Company may have remained the same; but the expenses having been decreased, the net profit was increased. And this expendi-

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ture helped in earning net profit in every succeeding year during which the old bonds would have been outstanding but for the operation.

The essential point is, with regard to the judgment *a quo*, that the operation did not alter the capital structure to the slightest extent. Such is the difference between expenses incurred in raising the initial capital of the Company by an issue of bonds and merely replacing the bonds at a reduced rate of interest and by elimination of exchange charges, but without in any way increasing the capital of the bonds. On the contrary, in the case of the Montreal Light, Heat & Power Consolidated, the capital of the bonds was reduced.

It need hardly be stated that, in an operation of this kind, the several elements thereof were essentially linked together and inseparable. In order to pay a lower interest and to get rid of the exchange rates, it was necessary to redeem the original bonds; and, therefore, the expenses required to achieve that result were wholly, exclusively and necessarily laid out or expended for the purpose of decreasing the fixed interest and exchange charges, and, accordingly, "for the purpose of earning the income."

It may be mentioned that it was not even a matter of renewing debentures as they came due, because the old ones were not maturing; but it was merely a question of refunding debentures to secure a lower interest rate and to completely eliminate the exchange charges. By doing as they did, the two Companies were relieved of an onerous obligation due upon the same capital liability.

In the circumstances, I am unable to find otherwise than that the disbursement or expense so incurred must be allowed as a legitimate deduction in computing the amount of the profits or gains of the appellants, within the meaning of section 6 (*a*) of the *Income War Tax Act;* and, as a consequence, in my view, the judgments appealed from should be reversed and the appeals of the two companies from the decision of the Minister should be allowed with costs throughout.

DAVIS J.—These appeals, which were heard together, come to us from the Exchequer Court of Canada, which heard appeals by the companies from the decision of the Minister of National Revenue on certain claims for deduc-

tions that the companies sought to have allowed in ascertaining the amount of their assessable income for income tax purposes.

Broadly speaking, what happened was that each of the companies had large bond issues outstanding carrying onerous provisions as to the rate of interest and as to payment in several currencies, particularly in United States currency, of principal and interest at the holder's option, when, in the case of one company in 1935 and in the case of the other company in 1936, the companies decided to call in these bonds (which they had the right to do on certain notice and on the payment of a certain premium) and, taking advantage of a favourable bond market then existing, issue and sell new bonds to the public bearing a much lower rate of interest and without the option of payment of principal or interest in United States currency. The new bonds were to run for twelve years, which was the period that the old bonds had to run had they not been called in. This plan was adopted and successfully carried out, with large annual savings in interest payments to the companies and consequent increase in the annual gross profits to the extent of the savings.

The amounts were very large. In the case of the Montreal Light, Heat & Power Consolidated in the beginning of the year 1936 the company had outstanding $27,615,000 par value of bonds maturing in 1951. The said outstanding issue was replaced as to $15,000,000 by a new bond issue; the balance was redeemed out of the proceeds of the sale of company investments. The Montreal Coke & Manufacturing Company in the year 1935 had outstanding $3,457,000 par value of its bonds maturing in 1947. These bonds were replaced by two issues totalling $3,400,000.

The companies seek to treat as proper deductions for purposes of income tax the expenses incidental to the changes, i.e., the discount on the sale of new bonds, the amounts of the premium paid in order to call in the old bonds, the amount of foreign exchange paid upon retirement of the old bonds, and incidental expenses of retiring the old and issuing the new bonds. In the Coke Company case the total is $23,207.54, while in the Light, Heat & Power Consolidated, the total deductions sought are $2,282,079.42.

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Davis J.

What the companies say is, their annual gross profits during the twelve-year period will be increased by the amount of the corresponding savings in fixed interest charges. The Montreal Light, Heat & Power Consolidated estimates that annual sum in its own case at $303,119.18. To the extent of the tax leviable on such a sum the Government will reap a largely increased income tax revenue—it will reap where it has not sown unless, say the companies, the expenses of effecting the change in the bonded indebtedness of the companies are allowed as proper deductions. The Minister has, however, ruled against this claim and, on appeal to the Exchequer Court of Canada, his decision has been affirmed. The companies then appealed to this Court.

The companies were obviously faced with the difficulty of having the total amount of the expenditures incurred in making the changes treated as deductions in the particular taxation period in which they were incurred, and therefore contended that the proper method of dealing with them is to amortize them over the twelve-year period.

The relevant part of section 6 of the *Income War Tax Act* reads as follows:

> 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.

As Lord Hanworth said in *Thomas Merthyr Colliery Co. Ltd.* v. *Davis* (1), adopting the language of Lord Dunedin in the *Gliksten* case (2), "It is necessary to tread a narrow path in these income tax cases. It is that stern rule which must be followed." The Court must interpret the statute without reference to its own views of the fairness or unfairness, in a commercial sense, of the result in any particular case. Parliament has made the law; we are merely to interpret and apply it.

After much consideration of the able arguments presented to us by counsel on behalf of the companies, I cannot bring myself to the view that these expenditures

(1) [1933] 1 K.B. 349, at 370.
(2) *Gliksten & Son Ltd.* v. *Green* [1929] A.C. 381, at 385.

come properly under our statute as allowable deductions. Once the practical necessity appears for amortization over a period of years of any large expenditure actually incurred in a particular taxation year, the real character of the expenditure emerges as something quite different from those ordinary annual expenditures which fall naturally into the category of income disbursements. The expenditures here in question are, in my opinion, in the nature or of the character of capital expenditures and are not the sort of expenditures that the statute contemplated to be allowed as deductions under the language of section 6 (*a*) as "expended for the purpose of earning the income". The words "the income" must, I think, mean the assessable income of the taxation period.

I should dismiss the appeals with costs.

KERWIN J.—It is undoubted that the expenditures made by the appellant companies were prudent and have resulted, and will result, in a lessening of their annual outgoings, and that because of this the sums assessable for income taxes in each year during the currency of the bond issues will be increased. However, as much could be said in the case suggested in argument by Mr. Varcoe of a company replacing old furnaces with new in order to save a considerable sum annually in its coal bill, and in such circumstances it could not be suggested that the money expended for that purpose was not a capital expense.

The appellant companies have amortized the totals of some of the items in question over the period covered by the bond issues and have expressed a willingness to treat any remaining item in the same manner. The fact that their auditors considered this a proper business practice is not necessarily decisive but it does weigh against the contention now put forward on behalf of the appellants. What happened, in my view, is that there was an application of the profits of a certain year to prevent an annual expense arising thereafter and brings the cases within Viscount Cave's criterion in *British Insulated and Helsby Cables Limited* v. *Atherton* (1) of an expenditure made with a view of bringing into existence an advantage for the enduring benefit of the appellants' business. The

(1) [1926] A.C. 205, at 213.

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expenditures are outlays or payments on account of capital and, under clause (*b*) of section 6 of the *Special War Tax Act,* are not to be allowed in computing the amount of the profits or gains to be assessed.

The appeals should be dismissed with costs.

Appeal dismissed with costs.

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Kerwin J.

An appeal of *Montreal Coke & Manufacturing Company and The Minister of National Revenue,* from the decision of the Exchequer Court of Canada, Maclean J. (1), dismissing an appeal by the appellant from a decision of the Minister of National Revenue which had affirmed an assessment levied against the appellant under the *Income War Tax Act,* was heard on the same date as the appeal of *The Montreal Light, Heat and Power Consolidated,* above mentioned, before the same members of the Court, the same counsel being engaged on the appeal.

The questions raised on the two appeals were identical, the only distinction being that in this case the outstanding bond issue, $3,400,000 par value, was replaced by a new issue for the same amount bearing a lower interest rate.

Judgment was delivered by the Supreme Court of Canada on the same date as the other appeal, also dismissing the appeal with costs.

Both appeals were disposed of by the members of the Court upon the same reasons for judgment, with the exception of the Chief Justice who delivered the following judgment: "In principle this appeal is governed by my judgment in *The Montreal Light, Heat and Power Consolidated* v. *The Minister of National Revenue* appeal. The appeal is dismissed with costs."

Appeal dismissed with costs.

Solicitors for the appellants: *Montgomery, McMichael, Common & Howard.*

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

(1) [1941] Ex. C.R. 30.

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*Oct. 31.
*Feb. 3.

HYMAN M. RIPSTEIN (PLAINTIFF).... APPELLANT;

AND

TROWER & SONS LIMITED (DEFENDANT) ..... } RESPONDENT;

AND

THOMAS S. GILLESPIE AND THOMAS REDPATH (DEFENDANTS).

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

Contract—Jurisdiction—Declinatory exception—Agreement with foreign company for sale of its goods in Canada—Business carried on in the province of Quebec with head-office located therein—Net commission on sales to be divided between foreign company and parties residing in the province—Action for accounting of such commissions taken by one party against foreign company—Whether provincial courts competent to hear the issue—Whether whole cause of action arise in the province—Article 94, 103 C.C.P.

The appellant brought an action in the district of Montreal, province of Quebec, against the respondent, an incorporated body described in the writ of summons as having its head-office and principal place of business in the city of London, England, and also against the two other defendants, both residing in the city of Montreal. The action was instituted for an accounting of all commissions received directly or indirectly by or on behalf of the above-mentioned company in connection with orders for merchandise sent by or on behalf of persons, firms or corporations in Canada or in the United States, in pursuance of an agreement herein described; in default of which the appellant asked that each defendant be condemned to pay him the sum of $225,000 as *reliquat de compte*. The respondent and the other defendants moved, by way of declinatory exception, that the action be dismissed on the ground that the Superior Court of the district of Montreal was not competent to hear the issue with regard to them. An agreement had originally been entered into between a certain partnership, carrying on business as wine and spirit merchants in the city of London, England, under the style of Trower and Sons, called "the Firm", and the appellant Ripstein and the defendant Gillespie, both of the city of Montreal. The Firm was to open, at their own expense, for the sale of their goods, an office in Montreal, called "Canadian office" and to appoint the defendant Redpath as its manager, Gillespie and Ripstein undertaking to use their best endeavours to introduce customers in Canada and the United States. The commission on all orders obtained by the Firm from these customers, whether obtained direct by the Firm or through Gillespie and Ripstein, were to be credited to the Canadian office. The Firm was to send credit notes from the London office to the Canadian office, showing the amount of commission to be allowed to the Canadian office, such commission being the difference between the cost price of the goods shipped by the Firm to Canada and the price at

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

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which such goods were invoiced to customers in Canada or the United States. Payment was to be made by customers direct to the Firm's London office, and the Firm was to remit to the Canadian office monthly the commission due to the latter on all sales in respect of which payment had been received. The "net commission" of the Canadian office, after deduction of the expenses of carrying on the same, was to be divided, one-third each, between the Firm, Gillespie and the appellant Ripstein. Later on, the respondent company purchased the business of the Firm and undertook to carry on under the agreement. The respondent company's motion, by way of declinatory exception, was maintained and the action, as against the respondent, was dismissed by the Superior Court, whose judgment was affirmed by the appellate court.

Held, reversing the judgment appealed from (Q.R. 69 K.B. 424), Davis and Hudson JJ. dissenting, that, under the circumstances of the case, all the essential facts, which together ought to give rise to the action brought by the appellant, i.e., the whole cause of his action, as constituted, had arisen in the city and district of Montreal, before the courts of which appellant was entitled to institute his action, under article 94 (3) C.C.P., and the declinatory exception should have been dismissed.—The whole business covered by the agreement, whatever be its nature, was, in the intention of the parties, to be, and was, carried on in and from the Canadian office; and the appellant's action was for an accounting of the "net commission", i.e. for an accounting of the business carried on in and through the Canadian office, in the city and district of Montreal, where the seat of the business was located.

Per Rinfret, Crocket and Taschereau JJ.—The provisions of article 94 C.C.P. are broad enough to include within their ambit any defendant, be he a foreigner, a stranger or not; and it was the evident intention of the legislature of Quebec, as expressed in that article, to grant to the Quebec courts jurisdiction over aliens or parties outside the province, if the whole cause of action arose therein.

Per Rinfret, Crocket and Taschereau JJ.—No opinion is expressed as to whether the agreement should be styled a partnership, or an agency agreement, or a contract of lease and hire of service, nor as to whether the declinatory exception was also wrong on any of the other grounds raised by it and decided by the judgments appealed from.

Per Davis J. (dissenting).—The making or assuming of the contract by the respondent company in the city of London, England, the receipt of payments by that company there from Canadian and American sales, the failure of the company "to remit" from London to Montreal certain commissions on these sales, and probably other facts necessary to establish the alleged cause of action, did not arise within the jurisdiction of the Quebec court.

Per Hudson J. (dissenting).—The agreement itself was made in London, England, the moneys were collected by the defendants there and not in Canada, contracts were made with a number of distillers and liquor dealers in London and in New York and moreover the appellant asked for an accounting in respect of all transactions had and done, whether in Canada, in the United States or in England, and, therefore, it cannot be said that the whole cause of action arose within the district of Montreal.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Décary J., and maintaining the company respondent's motion, by way of declinatory exception, that the appellant's action for an accounting be dismissed on the ground that the Superior Court had no jurisdiction to hear the issue in the case.

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. Weinfield K.C. for the appellant.

R. C. Holden K.C. and *G. B. Puddicombe* for the respondent.

The Judgment of Rinfret, Crocket and Taschereau JJ. was delivered by

RINFRET J.—The appellant brought this action in the district of Montreal, province of Quebec, against the respondent, described in the writ of summons as being

> a body politic and corporate duly incorporated and having its head-office and principal place of business in the city of London, in that part of Great Britain called England;

and also against Thomas S. Gillespie and Thomas Redpath, both of the district of Montreal, summoned as co-defendants with the respondent.

The action is to the effect

> that the defendants and each of them be ordered and condemned to render * * * a true and accurate accounting to plaintiff, accompanied by vouchers (pièces justificatives), showing all transactions had and done by the defendants, or either of them * * * not only in the name of and on behalf of the Canadian partnership, but also under the name of Redpath & Company and under the name of the defendant Redpath and in the name of or through the defendant Gillespie and under the name of or through the defendant Trower & Sons Limited, and this whether in Canada or in the United States of America, or in England, for account of the Canadian partnership, in connection with the products of the defendant Trower & Sons Limited, or in connection with the firms, or either of them mentioned in (the declaration); and also showing in detail all assets of every nature and kind whatsoever belonging to the Canadian partnership, or to which it is legally entitled, including * * * all profits, salaries, bonuses, commissions or other remuneration, directly or indirectly, received by the defendants, or either of them * * * in connection with the business of the Canadian partnership and in connection with the products of the firm mentioned (in the declaration); and also showing in detail the surplus and good-will of the said Canadian partnership.

(1) (1940) Q.R. 69 K.B. 424.

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A similar action had previously been instituted in London, England, between the same parties; but, as stated at bar, it has since been discontinued.

The Canadian action was served upon the defendants Gillespie and Redpath in the district of Montreal, where they have their domicile, and upon the defendant Trower & Sons Limited (respondent) through a notice published in newspapers in the district of Montreal, pursuant to art. 136 of the Code of Civil Procedure.

The respondents moved, by way of declinatory exception, that the action be dismissed in so far as they were concerned, on the ground that the appellant could not institute the action against them in the district of Montreal and that the Superior Court of that district was not competent to hear the issue with regard to them.

The declinatory exception of the respondent was maintained and the action as against the respondent was dismissed by the Superior Court, whose judgment was confirmed by the Court of King's Bench, appeal side (1).

The appellant justified the course followed by him on several grounds in respect of which he contended that the courts of the district of Montreal had jurisdiction over the respondent: that the contracts were made in Montreal; that the other defendants resided in Montreal, were served there and that accordingly all defendants could be brought before the court of the district in which one of them was validly summoned; that the relationship between the appellant and the respondent, as well as the other defendants, constituted a partnership and the action for accounting and partition in a partnership may be instituted where the accounting is due and where the partition is to be made; that the respondent had properties in the district of Montreal; that the courts of the district of Montreal could assert jurisdiction over the respondent by force of the general rule concerning jurisdiction of the courts of Quebec resulting from article 27 of the Civil Code, whereby

> aliens, although not resident in Lower Canada, may be sued in its courts for the fulfilment of obligations contracted by them in foreign countries.

In the courts of the province of Quebec the appellant failed, and he now submits on appeal to this Court the several grounds upon which he based his contestation of the respondent's declinatory exception.

(1) (1940) Q.R., 69 K.B., 424.

In my view of the matter, it is immaterial whether the agreement between the parties was made verbally in London, England, or made in writing and signed, first in England by the respondent, and subsequently in Montreal by the other defendants and by the appellant (where, therefore, it was actually completed as a binding contract).

The material point is that the written document, alleged and invoked by the appellant, contains the full terms and expresses the true effect of the agreement entered into by the parties.

Nor do I find it necessary to decide whether the agreement should be styled a partnership, or an agency agreement, or a contract of lease and hire of service. This point may well be left to be decided on the merits of the case, after the parties have had the opportunity of adducing fuller and more complete evidence than it was possible for them to put forward on the issue restricted to the question of jurisdiction.

For the purposes of the present appeal, and whether the appellant is right or not in calling the agreement a partnership, the courts must look at the allegations of the declaration and its conclusions considered in the light of the true substance of the contract itself. Thus will be ascertained the cause of the appellant's action and the place where it has arisen, conformably to paragraph 3 of art. 94 of the Code of Civil Procedure.

If the whole cause of action arose in the district of Montreal, this is sufficient, under art. 94 (3), to allow the appellant to institute his action in that district, independently of any other ground upon which he may have justified his course.

The original agreement was entered into between Agnes Marian Bence Trower, Richard Alexander Bence Trower and Henry Arthur Bence Trower, of the city of London, carrying on business in co-partnership under the style of Trower and Sons as wine and spirit merchants, of the first part, and Thomas Stevenson Gillespie and Hyman Mendel Ripstein (the appellant), both of Montreal, respectively of the second and the third part.

In the agreement, the partnership of Trower and Sons is called " the Firm ".

It was agreed that the Firm would open, at their own expense, an office at Drummond Building, or elsewhere in

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Montreal, in the province of Quebec, Canada, for the sale of their goods, and that they would appoint Thomas Redpath (one of the defendants) as the manager of such office, which, in the agreement, is referred to as the "Canadian Office".

Gillespie and Ripstein undertook to use their best endeavours to introduce customers in Canada and the United States to the Firm.

The commission on all orders obtained by the Firm from customers in Canada and the United States, whether obtained direct by the Firm or through Gillespie or Ripstein, was to be credited to the Canadian office. The firm was to send credit notes from their London office to the Canadian office, showing the amount of commission to be allowed to the Canadian office in respect of sales of goods comprised in each shipment.

It is stated that, for the purposes of the agreement, "commission" shall mean the difference between the cost price of the goods shipped by the Firm to Canada (including duty, freight and insurance) and the price at which such goods are invoiced to customers in Canada or the United States.

Payment is to be made by customers direct to the Firm's London office, and the Firm is to remit to the Canadian office monthly the commission due to the Canadian office on all sales in respect of which payment has been received.

The expense of establishing the Canadian office and all expenses of carrying on the same, including the salary, commissions or other remunerations of Redpath (the manager), and of all necessary clerks, servants and travellers employed by the Firm in Canada and the United States are to be debited to the Canadian office.

The "net commission" of the Canadian office, after deduction of the expenses above mentioned, is to belong as to one-third to the Firm, as to one-third to Gillespie and as to one-third to Ripstein, and to be divided accordingly at the Canadian office on the thirty-first day of December in every year or oftener, if the parties shall so agree.

The agreement is to take effect as of the 27th day of March, 1927; and any party thereto shall be entitled to terminate the agreement by giving to the others six calendar months' notice in that behalf.

By a supplementary memorandum, it was understood that the agreement was for a period of five years, with the option of a renewal of a further five years at the end of that period.

The respondent Trower & Sons Limited later took over the operations of Trower and Sons, and, among others, the business of the Canadian office in Montreal. Accordingly they became responsible for the operations under the agreement; and that is why they were made defendants, instead of the "Firm", whose business they had purchased and undertook to carry on.

The analysis which has just been made of the contract between the parties shows that, whatever may be the exact nature of the relationship thus created between the appellant, the other defendants and the respondent, the object of the agreement between them was the carrying on of the business there described, in the city and the district of Montreal. The seat of that business called the "Canadian Office" was opened and maintained

at Drummond Building or elsewhere in Montreal, in the province of Quebec, Canada.

The manager of such office was the defendant Redpath, in the district of Montreal.

The business to be carried on under the agreement, the transactions contemplated by the agreement, "the cash, monies received and monies paid out" were carried "through the books of Gillespie & Company, in Montreal"; and so was the banking done in connection with the Canadian business. This was established by the evidence of Redpath, the manager, without any contradiction.

It is also proven that the books and records and the accounts of the concern were kept in Montreal.

It was so far intended by the parties that the business carried on under the agreement was to be a Canadian business with situs in Montreal, that in connection with the signature of the contract between the respondent, the appellant and the other defendants, the partnership of Trower & Sons caused to be registered in Montreal a declaration signed by the several Trower partners certifying that they

carry on and intend to carry on business as wine and spirit merchants, at Drummond Building, St. Catherine street west, in the city of Montreal, under the name and firm of Trower & Sons.

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It follows from what precedes that the relationship, resulting from the agreement of the parties, centred upon the "net commission" of the Canadian office in Montreal, in respect of which alone the signatories of the document had joint interests and in the division of which exclusively the appellant was to participate.

Whatever be the nature of the agreement, it is apparent that, in the intention of the parties, the whole business covered by it was to be, and was, carried on in and from the Canadian office, in the city and district of Montreal, where the seat of the business was stated to have been established.

Now, on the face of the record and of the allegations and conclusions of the declaration, the appellant's action is for an accounting of the "net commission", and that is to say: for an accounting of the business carried on in and through the Canadian office in the city and district of Montreal.

It is not to the point to say that such business had ramifications outside of the district of Montreal, throughout the province of Quebec, Canada and the United States. The business itself was located in the city and district of Montreal and none the less so because certain of its transactions spread throughout Canada and the United States. The business and the transactions originated in the Canadian office in Montreal, whence the goods were shipped and invoiced to customers and where books, records and accounts were kept.

An accounting of that business and of those transactions was what the appellant prayed for in his action against the respondent; and all the essential facts which together gave rise to the action brought by the appellant, or, in other words: the whole cause of his action as constituted has arisen in the city and district of Montreal, before the courts of which the appellant was entitled to institute his action under paragraph 3 of art. 94 of the Code of Civil Procedure.

There may be some doubt whether the respondent Trower & Sons Limited may, for the purposes of the declinatory exception which they made, be looked upon as being domiciled outside the province of Quebec, in view of the fact that, in this case, they merely represent the interests of Trower & Sons (the partnership or "the Firm")

and that the said firm of Trower and Sons had caused to be registered, in the district of Montreal, a declaration that it was carrying on "business as wine and spirit merchants at Drummond Building, St. Catherine street west, in the city of Montreal, under the name and firm of Trower and Sons". It may be a debatable question whether the limited company representing the Firm as it does here, and brought into the case as defendants in lieu of Trower and Sons (the partnership) so registered, should not, for the purposes of this case, be considered as carrying on business in Montreal. But the fact remains that, whether the domicile of the Firm was in London, England, or in Montreal, Canada, —with regard to the business about which we are concerned, and, for jurisdiction purposes in this case, it may well be argued that such domicile and residence should be held to be at the seat of the Canadian office, in Montreal.

Be that as it may, the whole cause of action having arisen in the city and district of Montreal, there can be no doubt that the respondent in the premises could be brought before the courts of the city of Montreal upon an action to account for the business and transactions carried on in the "Canadian Office" situated in Montreal.

It has never been disputed that the provisions of art. 94 C.C.P. are broad enough to include within their ambit any defendant, be he a foreigner, a stranger or not; and it was the evident intention of the legislature of Quebec, as expressed in that article, to grant to the Quebec courts jurisdiction over aliens or parties outside the province, if the whole cause of action arose therein (*Fraser* v. *Beyers-Allen Lumber Company* (1); *Gosset* v. *Robin* (2); *Archambault* v. *Bolduc* (3).)

Accordingly, upon that ground, the appellant was right in bringing the respondent before the Superior Court of the district of Montreal, in the province of Quebec; and the declinatory exception should have been dismissed with costs.

As it becomes unnecessary to discuss whether the declinatory exception was also wrong on any of the other grounds raised by it, it should be understood that we refrain to approve or disapprove of the reasons given for the judgments appealed from in respect thereof.

(1) 1913) Q.R. 45 S.C. 42, at 53.
(2) (1876) 2 Q.L.R. 91, at 107, 108.
(3) (1881) 2 Decisions de la Cour d'Appel, 110.

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The appeal should be allowed with costs throughout and the record should be returned to the Superior Court there to be proceeded with on the merits of the action.

DAVIS J. (dissenting).—This appeal arises out of the trial of a preliminary issue in the action to determine whether or not the Superior Court of the province of Quebec in and for the district of Montreal has jurisdiction to entertain this action against one of the defendants, Trower & Sons, Limited (for convenience hereinafter referred to as the company). Mr. Justice Décary, who tried the issue in the Superior Court, dismissed the action as against the company on the ground that the Superior Court did not have jurisdiction. That judgment was unanimously affirmed on appeal by the Court of King's Bench (appeal side) of the province of Quebec. The plaintiff appealed further to this Court.

The company is an English corporation having its domicil in London, England, where its head office and principal place of business are situate. It was incorporated in 1929 and shortly after its incorporation acquired the assets of an English partnership known as "Trower & Sons", which firm had in 1927 entered into an agreement with the appellant and one Gillespie, both of the city of Montreal, for the furtherance of the sale of the firm's liquors in Canada and the United States. Payment was to be made by customers direct to the firm's London office and the agreement provided that certain commissions in respect of payments on sales obtained by the firm from customers in Canada and the United States, whether obtained directly by the firm or through the appellant or Gillespie, were to be "remitted" to a Canadian office and (after payment thereout of certain local expenses referred to in the agreement) were to be divided at the Canadian office at the end of each year, one-third to the firm, one-third to the appellant and one-third to Gillespie. There was a good deal of argument before us as to whether or not this agreement, which was not made under seal, was made in London or in Montreal. In the English action to which I shall presently refer the appellant pleaded that the agreement was made in England. In the Quebec action it was only by an amendment made to his original declaration that the appellant pleaded it was made in Montreal. Both courts

below have examined into the facts and have concluded that the agreement was made in England. This, of course, is the agreement with the partnership; not an agreement with the company.

This action was brought by the appellant in the province of Quebec against Gillespie and one Redpath (both residents of the province of Quebec) and the company, for an accounting of all commissions received directly or indirectly by or on behalf of the company in connection with orders for merchandise sent by or on behalf of persons, firms or corporations in Canada or in the United States; in default of which the plaintiff asks that each defendant be condemned to pay him the sum of $225,000 as *reliquat de compte*.

At the date of the institution of this action there was pending for trial in London an action instituted there by the appellant, as plaintiff, against the same parties—the company, Gillespie and Redpath—alleging the same cause of action and seeking the same accounting and payment on the footing of the accounts to be taken. That action had been commenced by writ issued July 22nd, 1935. The Quebec action was not commenced until June 22nd, 1938. The only material difference between the English and the Quebec actions was that the appellant in his Quebec action (not originally but by amendment) set up a partnership among the parties to the action, obviously for the purpose of endeavouring to create a jurisdiction in the Quebec court on the basis that the company was a partner of the other parties defendant to the action and on the appellant's contention could therefore, under the Quebec practice and procedure, be added as a party defendant in the action. There is as a matter of fact no proof that the company ever entered into any agreement with the appellant; reliance was had entirely upon the agreement made with the English partnership prior to the incorporation of the company. I am satisfied, as were all the judges in the courts below, that on the proper construction of the document there was no partnership between the parties defendant to the action.

We were informed by counsel during the argument, though it is not part of the record, that since the commencement of the Quebec action the English action has been dismissed with costs, the appellant having failed to

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comply with an order made in the English action for security for costs. But the English action was pending for trial at the time of the commencement of this similar action in Quebec, and I should think that in itself may have made the Quebec action a vexatious one sufficient to have entitled the company to have it dismissed. But the courts below have dismissed the action as against the company upon the ground of want of jurisdiction in the Court. The company was not served personally (it was summoned merely by publication in Montreal newspapers) though it appeared to contest the jurisdiction of the court over it. Further, when the action was instituted, the company had no known office or place of business in the province of Quebec and no officer, agent or representative there. Neither had the company any assets in the province of Quebec. Upon those facts the courts below have held there was no jurisdiction over the company in this action in the courts of the province of Quebec.

It cannot be said, in my opinion, that the Quebec court is " the court of the place where the whole cause of action has arisen ", within the meaning of article 94 (3) of the Quebec Code of Civil Procedure. The Quebec authorities to which we were referred as to the meaning of " the whole cause of action " are in agreement with the Ontario authorities on similar words, i.e., all the material facts which must be proved in order to entitle the plaintiff to recover must have arisen within the jurisdiction of the Court. The English decisions, to like effect, are collected in Hals. 2nd ed., vol. 1, p. 8. In this case, the making or assuming of a contract by the company, the receipt of payments by the company in London from Canadian and American sales, the failure of the company " to remit " from London to Montreal certain commissions on these sales, and probably other facts necessary to establish the alleged cause of action, did not arise within the jurisdiction of the Quebec court.

It was contended for the appellant that article 103 of the Quebec Code of Civil Procedure entitled the appellant to bring the company before the Quebec court. The relevant part of the article reads as follows:

> 103. In matters purely personal, if there are several defendants in the same action residing in different districts, they may all be brought before the court of the district in which one of them has been summoned, provided that such summons be not made with the intention of withdrawing the real parties from the courts which would otherwise have jurisdiction.

It was argued by counsel for the appellant that that article entitled the appellant to bring the English company before the Quebec court as one of "several defendants in the same action residing in different districts." But the word "districts" in the article plainly means judicial districts within the province of Quebec. The article has no application to a person resident outside the province of Quebec. Mr. Justice Barclay in the Court of King's Bench has carefully canvassed that point. It was urged that such an interpretation of the article leaves no provision in the Code, in an action purely personal where there are several defendants residing in different places, to bring before the court a person residing outside the province of Quebec. There may be a *casus omissus* (I have not felt it necessary to consider that) but that would not entitle the Court to construe the article in any other way than its plain language requires.

I should dismiss the appeal with costs.

HUDSON J. (dissenting).—The questions involved in this appeal are largely matters of practice and procedure governed by the Quebec Code of Civil Procedure and, in view of the unanimous opinion of the judges in the court below, I would be disposed to dismiss this appeal without further comment. But my brother Rinfret has taken a point which, while mentioned in the court below, was apparently not seriously discussed, that is, whether or not the whole cause of action arose in Montreal, so as to bring the plaintiff's claim within the provisions of article 94 (3) of the Code of Civil Procedure, which reads as follows:

> 94. In matters purely personal, other than those mentioned in articles 96, 97, 98, 103 and 104, the defendant may always, notwithstanding any stipulation, agreement or undertaking to the contrary, be summoned:
>
> * * *
>
> 3. Before the court of the place where the whole cause of action has arisen * * *

It seems to me that the whole cause of action referred to in this article must signify all of the facts, causes, moyens and motifs alleged in the declaration, which, if traversed, must be proven. This interpretation has been placed on the article by many decisions in the courts of Quebec.

In the present action, as stated by my brother Rinfret, the place from where the services rendered by the plaintiffs

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radiated was Montreal; there was the office where the accounts were kept and where the eventual division of profits was to be made. On the other hand, the contract itself was made in London, England. Moneys collected as a consequence of plaintiffs' work were collected by the defendants in London, not in Canada, and although the plaintiffs ask for an accounting in respect of business done at or through Montreal, yet they also say that the defendants made a contract with a number of distillers and liquor dealers in London and in New York, in the profits of which they were entitled to participate, and in their prayer they ask for an accounting by the defendants, Trower and Sons, Limited, in respect of all transactions had and done * * * by or under the name of or through the defendants, Trower and Sons, Limited, and this whether in Canada or in the United States of America or in England.

In view of these claims, with respect I cannot see how it can be said that the whole cause of action here arose within the district of Montreal and, for that reason, I would dismiss the appeal.

Appeal allowed with costs.

Solicitors for the appellant: *Weinfield & Rudenko.*

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

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* Oct. 10, 14.
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* Feb. 3.

IN THE MATTER OF THE WILL AND ESTATE OF SARAH MARGARET WEST, DECEASED

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Will — Interpretation of — Priority of legacies — Abatement — Residuary legatees — Disposition of corpus of trust fund.

Upon a consideration of the terms of a particular will, it was *held,* reversing the judgment of the Court of Appeal for Manitoba ([1941] 3 W.W.R. 49) and restoring the judgment of the judge of first instance, that the rule in *Farmer* v. *Mills* ((1827) 4 Russ. 86), and *Dudman* v. *Shirreff* ((1870) 18 W.R. 596) did not apply.

Robertson v. *Broadbent* ((1883) 8 A.C. 812), *Arnold* v. *Arnold* ((1834) 2 M & K 365) and *Hichens* v. *Hichens* ((1876) 25 W.R. 249) discussed.

APPEAL by two beneficiaries under the will of Sarah Margaret West, deceased, from the judgment of the Court

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

of Appeal for Manitoba (1) reversing the judgment of the judge of first instance, Donovan J. (2) on an application by the executor of the will, by way of originating motion for an order construing and interpreting the will and for the opinion, advice and direction of the Court upon certain questions arising out of some clauses of the will.

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

John Jennings K.C. for the appellants.

Sir Charles Tupper K.C. for the respondent.

R. N. Starr for the executors.

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

KERWIN J.—This appeal is concerned with a question that arises in the administration of the estate of Mrs. Sarah Margaret West. By her last will and testament Mrs. West devised and bequeathed all her property to her trustees in trust and, after disposing of her jewelry, furniture, clothing, household and personal effects, provided by paragraph 8:—

> The distribution of my estate under the devises and bequests hereinafter stated is to be made in the order of priority indicated in the succeeding paragraphs of this my will.

The first provision in order of priority was made by paragraph 9 whereby certain bonds to the par value of $45,000 were to be held in trust in a special fund, the income from which was to be paid to Emma Melissa Carr, a sister of the testatrix, with power to advance to Miss Carr out of the corpus of the fund, such amounts as the executors and trustees should consider necessary or advisable for her proper maintenance and support. Then follows this sentence:—

> Upon her death any unexpended portion of the corpus of said special fund, including any accretion of interest thereto, shall become part of my residuary estate.

Paragraph 10 provides for the bequests that are to be paid second in priority, and paragraph 11 for those to be

(1) [1941] 3 W.W.R. 49; [1941] 2 D.L.R. 437.
(2) [1941] 3 W.W.R. 50; [1941] 1 D.L.R. 795.

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paid third in priority. Paragraph 12, dealing with the fourth priority, opens as follows:—

Paragraph 12. Fourthly: I make the following bequests, and should my estate be insufficient to pay same in full after the creation of the fund mentioned in paragraph "9" hereof, I direct that the beneficiaries named in this paragraph shall abate proportionately:

By paragraph 13 the sum of $15,000 less succession duty was to be paid as the fifth priority to the governing authorities of Victoria University of Toronto, Ontario.

The opening part of paragraph 14 is as follows:—

Paragraph 14. Sixthly: Subject to the completion of the devises and bequests in paragraph 9, 10, 11, 12 and 13 hereof, I make the following bequests, and should my estate be insufficient to pay same in full, I direct that the beneficiaries named in this paragraph shall abate proportionately:

Then follow bequests to the Superannuation Fund of the United Church in Canada, to Wesley College in Winnipeg, and to the Fort Rouge United Church in Winnipeg.

Paragraph 15 reads in part:—

Paragraph 15. Seventhly: All the rest and remainder of my estate is to be divided into five equal residuary portions

and contains directions as to the payment of each portion. By paragraph 17 the executors were directed "before providing for any of the bequests mentioned in this my will" to set aside $500 in a trust fund in order to care for a cemetery plot. By a codicil to the will, Mrs. West bequeathed Miss Carr $5,000, which was to "take priority over all other bequests and funds created in my will", and a bequest in paragraph 10 of the will was increased.

After the death of Mrs. West, the executors paid Miss Carr the legacy of $5,000, established a fund for the care of the cemetery plot, and set up the trust fund for Miss Carr. The executors were able to pay the legacies mentioned as second in priority in paragraph 10 and also the ones mentioned as third in priority in paragraph 11, except that as to the latter, one of the legatees mentioned therein having predeceased the testatrix and his legacy having lapsed, the amount of it was used, together with the remaining assets of the estate, to make payments on account of the legacies mentioned as fourth in priority in paragraph 12. The estate was not sufficient to pay these in full or to pay anything on those mentioned in the subsequent paragraphs of the will.

Miss Carr has since died and as to her fund the question that arises is as to the manner in which the

> unexpended portion of the corpus of said special fund, including any accretion of interest thereto

(paragraph 9), is to be applied. On behalf of those among whom, by paragraph 15, "all the rest and remainder of my estate is to be divided into five equal residuary portions", it is contended that the Carr Fund should fall into the ultimate remainder of the estate and be divided among those mentioned therein, while the beneficiaries mentioned in paragraphs 12, 13 and 14, contend that the Fund should be used to complete the payments to those mentioned in paragraph 12 and pay the legacies mentioned in paragraphs 13 and 14, leaving a small balance for the five residuary portions referred to in paragraph 15.

There is no doubt as to the general rule that residuary legatees have no right to call upon particular general legatees to abate.

> It does not need authority (as Lord Blackburn points out in *Robertson* v. *Broadbent* (1)) to show that * * * the residuary legatee can take nothing until all the other legacies are paid in full for till then there is no residue.

In the present case I did not understand counsel for the respondents to contend that because of that part of paragraph 9 quoted above the Carr Fund was subtracted from the estate and placed in the ultimate residue so as to make it unavailable for the general legatees. Such a proposition could not, of course, be supported even without the distinction that the testatrix drew between her "residuary estate", which expression she uses in numerous places throughout the will, and "the rest and remainder of my estate", mentioned in paragraph 15. What is argued is that since the opening part of paragraph 12 directs that if the estate be insufficient to pay in full the bequests mentioned in that paragraph, after the creation of the Carr Fund ," the beneficiaries named in this paragraph shall abate proportionately", the abatement that was found necessary upon the setting up of the Carr Fund was permanent, within the meaning of the decision in *Farmer* v. *Mills* (2).

(1) (1883) 8 App. Cas. 812, at 818, 819. (2) (1827) 4 Russ. 86.

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In that case a testator, by his will, gave certain annuities, directing that, as the annuitants should die, the sums by which the annuities were secured should sink into and become a part of the residue of his estate, and named several persons as residuary legatees. To quote from the report:—

> By a codicil to his will he stated, that, upon reflection, he considered it to be probable, that, after full payment of his funeral expenses, debts, and legacies there might not be property left, which would be adequate to produce interest sufficient to pay the annuities given by his will; and in such case he directed that an equal deduction should be made from each annuity rateably according to its amount, after the expiration of six months from his death; in which time he considered that his affairs might be closed, so as to ascertain the amount of his property.
>
> His estate did prove insufficient for the full payment of the several annuities given by his will: and the question in the cause was, whether, upon the death of any annuitant, the sum set apart to secure his reduced annuity should be applied to increase the other annuities, until they were made to amount to the sums given by the will? or, whether the sum so set apart should belong to the residuary legatees?

Sir John Leach, Master of the Rolls, decided that:—

> The annuitant, who receives his reduced annuity, received all that the testator intended he should receive, in case of the deficiency of his property: and the sum set apart to secure the reduced annuity will sink into the residue, in the same manner as it would have done, if the property had been adequate to provide for the sum given by the will.

In *Arnold* v. *Arnold* (1), Sir Charles Pepys, Master of the Rolls, pointed out that in the *Farmer* case (2) the testator's codicil expressly provided that the annuities should be rateably reduced. In *Dudman* v. *Shirreff* (3), the testator directed the trustees to set apart four sums upon certain trusts, disposed of the residue of his personal estate and provided that if the whole of his estate should not be sufficient to answer and satisfy all the trusts of his will, then each trust should abate in proportion. His estate was not enough to satisfy the four funds and the executors accordingly divided the available assets rateably among them. The testator's widow was entitled to the income for life from one fund with power of appointment as to one moiety thereof and in default of appointment such moiety was to fall into and be considered as part of the residue of the testator's personal estate. The widow made an appointment of this first moiety but part of it lapsed.

(1) (1834) 2 M. & K. 365, at 379. (2) (1827) 4 Russ. 86.
(3) (1870) 18 W.R. 596.

In proceedings in the original estate taken after the widow's death, it was held by Vice-Chancellor James that the case was governed by *Farmer* v. *Mills* (1). He held that the direction for abatement was the same as if the testator had directed his executors to pay the income of each fund, after abatement, to the tenant for life and gave over the capital of such abated fund afterwards.

I do not understand *Farmer* v. *Mills* (1) and *Dudman* v. *Shirreff* (2) to lay down any general rule of law applicable to all wills which contain an abatement clause in whatever form it may be expressed. In *Robertson* v. *Broadbent* (3), Lord Blackburn states:—

> Sometimes a testator foresees this possibility of a deficiency and provides for it. This was done by a codicil in *Farmer* v. *Mills* (1). When a testator does so there can be no doubt about it his express intention governs.

If Mrs. West had expressed in her will an intention such as was found in the *Farmer* (1) and *Dudman* (2) cases, those decisions should be followed but in my opinion her will is entirely different. As I have already indicated, the words "residuary estate", in paragraph 12, do not bear the same meaning as "the rest and remainder of my estate", in paragraph 15, but what is more important, the direction to abate, in paragraph 12, applies only to the beneficiaries named in that paragraph. A similar direction to abate is found in paragraph 14, confined to the beneficiaries named therein. In neither case is the abatement for the benefit of those entitled to the five portions of "the rest and remainder of my estate" in paragraph 15. In my view the whole tenor of the will makes it clear the testatrix intended to provide, and did provide, that upon the falling in of the Carr Fund the assets comprised therein should become assets in the hands of the executors and trustees to carry out the priorities in the order named.

I would allow the appeal and restore the judgment of the judge of first instance. The costs of all parties to the appeals to the Court of Appeal and to this Court should be paid by the executors in priority to any further payments to the legatees named in the will, those of the executors as between solicitor and client.

(1) (1827) 4 Russ. 86. (2) (1870) 18 W.R. 596.
(3) (1883) 8 App. Cas. 812, at 818.

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

HUDSON J.—The question for decision here is whether a fund in the hands of the executors after the termination of a life interest falls to the persons named in the will as residuary legatees, or whether it is available to make good deficiencies of pecuniary legacies of specific amounts.

The provisions of the will which directly give rise to the controversy are the following:

Paragraph 8. The distribution of my estate under the devises and bequests hereinafter stated is to be made in the order of priority indicated in the succeeding paragraphs of this my will.

Paragraph 9. (*a*) Should my said sister Emma Melissa Carr be living as at the date of my death, I direct that Dominion of Canada Bonds maturing in 1959 and yielding four and one-half per centum per annum on the par value thereof, to the par value of forty-five thousand ($45,000) dollars shall be selected or if necessary purchased and held by my executors and trustees in trust in a special fund, the income from which shall be paid as from time to time received to my said sister Emma Melissa Carr, with power to my said executors and trustees to advance from time to time to my said sister Emma Melissa Carr, out of the corpus of said special fund, such amounts as in their judgment may be necessary or advisable for her proper maintenance and support. Upon her death any unexpended portion of the corpus of said special fund, including any accretion of interest thereto, shall become part of my residuary estate.

Paragraph 12. I make the following bequests, and should my estate be insufficient to pay same in full after the creation of the fund mentioned in paragraph 9 hereof, I direct that the beneficiaries named in this paragraph shall abate proportionately

(Then follows a number of specific bequests).

Paragraph 13. I direct that my executors and trustees shall pay to the governing authorities of Victoria University, in Toronto, Ontario, the sum of fifteen thousand ($15,000) dollars to form * * *

Paragraph 14. Subject to the completion of the devises and bequests in paragraphs 9, 10, 11, 12 and 13 hereof, I make the following bequests, and should my estate be insufficient to pay same in full, I direct that the beneficiaries named in this paragraph shall abate proportionately.

(Then follow bequests to certain charitable organizations).

Paragraph 15. All the rest and remainder of my estate is to be divided into five equal residuary portions, one residuary portion to be paid into the said "Anna Margaret West Trust Fund" to be held on the trusts hereinbefore established in connection with said fund.

Of the remaining four equal residuary portions, one residuary portion is to be paid to my sister Emma Melissa Carr; one residuary portion to be paid to Annie West, widow of Edward Charles West of Campbellford, Ontario; one residuary portion to be paid to Martha Emily West, widow of Samuel John West, late of Campbellford aforesaid; and one residuary portion to be paid to William Newton Redner, son of my

deceased sister, Mary Jane Redner. Should any of the four last mentioned legatees of residuary portions predecease me leaving children him or her surviving, his or her residuary portion is to be paid share and share alike to his or her children now living, and if only one then to that one; and should any of the children of such deceased legatee of a residuary portion (being one of the four last mentioned residuary legatees) predecease me leaving child or children they shall take their parent's share of the residuary portion equally among them, and if only one then to that one. If any of the four last mentioned legatees of the residuary portions above named, predecease me leaving no surviving child or issue of children, the residuary portion which would otherwise go to such legatees shall be divided equally per capita and not per stirpes among the children of the remaining four legatees of residuary portions living as at the date of my death.

Miss Carr, the sister of the testatrix, survived and the trust fund provided for in paragraph 9 was set up by the executors. The assets of the estate were to the extent of about 95% liquid and all of the legatees ranking prior to the legacies specified in paragraph 12 were paid in full, except one which had lapsed. Those mentioned in paragraph 12 were paid to the extent of 75%, but nothing has been paid on account of those provided for in paragraphs 13 and 14.

Miss Carr has died and the assets in the special fund created pursuant to paragraph 9 had, at the time the present proceedings were commenced, a market value of approximately $48,000. Apart from this fund, the value of the assets still in the hands of the executors was stated to be $7,555.91, an amount quite insufficient to pay in full the beneficiaries under paragraph 12, and leaving nothing for those mentioned in paragraphs 13 and 14. On the other hand, if the $48,000, with accretions, were available to make good deficiencies of specific legacies, they all would be paid in full and still leave a residue of over $9,000.

Mr. Justice Donovan, before whom the matter came in the first instance (1), held that the fund was available to make up deficiencies in the specific legacies.

The Court of Appeal (2) reversed this decision, holding that the fund passed to the persons named in the residuary clause. Mr. Justice Trueman, in giving the judgment of the Court, after pointing out that paragraph 12 directs that should the estate be insufficient to pay the bequests named therein in full

(1) [1941] 3 W.W.R. 50; [1941] 1 D.L.R. 795.
(2) [1941] 3 W.W.R. 49; [1941] 2 D.L.R. 437.

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after the creation of the fund mentioned in paragraph 9 hereof, the beneficiaries named in this paragraph shall abate proportionately, proceeds:

This fund was thus not to be looked to to make up any deficiency in the legacies in paragraphs twelve, thirteen and fourteen. The fund was a trust in the hands of the trustee during Miss Carr's life, subject to the terms of paragraph nine, and upon her death to become part of the testatrix' "residuary estate", and then to be disposed of as directed in paragraph fifteen. By reason of the estate being in liquid form the legacies provided for in the will were to be paid forthwith after the creation of said trust fund in the order of their priority, those in paragraph twelve being subject to proportionate abatement if need be, and those in thirteen and fourteen having in their order to depend on what remained, if anything. It is thus clear that the will called for immediate distribution after said fund was created, and that the legatees, in event of deficiency or non-payment, had nothing to hope for on the trust for Miss Carr coming to an end on her death.

This statement embodies the chief argument urged before this Court on behalf of the respondent.

On the other hand, the appellant here contended that on reading the will as a whole it is manifest that the abatement referred to in paragraph 12 was a temporary and not a permanent abatement; that it is perfectly clear that the testatrix intended that ultimately all of the beneficiaries should be paid in full; that paragraph 8 providing for priorities is re-enforced by the concluding paragraph of the will, namely, 19, which reads as follows:

Except as otherwise provided herein I direct that all succession duties with which my estate may be charged, shall be paid first out of my estate, my intention being that each beneficiary of this my will shall in the order named receive the full amount of each respective bequest free of succession duty except as hereinbefore directed.

that the real purpose of the provision in paragraph 12 as to abatement was to make it perfectly clear that each one of the many beneficiaries enumerated therein should abate proportionately, notwithstanding the provision in paragraph 8 as to general priorities; that Mr. Justice Trueman correctly interpreted the provision in another portion of his judgment dealing with a matter not now in issue, where he said:

The legatees in paragraph twelve are relatives of her deceased husband and of herself. The sole object of the provision for proportionate abatement in paragraph twelve was to ensure that the legatees therein should have no priority *inter sese* in event of deficiency of assets.

That as by paragraph 15 providing for the disposition of the remainder of the estate, one portion was directly to go to Miss Carr, a portion of the trust set aside which was to remain undivided until her death could not in fact be paid to Miss Carr, it is not to be supposed that the testatrix, in order to allow Miss Carr's personal representative to dispose of a portion of the Carr fund, would defeat her own will entirely as to the provisions in paragraphs 13 and 14 and deprive the numerous beneficiaries in paragraph 12 of a part of what had been intended for them. The prescribed benefits for Miss Carr in her lifetime were to take priority over these other things, but Miss Carr could not benefit by an addition to the residuary estate after her own death.

Another circumstance not discussed by either counsel is that paragraph 9 was conditional on Miss Carr surviving the testatrix. If she had not survived, the fund would not have come into existence and the money represented by the fund would have continued as part of the general estate for distribution according to the priorities provided for in the will.

Consideration of the terms of the whole will in the light of these arguments has satisfied me that the intention of the testatrix was that the abatement mentioned in paragraph 12 should be only temporary.

The respondent relied upon the principle laid down in the cases of *Farmer* v. *Mills* (1); *Dudman* v. *Shirreff* (2); and *Hichens* v. *Hichens* (3), also referred to in the judgment of Mr. Justice Trueman. If we were confined to a consideration of paragraphs 9 and 10 of the will, I would agree with the Court of Appeal that the principle upon which these cases were decided is applicable and should prevail. But, as already pointed out, the will does contain other provisions and the consideration of these provisions has led me to the conclusion that it was the intention of the testatrix that the abatement should be temporary only. For that reason, I do not think that the decisions in these cases are applicable.

(1) (1827) 4 Russ. 86.
(2) (1870) 18 W.R. 596.
(3) (1876) 25 W.R. 249.

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I agree that the appeal should be allowed and that the judgment of the judge of first instance be restored, with costs of all parties to be paid by the executors out of the estate, and that the costs of the executors should be as between solicitor and client.

Appeal allowed, costs as per judgment.

Solicitors for the appellants: *Pitblado, Hoskin, Grundy, Bennest & Drummond-Hay,* and *Hull, Sparling & Sparling.*

Solicitors for the respondent: *Tupper, Tupper & Adams.*

Solicitors for the executors: *Fillmore, Riley & Watson.*

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* Nov. 14.
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* Mar. 3.

IN THE MATTER OF THE BANKRUPTCY OF GEORGE BOZANICH

THE A. H. BOULTON COMPANY LIMITED (DEFENDANT) ..... } APPELLANT;

AND

THE TRUSTS AND GUARANTEE COMPANY LIMITED (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Bankruptcy—Bankruptcy Act, R.S.C. 1927, c. 11, ss. 60, 61, 62, 64—"Settlement" within meaning of ss. 60, 62 (3)—Chattel mortage to creditor for debt incurred in store business—Constitutional law—Ontario legislation as to preferences superseded by s. 64 of Bankruptcy Act—B.N.A. Act, s. 91.

On April 5, 1939, B. gave to appellant a chattel mortgage on certain chattels in B.'s store to secure payment of indebtedness to appellant incurred by B. in the course of business. On October 21, 1939, B. made an authorized assignment in bankruptcy. Respondent, the trustee in bankruptcy, attacked the validity, as against it, of the security of the chattel mortgage.

Held (reversing judgment of the Court of Appeal for Ontario, [1941] O.R. 21): The chattel mortgage was not a "settlement" within the meaning of ss. 60 and 62 (3) of the *Bankruptcy Act,* R.S.C., 1927, c. 11, and is valid and effectual as against respondent.

The enactment in s. 62 (3) that, for the purpose of ss. 60, 61 and 62, "settlement" "shall include any conveyance or transfer of property" does not so extend the ordinary meaning of the word "settlement" as to bring within its scope all conveyances or transfers of property.

Per the Chief Justice and Davis and Kerwin JJ.: In enacting said sections Parliament adopted in substance provisions in the English Act which had been the subject of discussion and decision in the English courts,

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

and it is proper to assume that Parliament intended to adopt those provisions as construed by the English courts and applied in the administration of the bankruptcy law in England; and the settled law in England had been that, although in the form of definition the words now in said s. 62 (3) purport to enlarge the meaning of the term "settlement", they must, by reason of the context, be restricted in their scope. Broadly speaking, the settled principle in England was that those words had not the effect of bringing within the scope of the term "settlement", as used in provisions corresponding to said ss. 60, 61 and 62, transactions which have none of the essential elements of a "settlement" as that term is commonly understood. Reading said ss. 60, 61 and 62 together with s. 64 (as to preference given to a creditor) and considering these enactments in the light of the history of the law in relation to preferences, it must be held that such a transaction as that in question does not fall within the intendment of "settlement" as employed in said sections; it belongs to the class of transactions the validity of which is to be determined by the application of s. 64.

The provisions of the Ontario Act, R.S.O. 1927, c. 162, in relation to preferences are superseded by s. 64 of the *Bankruptcy Act*, and the authority of the Ontario Legislature to enact such legislation is, in consequence of the enactment of said s. 64, suspended in virtue of the concluding paragraph of s. 91 of the *B.N.A. Act*.

Per Rinfret and Crocket JJ.: Said ss. 60 and 62 are directed against a "settlement of property", and it is apparent that in using the word "settlement" Parliament intended to connote a particular kind of gift or grant, excluding other kinds. Secs. 60 and 62 were adoption of provisions in the English Act, and the construction of the word had been settled in England and had there acquired an established meaning. A settlement in the ordinary sense of the word is intended; the transaction must be in the nature of a settlement, though it may be effected by a conveyance or transfer (*In re Player, Ex parte Harvey*, 15 Q.B.D. 682, at 686-7, and other cases, cited). The words "conveyance or transfer" in s. 62 (3) must be qualified by the word "settlement" in s. 60, and it is only such a conveyance or transfer as comes within the meaning of "settlement" in s. 60 that is by s. 60 declared void. The transaction in question had not any of the necessary elements of a settlement. (Doubt expressed whether an arrangement with a creditor may ever be considered a "settlement"; and inclination expressed to the opinion that, generally speaking, "settlement" involves the idea of a clear gift or that type of cases where provision is made for a trust of some sort. It should not be taken to include an ordinary business transaction between a debtor and a creditor.)

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1).

On April 5, 1939, one Bozanich (hereinafter called the debtor) executed and delivered to appellant a chattel mortgage on certain chattels in the debtor's store to secure payment of indebtedness to appellant incurred by the

(1) [1941] O.R. 21; 22 C.B.R. 143; [1941] 1 D.L.R. 570.

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debtor in the course of business. On October 21, 1939, the debtor made an authorized assignment in bankruptcy. Respondent, the trustee in bankruptcy, attacked the validity, as against it, of the security of the chattel mortgage.

By an order in the Supreme Court of Ontario in Bankruptcy, Urquhart J. directed the trial of an issue in the County Court of the County of Essex before His Honour J. J. Coughlin, Esquire, Senior Judge of the said Court, in which the trustee in bankruptcy should be plaintiff and the present appellant (in said order called the creditor) should be defendant. The following question was ordered to be tried on the said issue:

> Is the chattel mortgage made by the said debtor to the said creditor on the 5th day of April, 1939, for the sum of $900 valid and effectual as against the said trustee and does the said creditor, by virtue of the said chattel mortgage, hold a valid security on the goods and chattels described in the said chattel mortgage?

(The question of the validity of a certain lien note, attacked by the trustee, was also ordered to be tried on said issue. This question was decided by the County Court Judge against the present appellant and no appeal was taken from this decision.)

The County Court Judge found that the chattel mortgage was valid and effectual as against the plaintiff and that the defendant by virtue of it held a valid security on the chattels described therein. He held that the transaction was not a "settlement" in the sense in which that word is used in s. 60 of the *Bankruptcy Act*.

On appeal by the plaintiff, Urquhart J. (1), feeling himself bound to follow the decision in *Re Trenwith* (2) (but intimating that, if not so bound, he would have held otherwise), held that the transaction in question was a "settlement"; but he directed a new trial before the County Court Judge on the question whether the chattel mortgage was made in favour of the incumbrancer "in good faith and for valuable consideration" within s. 60 (3) (*b*) of the *Bankruptcy Act*.

The decision of Urquhart J. was affirmed by the Court of Appeal for Ontario (3), Henderson J.A. dissenting, who would have restored the judgment of the County Court Judge.

(1) 22 C B.R. 143, at 144-149. (2) [1934] O.R. 326.
(3) [1941] O.R. 21; 22 C.B.R. 143; [1941] 1 D.L.R. 570.

The defendant appealed to the Supreme Court of Canada (special leave to do so was granted by a Judge of this Court).

Paul Martin K.C. for the appellant.

Lorne R. Cumming for the respondent.

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

THE CHIEF JUSTICE.—The material facts are stated in the respondent's factum, as follows:—

The debtor, George Bozanich, operated a small retail grocery and meat market in the City of Windsor, under the name and style of "Goodwill Market" from January, 1936, until July, 1939, when he discontinued business. On October 21st, 1939, he made an authorized assignment under the Bankruptcy Act. The appellant company is a wholesale grocery firm with which the debtor had substantial dealings from the commencement of the business until April, 1939.

On April 5th, 1939, the debtor executed a chattel mortgage in favour of the appellant to secure the sum of $900, the amount of a long past due indebtedness owing by the debtor to the appellant company. The chattel mortgage covered most of the debtor's store fixtures other than his cash register and it is alleged that the said fixtures at the time of the chattel mortgage and also at the time of the subsequent assignment constituted by far the greater part of the debtor's realizable assets.

At the same time the appellant also took from the debtor a so-called lien note on the cash register as security for the sum of $361.45.

Upon bankruptcy occurring the appellant claimed to be a secured creditor by virtue of both the chattel mortgage and the lien note, and the respondent, the trustee in bankruptcy, attacked the validity of both securities in a motion instituted in the Supreme Court of Ontario (in Bankruptcy) heard before the Honourable Mr. Justice Urquhart on April 1st, 1940.

The learned Bankruptcy Judge directed the trial of an issue before the Senior Judge of the County Court of the County of Essex to determine the validity of the questioned securities. The trustee was made plaintiff in the issue and the present appellant was made defendant and the trial Judge was directed to find as to the validity of the chattel mortgage and the lien note and to find for or against the right of the appellant company to rank as a secured creditor under either or both of the said documents.

On the trial of this issue the lien note was set aside and there has been no appeal from this decision. The County Court Judge, however, reported that the chattel mortgage was valid and effectual as against the trustee in bankruptcy and that it did not constitute a "settlement" within the meaning of Section 60 of the Bankruptcy Act.

An appeal was taken by the trustee in bankruptcy from the finding of the trial Judge with respect to the chattel mortgage and on this appeal the Honourable Mr. Justice Urquhart held that the chattel mortgage did constitute a "settlement" under the provisions of the said

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section of the Bankruptcy Act and ordered a new trial before the County Court Judge on this basis, directing also that both parties might adduce further evidence.

The trial Judge having failed to make any finding as to good faith and valuable consideration within the meaning of Section 60, subsection 3 (*b*), of the *Bankruptcy Act,* and the learned Bankruptcy Judge finding himself unable to determine this question on appeal, the new trial was directed for the purpose of deciding this question and it was directed that the onus of establishing good faith and valuable consideration would be on the creditor, the present appellant.

From the decision of the Bankruptcy Judge an appeal was taken by the present appellant to the Court of Appeal for the Province of Ontario on the ground that the finding that the chattel mortgage was a "settlement" was erroneous, and that in any event the decision of the trial judge amounted to a finding of good faith and valuable consideration. The trustee cross-appealed from the portion of the judgment of the Bankruptcy Judge directing a new trial on the ground that the onus being on the creditor to establish good faith and valuable consideration, the failure of the trial judge to find affirmatively in favour of the creditor on these points was sufficient to entitle the trustee to the relief sought.

The appeal and cross-appeal came on for hearing on December 9th, 1940, before the Honourable Mr. Justice Riddell, Acting Chief Justice, the Honourable Mr. Justice Henderson and the Honourable Mr. Justice Gillanders. On December 21st, 1940, the majority of the Court delivered judgment dismissing the appeal and the cross-appeal and confirming the decision of the Bankruptcy Judge that the chattel mortgage was a "settlement" within the meaning of the Bankruptcy Act, Section 60, and also the directions of the Bankruptcy Judge for a new trial. The Honourable Mr. Justice Henderson dissented from this judgment and would have allowed the appeal and restored the report of the trial judge on the ground that the transaction was not a "settlement".

The question raised by the appeal concerns the interpretation of sections 60 to 62 inclusive and section 64 of the *Bankruptcy Act,* which are under the caption "Settlements and Preferences". Sections 60, 61 and 62 were enacted in 1919 and section 64 in the following year. These were, in substance, re-enactments of sections 42 and 44 of the English *Bankruptcy Act, 1914.*

The controversy turns upon the effect of section 62, subsection 3, which is in these words:—

> For the purpose of this section and sections sixty and sixty-one "settlement" shall include any conveyance or transfer of property.

It is contended that by force of this section the ordinary meaning of "settlement" is extended in such a manner as to bring within its scope any conveyance or transfer of property. The corresponding provision in the English *Bankruptcy Act,* which was found in the Act of 1869, was the subject of discussion and decision before the enactment

of the Canadian *Bankruptcy Act* of 1919; and it may, I think, properly be said that in 1919 when these provisions were adopted by Parliament it was the settled law in England that, although in the form of definition these words purport to enlarge the meaning of the term "settlement", they must, by reason of the context, be restricted in their scope. Broadly speaking, the settled principle in England is that this clause has not the effect of bringing within the scope of the term "settlement", as used in the sections corresponding to sections 60, 61 and 62 of our Act, transactions which have none of the essential elements of a "settlement", as that term is commonly understood.

In the treatise on Bankruptcy and Insolvency in the 2nd edit. of Halsbury by Lord Justice Luxmoore, it is stated that the term "settlement" "implies an intention that the property shall be retained or preserved for the benefit of the donee in such a form that it can be traced". This construction was well settled in the year 1919 when the relative provisions of the English statute were enacted as part of the bankruptcy law of this country. It is proper to assume that it was the statute as it had been construed by the English courts and applied in the administration of bankruptcy law in England that Parliament intended to adopt.

I pass now to section 64 which deals with transactions between an insolvent person and his creditor. The history of the law relating to such transactions is familiar. At common law there is nothing to prevent a debtor preferring one creditor to another. The Statute, 13 Elizabeth, Chap. 5, did not prohibit such transactions. This common law privilege is obviously opposed to the fundamental principle of bankruptcy law—the equitable distribution of assets among all entitled to share; and the law of fraudulent preference was originally developed by the courts on the basis of the principles of the Bankruptcy Acts. The principle of section 64 was first formulated by statute in section 92 of the *Bankruptcy Act* of 1869. In Canada in most of the provinces there were, prior to the *Bankruptcy Act,* statutory enactments making voidable transfers of property by an insolvent made with the intention of giving a particular creditor an "unjust preference".

When sections 60, 61 and 62 of the *Bankruptcy Act* are read together with section 64 and these enactments are

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considered in light of the history of the law in relation to preferences, I find it impossible to convince myself that such a transaction as that with which we are now concerned falls within the intendment of "settlement", as employed in those sections. It belongs, I think, to the class of transactions, the validity of which is to be determined by the application of section 64.

I may add that, in my opinion, the provisions of R.S.O. 1927, Chap. 162, in relation to preferences are superseded by section 64 of the *Bankruptcy Act*, and that the authority of the Ontario Legislature to enact such legislation is, in consequence of the enactment of section 64, suspended in virtue of the concluding paragraph of section 91.

The appeal should be allowed and the report of His Honour, Judge Coughlin, restored, with costs throughout.

The judgment of Rinfret and Crocket JJ. was delivered by

RINFRET J.—This case is a bankruptcy matter.

An order was made by the Supreme Court of Ontario in Bankruptcy that the parties proceed to the trial of the following issue:

Is the chattel mortgage made by the bankrupt debtor to his creditor (the appellant), on the fifth day of April, 1939, for the sum of $900, valid and effectual as against the trustee in bankruptcy (the respondent); and does the said creditor, by virtue of the said mortgage, hold a valid security on the goods and chattels described in the said chattel mortgage?

Another matter (in respect of a lien note) was also made the subject of the issue; but it has been disposed of in the bankruptcy court, and there is no appeal as to it.

The chattel mortgage was given by the debtor to the appellant on the 5th of April, 1939. The bankruptcy occurred on the 21st of October, 1939.

Section 64 of the *Bankruptcy Act* provides that:

> Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, * * * by any insolvent person in favour of any creditor * * * with a view of giving such creditor a preference over the other creditors shall, if the person * * * is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making * * * the same, * * * be deemed fraudulent and void as against the trustee in the bankruptcy * * *

2. If any such conveyance, transfer, payment, obligation or judicial proceeding has the effect of giving any creditor a preference over other creditors, * * * it shall be presumed *prima facie* to have been made * * * with such view as aforesaid whether or not it was made voluntarily or under pressure and evidence of pressure shall not be receivable or avail to support such transaction.

In this case, the chattel mortgage was given almost seven months before the date of the bankruptcy, and it does not come within that section.

There are, however, other sections of the *Bankruptcy Act* on which the respondent relies:

60. Any settlement of property made after the thirtieth day of June, one thousand nine hundred and twenty, shall, if the settlor becomes bankrupt or makes an authorized assignment within one year after the date of the settlement, be void against the trustee.

2. Any such settlement shall, if the settlor becomes bankrupt or makes an assignment as aforesaid at any subsequent time within five years after the date of the settlement, be void against such trustee, unless the parties claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof.

3. This section shall not extend to any settlement made

* * *

(*b*) in favour of a purchaser or incumbrancer in good faith and for valuable consideration.

* * *

62. (3) For the purpose of this section and sections sixty and sixty-one "settlement" shall include any conveyance or transfer of property.

The question is whether the chattel mortgage comes under those parts of sections 60 and 62 above reproduced.

His Honour the County Judge of the County of Essex determined that the chattel mortgage in question was valid. The trustee appealed to the Supreme Court in Bankruptcy, where Urquhart J., although holding the same view as the County Judge, felt bound by the decision of the Court of Appeal in the case of *Re Trenwith* (1) and said:

I cannot, in view of the very clear words of the Court of Appeal, see how I can distinguish the *Trenwith* case (1), although I realize that the circumstances there approach more nearly a settlement than the purely commercial transaction which occurred in the case at bar. I therefore feel bound to follow it.

He thought, however, that the question might come within the exception contained in subsection 3 (*b*) of sec-

(1) [1934] O.R. 326.

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tion 60 "in favour of a purchaser or incumbrancer in good faith and for valuable consideration"; and, for that reason, he directed a new trial and that the matter might "be remitted to the County Court Judge for reconsideration on the evidence as adduced and extended and such further evidence as either the parties or the Judge may desire", so that the appellant may be able "to establish the question of good faith and valuable consideration".

In the Court of Appeal, this judgment was affirmed, Henderson, J.A., dissenting on the ground that the case could be distinguished from *Re Trenwith* (1).

As will have appeared, the case is simple, but by no means an easy one.

If one confines himself to the literal meaning of the material portions of ss. 60 and 62, which have to be construed, what is first to be noted is that the agreement against which these sections are directed is the agreement known as a "settlement of property". The word "settlement" is the one exclusively used in subsections 1, 2 and 3 of section 60.

Whether, therefore, "settlement" is or not a technical expression, it is apparent that, in the mind of the legislator, the use of the word "settlement" was intended to connote a particular kind of gift or grant excluding the others. Both sections 60 and 62, since over a quarter of a century, had been in the English Act in similar language; and the Canadian *Bankruptcy Act* borrowed them from the English statute. The construction of the word had been settled in England for some appreciable time and it had there acquired an established meaning.

It need not be stated that all conveyances or transfers of property are not settlements; nor can it be said that a settlement is a settlement because it happens to be a conveyance or a transfer.

Without attempting to give a definition of the word—and more particularly of that word as used in section 60—it seems to me sufficient for the purpose of interpreting the section to adopt a passage of Cave J., in the case of *In re Player; Ex parte Harvey* (2):

> One must look at the whole of the language of the section in applying that definition, and consider what is meant by "settlement". Although "settlement", by the 3rd subsection, "shall for the purposes of

(1) [1934] O.R. 326. (2) (1885) 15 Q.B.D. 682, at 686-687.

this section include any conveyance or transfer of property", yet I think the view of my brother Mathew is well founded, and that a settlement in the ordinary sense of the word is intended. The transaction must be in the nature of a settlement, though it may be effected by a conveyance or transfer. The end and purpose of the thing must be a settlement, that is, a disposition of property to be held for the enjoyment of some other person.

This view was concurred in by Mathew and Wills JJ.

In the *Player* case (1), a gift of money to a son, made for the purpose of enabling him to commence business on his own account, was held not to be a "settlement of property" within the meaning of the section of the English *Bankruptcy Act* which renders such settlements void in certain specified cases as against the trustee in bankruptcy of the settlor.

In the case of *In re Vansittart; Ex parte Brown* (2), upon an application under the section in the English Act (again, it should be noted, expressed in identical language with sections 60 and 62 (3) of the Canadian Act) to avoid a gift of valuable jewelry by the bankrupt, it appeared that such jewelry had been given by him as a present to his wife within two years of his bankruptcy. It was held that, to bring a transfer of personal property within the section, it must be manifest, from the nature and circumstances of the case, that it was the object of the transferor that the subject-matter of the transfer should permanently remain the property of the transferee; and, in the premises, it must be taken that the bankrupt contemplated the retention by his wife of the present which he had given her. In that case, Vaughan Williams J. approved the construction of Cave J. in the *Player* case (1); and, applying it to the facts in the case then before him, he found that the donor contemplated the retention by his wife of the present which he gave her, and accordingly held the gift void against the trustee in bankruptcy.

Again, the Court of Appeal, in the case of *In re Plummer* (3)—Lord Alverstone, M.R., Rigby and Collins, LL.JJ. —approved of the principle stated in *In re Vansittart* (2) and *In re Player* (1) and held that the mere fact that some business had been acquired by the son partly by means of money obtained from or paid by the father was not sufficient to make the transaction a "settlement" within

(1) (1885) 15 Q.B.D. 682. (2) [1893] 1 Q.B. 181.
(3) [1900] 2 Q.B. 790.

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the section. "Settlement", in the English *Bankruptcy Act*, was held to mean such a conveyance or transfer by the donor as contemplates the retention of the property by the donee, either in its original form or in such a form that it can be traced, and does not extend to a conveyance or transfer of property which cannot be traced, as, for instance, where there is a gift of money to be employed in a business or in the purchase of a business and the money is so employed or spent, the business itself not being settled.

In his judgment, Rigby, L.J., referred to what Cave, J., had said (as above reproduced) in the *Player* case (1) and observed:

> I do not think that that judgment has been impeached by any of the later authorities that have been referred to.

Collins, L.J., expressing the same view, said:

> It is impossible, in my opinion, to treat such a transaction as the subject-matter of a "settlement" within the section.

It seems that the word "settlement" used in the *Bankruptcy Act* does not embrace the set of circumstances constituting the facts of the case at bar. I doubt whether an arrangement with a creditor may ever be considered a settlement; and I would incline to the opinion that, generally speaking, "settlement" involves the idea of a clear gift, or that type of cases where provision is made for a trust of some sort. It should not be taken to include an ordinary business transaction between a debtor and a creditor.

The transaction in the case at bar was one to secure a past and future indebtedness. The chattel mortgage in question was given in the course of an ordinary commercial transaction. The mortgagor settled nothing on the mortgagee.

Subsection 3 of section 62 provides that "settlement" shall include any conveyance or transfer of property; but the section which declares the transaction void against the trustee is section 60. That section uses the word "settlement". It follows that "conveyance or transfer", in section 62 (3) must be qualified by the word "settlement" in section 60. The mere fact that the transaction is said to include any conveyance or transfer does not make the transaction a settlement. The transactions which are

(1) (1885) 15 Q.B.D. 682.

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declared void under section 60 are such conveyances and transfers as come within the meaning of the word in section 60.

As pointed out by Henderson, J.A., the necessary elements of a settlement were found in the *Trenwith* case (1); but they are not to be found in the case now under review, where the transaction does not include any of the elements which one must find present in a settlement.

The Act, as broad as it is, allows of a clear distinction between settlements though effected by a conveyance or transfer of property and conveyances or transfers of property not in the nature of a settlement.

In the circumstances of the present case, I think the appeal ought to be allowed and the decision of the County Court Judge restored with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Martin & Laird.*

Solicitors for the respondent: *Croll & Croll.*

EDWARD McCULLOCH (DEFENDANT) ....APPELLANT;

AND

SARAH J. MURRAY (PLAINTIFF) .....RESPONDENT.

1941

* Oct. 24.

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* Feb. 3.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Motor vehicles—Negligence—Accident causing injury to guest passenger in motor car—Action by her against driver for damages—Motor Vehicle Act, Nova Scotia, 1932, c. 6, s. 183—Question whether accident caused by "gross negligence or wilful and wanton misconduct" of driver—Findings by jury—Sufficiency of and justification for findings.

Respondent sued appellant for damages for injury caused to her by an accident occurring while she was being transported as appellant's guest without payment in a motor car driven by appellant. By s. 183 of *The Motor Vehicle Act,* Nova Scotia (1932, c. 6), she had a cause of action only if the accident was caused by "the gross negligence or wilful and wanton misconduct" of appellant which contributed to the injury. At the trial the jury found (*inter alia*) that there was on appellant's part gross negligence which caused the accident and that it consisted of "reckless driving."

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

(1) [1934] O.R. 326.

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Held, affirming the judgment of the Supreme Court of Nova Scotia *en banc*, 16 M.P.R. 45, that the jury's said findings were sufficient and had sufficient certainty of meaning, and that on the evidence the jury was entitled to make said findings and that respondent should recover.

Per the Chief Justice: Comment as to attempting to define or replace by paraphrases the phrases "gross negligence" or "wilful and wanton misconduct", and observations as to a trial judge's duty in assisting a jury in an action based upon said enactment. The said phrases imply conduct in which, if there is not conscious wrong doing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves. Subject to that, it is entirely a question of fact for the jury whether conduct falls within the category of one or other of said phrases.

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc* (1).

The respondent sued the appellant for damages for injuries to her caused by an accident which occurred while she was being transported as appellant's guest without payment in a motor car driven by the appellant. She alleged that the accident was caused by the manner in which the appellant was driving, which she alleged was careless, negligent and reckless and in wilful and wanton disregard of the rights and safety of others. The appellant denied such allegations, and alleged that the accident was caused by the motor car striking a piece of wood on the roadway, and without any negligence or want of care on his part.

The parties lived in the province of Nova Scotia and the accident occurred on a highway in that province.

Sec. 183 of *The Motor Vehicle Act* of Nova Scotia, c. 6 of the Acts of 1932, provides:

> No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been caused by the gross negligence or wilful and wanton misconduct of the owner or operator of such motor vehicle and unless such gross negligence or wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought.

The action was tried before Archibald J. and a jury. The questions submitted to the jury and their answers thereto were as follows:

(1) 16 M.P.R. 45; [1941] 3 D.L.R. 42.

1. Was there on the part of the Defendant McCulloch gross negligence which caused the accident?
A. Yes.

2. If so, of what did such gross negligence consist?
A. Reckless driving.

3. Was there on the part of the Defendant McCulloch wanton and wilful misconduct which caused the accident?
A. Yes.

4. If so, of what did such wanton and wilful misconduct consist?
A. Not exercising proper care.

5. Was the accident caused by the automobile (driven by the Defendant McCulloch) striking a piece or block of wood on the highway?
A. No.

6. Was the accident, under the circumstances an inevitable accident?
A. No.

7. What damages did the Plaintiff sustain?
A. $2,632.

The trial judge later gave a written judgment dismissing the plaintiff's (the present respondent's) claim with costs. He held that it was impossible to give effect to the jury's answers to questions 1 and 2, because the answer to question 2 could not be interpreted with sufficient certainty; to interpret the answer "reckless driving" the judge would have to speculate as to what conduct (or misconduct) constituted reckless driving; careful attention to the evidence failed to indicate to him such conduct on the part of the driver of the car (the present appellant) as would constitute gross negligence or reckless driving; and speculation as to what the jury had in mind was not helpful. As to the answers to questions 3 and 4, he held that it was impossible to be certain, from the answer to question 4, in what respect or particular the driver of the car did not exercise proper care; but more serious than that was the fact that failure to exercise care is not in itself sufficient to constitute wilful and wanton misconduct. He remarked that the answers to questions 5 and 6, though not to his mind justified by the evidence, did not clear up the uncertainty and insufficiency of the answers to questions 2 and 4; these answers might be equally as consistent with negligence as with gross negligence or wilful and wanton misconduct. Therefore on the jury's answers he was unable to direct judgment for the plaintiff; the jury may have intended to make such findings that the plaintiff would succeed, but they failed to give such answers as would make this possible, and on their findings the action should be dismissed.

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Upon appeal by the plaintiff to the Supreme Court of Nova Scotia *en banc* that Court (1) allowed the appeal and held that the plaintiff should recover against the present appellant the amount of damages found by the jury at the trial to have been sustained by the plaintiff, and also the costs of the action and of the appeal. In the reasons for judgment in the Court *en banc,* the meanings of the phrases "gross negligence" and "reckless driving" were dealt with, reference was made to what was said in the trial judge's charge to the jury, and it was held that the jury's answer to question 2 was sufficient and had sufficient certainty of meaning, and that on the evidence the Court could not say that the jury as reasonable men could not make the findings which they did in answer to questions 1 and 2 and 5, 6 and 7, and on those findings the plaintiff was entitled to judgment.

Beverley V. Elliott for the appellant.

F. D. Smith K.C. for the respondent.

THE CHIEF JUSTICE—This appeal is concerned with the construction and application of sec. 183 of *The Motor Vehicle Act,* being chap. 6 of the Acts of Nova Scotia, 1932, as amended.

The Court of Appeal unanimously held that the findings of the jury entitled the respondent to a verdict against the appellant for the damages found by the jury. I am content, myself, to rest upon what was said in the Court below upon that subject, and particularly by the Chief Justice, Sir Joseph Chisholm. I concur also with the view of the full Court as to the effect of the findings.

I do not think it is any part of the duty of this Court, in applying the enactment before us, to define gross negligence, or to define wilful and wanton misconduct. It is necessary, of course, that the judge trying an action based upon the enactment should assist the jury by suggesting to them such tests as may seem to be appropriate in the circumstances of the case for determining whether gross negligence, or wilful or wanton misconduct has been established, and paraphrases may be useful for the purpose of dealing with the particular case, but, generally speaking, I think, it is undesirable that the courts should attempt

(1) 16 M.P.R. 45; [1941] 3 D.L.R. 42.

to replace by paraphrases the language which the legislature has chosen to express its meaning. A paraphrase which may in a particular case be valuable, may, in a case involving different facts, be misleading.

I am, myself, unable to agree with the view that you may not have a case in which the jury could properly find the defendant guilty of gross negligence while refusing to find him guilty of wilful or wanton misconduct. All these phrases, gross negligence, wilful misconduct, wanton misconduct, imply conduct in which, if there is not conscious wrong doing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves. Subject to that, I think it is entirely a question of fact for the jury whether conduct falls within the category of gross negligence, or wilful misconduct, or wanton misconduct. These words, after all, are very plain English words, not difficult of application by a jury whose minds are not confused by too much verbal analysis.

In this case the jury found gross negligence and stated that the gross negligence consisted in reckless driving. I have no doubt that the jury were entitled on the evidence to find that the appellant's driving was reckless, and, that having been found, there was, I think, a sufficient basis for their finding that this reckless driving constituted gross negligence.

The appeal should be dismissed with costs.

CROCKET J.—I agree with my brother Taschereau that this appeal should be dismissed with costs.

I think there was ample evidence to warrant the finding of the jury that the appellant was guilty of such reckless driving in the circumstances as to constitute gross negligence within the meaning of s. 183 of the Nova Scotia *Motor Vehicle Act.*

The judgment of Kerwin, Hudson and Taschereau JJ. was delivered by

TASCHEREAU J.—In this case, the plaintiff, respondent before this Court, brought action to recover damages for personal injuries sustained while she was a passenger transported without payment in a motor car operated by the appellant.

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Taschereau J.

Section 183 of *The Motor Vehicle Act* of Nova Scotia determines the liability of the operator of an automobile towards a gratuitous passenger. It reads as follows:—

> No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been caused by the gross negligence or wilful and wanton misconduct of the owner or operator of such motor vehicle and unless such gross negligence or wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought.

The jury reached the conclusion that the appellant McCulloch was guilty of gross negligence and said in one of its answers that such gross negligence consisted in "reckless driving". It said also that the appellant was not "exercising proper care", and completely rejected the theory of the appellant who claimed in his defence that the accident was caused by the automobile striking a piece or block of wood on the highway. The damages were assessed at $2,632.

After the trial, the learned Judge gave his decision, and dismissed the action with costs. He thought that it was impossible to give effect to the answers to questions 1 and 2 because the answer to question 2, where the jury said that the gross negligence consisted of "reckless driving", could not be interpreted with sufficient certainty. He also said that a careful attention to the evidence failed to indicate such conduct on the part of the appellant as would constitute gross negligence or reckless driving.

The Court of Appeal unanimously reversed this decision and directed that judgment be entered for the respondent with costs. I fully concur in this conclusion reached by the Court of Appeal. The questions put to the jury were clear and unequivocal. They were agreed to by counsel for both parties and approved by the Judge, and the answers given by the jury are in no way uncertain. Furthermore, no objection was taken to any of these answers before the jury had been discharged.

As to the finding of the trial Judge that there was no gross negligence or reckless driving, I am unable to agree. The evidence justifies the jury to say that there was; and it is not my duty, nor do I feel in any way disposed

after reading the evidence, to alter the views which have been expressed by a properly instructed jury as to the legal meaning of the words "gross negligence".

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I would dismiss the appeal with costs.

Appeal dismissed with costs.

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

Solicitor for the respondent: *W. T. Hayden.*

CONTAINER MATERIALS, LIMITED, AND OTHERS ..... APPELLANTS;

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* Dec. 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17.

AND

HIS MAJESTY THE KING ..... RESPONDENT.

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* Feb. 3.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Agreement or arrangement "to unduly prevent or lessen competition"—Cr. Code, s. 498 (1) (d)—What must be shown to establish the offence—"Unduly"—Intent—Evidence—Admissibility of written opinions of counsel given before the making of proposed agreements.

This Court dismissed appeals from the affirmance, by the Court of Appeal for Ontario (Henderson J.A. dissenting on certain questions of law) ([1941] 3 D.L.R. 145), of appellants' convictions on the charge, laid under s. 498 (1) (*d*) of the *Criminal Code,* that they did unlawfully conspire, combine, agree or arrange together and with one another, and with ten other named companies or individuals not indicted, to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply in certain named places and other places throughout Canada, of corrugated and solid fibreboard boxes or shipping containers.

Per the Chief Justice: S. 498 (1) (*d*)is aimed at protecting the specific public interest in free competition (*Stinson-Reeb* v. *The King,* [1929] S.C.R. 276; *Weidman* v. *Shragge,* 46 Can. S.C.R. 1). The lessening or prevention agreed upon will be "undue" within the meaning of the enactment if, when carried into effect, it will prejudice the public interest in free competition to a degree that the tribunal of fact finds to be undue, and an agreement to prevent or lessen competition to such an extent is, accordingly, an offence under the enactment. In the present case, the aim of the parties to the agreement was to secure effective control of the market in Canada; and this fact affords in point of law a sufficient basis for a finding that the agreement was one which, if carried into effect, would gravely prejudice the public interest in free competition, and for a conviction under s. 498 (1) (*d*).

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

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Per Rinfret, Kerwin, Hudson and Taschereau JJ.: If it is shown that the accused entered into an agreement or arrangement, the effect of which would be unduly to prevent or lessen competition, it need not also be shown, in order to establish an offence under said enactment, that the agreement or arrangement must have been intended by the accused to have that effect. *Mens rea* is necessary, but that requirement was met when it was shown that appellants intended to enter and did enter into the very arrangement found to exist. As to the word "unduly" in the requirement to constitute the offence: The public is entitled to the benefit of free competition (except in so far as it may be interfered with by valid legislation), and any party to an arrangement, the direct object of which is to impose improper, inordinate, excessive or oppressive restrictions upon that competition, is guilty of an offence (*Stinson-Reeb* v. *The King*, [1929] S.C.R. 276). Once an agreement is arrived at, whether anything be done to carry it out or not, the matter must be looked at in each case as a question of fact to be determined by the tribunal of fact upon a common sense view as to the direct object of the arrangement complained of. The evidence in these cases of what was done is merely better evidence of that object than would exist where no act in furtherance of the common design had been committed.

Per curiam: Letters giving opinions of counsel to appellants or some of them prior to the execution of original agreements in question, which opinions, it was suggested, would indicate that the matter was placed before counsel who advised that, on the information before them, it would not be contrary to law for appellants, or some of them, to enter into the agreements, were properly rejected as evidence at the trial, because, even if the letters contained what was suggested, they could have no bearing upon the point of substance to be determined.

APPEALS from the judgment of the Court of Appeal for Ontario (1) in so far as it affirmed (Henderson J.A. dissenting on certain questions of law) the conviction of the appellants by Hope J. (2), sitting without a jury, under the count of an indictment which charged that they did unlawfully conspire, combine, agree or arrange together and with one another, and with ten other named companies or individuals not indicted, to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply in certain named places, and other places throughout Canada where the articles or commodities hereinafter mentioned are offered for sale, of articles or commodities which may be the subject of trade or commerce, to wit, corrugated and solid fibreboard boxes or shipping containers, and did thereby commit an indictable offence contrary to the provisions of the *Criminal Code*, s. 498, subs. 1 (*d*).

(1) [1941] 3 D.L.R. 145. (2) [1940] 4 D.L.R. 293.

A. G. Slaght, K.C., and *H. E. Manning, K.C.*, for Container Materials, Ltd., and Badden (appellants).

L. Forsythe, K.C., for Shipping Containers, Ltd., and Standard Paper Box, Ltd. (appellants).

A. G. Slaght, K.C., for Martin-Hewitt Containers, Ltd., Canadian Wirebound Boxes, Ltd., The Corrugated Paper Box Co. Ltd., Gair Company, Canada, Ltd., Hinde and Dauch Paper Company of Canada, Ltd., Hygrade Corrugated Products, Ltd., Hilton Brothers, Ltd., Martin Paper Products, Ltd., Canadian Boxes, Ltd., Maritime Paper Products, Ltd., and G. W. Hendershot Corrugated Paper Co., Ltd. (appellants).

H. E. Manning, K.C., for Dominion Corrugated Paper Co., Ltd., Kraft Containers, Ltd., and Acme Paper Box Co., Ltd. (appellants).

F. W. Wegenast, K.C., for Superior Box Co., Ltd. (appellant).

J. C. McRuer, K.C., and *R. M. Fowler* (*J. L. McLennan* also present), for respondent.

THE CHIEF JUSTICE—The facts of the case have been fully discussed in the eleborate judgments at the trial and in the Court of Appeal in those of the Chief Justice of Ontario and Mr. Justice Masten and need not be restated.

The learned Chief Justice of Ontario, in the course of his judgment, says:—

> In my opinion it is established by evidence properly admissible, that an agreement or arrangement was made among the manufacturers who mainly supplied the market throughout Canada for corrugated and solid fibreboard boxes and shipping containers that they would place the control of the marketing, the barter, sale and supply to customers of their output of these products under the control of Container Materials Limited, a company that they themselves, through their representatives on the board of directors, controlled and operated, with the appellant Badden as president and secretary and virtual manager, and that the measure and extent of that control was such control as would be in the hands of a single purchaser, to whom alone any of these manufacturers was at liberty to sell its products, or any part of them, and for whom the manufacturers themselves in supplying their real customers were mere agents selling the goods of that purchaser for it and under its strict supervision and control. While this was not strictly a monopoly it was to have all the effect of one so far as the public was concerned.

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Duff C.J.

If I am right in the conclusion I have reached as to the real arrangement or scheme of these manufacturers, and of those who worked with them in its execution, then I think there can be no question that it falls within the terms of sec. 498, s.s. 1 (*d*). Its purpose was to extinguish so far as these manufacturers were concerned all competition in the barter and sale of these products in Canada just as completely as if Container Materials Limited had a monopoly of them.

Mr. Justice Middleton, after referring to the judgments of this Court in *Weidman* v. *Shragge* (1), and in *Stinson-Reeb* v. *The King* (2), thus expressed his conclusion:

Unquestionably these cases establish that the agreements here referred to by the learned trial Judge are a violation of clause (*d*) of section 498 and therefore the conviction ought to affirmed.

Mr. Justice Masten says:—

The organization at the time of its creation and during the period from 1931 to 1939 appears to have included, with certain minor exceptions, substantially all the Canadian manufacturers of corrugated and solid fibre board boxes or shipping containers. The allegations of the Crown as set forth in the particulars delivered by them are as follows:

"At the time of the incorporation of Container Materials Limited, the aforementioned corporations, together with Kitchener Paper Box Company, were all the producers in Canada of corrugated paper boxes and with the exception of Building Products Limited were all the manufacturers of fibre board boxes.

"At the date of the indictment the accused manufacturing corporations, together with Pacific Mills Limited, were the only producers of corrugated and fibre board shipping containers in Canada, with the exception of one other company with a small production.

"Building Products Limited, a corporation mentioned in the indictment was, up to the year 1935, engaged in the manufacture of shipping containers at which time it ceased to manufacture the same under circumstances which will be referred to in greater detail hereafter.

"Pacific Mills Limited was since 1933, and now is, engaged in the manufacture of shipping containers."

The finding of the trial Judge is "that Container Materials Limited represented that it controlled 100% of the industry". I think it is established that the organization operating through Container Materials Limited substantially controlled throughout Canada during the period in question the manufacture and sale of containers.

It is clear from the foregoing analysis of the organization created in 1931 that it was an instrument possessing enormous potency, whose first object was to improve or increase the profits of its members and adherents by its control of the manufacture and sale throughout Canada of containers. It is also manifest from the foregoing analysis that the supervision and restrictions imposed by the organization necessarily lessened competition. Whether the charter and by-laws of Container Materials Limited, coupled with the four agreements when taken by themselves, make manifest an agreement to lessen competition *unduly* need not be considered, for the organization manifests a common agreement

(1) (1912) 46 Can. S.C.R. 1. (2) [1929] S.C.R. 276.

and certain subsequent overt acts done by the organization in pursuance of the common agreement establish in my opinion that its objective was to "unduly lessen competition" and hence was unlawful.

Mr. Justice Fisher agreed with the conclusion and reasons of the Chief Justice.

I think it right to say that, after fully weighing the arguments presented, I am in agreement with these conclusions of the learned Chief Justice and Justices of the Court of Appeal in respect of fact as well as in respect of law. It follows necessarily, of course, that the appellants must fail in their contention that there was no evidence to support the conviction pronounced by the learned trial Judge under clause (*d*) of section 498.

This, however, is by no means the end of the matter, because it was argued with great ability and force by counsel for the appellants that, assuming the conclusions of fact of the learned trial Judge and of the majority of the Court of Appeal to be well-founded, this is not sufficient to sustain the conviction, since, the appellants contend, both the learned trial Judge and the learned Justices of the Court of Appeal misconstrued and misapplied the section of the Code upon which the indictment is based, which is in these terms:—

Lessen competition.

498. (*d*) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property.

Two main points are raised. First, it is not sufficient, it is argued, to establish an agreement to prevent or lessen competition in such a manner, or to such an extent, that the tribunal considers to be undue in fact. It is, it is argued, an essential element of the offence, which, of course, must be proved, that the intention present in the minds of the accused persons in entering into their agreement is to do what they conceive will have the effect and which they intend to have the effect of unduly preventing or lessening competition, within the meaning of the statute.

The second point arises from the contention of the appellants that the essence of the offence is an agreement to do something injurious to the public; that such injury to the public must appear from the evidence and must be found as a fact in order to establish a legal basis for a conviction.

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These contentions were advanced in the Court of Appeal, as well as in this Court. They constitute the most important grounds of appeal.

The enactment before us, I have no doubt, was passed for the protection of the specific public interest in free competition. That, in effect, I think, is the view expressed in *Weidman* v. *Shragge* (1) in the judgments of the learned Chief Justice, of Mr. Justice Idington and Mr. Justice Anglin, as well as by myself. This protection is afforded by stamping with illegality agreements which, when carried into effect, prevent or lessen competition unduly and making such agreements punishable offences; and, as the enactment is aimed at protecting the public interest in free competition, it is from that point of view that the question must be considered whether or not the prevention or lessening agreed upon will be undue. Speaking broadly, the legislation is not aimed at protecting one party to the agreement against stipulations which may be oppressive and unfair as between him and the others; it is aimed at protecting the public interest in free competition. That is only another way of putting what was laid down in *Stinson-Reeb* v. *The King* (2) which, it may be added, was intended to be in conformity with the decision in *Weidman* v. *Shragge* (1), as indicated in the passages quoted in the judgment.

The lessening or prevention agreed upon will, in my opinion, be undue, within the meaning of the statute, if, when carried into effect, it will prejudice the public interest in free competition to a degree that the tribunal of fact finds to be undue, and an agreement to prevent or lessen competition to such an extent is, accordingly, an offence against sec. 498 (*d*).

The learned trial Judge, as well as the learned Justices of the Court of Appeal, directed their attention to the effect of the agreement from this point of view. The learned trial Judge observed that the agreement was " to put free competition into a straight jacket ". Mr. Justice Masten said " free competition was stifled ". The learned Chief Justice of Ontario says that " the purpose of the agreement was to extinguish so far as these manufacturers were concerned all competition in the barter and sale of these products in Canada just as completely as if Container Materials Limited had a monopoly of them ".

(1) (1912) 46 Can. S.C.R. 1. (2) [1929] S.C.R. 276.

The majority of the Court of Appeal rightly held, I think, that the aim of the parties to this agreement was to secure effective control of the market in Canada; it may be added that in this they were very largely successful. But the fact that such was the agreement affords in point of law a sufficient basis for a finding that the agreement was one which, if carried into effect, would gravely prejudice the public interest in free competition, and a conviction under section 498 (*d*).

With respect to the other points raised by the appellants, it is sufficient to say that I have had an opportunity of reading the judgment of my brother Kerwin and I fully concur with him as regards those points.

The appeal should be dismissed.

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

KERWIN J.—The appellants, together with Wilson Boxes Limited, were convicted by Hope J. upon each of four counts in an indictment, count 1 being laid under clause (*d*) of subsection 1 of section 498 of the *Criminal Code,* and counts 2, 3 and 4 under clauses (*b*), (*a*) and (*c*) respectively. The convictions against all the accused on counts 2, 3 and 4 were quashed by the Court of Appeal; the conviction against Wilson Boxes Limited under count 1 was set aside and a new trial directed; the convictions of the appellants under count 1 were affirmed, and the sentences imposed by the trial Judge were affirmed and imposed with respect to the conviction of each of the appellants under that count. These appeals are from the affirmance of such convictions and are based on questions of law on which Henderson J. A. dissented in the Court of Appeal. Our jurisdiction is limited to those questions of law and imposes upon this Court a task different from that which confronted the Court of Appeal.

Subsection 1 of section 498 of the Code provides:—

> Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years' imprisonment, or, if a corporation, is liable to a penalty not exceeding ten thousand dollars, and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company,
>
> (*a*) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or

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(b) to restrain or injure trade or commerce in relation to any such article or commodity; or

(c) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or

(d) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property.

By count 1 of the indictment, the accused were charged that they did unlawfully conspire, combine, agree or arrange together and with one another and with ten other named companies or individuals not indicted, to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply, in certain named places and other places throughout Canada, of corrugated and solid fibreboard boxes or shipping containers.

The circumstances preceding the incorporation and organization of Container Materials Limited and the facts in connection with the operation of that company as affecting the appellants, are set forth in the reasons for judgment of the Chief Justice of Ontario. Having considered the record in connection with the arguments presented on behalf of the appellants, I find myself in agreement with the Chief Justice's statement of facts. Any slight inaccuracy does not in the least affect the matters to be determined by this Court. These matters depend upon the questions of law upon which Henderson, J. A., dissented, and counsel for the appellants have conveniently allocated what they contend are those questions under six different headings as follows:—

Firstly:

That the learned trial judge erred in accepting the view of the Crown that the intentions and objects of the accused were beside the question; and

That *mens rea* or guilty mind is a necessary ingredient of the crime here charged and the crime of conspiracy is particularly one which involves *mens rea.*

Secondly:

The improper rejection of evidence.

Thirdly:

The accused were prejudiced in their defence by the manner in which the Crown dealt with the documentary records of the accused; and

That the conviction and sentence both fail and that in order to convict the accused on appeal the Appellate Court would have to substitute a conviction by such Court and a sentence by such Court, which is beyond its province.

Fourthly:

The improper admission of evidence.

Fifthly:

That it is not sufficient for the Crown to make out a *prima facie* case and it is not sufficient that the Crown give in evidence circumstances capable of two interpretations, one consistent with innocence and the other with guilt; much less is the Court asked to find guilt from circumstances at least equally consistent with innocence.

Sixthly:

There is no evidence to support any conviction; and

A conviction under section 498, subsection (*d*), cannot stand in view of an acquittal under subsection (*b*); and

That the accused were charged with one conspiracy only and that the gist of the offence is conspiracy and that the various counts set forth in the indictment were simply allegations of overt acts in pursuing the objects of the conspiracy and therefore the conviction cannot be upheld.

I turn first to those identified as secondly, thirdly and fourthly. I agree with what the learned Chief Justice has said as to the manner in which the documents seized in the possession of various of the appellants were subsequently dealt with. I approve of every word that he has said with reference to this matter but I also agree with his statement "that a case was made against each of the appellants without the assistance of any documents or books the admissibility of which was properly objected to". In the great majority, if not all, of the cases to which our attention was called, where an original letter was found in the possession of one of the accused a copy of that letter was

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found in the possession of another, from whom the original purported to have come. There was evidence before the Court sufficient to show that the accused were engaged in accomplishing the same common object, and evidence of one conspirator was therefore evidence against the other. The distinction between entries made by a fellow conspirator, contained in various documents actually used for carrying out the design, and a document not created in the course of carrying it out but made by one of the conspirators after the illegal object was completed, is shown in *The Queen* v. *Blake* (1), referred to in *Mirza Akbar* v. *King-Emperor* (2). The appellants were not tried before a judge and jury but by a judge alone, who has given his reasons for the conviction on count 1 and, even if any of the evidence that was admitted before him falls within the second category, it is quite apparent from those reasons that it had no effect upon the reasons or the result. It has not been overlooked that the trial judge stated:—

> It might also be noted that according to The Companies Act, cap. 251, R.S.O. 1937, sec. 106, minute books which are required to be kept by the company shall be *prima facie* evidence of all facts purporting to be therein stated in any action or proceeding against the corporation.

This provision of the Ontario *Companies Act* could, of course, have no application to a prosecution under the Code, and the trial Judge did not so treat it. He had already determined that the books were otherwise admissible and merely added a reference to the Ontario statute.

The appellants complain that the opinions of counsel, rendered to the appellants or some of them prior to the execution of the original agreements, were wrongfully rejected. What these opinions are, we do not know, but it is suggested that they would indicate that the matter was placed before counsel who advised that, on the information before them, it would not be contrary to law for the appellants, or some of them, to enter into the agreements. In my opinion, the evidence was properly rejected because, even if the letters contained what has been suggested, they could have no bearing upon the point of substance to be determined. The only other bit of evidence rejected by the trial judge that was specifically referred to is a letter which, according to a statement of counsel appearing in the record, was addressed, by Wilson Boxes

(1) (1844) 6 Q.B. 126. (2) [1940] 3 All E.R. 585.

Limited, to Messrs. Hardy and Badden and dated January 27th, 1939. This is the letter referred to by Chief Justice Robertson and because of its non-admission a new trial was directed so far as the conviction of Wilson Boxes Limited on count 1 was concerned. It is pointed out that the Chief Justice was in error in stating that this letter was tendered in evidence by counsel for Wilson Boxes Limited, and apparently this is so. Wilson Boxes Limited was not represented at the trial. It was counsel for Superior Box Company, Limited, who tendered the letter in evidence. No doubt the confusion arose because the same counsel appeared before the Court of Appeal not only for Superior Box Company, Limited, but also for Wilson Boxes Limited. We are not concerned with the position of the latter company but it was argued that this letter should have been admitted in favour of Superior Box Limited. I am unable to see how a letter from Wilson Boxes Limited to Hardy and Badden could be evidence on behalf of Superior Box Limited.

Having gone over the record carefully to see what transpired at the trial with reference to the seized bundles, I am satisfied that the appellants were not prejudiced in their defence by the manner in which the Crown dealt with the documentary evidence of the accused. Every facility was offered by Crown counsel and was refused by counsel for the appellants, or at least by some.

The second, third and fourth points argued by the appellants being disposed of, the first, fifth and sixth may be taken together. The ground may first be cleared by dealing with the objection that the accused were not all those engaged in the manufacture of corrugated and solid fibreboard boxes or shipping containers. It was pointed out that the count in the indictment alleged that the accused conspired together and with one another and with ten other named companies or individuals not indicted, to unduly prevent or lessen competition. While counsel for the Crown referred to certain documents as indicating that the accused were all the manufacturers of the articles mentioned, a perusal of these documents does not satisfy me that that contention is correct, but I am satisfied from the evidence that the accused represented the great bulk of the industry. That was the conclusion of the trial judge and of the Chief Justice of Ontario, and any difference of

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opinion on that score, in the Court of Appeal, would be on a question of fact, as to which there is no appeal to this Court. The objection that the convictions under clause (*d*) could not stand because of the acquittals under clause (*b*) is of no moment, as this Court is not concerned with anything except the question whether the convictions on the first count are proper.

It was argued that it was not sufficient for the Crown to show an agreement or arrangement, the effect of which would be unduly to prevent or lessen competition, but that the agreement or arrangement must have been intended by the accused to have that effect. This is not the meaning of the enactment upon which the count was based. *Mens rea* is undoubtedly necessary, but that requirement was met in these prosecutions when it was shown that the appellants intended to enter, and did enter, into the very arrangement found to exist. The offences mentioned in the statute in question in *Attorney General of Australia* v. *Adelaide Steamship Company* (1) were not complete without proof of the intent. As pointed out by Lord Parker at page 798, an amending Act provided that in any prosecution for an offence against certain sections of the main enactment,

> the averments of the prosecutor contained in the information, declaration, or claim shall be deemed to be proved in the absence of proof to the contrary, but so that the averment of intent shall not be deemed sufficient to prove such intent.

This decision can have no application to a prosecution under clause (*d*) of subsection 1 of section 498 of the Code.

The meaning of "unduly" in clause (*d*) of subsection 1 of section 498 of the Code was considered in the criminal case of *Stinson-Reeb Builders Supply Company* v. *The King* (2), where Mr. Justice Mignault, speaking for the Court, quoted the following passage from the judgment of the present Chief Justice of this Court in the civil case of *Weidman* v. *Shragge* (3):—

> I have no hesitation in holding that as a rule an agreement having for one of its direct and governing objects the establishment of a virtual monopoly in the trade in an important article of commerce throughout a considerable extent of territory by suppressing competition in that trade, comes under the ban of the enactment.

(1) [1913] A.C. 781.
(2) [1929] S.C.R. 276.
(3) (1912) 46 Can. S.C.R. 1, at 37.

Mr. Justice Mignault also quoted the following passage from the judgment of Mr. Justice Anglin (as he then was), at page 42:—

> The prime question certainly must be, does it (the agreement alleged to be obnoxious to section 498), however advantageous or even necessary for the protection of the business interests of the parties, impose improper, inordinate, excessive or oppressive restrictions upon that competition the benefit of which is the right of every one?

Under the decision in the *Stinson-Reeb* case (1), the public is entitled to the benefit of free competition except in so far as it may be interfered with by valid legislation, and any party to an arrangement, the direct object of which is to impose improper, inordinate, excessive or oppressive restrictions upon that competition, is guilty of an offence. A comparison between section 498 of the Code and section 498A (which was enacted subsequent to the decision in the *Stinson-Reeb* case (1)) indicates that there has not been any change in the rule. Once an agreement is arrived at, whether anything be done to carry it out or not, the matter must be looked at in each case as a question of fact to be determined by the tribunal of fact upon a common sense view as to the direct object of the arrangement complained of. The evidence in these cases of what was done is merely better evidence of that object than would exist where no act in furtherance of the common design had been committed. So viewing the matter, there can be no question that, not only was there some evidence upon which the trial judge could convict, but the evidence was overwhelming that all the appellants at one time or another conspired, combined, agreed or arranged to prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of corrugated and solid fibre boxes or shipping containers, and that they conspired to do so unduly.

This applies as well to Superior Box Company Limited as to the other appellants. It is true that this Company, as well as several others, did not sign any agreement, but the correspondence between it and Container Materials Limited and other admissible evidence shows that it paid a portion of the expenses of Container Materials Limited; that it submitted to inspection; that its representatives were present at various meetings; that it contributed to the costs of the Acme contract; and that it had a knowledge of

(1) [1929] S.C.R. 276.

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and contributed to the cost of the Building Products purchase. Instead of the position of this appellant being, as put in its factum, "entirely consistent with an intention to make the best of conditions as we found them and over which we had no control", the truth of the matter is that the Company became a member of the conspiracy and actually acted in conjunction with the others, although, on occasions, it sought to free itself from some of its fetters and succeeded in securing, from time to time, special advantages not enjoyed by the others.

The appeals should be dismissed.

Appeals dismissed.

Solicitors for the appellants other than Acme Paper Box Co., Ltd., and Superior Box Co., Ltd.: *Manning & Babcock.*

Solicitors for the appellant, Acme Paper Box Co., Ltd.: *Singer & Kert.*

Solicitors for the appellant, Superior Box Co., Ltd.: *Wegenast, Hyndman & Kemp.*

Solicitors for the respondent: *McRuer, Mason, Cameron & Brewin.*

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*Nov. 24, 25.

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*Feb. 3.

MATHIAS ANDREW HEIL (PLAINTIFF). APPELLANT;

AND

EDITH ALICE HEIL (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Husband and wife—Suit for annulment of marriage—Alleged incapacity of wife owing to mental condition creating invincible aversion to act of consummation.

The mere refusal by a wife of marital intercourse due to her caprice is not a sufficient ground to warrant a decree of nullity of marriage; there must be an incapacity of some kind, which in some cases is a structural defect, but in some cases may arise out of a mental condition creating an invincible aversion to the physical act of consummation. Such a mental condition may be inferred from the proven facts, and justifies a decree for annulment of marriage.

G. v. *G.*, [1924] A.C. 349; *Napier* v. *Napier*, L.R. [1915] P. 184, at 193, and other cases, referred to.

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

In the present case it was held, reversing the judgment of the Court of Appeal for Ontario ([1939] O.W.N. 524; [1939] 4 D.L.R. 402), that the drawing of such an inference, and judgment for annulment, by the trial Judge, was right. (Davis J. dissented, holding that, on the evidence, the husband had not made a case for a decree of nullity.)

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HEIL v. HEIL

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) reversing (Henderson J.A. dissenting) that part of the judgment of Greene J. which annulled the marriage between the plaintiff and defendant (unless sufficient cause were shown within six months why the judgment should not be made absolute). The Court of Appeal dismissed the plaintiff's action. Leave to appeal to the Supreme Court of Canada was granted by the Court of Appeal for Ontario. The material facts and questions for consideration 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, Davis J. dissenting.

John J. Robinette for the appellant.

John Mirsky for the respondent.

The judgment of the majority of the Court (Rinfret, Crocket, Kerwin and Taschereau JJ.) was delivered by

TASCHEREAU J.—The appellant, who is a medical doctor engaged in the practice of his profession in the Town of Timmins, Ontario, married the respondent in Vienna in June, 1937, where he had undertaken post-graduate medical studies. After the marriage, which for some time remained unknown to the respondent's parents, both came to Canada, on board the *Empress of Britain*, and on the 8th of July they reached Quebec City, and proceeded immediately on the boat train to Montreal. The appellant remained in that city until the 17th of July, while the respondent had gone to Manchester, N.H., to visit her aunt. Upon her return, the respondent went to Ottawa with her husband, but the next day left again for Manchester, saying that she had not seen her aunt in her previous visit.

She was away until August 13th, and during this prolonged absence of his wife, the appellant, whose funds were depleted, stayed with friends in Ottawa, and finally accepted an offer to go and practise his profession in the

(1) [1939] O.W.N. 524; [1939] 4 D.L.R. 402.

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Town of Timmins. When the respondent returned after her second visit to Manchester, she met the appellant at the Ford Hotel in Montreal, and immediately left for Europe where she lived in Vienna until March, 1938. It was only after that date, nearly one year after her marriage, that she decided, although the appellant had sent her several times the necessary funds to pay her fare, to come and live with her husband. However, her good intentions, if she ever had any, were not of a very long duration, for she left the common domicile in November, 1938. The next meeting of the parties was before the Ontario courts, where she was made the respondent in an action in nullity of marriage.

While the respondent was in the United States and in Europe, some correspondence was exchanged between these unfortunate people, which is of great assistance in determining the points raised in the present appeal. The husband, appellant, claims that in spite of his repeated requests, the respondent refused to consummate the marriage, and he further alleges that the respondent is impotent and incapable of having or submitting to sexual intercourse. The learned trial Judge disbelieved the plea of the defendant that she had fulfilled her marital duties, found that there was no physical inability on the part of the respondent, but that she was mentally incapable of sexual relationship between man and woman. He therefore declared the marriage null.

The Court of Appeal, Mr. Justice Henderson dissenting, allowed the appeal and dismissed the action. The Court is unanimous in finding that the marriage has not been consummated, and agrees with the trial Judge who found against the story of the respondent. The majority, however, reached the conclusion that she was not suffering from any physical disability, and that the refusal of intercourse is the result of obstinacy, which is a creature of her will, and not the result of an invincible repugnance to the physical life of marriage.

The mere refusal of marital intercourse due to caprice is not a sufficient ground to warrant a decree in nullity. The earlier decision, *Dickinson* v. *Dickinson* (1), which held that persistent refusal was a legal ground for a decree, is overruled, and it is now settled that there must be an

(1) L.R. [1913] P. 198.

incapacity of some kind, which in certain cases is a structural defect, but which may also arise out of mental condition, with the resulting effect of creating in the mind of the woman an aversion to the physical act of consummation.

In *Napier* v. *Napier* (1) it was held:—

> It is true that in recent times the Court has not always required proof of an actual structural defect as evidence of incapacity, but has considered itself at liberty to infer from the conduct of the parties or one of them an incapacity arising from some abnormal condition of mind or body.

Reference might also be made to: *Hudston* v. *Hudston* (2), *K.* v. *K.* (3), *Barnes* v. *Barnes* (4), *Vickery* v. *Vickery* (5), *Bethell* v. *Bethell* (6), *Szrejher* v. *Szrejher* (7).

In *F.* v. *P.* (8), Sir Francis Jeune expressed his views as follows:—

> If it be satisfactorily proved that repeated endeavours of a potent husband, who has tried all means short of force, have been uniformly unsuccessful, it was for the Court, in the absence of any alleged or probable motive for wilful refusal, to draw the inference that the non-consummation was due to some form of incapacity on the part of the wife.

The latest pronouncement on the matter is a decision of the House of Lords in the case of *G.* v. *G.* (9), where it was held that the conclusion to be drawn from the evidence was that the wife's refusal was due, not to obstinacy or caprice, but to an invincible repugnance to the act of consummation, resulting in a paralysis of the will which was consistent only with incapacity, and that the husband was entitled to a decree of nullity. The words of Lord Phillimore are as follows:—

> The evidence here seems to me to prove "invincible repugnance", "invincible" in the full sense of an unconquerable, uncontrollable nervous condition which is physical and which creates nullity.

In the case at bar, the medical examinations clearly reveal that there was no structural defect, the respondent

(1) L.R. [1915] P. 184, at 193.
(2) (1922) 39 T.L.R. 108.
(3) [1923] 3 W.W.R. 22; [1923] 3 D.L.R. 485.
(4) (1921) 14 Saskatchewan Law Rep. 505.
(5) (1921) 37 T.L.R. 332.
(6) [1932] O.R. 300.
(7) [1936] O.R. 250.
(8) (1896) 75 L.T. 192. (*See* quotation in Lord Dunedin's judgment in *G.* v. *G.*, [1924] A.C. 349, at 353-4. The words quoted do not appear in the oral judgment reported in 75 L.T. 192).
(9) [1924] A.C. 349.

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being physically normal and fully capable of sexual intercourse. There is no alleged motive for the refusal of the respondent to consummate the marriage, and the only defence put forward is that she has performed her marital duties. The learned trial Judge who has heard her evidence, and appreciated her behaviour, has come to the conclusion that she was not telling the truth, and this finding has been unanimously upheld by the Court of Appeal, and I see no valid reason why it should be altered. This ground of defence having been rejected, we have to look elsewhere to see if the respondent's refusal is due to obstinacy or to an invincible repugnance to the act of consummation. The learned trial Judge has reached the conclusion that the proper inference to be drawn from the proven facts is that her hostility to the fulfilment of her marital duties is due to a mental condition with the resulting effect of creating an invincible aversion to the sexual act.

And the reading of the evidence which discloses her mentality, leads me to an identical conclusion. Her correspondence with her husband, and the conversations she had with some of her friends in Timmins, and even her own testimony, reveal her ideas that marriage is exclusively spiritual, eliminating all physical relations, and therefore bring the case within the principles laid by the House of Lords in *G.* v. *G.* (1). We are not confronted here with an obstinacy of a momentary nature which may for a time only keep the respondent away from her husband, but with a repugnance which she has unsuccessfully endeavoured to overcome in spite of her promises to yield to the appellant's requests, and which cannot amount to anything else but to an aversion to the act of consummation itself.

I would allow the appeal and restore the judgment of the trial Judge. In view of the circumstances, there should be no costs in the Court of Appeal and in this Court.

DAVIS J. (dissenting).—This appeal arises out of an action brought in Ontario by the appellant against his wife (respondent) for a decree of nullity. There is a concurrent finding of fact in the courts below that the marriage was never consummated due to the wife's unwillingness alone. There was no structural impediment to marital

(1) [1924] A.C. 349.

relations and the issue in this case is the same as that stated by Lord Shaw of Dunfermline in the House of Lords to be the issue in the case of *G.* v. *G.* (1):

> That issue, as I view it, is whether the refusal of the respondent to consummate the marriage can be ascribed to a cause which the law can hold to be such incompetence as can ground a decree of nullity of marriage.

Since 1938 a marriage is now voidable in England on the ground, amongst others, that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage. *Matrimonial Causes Act, 1937,* sec. 7 (1) (*a*). But there is no such statutory provision available to the appellant here. Obstinate or wilful refusal is not enough.

Were it not for the very able and exhaustive judgments in the House of Lords in the *G.* v. *G.* case (2), this would be a very difficult appeal to determine, but that decision, as I understand it, laid it down to be necessary, in the absence of direct proof of incapacity, that there be evidence upon which the Court would be entitled to draw the inference that the refusal has been due to incapacity—what Lord Dunedin called an "invincible repugnance" to the physical act as distinct from a mere obstinacy of denial. Lord Phillimore at p. 376 put "invincible repugnance" in these words:—

> "invincible" in the full sense of an unconquerable, uncontrollable nervous condition which is physical and which creates nullity.

I think it useful to quote a short passage from the judgment of Lord Shaw at pp. 366-367:—

> * * * it is now settled that Courts have the power to annul the contract of marriage on the ground of incapacity, although that incapacity may not be structural; room is still left for a declaration of nullity, although structural incapacity is not proved. There may be cases—rare and extreme cases they of course must be—in which incapacity is established *de facto* to exist, that incapacity not being a mere hostile determination of the mind arising from obstinacy or caprice, but such a paralysis and distortion of will as to prevent the victim thereof from engaging in the act of consummation. From this paralysis and distortion the incapacity arises. I have said that these instances are rare and most extreme, while of course Courts of law must be alert to dissever them and differentiate them from cases arising from any minor cause such as the obstinacy to which I have referred. Otherwise the marriage tie could be severed by a thing which is the very opposite of incapacity, not a powerlessness of will, but a resolute determination of will in the direction contrary to duty.

(1) [1924] A.C. 349, at 366. (2) [1924] A.C. 349.

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A careful reading of the evidence in the case now before us leads me to the conclusion that the appellant has not made a case for a decree of nullity. I should therefore dismiss the appeal with costs.

Appeal allowed.

Solicitors for the appellant: *MacBrien & Bailey.*

Solicitors for the respondent: *Kester & Kerr.*

1941
* Oct. 20, 21, 22, 23, 24.
1942
* Feb. 3.

EDGAR J. WHITFORD (DEFENDANT).....APPELLANT;

AND

SELENA E. WHITFORD, ADMINISTRATRIX OF THE ESTATE OF JAMES E. WHITFORD, DECEASED (PLAINTIFF)... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Parent and child — Gift — Descent of property — Sum transferred from father's bank account to son's bank account—Death of father intestate —Transaction held to be a gift—Question whether gift was in advancement—Evidence—Burden of proof—Law of Nova Scotia—R.S.N.S., 1923, c. 147, s. 13—Appeal—Claim for accounting—Matters of fact—Concurrent findings in courts below.

A deceased, resident in Nova Scotia, died intestate. In his lifetime a sum to his credit in his bank account was transferred to a bank account in the name of his son. In disputes after deceased's death, between his widow, suing as administratrix of his estate, and the son, in regard to transactions or arrangements in deceased's lifetime in connection with his affairs, one question was, whether said sum belonged to deceased's estate, or whether it was transferred as a gift, and, in the latter case, whether it was a gift to the son in advancement on account of or in lieu of his distributive share in the estate.

Held: On the evidence, the transfer was a gift to the son; and, further (reversing on this point the judgment of the Supreme Court of Nova Scotia *en banc,* 16 M.P.R. 131), it was not a gift in advancement but an absolute gift. The question whether it should be held to have been made in advancement must be decided in accordance with the Nova Scotia statute, R.S.N.S., 1923, c. 147 (*Of the Descent of Real and Personal Property*) and that statute alone. By force of s. 13 thereof, there is no presumption, and the burden of proof is on the party asserting, that the gift was made in advancement. Furthermore, in view of clauses (*a*), (*b*) and (*c*) of s. 13, it would seem to follow that, in order that the intention of advancement may be held as established "by evidence taken upon oath before a court of justice" under the provision in clause (*d*), the evidence

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

must be of such a character that it is as forceful, cogent and unequivocal as the writing required by clauses (*a*), (*b*) and (*c*). This reasoning is further strengthened by the words "and not otherwise" at the end of s. 13. Upon the above view of the law, and upon the evidence, it could not be said that the gift was made in advancement.

Appeals on certain other questions decided by said Court *en banc* were dismissed. As to certain items for which appellant was held liable to account, this Court, having held that the contest in regard to them was strictly confined to matters of fact, pointed out that appellant "comes to this Court with concurrent findings against him in respect of matters strictly of fact and as to which he was unable to point to any specific and material mistake in the decisions appealed from", and that this Court found no reason to interfere therewith.

APPEAL by the defendant from part of the judgment of the Supreme Court of Nova Scotia *in banco* (1) and cross-appeal by the plaintiff from part of that judgment. The plaintiff sued as administratrix of her deceased husband's estate. The defendant was the son of the said deceased. The disputes between them were in regard to transactions or arrangements in the deceased's lifetime in connection with his affairs. The questions in dispute on the present appeal are set out in the reasons for judgment now reported.

W. P. Potter K.C. and *G. H. Crouse* for the appellant.

C. B. Smith K.C. for the respondent.

The judgment of the Court was delivered by

RINFRET J.—James E. Whitford died intestate at Chester, in the County of Lunenburg, Province of Nova Scotia, on the 10th day of May, 1938.

The deceased left, surviving him, his widow, Selena E. Whitford, who was appointed administratrix of his estate and who is the respondent, Edgar J. Whitford, a son by his first marriage, who is the appellant, and Fanny Cleveland, wife of Bernard Cleveland, of Halifax, a daughter by his marriage with the respondent.

The respondent, in her capacity of administratrix, brought action against the appellant for:

(*a*) an accounting of all moneys received by the appellant for, or on behalf of, the deceased, or of all dealings and transactions between the deceased and the appellant, and of all transactions carried out by the appellant for

(1) 16 M.P.R. 131; [1941] 2 D.L.R. 701.

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the deceased under a power of attorney dated June 1st, 1931, for the period extending from the said 1st of June, 1931, to the 10th day of May, 1938;

(*b*) a declaration that a certain sum of $34,968.45, withdrawn from the Bank of Nova Scotia, in Chester, by the late James E. Whitford, on or about the 15th day of June, 1931, and transferred to the account of the appellant, was moneys belonging to the estate of the deceased and payable by the appellant to the respondent; or, in the alternative, that the said sum was an advancement on account of, or in lieu of, the appellant's distributive share in the late James E. Whitford's estate;

(*c*) a declaration that the transfer of real property to the appellant by the late James E. Whitford by deed dated the 19th May, 1928, was null and void and bad in law because it was a testamentary document executed contrary to the terms and provisions of the Nova Scotia statute thereto relating; or, in the alternative, that this transfer was an advancement on account of, or in lieu of, the appellant's distributive share in the estate of the late James E. Whitford.

The appellant counterclaimed for a declaration that the purported transfer, on June 6th, 1938, by the appellant to the respondent of a balance of $12,387.75 standing to the credit of the joint account in the name of both the deceased and the appellant was null and void and without consideration, should be set aside and the money returned to the appellant.

The appellant also counterclaimed for an accounting by the respondent of the money received by her from the deceased; but that was subsequently abandoned.

The action was tried before His Lordship Mr. Justice Doull, who decided:

(1) that the transfer of real property dated May 19th, 1928, was not an attempted testamentary disposition; that it was a gift by the deceased to the appellant, but a gift in advancement;

(2) that the appellant was obliged to account to the respondent for moneys received by him in connection with certain transactions, including the moneys handled by the appellant from the time of the execution of the power of attorney of June 1st, 1931, to the death of the deceased;

(3) that the transfer by the deceased to the appellant of the sum of $34,968.45, on June 15th, 1931, was a gift to the appellant, but a gift in advancement;

(4) that the appellant's claim for the return of the balance of the joint account ($12,387.75) should be dismissed, the learned judge holding that the creation of the account was not a gift by the deceased to the appellant of a joint interest therein but an account for the convenience of the deceased; and that, therefore, it belonged to his estate;

(5) that the counterclaim of the appellant should be dismissed.

On appeal to the Supreme Court of Nova Scotia *in banco* the decision of the learned trial judge was affirmed, except in the following respect:

The lands described in the deed of conveyance of the 19th of May, 1928, were declared to have been an unconditional gift, not a gift in advancement. (Mr. Justice Carroll, dissenting, would have declared that the transfer of the bank account of $34,968.45 was also an unconditional gift).

In this Court, the appellant contended that the judgments appealed from were erroneous in failing to apply to the gift of $34,968.45 transferred by the deceased to the appellant on the 15th of June, 1931, the same reasoning as was applied to the gift of the lands made in the deed of May 19th, 1928, and to declare accordingly that the money gift was also an unconditional gift for the same reasons that the gift of the lands was declared to have been so made.

The appellant further contended that no duty to account was ever undertaken by him, and that, if it is to be implied that he was under such a duty, he had accounted; further, that, at all events, no such duty to account existed in respect of certain specific transactions dealt with in the judgment of the trial judge; and, finally, that the order with regard to the balance of $12,387.75 standing to the credit of the joint account should be reversed and that the purported transfer of such balance by the appellant to the respondent, on June 6th, 1938, should be set aside.

The respondent cross-appealed with regard to the item of $34,968.45, contending that this money belonged to the estate and had not been given by the deceased to the

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appellant. There was no cross-appeal by the respondent with respect to the order of the Court of Appeal concerning the gift of lands, of May 19th, 1928, and the decision on this point is, therefore, left undisturbed.

At the conclusion of the argument of counsel for the appellant before this Court, it was intimated that we would not require to hear counsel for the respondent, except as to the following three items:—

(1) The transfer of the bank account of $34,968.45; as to this, counsel for the respondent was, in any event, entitled to be heard in connection with her cross-appeal;

(2) The specific transaction with one Harvey Hatt;

(3) The sum of $4,912.65 in connection with the Corkum and Mader transaction.

The three items just enumerated are, therefore, those to which we must now turn our attention.

It will be convenient to take up first the bank account of $34,968.45, which is the most important because of the amount involved and the points of law raised in connection therewith.

The deceased, James E. Whitford, carried on the business of farmer, drover, butcher and money lender. He was able to amass considerable wealth in the prosecution of his varied activities.

The appellant, his only son, left school at a very early age and began to assist his father on the farm and in his other businesses. He lived with his father and was not in the receipt of any wages. He undoubtedly was an important factor in contributing to his father's success in business.

On the 15th of June, 1931, the father had standing to his credit in the Bank of Nova Scotia, at Chester, a sum of $34,451.73.

Mr. Bonnezen was then local manager of the Bank. His evidence on this matter is as follows:

Counsel having shown to him a bank withdrawal slip wherein James Whitford acknowledged to have "received from the Bank of Nova Scotia the sum of thirty-four thousand nine hundred and sixty-eight 45/100 dollars, balance of account and interest to date to be charged to Account No. 1222", he stated that the slip was made in his own handwriting. His recollection was that, a few

days before, the appellant, Edgar J. Whitford, called at the bank and they discussed the matter of the account being transferred from the father's name to the son's; and he drew this withdrawal slip, having computed the interest to the end of the month, i.e., to the end of June, 1931. He handed it to Mr. Edgar Whitford and thinks he also suggested that he might also have a witness, although, as he said, it is not customary to have a witness on withdrawal slips.

It was only because of the large amount involved that the witness was advising him in that way to the best of his ability.

His recollection was that Mr. Edgar Whitford said his father was simply contemplating transferring the account to his (the son's) name; he did not assign any reason, nor did the witness consider it his duty to cross-question either party as to their motives; they simply came to him as a business man and asked his advice.

Having filled out the withdrawal slip, he gave it to Edgar Whitford. Later, on the 15th June, one Roy Nauss came into the bank and asked him to step outside to speak to Mr. James E. Whitford. He did so, and the old gentleman handed him the bank book. The withdrawal slip was folded up inside the book. Mr. Bonnezen started to open it and James E. Whitford made a gesture. Bonnezen said to the old gentleman: "Do you acknowledge this as your signature?" (on the slip withdrawal). And he said: "I do." Bonnezen said: "This is your wish?" And the old gentleman assented. Bonnezen then adds:

> I simply complied with his wishes. I retained the bank book and the slip until the 2nd of July, when I issued a fresh book in the name of Edgar J. Whitford, which you will find there with his signature on it.

Bonnezen, immediately upon having returned to his office, wrote on the withdrawal slip the following endorsement:

> At 9.25 a.m. on 15th June, 1931, Roy Nauss called at Bank and asked the Mgr. to step outside and speak to Mr. Whitford. I found Mr. Jas. E. Whitford and his son together in the latter's car and the former stated within signature was his and that the transfer was in accordance with his wishes. Edg. Whitford and Roy Nauss were in the car at the time.
>
> (Sgd.) R. T. B. Bonnezen, Mgr.
>
> Witness to the visit of Roy Nauss to the Bank as aforesaid.
>
> (Sgd.) K. M. Hume, Teller.

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As stated by Mr. Bonnezen, on 2nd July, that is: after the month of June, for which the interest had been calculated to make up the total of $34,968.45, the latter sum was put to the credit of the appellant in a fresh account opened under number 3061.

The trial judge and all the judges of the Supreme Court *in banco,* upon this evidence and the other circumstances testified to in the course of the trial, held that there was a gift of the amount in question to the appellant by his father. On the record, these concurrent findings are amply warranted; and there would be no justification to disturb them in this Court. The cross-appeal therefore fails.

But the question remains whether, as held by the learned trial judge and the majority of the Court *en banc,* this gift should be held to have been made in advancement.

Now, there exists in Nova Scotia some statutory provisions dealing with gifts or grants made in advancement by an intestate during his lifetime. They are to be found in sections 8-13 inclusive of ch. 147 of the Revised Statutes of 1923. The material section concerning the matter now under discussion is expressed as follows:

> 13. Every gift or grant made by an intestate in his lifetime to a child or grandchild shall be deemed to have been made in advancement if,—
>
> (*a*) it is so expressed in writing in a grant thereof; or
>
> (*b*) it is so charged in writing by the intestate; or
>
> (*c*) it is so acknowledged in writing by such child or grandchild; or
>
> (*d*) it is proved to have been so made by evidence taken upon oath before a court of justice,
>
> and not otherwise.

As a consequence of the existence of this provision, a reference to English decisions and to statements of English textbook writers, under a different law and different statutes, may, no doubt, be interesting; but we apprehend that, in this case, the matter stands to be decided in accordance with the Nova Scotia statute—and with that statute alone.

Indeed, it may be said here as Boyd C. said of the Ontario statute, on the same subject-matter, in the case of *Re Hall* (1):

> The English cases I have consulted exhibit a very peculiar and anomalous state of the law. It seems to be held that, for the purposes of distribution, loan, gift, and advancement may be treated as almost

(1) (1887) 14 O.R. 557, at 558-559.

interchangeable terms. * * * But our statute requires that some certainty of definition be given to the term "advancement", by the very fact that it is to be evidenced by writing. * * *

and, in *Filman* v. *Filman* (1), Spragge, V.C., refers to the English cases and says the provisions inserted in the Ontario Act were to avoid the questions which have arisen in England as to what constituted an advancement. With due deference, the same may be said of the Nova Scotia statute, although the Ontario Act requires a writing and does not contain any provision similar to clause (*d*).

While apparently in England, under certain circumstances, a gift may be presumed to have been made in advancement, it is clear that in Nova Scotia such a presumption is never to be admitted. By force of section 13, the rule is that a gift or grant, made by an intestate in his lifetime to a child or grandchild, shall not be deemed to have been made in advancement. In order that such a gift or grant may be held to have been made in advancement, it must have been so expressed or charged in writing by the intestate, or it must be so acknowledged in writing by the child or grandchild. The only other case where a gift or grant made to a child or grandchild may be held to have been in advancement is "(*d*) if it is proved to have been so made by evidence taken upon oath before a court of justice". And, so that there may be no doubt about the intention of the Legislature, section 13 adds: " and not otherwise ".

This, in our view, means, in the first place, that the burden of proof is on the party asserting that the gift is in advancement. Therefore, it excludes presumptions; for, as well said by Graham J. (with whom Archibald J. concurred), in his reasons for judgment in the present case:

If the presumption applied, the burden of proof would be on the other side; and the party asserting advancement might stand upon it and produce no evidence. That is not possible in face of the words of our statute.

It cannot be that the Legislature, when enacting a statute whereunder a gift or grant shall not be deemed to have been made in advancement, unless " it is proved to have been so made " in certain specific ways therein enumerated, should be understood to have intended that the advancement may be proved by evidence based upon presumption.

(1) (1869) 15 Gr. Ch. 643, at 647-8.

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Furthermore, if the gift or grant cannot be deemed an advancement unless expressed in writing, or charged in writing, by the grantor, or acknowledged in writing by the grantee, as required by subsections (*a*), (*b*) and (*c*), it would seem to follow that, in order that the intention of advancement may be held as established "by evidence taken upon oath before a court of justice", the evidence must be of such a character that it is as forceful, cogent and unequivocal as the writing required by subsections (*a*), (*b*) and (*c*).

This reasoning is further strengthened, as already mentioned, by the addition at the end of section 13, of the words: "and not otherwise". These words, if they are to be given a meaning, must evidently exclude certain kind of evidence; and, therefore, it cannot be accurate to say that the proof required under the statute "is subject to the ordinary rules of evidence", which is stated by the learned trial judge as the principle by which he was guided in reaching the conclusion that the gift of $34,968.45 had been made in advancement to the appellant by his father.

Upon that view of the Nova Scotia law on the subject, it must be found that there is absolutely no evidence in the record to the effect that the gift of the bank account of $34,968.45 was made in advancement at the time when the father gave that amount to the appellant. There is no writing in which such an intention was expressed, or charged, by the father, or in which it was so acknowledged by the appellant. There is no evidence of any statement that the gift was "so made" on the 15th of June, 1931.

In order to satisfy the burden of proof put upon her, as pointed out by Carroll, J., in the Court of Appeal, the respondent is compelled to rely on certain statements made by the appellant himself, when he was heard as a witness on her behalf.

Truly, the learned trial judge stated that he thought he should "regard the defendant's evidence, where it is in conflict with others", with some suspicion; and in cases where he is in conflict with the plaintiff, the learned judge added: "I prefer to believe her". But, on the point we are now discussing, this statement of the learned trial judge has no application, for the evidence of the appellant with regard to the declarations made by the intestate

regarding this matter stands uncontradicted; and, in fact, the respondent must depend on the appellant's evidence in her attempt to establish the advancement.

So that the respondent finds herself in this dilemma: Either the appellant, upon this point, is to be disbelieved, and the result is that the respondent is left with no evidence at all relating to the advancement; or, for the proof that the gift was made in advancement, the respondent must look to the evidence of the appellant, and, therefore, the question of his credibility must not be allowed to enter into the discussion. The respondent is bound to ask the Court to put a construction upon the appellant's evidence as it was given.

And what the appellant stated as witness with regard to the $34,968.45, is as follows:

> He [his father] told me he was going to give me the bank account; that there was plenty in his estate for all of us afterwards.
>
> * * *
>
> Q. [to the defendant] Didn't he tell you he wanted you to have—he wanted Mrs. Whitford and Mrs. Cleveland [the daughter] to have the money and you to have the rest of the property?
>
> A. Yes, he told me that the property was of no use to Mrs. Whitford or his daughter; he wanted me to pay in cash the $15,000.
>
> Q. When had he told you that for the first time?
>
> A. Shortly after the power of attorney.
>
> Q. Before you had the bank account transferred?
>
> A. No, after.

In another part of his evidence, the appellant stated that his father's wish was that, after the latter's death, he should give $10,000 to his widow and $5,000 to his daughter, as their respective share in the estate.

As a matter of fact, shortly after his father's death, the appellant offered the money to the respondent and her daughter. The offer appears to have been accepted; but, at the last moment, something prevented the transaction from being completed; and then ensued the present lawsuit.

This evidence—which is all that is to be found in the record on the subject—falls far short of establishing, on the part of the father, an intention of making an advancement within the requirements of section 13 of the statute.

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Indeed, it may lead to a contrary conclusion; and, as was said by Carroll, J., it tends to show that "these gifts were absolute".

But the least that may be said is that the father's declarations, as reported by the appellant, do not manifest an intention of making a gift in advancement; and they do not supply, for the purposes of the respondent's contention, such cogent and convincing evidence as, in our view, is required by the Nova Scotia statute to decide that the gift is proven to have been made in advancement.

In the Court *en banc,* Carroll, J., was of opinion that the gift of the bank account was an absolute gift. Graham and Archibald, JJ., expressed grave doubts whether "the transfer of the bank account was an advancement", although they stated they did not want to "dissent from that conclusion of the trial judge".

But, with respect, we think that the conclusion of the trial judge on this point was arrived at as a consequence of a construction of the Nova Scotia statute with which we find ourselves unable to agree; and, as a result, applying to the facts and to the evidence what we conceive to be the intention of the Legislator, we conclude that the respondent has failed to establish that the gift of $34,968.45 was made in advancement to the appellant by his father.

As for the two other items on which, at the hearing, we expressed our desire to obtain the benefit of the argument of the respondent's counsel, after further consideration, we agree with the learned Chief Justice of Nova Scotia that the contest in regard to these transactions is strictly confined to matters of fact; and, upon this point, all the members of the Court *en banc* agreed with the Chief Justice.

Under the circumstances, the appellant's position in this Court on these two items is not, of course, even as favourable as it was in the Court of Appeal; for he comes to this Court with concurrent findings against him in respect of matters strictly of fact and as to which he was unable to point to any specific and material mistake in the decisions appealed from. We do not find any reason why we should interfere with the judgments *a quo* with regard to these two items.

The combined result in favour of the appellant, both in the Supreme Court *in banco* and in this Court, is that he finally succeeds on the contest concerning the deed of lands dated May 19th, 1928, and the gift of the bank account of June 15th, 1931, by far the two most important items in the litigation between the parties. We think, therefore, justice would be done if the order as to costs in the trial judgment is set aside and replaced by the following:

"The plaintiff will recover from the defendant one-third of her costs of action to be taxed, and all the costs of the taking of accounts before the Referee, including the costs of the Referee; and she will be entitled to her costs of the counterclaim."

In the Supreme Court *in banco,* the appellant should recover against the respondent his costs of and occasioned by the respondent's cross-appeal which was there dismissed. He should also recover his costs of the appeal to that Court incidental to, or connected with, the issues on which he ultimately succeeds in this Court (as if the Supreme Court *in banco* had given the judgment we are now rendering); and the respondent should recover against the appellant her costs of the appeal to the Supreme Court *in banco* incidental to, or connected with, the issues on which she ultimately succeeds in the present Court (again as if that Court had given the judgment we are now rendering).

The appeal is allowed to the extent above indicated, with full costs of appeal to the appellant, and the cross-appeal is dismissed without costs.

Appeal allowed in part, with costs of appeal.

Cross-appeal dismissed without costs.

Solicitor for the appellant: *W. P. Potter.*

Solicitor for the respondent: *L. A. Lovett.*

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* Dec. 18, 19.
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* Feb. 23.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF)..... APPELLANT;

AND

NOXZEMA CHEMICAL COMPANY OF CANADA, LIMITED (DEFENDANT)... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Crown—Sales and Excise taxes—"Fair price on which the tax should be imposed", as determined by the Minister under s. 98 of Special War Revenue Act (R.S.C. 1927, c. 179, as amended by 23-24 Geo. V, c. 50, s. 20).

Respondent, a company which manufactured and sold toilet articles and medicated preparations, had, prior to January 1, 1939, sold its products direct to chain stores and wholesale dealers and paid sales and excise taxes on the basis of the prices charged. In December, 1938, a company—hereinafter called B. Co.—was incorporated for the purpose of selling in Canada respondent's and other products, and by an agreement of January 1, 1939, B. Co. became sole distributor in Canada of respondent's products, and was to sell them at the prices previously charged by respondent (unless respondent designated other prices) and to pay to respondent certain prices, which, it was calculated, were less than B. Co's selling prices by amounts estimated to have been the cost to respondent of selling, of which it was relieved. Respondent thereafter paid sales and excise taxes on the basis of prices received by it from B. Co. The Minister of National Revenue, in expressed pursuance of the powers vested in him by s. 98 of the *Special War Revenue Act* (R.S.C., 1927, c. 179, as amended by 23-24 Geo. V, c. 50, s. 20), determined that these last-mentioned prices were less than the fair prices on which such taxes should be imposed, and that the prices at which B. Co. sold the goods to dealers were the fair prices on which the taxes payable by respondent should be imposed; and by information in the Exchequer Court the Crown sued for the further taxes claimed (and penalties). The claim was dismissed ([1941] Ex. C.R. 155), and the Crown appealed.

Held: The appeal should be allowed and the Crown should have judgment for the additional taxes payable as a result of the Minister's determination (and also for the penalties provided for by s. 106 (5) of the Act).

Per the Chief Justice and Davis J.: The Minister's determination under s. 98 is a purely administrative act and is not open to review by the Court; and even if it may be said to be of a quasi-judicial nature, then all that was necessary was that the taxpayer be given a fair opportunity to be heard, and to correct or contradict any relevant statement prejudicial to its interests (*Board of Education* v. *Rice*, [1911] A.C. 179, at 182), and that was done.

Per Rinfret, Kerwin and Hudson JJ.: S. 98 confers upon the Minister an administrative duty which he exercised and as to which there is no appeal; and in any event it was clear that he acted honestly and

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

impartially and gave respondent every opportunity of being heard; and his determination must be held to be binding. (*Spackman* v. *Plumstead District Board of Works*, 10 App. Cas. 229, at 235, cited).

Per Curiam: Pioneer Laundry v. *Minister of National Revenue*, [1940] A.C. 127, is not applicable to the present case.

APPEAL by the Crown from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing the Crown's claim (sued for, together with penalties, by information of the Attorney-General of Canada, in that Court) against the respondent for sales taxes and excise taxes, which claim was based on a determination by the Minister of National Revenue (set out in the reasons for judgment of Kerwin J. *infra*) that certain prices, which the respondent claimed were the prices on which the taxes should be imposed, and on which it had paid them, were less than the fair prices on which the taxes should be imposed, and that other prices mentioned in the determination were the fair prices on which the taxes payable by respondent should be imposed. The Minister's determination stated therein that it was made "pursuant to the powers vested by section 98 of the Special War Revenue Act" (R.S.C. 1927, c. 179, as amended by 23-24 Geo. V, c. 50, s. 20).

J. C. McRuer K.C. and *W. R. Jackett* for the appellant.

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

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

DAVIS J.—Much discussion took place before us on the argument with reference to the decision in the *Palmolive* case (2). But that case turned upon its own special facts and I do not think the decision governs the facts of the case now before us. An entirely different question was raised. The judgment of this Court in that case was delivered February 7th, 1933, and shortly thereafter Parliament amended the *Special War Revenue Act* by ch. 50, 1932-33, sec. 20, adding a provision (sec. 98) that where goods are sold at a price (that is, by the manufacturer or producer) "which in the judgment of the Minister" is

(1) [1941] Ex. C.R. 155.
(2) *Palmolive Mfg. Co. (Ont.) Ltd.* v. *The King; The King* v. *Colgate-Palmolive-Peet Co. Ltd.*: [1933] S.C.R. 131.

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Davis J.

less than "the fair price on which the tax should be imposed", the Minister shall have the power to determine the fair price and the taxpayer shall pay the tax on the price so determined.

The important question that arises upon this appeal is one of law, as to the position of the Minister under this section of the statute—that is, whether his act is purely an administrative act in the course of settling from time to time the policy of his Department under the statute in relation to the various problems which arise in the administration of the statute, or whether he is called upon under the section of the statute to perform a duty of that sort which is often described as a quasi-judicial duty.

My own view is that it is a purely administrative function that was given to the Minister by Parliament in the new sec. 98; to enable him to see, for instance, that schemes are not employed by one or more manufacturers or producers in a certain class of business which, if the actual sale price of the product is taken, may work a gross injustice to and constitute discrimination against other manufacturers or producers in the same class of business who do not resort to such schemes which have the result of reducing the amount on which the taxes become payable. If that be the correct interpretation, in point of law, of the section in question, then the administrative act of the Minister is not open to review by the Court. It is to be observed that no statutory right of appeal is given.

If, on the other hand, the function of the Minister under the section may be said to be of a quasi-judicial nature, even then all that was necessary was that the taxpayer be given a fair opportunity to be heard in the controversy; and to correct or to contradict any relevant statement prejudicial to its interests. Reliance has consistently been put by the courts since 1911 upon the language of Lord Loreburn in *Board of Education* v. *Rice* (1):—

> In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as

(1) [1911] A.C. 179, at 182.

though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. Provided this is done, there is no appeal from the determination of the Board under s. 7, sub-s. 3, of this Act. The Board have, of course, no jurisdiction to decide abstract questions of law, but only to determine actual concrete differences that may arise, and as they arise, between the managers and the local education authority. The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari.

But here the taxpayer very frankly admits that its solicitor was afforded every opportunity by the Minister to be heard and did in fact state in detail the taxpayer's position in the matter, supplemented with such statements and references as he thought advisable, and that the Minister's decision was not made until after that had been done.

A good deal was also said in argument about the judgment of the Judicial Committee in the *Pioneer Laundry* case (1), and an attempt was made by the respondent to show that the Minister here had acted against "proper legal principles", but I cannot see that there is any valid ground for that contention. In the *Pioneer Laundry* case (1) the manufacturer had a statutory right to an allowance for depreciation on its machinery. The amount of that allowance was to be "such reasonable amount as the Minister, in his discretion, may allow". The Minister said he would allow nothing, and in the reasons of his Commissioner of Taxation which he accepted there were very fairly and fully set out the grounds upon which no allowance was arrived at; and those grounds were held to be against "proper legal principles". I cannot see that the decision in the *Pioneer Laundry* case is relevant to the facts of this appeal.

I should therefore allow the appeal and set aside the judgment of the Exchequer Court. The appellant should have judgment for the additional sales and excise taxes payable as a result of the Minister's determination. The appellant is also entitled to the penalties provided for by subsection 5 of section 106 of the Act and the costs of the action and of the appeal.

(1) *Pioneer Laundry and Dry Cleaners, Ltd.*, v. *Minister of National Revenue*, [1940] A.C. 127.

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v.
NOXZEMA CHEMICAL COMPANY OF CANADA, LTD.

Davis J.

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

KERWIN J.—This is an appeal by His Majesty the King from a decision of the Exchequer Court dismissing an information exhibited by the Attorney-General of Canada against Noxzema Chemical Company of Canada, Limited. By this information the appellant claimed from the respondent, under the provisions of the *Special War Revenue Act*, certain amounts for sales and excise taxes and also penalties for non-payment of these taxes at the times specified in the Act.

In the course of its business, the respondent manufactures and sells toilet articles and medicated preparations, and the taxes are claimed in respect of sales of these goods made by the respondent in the period from January 1st to July 31st, 1939. Under section 80 of the Act, the respondent became liable to pay excise taxes, and under section 86, to pay sales taxes,—in each case on " the sale price " of the goods mentioned. The expression " the sale price " used in these two sections is not defined. The question for determination arises because of the action of the Minister of National Revenue, taken under the provisions of section 98:—

> 98. Where goods subject to tax under this Part or Under Part XI of this Act are sold at a price which in the judgment of the Minister is less than the fair price on which the tax should be imposed, the Minister shall have the power to determine the fair price and the taxpayer shall pay the tax on the price so determined.

Section 80 is in Part XI of the Act while section 86 is in the same Part (XIII) as section 98.

Prior to January 1st, 1939, the respondent sold its products direct to chain stores and wholesale dealers at tax-included prices and paid sales and excise taxes on the basis of these prices. On December 30th, 1938, a company called " Better Proprietaries Limited " was incorporated under the laws of the Province of Ontario, at the instance of J. M. Shaw, the President of the respondent company, and of one Andrews who was interested on behalf of Bromo-Seltzer Limited in the distribution of the latter's product Bromo-Seltzer. Better Proprietaries Limited was financed by Shaw and Andrews who each loaned the Company $2,500.

On January 1st, 1939, an agreement was made whereby Better Proprietaries Limited became the sole distributors

in Canada of the respondent's products. By that agreement it was provided that the same tax-included prices previously charged by the respondent for its products should be the prices to be charged by Better Proprietaries Limited unless otherwise designated by the respondent. Better Proprietaries Limited agreed to pay the respondent prices which it was calculated would net the respondent what it had previously received from dealers. That is, it was estimated that the difference between the two sets of prices was the cost of selling the products, of which cost the respondent was relieved when Better Proprietaries Limited took over that expense. It was also agreed that should J. M. Shaw at any time cease to be President and General Manager of the latter company, the respondent should have the right to cancel the agreement.

During the period from January 1st to July 31st, 1939, the respondent made sales of the goods mentioned to Better Proprietaries Limited at the prices set out in the contract between the two companies. As a result of these sales it became liable to pay to His Majesty sales taxes and excise taxes not later than the last day of the first month succeeding that in which the sales were made. It duly paid these taxes on the basis of the sale prices actually received by it from Better Proprietaries Limited. In pursuance of section 98 of the Act, the Minister determined on or about September 27th, 1939, that these sale prices were less than the fair prices on which the taxes should be imposed, and also determined what those fair prices should be. This determination appears from the following memorandum:—

Ottawa, September 27th, 1939.

Whereas the Noxzema Chemical Company of Canada Limited did, prior to January 1st, 1939, sell the whole of its manufactured products to various wholesalers and chain stores, tax-included, and account for excise and sales tax on the basis of such sales to the trade;

And whereas, commencing January 1st, 1939, the Noxzema Chemical Company of Canada Limited entered upon an arrangement with Better Proprietaries Limited whereby the latter company obtained exclusive selling rights of the products of the Noxzema Chemical Company of Canada, Limited;

And whereas, during the period January 1st to July 31st, 1939, the Noxzema Chemical Company of Canada sold or purported to sell to Better Proprietaries Limited the whole of its manufactured products for resale to the wholesalers and chain stores aforesaid;

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And whereas, in the judgment of the undersigned, the prices obtained by the Noxzema Chemical Company of Canada Limited from sales to Better Proprietaries Limited were less than the fair prices on which sales tax and excise tax should be imposed.

The undersigned, therefore, pursuant to the powers vested by Section 98 of the Special War Revenue Act, does hereby determine that the prices at which Better Proprietaries Limited sold the goods in question to the wholesalers and chain stores were the fair prices on which the taxes payable by the Noxzema Chemical Company of Canada should be imposed.

(Sgd.) J. L. Ilsley,
Minister of National Revenue.

On or about October 5th, 1939, notice was given to the respondent of this determination and of the additional sales and excise taxes payable on the basis therein set forth, and a demand for payment was made. This demand not being complied with, the information was filed in the Exchequer Court under the provisions of section 108 of the Act, the first four subsections of which read as follows:—

108. 1. All taxes or sums payable under this Act shall be recoverable at any time after the same ought to have been accounted for and paid, and all such taxes and sums shall be recoverable, and all rights of His Majesty hereunder enforced, with full costs of suit, as a debt due to or as a right enforceable by His Majesty, in the Exchequer Court or in any other court of competent jurisdiction.

2. Every penalty incurred for any violation of the provisions of this Act may be sued for and recovered

(*a*) in the Exchequer Court of Canada or any court of competent jurisdiction; or

(*b*) by summary conviction under the provisions of the *Criminal Code* relating thereto.

3. Every penalty imposed by this Act, when no other procedure for the recovery thereof is by this Act provided, may be sued for, prosecuted and recovered with costs by His Majesty's Attorney-General of Canada, or, in the case of penalties under Parts I, II or III, in the name of the Minister of Finance, and in the case of penalties under Parts IV to XIV, inclusive, in the name of the Minister of National Revenue.

4. Any amount payable in respect of taxes, interest and penalties under Parts XI, XII and XIII remaining unpaid, whether in whole or in part after fifteen days from the date of sending by registered mail of a notice of arrears addressed to the taxpayer, may be certified by the Commissioner of Excise and on the production to the Exchequer Court of Canada or judge thereof or such officer as the Court or judge thereof may direct, the certificate shall be registered in the said Court and shall, from the date of such registration, be of the same force and effect, and all proceedings may be taken thereon, as if the certificate were a judgment obtained in the said Court for the recovery of a debt of the amount specified in the certificate, including penalties to date of payment as provided for in Parts XI, XII and XIII of this Act and entered upon the date of such registration, and all reasonable costs and charges attendant upon the registration of such certificate shall be recoverable in like manner as if they were part of such judgment.

The learned President considered that section 98 did not empower the Minister to fix the sale prices so as to include items which did not enter into the computation of the respondent's production costs and its sale prices, or authorize the Minister to fix those sale prices at other than the actual sale prices when they were not below the fair prices as between a manufacturer and a dealer, the dealer being an independent trading corporation. He decided that section 98 must be construed to contemplate a case where a producer has sold his goods to a dealer below the nominal price,—below an average of the prices of the other manufacturers of the same class of goods; and that there was no evidence to show that the sale prices from the respondent to Better Proprietaries Limited were less than the fair prices. On these grounds he dismissed the information.

In this Court, Mr. Carson relied on the decision of the Judicial Committee in *Pioneer Laundry* v. *Minister of National Revenue* (1). During the course of the trial, the President intimated that he considered this decision inapplicable, and it would appear from his reasons for judgment that he adhered to that view. With that opinion I agree. While in the *Income War Tax Act* there under review there was no appeal provided in terms from a decision of the Minister as to depreciation, there was an appeal from the determination as to the amount of taxes to be paid, and the proceedings which culminated in the decision of the Privy Council originated with an appeal taken from such determination. It was held that in arriving at the amount of the income taxes to be paid by the Pioneer Laundry & Dry Cleaners, Ltd., the Minister had actually not exercised the discretion left to him by the Act as to depreciation, and the matter was referred back to him in order that that should be done. In the present case, the Minister has considered and determined the two matters mentioned in section 98 of the *Special War Revenue Act*.

I therefore turn to the grounds upon which the President proceeded and which, of course, are relied upon by the respondent. I proceed upon the assumptions that Better Proprietaries Limited is an independent sales corporation and that the Minister thought otherwise. Even with these assumptions, we cannot be aware of all the reasons that

(1) [1940] A.C. 127.

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moved the Minister and, in any event, his jurisdiction under section 98 was dependent only upon his judgment that the goods were sold at a price which was less,—not, be it noted, less than what would be a fair price commercially or in view of competition or the lack of it,—but less than what he considered was the fair price on which the taxes should be imposed. The legislature has left the determination of that matter and also of the fair prices on which the taxes should be imposed to the Minister and not to the court. In my view, section 98 confers upon the Minister an administrative duty which he exercised and as to which there is no appeal. In such a case the language of the Earl of Selborne in *Spackman* v. *Plumstead District Board of Works* (1) appears to be particularly appropriate:—

> And if the legislature says that a certain authority is to decide, and makes no provision for a repetition of the inquiry into the same matter, or for a review of the decision by another tribunal, *primâ facie*, especially when it forms, as here, part of the definition of the case provided for, that would be binding.

In any event, it is quite clear that the Minister acted honestly and impartially and that he gave the respondent every opportunity of being heard, and, in fact, heard all it desired to place before him. Whatever might be the powers of the Exchequer Court, if proceedings had been taken under subsection 4 of section 108, as to which it is unnecessary to express any opinion, the taxes, if properly payable, are recoverable under subsection 1 of section 108 as a debt due to or as a right enforceable by His Majesty in the Exchequer Court or in any other court of competent jurisdiction. In view of the wording of section 98, nothing, I think, need be shown other than what appears in the present case and the obligation of the respondent is to pay taxes on the basis of the prices determined by the Minister.

It has not been overlooked that as of January 1st, 1939, Bromo Seltzer Limited entered into an agreement with Better Proprietaries Limited with reference to the sale in Canada of its product, in terms similar to the agreement between the respondent and Better Proprietaries Limited. Prior thereto Bromo Seltzer Limited had disposed of its product throughout Canada through a separate selling organization and the sales taxes were figured by it and accepted by the Minister on the basis of the prices which

(1) (1885) 10 App. Cas. 229, at 235.

it received from the selling organization. That organization had no connection whatever with Bromo Seltzer Limited but was a company engaged in marketing different products. After the agreement between Better Proprietaries Limited and Bromo Seltzer Limited, the latter paid, and the Minister accepted, sales taxes on its product on the basis of the prices received by it from Better Proprietaries Limited. Whether that course is still being followed, we do not know. Nor may we speculate as to what difference, if any, there is between the case of Bromo Seltzer Limited and the present case. The result of such a speculation could have no effect upon the matter to be determined in this appeal.

The appeal should be allowed, the judgment of the Exchequer Court set aside, and the appellant should have judgment for the additional sales and excise taxes payable as a result of the Minister's determination. The appellant is also entitled to the penalties provided for by subsection 5 of section 106 of the Act and the costs of the action and appeal.

Appeal allowed with costs.

Solicitor for the Attorney-General of Canada: *W. Stuart Edwards.*

Solicitor for the respondent: *Mulock, Milliken, Clark & Redman.*

CONTINENTAL SOYA COMPANY LIMITED (DEFENDANT) ..... APPELLANT;

AND

J. R. SHORT MILLING COMPANY (CANADA) LIMITED (PLAINTIFF). RESPONDENT.

1941
* May 20, 21, 22.
1942
* Feb. 23.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Validity—Infringement—Bleaching agent derived from vegetables (preferably from soya bean) for application to wheat flour—Discovery and invention—Patentability of product—"Manufacture or composition of matter" (s. 2 (d) of Patent Act, 1935, c. 32)—"Prepared or produced by chemical processes" (s. 40 of said Act)—Claims in patent—Whether too broadly expressed.

Continental Soya Co. Ltd., one of the defendants, appealed to this Court from the judgment of Maclean J., President of the Exchequer Court

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

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of Canada, [1941] Ex. C.R. 69, the appeal being from his holding that plaintiff's patent no. 345,534 for "Agent for Bleaching Flour" and claims in question in plaintiff's patent no. 347,251 for "Agent for Bleaching Flour and Process of Preparing the Same" were valid and had been infringed by said defendant.

Held: The appeal should be dismissed.

The invention embodied in the patents is a product derived from vegetables, preferably from the soya bean, and possessing properties which constitute it an effective bleaching agent for application to wheat flour. The inventors, while engaged in investigations with a view to the improvement of bread, noticed what they conceived to be evidence that the soya bean contains some substance which could be effectively utilized as such an agent. Further investigations established this as a fact and enabled them to define the conditions under which this substance could be extracted and prepared for effective use.

The phrase "manufacture or composition of matter" in s. 2 (*d*) of *The Patent Act, 1935* (25-26 Geo. V, c. 32) includes a product, which, as well as the process by which it is obtained, may be patentable, if it is new and useful, in the sense of the patent law.

Though the discovery, which might truly be said to have been accidental, was the starting point of the inventors, and indeed the presence in the soya bean (and in other vegetables) of a substance capable of bleaching wheat flour was the basis and essence of the process devised and the product obtained, yet there was more than discovery, there was invention in the patent sense, in the methods devised for the extraction of the bleaching substance and for the preservation of its activity, making it applicable effectively in the manufacture of bread; the invention was patentable both as product and as process.

The invention was not one relating to a substance "prepared or produced by chemical processes" within the meaning of s. 40 of said Act. Everything done by the inventors was in the nature of a physical, as distinguished from a chemical, process. The application of heat for the purpose of drying the substance or the application of water for the purpose of stimulating germination could not bring either the process or the product within the ambit of s. 40. The fact that the vital processes might involve chemical processes is immaterial and does not make s. 40 applicable.

The claims in the patent, in embracing the use of any substance, found in vegetables other than the soya bean, of the same nature as that obtained (by the means devised for its extraction and preparation) from the soya bean, the specification indicating the manner of obtaining the substance from other vegetables, were not too broadly expressed.

Said patent no. 345,534 (issued in 1934) was a patent for an agent produced by improved processes and not a patent for the same invention as that to which said patent no. 347,251 and patent no. 347,252 (re-issues respectively of patents issued in 1932) related.

APPEAL by Continental Soya Company, Ltd., one of the defendants, from the judgment of Maclean J., Presi-

dent of the Exchequer Court of Canada (1), in holding that, as between the plaintiff and said defendant, the plaintiff's patent no. 345,534 for "Agent for Bleaching Flour" and the claims in question in the plaintiff's patent no. 347,251 for "Agent for Bleaching Flour and Process of Preparing the Same" were valid and had been infringed by said defendant.

E. G. Gowling and *G. F. Henderson* for the appellant.

C. F. H. Carson K.C. and *B. V. McCrimmon* for the respondent.

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

THE CHIEF JUSTICE—The invention embodied in the patents upon which the respondents' action was brought is a product derived from vegetables and possessing properties which constitute it an effective bleaching agent for application to wheat flour. Mr. Haas and Mr. Bohn, the inventors, while engaged in investigations with a view to the improvement of bread, noticed what they conceived to be evidence that the soya bean contains some substance which could be effectively utilized as such an agent. Furthere investigations established this as a fact and enabled them to define the conditions under which this substance could be extracted from the soya bean and prepared for effective use. The soya bean is, it seems, not the only vegetable containing a substance which can be utilized thus, but for various reasons which need not be discussed it is much the most preferable source.

The claims with which we are concerned are all claims for monopoly in a product. Two governing points had best be first determined. First, the appellants broadly challenge the patentability of a product as such. I have considered with care the able argument presented by Mr. Gowling and Mr. Henderson and my conclusion is that the phrase "manufacture or composition of matter", in section 2 (*d*) of the *Patent Act*, does include a product, which, as well as the process by which it is obtained, may be patentable, if it is new and useful, in the sense of the patent law.

(1) [1941] Ex. C.R. 69; [1940] 4 D.L.R. 579.

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Duff C.J.

The distinction between discovery and invention must, of course, be borne in mind. The relevant principle, in my opinion, is stated in the treatise on Patents and Inventions by Lord Justice Luxmoore, H. Fletcher Moulton and A. W. Bowyer in the 2nd edition of Halsbury, at p. 591:—

> The difference between discovery and invention has been frequently emphasized, and it has been laid down that a patent cannot be obtained for a discovery in the strict sense. If, however, the patented article or process has not actually been anticipated, so that the effect of the claims is not to prevent anything being done which has been done or proposed previously, the discovery which led to the patentee devising a process of apparatus may well supply the necessary element of invention required to support a patent. This is certainly the case if it can be shown that, apart from the discovery, there would have been no apparent reason for making any variation in the former practice.

I agree with the conclusion of the learned President that there was more than discovery in the methods devised by Haas and Bohn for the extraction of the bleaching substance and for the preservation of its activity, making it applicable effectively in the manufacture of bread. I agree with him, in consequence, that the invention of Haas and Bohn is patentable, both as product and as process.

I think section 40 of the *Patent Act* recognizes the patentability of a product as such. I agree with the learned President that here everything was new. The discovery, which may truly be said to have been accidental, was the starting point, and indeed the presence in the soya bean (and in other vegetables) of a substance capable of bleaching wheat flour is the basis and essence of the process devised and the product obtained by the inventors. Nevertheless, I repeat, in my opinion what Haas and Bohn did amounted to, as the learned President has held, invention in the patent sense.

The second point is based upon section 40 of the *Patent Act*, which is in these words:—

> 40. (1) In the case of inventions relating to substances prepared or produced by chemical processes and intended for food or medicine, the specification shall not include claims for the substance itself, except when prepared or produced by the methods or processes of manufacture particularly described and claimed or by their obvious chemical equivalents. R.S., c. 150, s. 17 (1) Am.
>
> (2) In an action for infringement of a patent where the invention relates to the production of a new substance, any substance of the same chemical composition and constitution shall, in the absence of proof to the contrary, be deemed to have been produced by the patented process.

(3) In the case of any patent for an invention intended for or capable of being used for the preparation or production of food or medicine, the Commissioner shall, unless he sees good reason to the contrary, grant to any person applying for the same, a licence limited to the use of the invention for the purposes of the preparation or production of food or medicine but not otherwise; and, in settling the terms of such licence and fixing the amount of royalty or other consideration payable the Commissioner shall have regard to the desirability of making the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention.

(4) Any decision of the Commissioner under this section shall be subject to appeal to the Exchequer Court.

(5) This section shall apply only to patents granted after the thirteenth day of June, 1923. R.S., c. 150, s. 17.

I do not think it is necessary to consider whether we have here a substance " * * * intended for food". The substance in question is not, I am satisfied, one "prepared or produced by chemical processes", within the meaning of this enactment. Everything done by Haas and Bohn is in the nature of a physical, as distinguished from a chemical, process. I do not think the application of heat for the purpose of drying the substance, and for that purpose alone, can bring either the process or the product within the ambit of the section. The same may be said with regard to the application of water for the purpose of stimulating germination. The vital processes may, it may be assumed, involve chemical processes, but that, in my opinion, is immaterial. If that were sufficient to make section 40 applicable, it would be enough to say that, the soya bean being a natural vegetable growth, everything contained or derived from it is produced by chemical processes.

There are two further points for consideration. Mr. Gowling pressed with great vigour the argument that the claims are too broadly expressed. The answer to the argument is this: The inventors claim that they have devised a means for obtaining and have obtained from vegetable sources a substance which can be (and have produced it in such a form that it can be) efficaciously applied for bleaching wheat flour for and in the baking of bread; such a substance, the inventors say, may be found not only in the soya bean but in other vegetables. The soya bean, for the reasons mentioned, being by far the most preferable source, they give detailed directions for the extraction

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and preparation of this substance from the soya bean, but they also indicate the manner of obtaining it from other sources; and the claims embrace the use of any substance of the same nature found in other vegetables. I do not think that in these circumstances they have spread their net too wide.

It is also contended that the patent comes under the ban of sections 42 and 26 (1) (*b*). I think Mr. Carson's answer to this contention is sufficient; I agree with the conclusions of the learned President that the processes claimed in Exhibit 5* are different and improved processes, while the description in Exhibit 7* was published too late to bring it within the application of section 26 (1) (*b*).

In connection with this point, counsel for the respondents very properly calls our attention to the proceedings in the Patent Office. On the 11th of February, 1929, Haas and Bohn made application for a Canadian patent. The Commissioner of Patents ruled that there were more than two separate and independent subject-matters of invention claimed in the application: a process of bread making; a process for bleaching flour; a bleaching agent; a food product; a decolorization agent; a process for preparing a bleaching agent; a process of preparing a bread dough, and a wheat flour.

As the result of discussions between the applicants and the Patent Office, two patents were issued. These were No. 319,123, dated the 19th of January, 1932, and entitled a patent for "Bakery Product and Process of Bleaching Flour while preparing Dough", and No. 326,416, dated the 27th of September, 1932, entitled "Agent for Bleaching Flour and Process of Preparing the Same". The specifications in the second of these patents disclosed methods for obtaining the bleaching agent (described as an enzyme, or enzymelike substance); one of these methods is:—

> Soak the beans for twelve to forty-eight hours in water of approximately room temperature, using enough water to cover the beans at all times. At the end of the steep period, the water is drained off and the beans are well washed with two or three changes of fresh water. At this point the beans have swelled to about three times their original size. After draining off the wash water, the beans are ground in a mill which

* Exhibit 5 was patent no. 345,534. Exhibit 7 was patent no. 347,251.

reduces them to a paste or sludge. This paste or sludge is thoroughly mixed with a corn-starch or corn flour or other cereal flour which has preferably been gelatinized to increase its water absorbing capacity.

The resulting mixture is a rather dry, friable mass. This mass is dried in vacuo at a temperature not exceeding 60° C. in order not to injure the enzyme, and it is then ground to a fine powder.

The quantity of soya bean material to be used for bleaching purposes was said to be between 0·15% and 0·45% of the quantity of flour to be bleached. All this appears in the re-issue patent no. 347,251, dated the 1st of January, 1935, entitled "Agent for Bleaching Flour and Process of Preparing the Same", one of the patents in question in this appeal.

The first of these two patents (issued in January, 1932, no. 319,123) was re-issued as no. 347,252, the 1st of January, 1935, a patent not in question in this appeal.

In October, 1932, Haas alone applied for a Canadian patent relating to new and useful improvements for "Bleaching Agent for Flour Dough and Process of Preparing Bleached Dough for Baking". The specification declares that the improvements are founded on the broad idea expressed in the patents already mentioned, no. 319,123 and no. 326,416, but the applicant had ascertained, it is stated, that 0·0625 of one per cent. of the same bleaching agent would be sufficient to effect the bleaching desired. Other methods of obtaining the bleaching enzyme in an active state are described. Specifically it is stated that one of the new methods disclosed renders unnecessary the soaking of the bean and the subsequent evaporation of the moisture. This method is described in detail in Patent no. 345,534, in these words:—

Wash the beans to free them from adhering dirt and immediately dry them at a temperature which must not be over 155° F. for a sufficient length of time to reduce their moisture content to 8% or less. It is preferable that the conditions of operation are so chosen that the temperature may be so controlled that it does not rise over 140° F. to 150° F. By this drying process the beans are prepared for milling. After drying the beans to the required moisture content, which may be readily determined by sample analysis, remove the beans from the drying apparatus and grind them to a flour, grinding them in such a way as to cause removal of the hulls as completely as possible by ordinary means, *i.e.*, aspiration. Then further reduce the hull-free material to a fine powder, a granulation similar to wheat flour. The finer the granulation, the better, as long as during the process the temperature of the material does not

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rise above 155° F. Under these conditions of drying, the activity of the material is not harmed, while higher drying temperatures would seriously impair the bleaching action of the beans. By this latter method the vegetable bleaching material is not subjected to any wetting action after granulation is begun or after the vegetable itself is modified from its original shape. As applied to soy-beans, the beans may be wet or otherwise treated in the process of cleaning them but after being cleaned the material is not further moistened at any stage to the very completion of the bleaching agent.

This method was compendiously referred to in the argument as the "dry process", as distinguished from the "wet process", described in the passage already quoted from patent no. 347,251.

It was ruled in the Patent Office that this application of October, 1932, included four separate and independent subject-matters of invention and the applicant was requested to confine the claims to one subject-matter. It was pointed out by the examiner that claims to a process and claims to its immediate product may be presented as a concrete invention in the same application. In the result three patents were issued on the 23rd of October, 1934, as follows:—

No. 345,532, entitled "Process of Making Bakery Products and Bleaching the Flour Thereof",

No. 345,533, entitled "Flour for Baking and Process of Preparing the Same", and

No. 345,534, entitled "Agent for Bleaching Flour".

The last mentioned of these patents comes in question in this appeal. The specification refers to the two patents above mentioned issued in 1932 (319,123 and 326,416); and the specification declares that the procedure disclosed in it for the preparation of the bleaching agent results in imparting to that agent specific characteristics which constitute an improvement on the agent as theretofore produced. One of these advantageous features is the capacity of the bleaching agent to retain its efficacy as such unimpaired for long periods of storage. Another feature emphasized as an improvement is the low moisture content of the product and the fact that in the course of production the substance possessing the bleaching properties is not moistened after the original cleaning of the exterior of the bean, or other vegetable.

The learned President has, I think, rightly held that the patent no. 345,534, entitled "Agent for Bleaching Flour", is a patent for an agent produced by improved processes and not a patent for the same invention as that to which patents no. 347,251 and no. 347,252 relate.

Haas' principal achievement, which was disclosed in the first group of patents mentioned, may be described in a sentence, or two. Haas discovered the presence of the bleaching substance in the soya bean; it was there in a state of nature. But soya bean flour known to contain this substance, and capable of being employed as a bleaching agent, had not been produced. Haas invented a means for producing a soya bean flour containing it which could be efficaciously employed for the purpose of bleaching wheat flour without impairing any of the qualities of the flour, or the bread, in the baking of which it should be employed, and disclosed the process and the conditions for ensuring its effective application for this purpose.

The second group of patents disclosed improvements on the methods disclosed in the earlier group and these have been sufficiently indicated above.

For the reasons given by the learned President, I think the argument based upon the French patent fails.

The appeal should be dismissed with costs.

CROCKET J.—I agree that this appeal should be dismissed with costs.

DAVIS J.—I agree in the dismissal of the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Matthew C. Holt.*

Solicitors for the respondent: *Tilley, Thomson & Parmenter.*

1941
*Nov. 24.
1942
*Mar. 3.

THE COMMISSIONER OF AGRICULTURAL LOANS OF THE PROVINCE OF ONTARIO (PLAINTIFF)..... APPELLANT;

AND

PEGGY MORROW IRWIN (DEFENDANT)..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Agreement to purchase land from tax sale purchaser—Stipulation that the agreement be void if the land be redeemed from tax sale—Redemption by party to the agreement—Question as to latter's right to avail himself of said stipulation under circumstances of the case and on construction of the agreement.

Appellant held a mortgage on farm land, on which there was a prior charge for an annuity to M., which became about $6,000 in arrears. There was also default on the mortgage and on taxes. The land was sold to respondent at a tax sale for $1,299.10. Appellant and M. had each a statutory right to redeem the land from the tax sale within one year. If appellant redeemed, that would leave M.'s claim in priority. Appellant agreed with respondent to buy the land from her for $3,000, paying $200 deposit, and to pay the balance on his getting title. Clause 7 of the agreement stipulated that, in the event of the land being redeemed from the tax sale, the agreement should have no effect and respondent would repay the $200. Later M. threatened to redeem; so appellant obtained for $3,000 a release of M.'s interest; and then redeemed. He sued respondent for repayment of said $200. Respondent denied liability and counter-claimed for the balance payable under said agreement (after giving credit for sums received as deposit and on redemption).

Held (Kerwin J. dissenting), affirming judgment of the Court of Appeal for Ontario ([1940] O.R. 489): Appellant's action should be dismissed and respondent's counter-claim allowed. Appellant could not by his own act bring about the event of redemption and claim the advantage thereof under said stipulation in his agreement with respondent, the agreement not specifically giving him such a right.

Per Kerwin J., dissenting: Appellant's object in entering into his agreement with respondent was to protect himself so far as possible from further loss in case M. did not redeem. The recitals therein showed that both appellant and respondent were aware that the land could be redeemed; and that the agreement to sell and purchase was subject to that right in whomsoever it might rest. Said clause 7 of the agreement provided for the event of the land being redeemed and had the same effect as if it were agreed that either party could, upon notice, determine the contract.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) reversing the judgment of Rose C.J.H.C. at trial (2).

(1) [1940] O.R. 489; [1940] 4 D.L.R. 338.

(2) [1940] O.R. 489, at 489-493.

*PRESENT:—Duff CJ. and Rinfret, Davis, Kerwin and Taschereau JJ.

The plaintiff held a mortgage on certain farm land. There was a prior charge on the land for an annuity to one Jemima Might for $60 monthly, which annuity became about $6,000 in arrears. The mortgagor defaulted on the annuity, the mortgage and the taxes. Pursuant to provisions of *The Assessment Act*, R.S.O. 1937, c. 272, the land was put up at a tax sale and thereon sold to defendant, on June 22, 1938, for $1,299.10. Under said Act the plaintiff and the said annuitant had each a right to redeem the land from the tax sale within one year therefrom, upon payment of said sum of $1,299.10 plus 10 per cent. thereof. If plaintiff redeemed, that would leave the annuitant's claim in priority. Plaintiff entered into an agreement with defendant, dated August 22, 1938 (set out in full in the judgment of Kerwin J. *infra*), by which plaintiff agreed to purchase the land from defendant for $3,000, of which $200 was paid as a deposit, the balance to be paid upon receipt and registration of a tax deed and of a deed from defendant to plaintiff; and it was stipulated that if it should happen and in the event that the land was redeemed from the tax sale, the agreement should be null and void and of no effect and in such case defendant agreed to repay to plaintiff any sum received by defendant under the agreement. Subsequently the annuitant threatened to redeem; so plaintiff obtained for $3,000 a release of her interest, and then redeemed. He sued defendant for repayment of said $200 paid as a deposit. Defendant denied liability and counter-claimed for $1,370.99, being the purchase price named in said agreement of August 22, 1938, less sums received by defendant (the deposit and what she received as redemption price). Rose, C.J.H.C., allowed plaintiff's claim and dismissed defendant's counter-claim. His judgment was reversed (Riddell J.A. dissenting) by the Court of Appeal for Ontario, which dismissed plaintiff's action and gave judgment to defendant on her counter-claim. McTague J.A., writing for the majority of the Court, held that plaintiff could not by his own act bring about the event of redemption and claim the advantage thereof under said stipulation in the agreement of August 22, 1938, the agreement not specifically giving him such a right.

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COMM'R OF AGRICULTURAL LOANS v. IRWIN.

Leave to appeal to the Supreme Court of Canada was granted to plaintiff by the Court of Appeal for Ontario.

John J. Robinette for the appellant.

J. S. Duggan for the respondent.

The Chief Justice and Rinfret and Taschereau JJ. were of the opinion that the appeal should be dismissed with costs, for the reasons stated by McTague J.A. in the Court of Appeal.

Davis J. would dismiss the appeal with costs.

KERWIN J. (dissenting).—The determination of this appeal depends upon the proper construction of a written agreement between the parties, dated August 22nd, 1938, but it is first necessary to state certain events that transpired prior to its execution.

The Agricultural Development Board, the predecessor of the appellant, The Commissioner of Agricultural Loans of the Province of Ontario, was the first mortgagee of the lands in the Township of Toronto in the County of Peel, described in the agreement, but this mortgage was subject to a prior claim to an annuity of one Jemima Might. The mortgagor defaulted in the payments due by him on this annuity, on the mortgage and on the taxes payable on the lands to the Township of Toronto. On June 22nd, 1938, pursuant to the provisions of *The Assessment Act*, R.S.O. 1937, chapter 272, the Township Treasurer sold the lands for arrears of taxes to the respondent, Mrs. Irwin, for $1,299.10. In accordance with the Act, the appellant and Jemima Might had a statutory right to redeem the lands from the tax sale within one year from the date of the sale upon the payment of this sum together with an additional ten per centum thereof. If the appellant redeemed, Jemima Might would have priority over the appellant's mortgage with respect to the arrears of her annuity which amounted at that time to about $6,000. If Jemima Might redeemed, she would have priority over the appellant's mortgage for those arrears together with the amount paid by her for redemption.

It was under these circumstances that the agreement in question was entered into. It reads as follows:—

This Agreement made in Triplicate this 22nd day of August, 1938,

BETWEEN:

PEGGY MORROW IRWIN, of the City of Toronto in the County of York, hereinafter called the Vendor

Of the First Part;

AND

THE COMMISSIONER OF AGRICULTURAL LOANS, hereinafter called the Commissioner,

Of the Second Part:

Whereas the lands hereinafter described were, on the 22nd day of June, 1938, sold for taxes by the Treasurer of the Township of Toronto, pursuant to the provisions of the Assessment Act, R.S.O. 1937, Ch. 272.

And whereas at the said sale the Vendor purchased the said lands.

And whereas the Commissioner is desirous of purchasing the said hereinafter described lands from the Vendor, provided the same are not redeemed within the time limited as provided in the Assessment Act.

And whereas the Vendor has agreed to sell and convey the said lands to the Commissioner at and for the price and sum hereinafter mentioned, provided the same are not redeemed from the said tax sale.

Now therefore this Agreement witnesseth that in consideration of the terms and conditions herein contained and in consideration of the sum of Three Thousand ($3,000) Dollars to be paid by the Commissioner to the Vendor (the receipt of $200 of which is hereby by him acknowledged) the parties hereto do hereby covenant and agree as follows:—

1. The Vendor hereby agrees to sell and the Commissioner hereby agrees to purchase *All and Singular* that certain parcel or tract of land and premises, situate, lying and being in the Township of Toronto, in the County of Peel and Province of Ontario, and being composed of lot Number Seven (7) in the First Concession West of Hurontario Street, in the said Township of Toronto, containing by admeasurement two hundred (200) acres, be the same more or less, *saving and excepting* therefrom the West half of the West half of the said Lot Seven (7), containing fifty (50) acres more or less.

2. The Commissioner hereby agrees, upon receipt and registration of a Tax Deed in proper form duly executed in accordance with the provisions of the Assessment Act R.S.O. 1937, Ch. 272, and upon receipt and registration of a deed in proper form from the Vendor to the Commissioner, to pay the Vendor the balance of the aforementioned sum of money.

3. The Vendor hereby sets over, transfers and assigns to the Commissioner the Treasurer's Certificate of Sale obtained at the aforementioned tax sale and all the right, title and interest of the Vendor therein and of in and to the said lands.

4. The Vendor hereby sets over, transfers and assigns to the Commissioner all the rights, claims and demands of the Vendor to and for a Tax Deed from the said Township and the officials of the said Township and hereby irrevocably nominates, constitutes and appoints the Commissioner his true and lawful attorney to obtain the same.

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COMM'R OF AGRICULTURAL LOANS v. IRWIN.

Kerwin J.

5. The Vendor hereby covenants and agrees with the Commissioner that he has not at any time heretofore and will not at any time hereafter do, commit, execute or knowingly or wilfully suffer any act, deed, matter or thing whatsoever, whereby or by means whereof the said lands and premises hereby sold and intended to be conveyed to the Commissioner or any part or parcel thereof are, is or shall or may be in anywise impeached, charged, affected or encumbered in title, estate or otherwise howsoever.

6. The Vendor hereby covenants and agrees with the Commissioner that he will at his request execute and deliver to the Commissioner a deed in proper form of the said lands and premises.

7. The parties hereto mutually covenant and agree that if it should happen and in the event that the said lands are redeemed from the hereinbefore-mentioned Tax Sale under and by virtue of the provisions of the Assessment Act, then and in that event, this agreement shall be null and void and of no effect, and in such case the Vendor covenants and agrees to repay to the Commissioner without interest, any sum or sums of money received by him hereunder.

This Agreement is to enure to the benefit of and be binding upon the respective heirs, executors, administrators, successors and assigns of the parties hereto.

In witness whereof the parties hereto have hereunto set their hands and seals.

The object of the appellant entering into this arrangement was to protect himself, so far as possible, from any further loss in case Jemima Might did not redeem. After the execution of the agreement, Jemima Might for the first time began to assert her rights and through her solicitor approached the appellant and threatened to redeem the lands. As a result, the appellant paid her $3,000 and took a quit claim deed from her and one from the mortgagor. On June 13th, 1939, the appellant redeemed and the respondent received from the Township Treasurer the amount she paid at the tax sale, with the additional ten per centum. The appellant thereupon demanded the return of the $200 paid under the agreement. This being refused, an action was brought, in which the respondent counter-claimed for $1;370.99, being the balance due under the contract after giving credit for the amount received by her from the Township Treasurer, and, in the alternative, for damages for the same amount. The appellant succeeded at the trial before the Chief Justice of the High Court but failed in the Court of Appeal, Riddell J.A. dissenting.

The appeal should succeed. The third and fourth recitals in the agreement of August, 1938, show that both parties were aware that the lands could be redeemed under the provisions of the *Assessment Act*, and that the agreement to sell and purchase subsequently appearing in the document was subject to that right in whomsoever it might rest. The seventh clause of the agreement provides for the event of the lands being redeemed and has the same effect as if it were agreed that either party could, upon notice, determine the contract.

On that construction of the agreement, the decision in *New Zealand Shipping Company* v. *Société des Ateliers et Chantiers de France* (1) need not be considered. There is no difficulty in the exact point that was there decided, but certain passages in some of the speeches of the peers have given rise to differences of opinion, as appears from the judgments of the Chief Justice of the High Court, and of the members of the Court of Appeal in this case, and of Russell J., as he then was, in *In re Meyrick's Settlement* (2). Taking the view I do, however, of the agreement, it is unnecessary to discuss these differences or the questions raised by the appellant that the respondent, having no title, could not counter-claim for specific performance, and had suffered no damage.

The appeal should be allowed and the judgment at the trial restored. The appellant is entitled to his costs of the appeal to the Court of Appeal on the Supreme Court scale. In accordance with the order of the Court of Appeal granting leave to appeal, there will be no costs of the appeal to this Court to either party.

Appeal dismissed with costs.

Solicitor for the appellant: *John F. Perrett.*

Solicitor for the respondent: *J. B. O'Brien.*

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(1) [1919] A.C. 1.

(2) [1921] 1 Ch. 311.

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* Feb. 20.
* March 3.

IN THE MATTER OF THE ESTATE OF GEORGE MATTHEW SNOWBALL, DECEASED

ELIZABETH LILLIAN STEWART .....APPELLANT;

AND

THE TORONTO GENERAL TRUSTS CORPORATION, EXECUTORS AND TRUSTEES OF THE LAST WILL AND TESTAMENT OF GEORGE MATTHEW SNOWBALL, DECEASED; AND OTHERS.. } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Succession duties—Direction in will for payment of succession duties out of residuary estate—Question as to succession duties payable on gifts inter vivos—Construction of the words in said direction in will—Succession Duty Act, 1934, Ont., 24 Geo. V, c. 55, ss. 6 (1) (2), 10 (1).

The deceased, whose home was in the province of Ontario, declared in his will "that all estate and succession duties payable upon or in respect of my estate or property shall be paid out of my residuary estate, and that all legacies or gifts bequeathed shall be free from inheritance tax". He had in his lifetime made gifts to certain persons, and after his death the question arose whether the succession duties payable in respect of such gifts should be paid out of his residuary estate. The Act applicable was *The Succession Duty Act, 1934,* Ont., 24 Geo. V, c. 55; and particularly ss. 6 (1), 6 (2) and 10 (1) thereof.

Held, affirming the judgment of the Court of Appeal for Ontario, [1941] O.R. 269, that the donees of the gifts *inter vivos* were not entitled to have the succession duties payable in respect thereof paid out of the deceased's residuary estate.

APPEAL from the judgment of the Court of Appeal for Ontario (1) which reversed the judgment of McFarland J. on a motion on behalf of the present appellant, to whom, and to others, George M. Snowball, late of the city of Toronto, Ontario, deceased, had made gifts in his lifetime, for the determination of the question whether the succession duties in respect of such gifts should be paid out of the deceased's residuary estate.

* PRESENT:—Rinfret, Kerwin, Hudson, Taschereau and Masten (*ad hoc*) JJ.

(1) [1941] O.R. 269; [1941] 4 D.L.R. 205.

Clause 9 of paragraph 4 of the deceased's will was as follows:

I declare that all estate and succession duties payable upon or in respect of my estate or property shall be paid out of my residuary estate, and that all legacies or gifts bequeathed shall be free from inheritance tax.

By s. 6 (1) of *The Succession Duty Act, 1934* (Ont., 24 Geo. V, c. 55, the Act that applies), "all property situate in Ontario and any income therefrom passing on the death of any person" is made subject to duty. By s. 6 (2):

Property passing on the death of the deceased shall be deemed to include for all purposes of this Act the following property,—

* * *

Any property taken under a disposition operating or purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, made since the 1st day of July, 1892.

* * *

By s. 10 (1):

Every heir, legatee, devisee or donee, and every person to whom property passes for any beneficial interest in possession or in expectancy shall be liable for the duty upon so much of the property as so passes to him and which is dutiable in Ontario according to the provisions of this Act, * * *

The Court of Appeal for Ontario (1) held that the succession duties payable in respect of the gifts *inter vivos* are not payable out of the residuary estate of the deceased. The reasons for judgment of that Court were delivered by Robertson C.J.O., and these reasons are adopted *infra* in the reasons for judgment in this Court now reported. Robertson C.J.O. held that the donor of a gift *inter vivos*, by making the gift, assumes no obligation whatsoever to the donee to make any provision for payment of succession duties that may become payable in respect of the gift, upon his death; that if, in this case, the residuary estate of the deceased is to bear the burden of the succession duties claimed from the donees, it is because the testator has said so in clause 9 (above quoted) of his will; that the succession duties now claimed are not within clause 9 as "succession duties payable upon or in respect of my estate or property"; the meaning of said words "my

(1) [1941] O.R. 269; [1941] 4 D.L.R. 205.

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In re SNOWBALL ESTATE.

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estate or property", which are perfectly plain. should not be extended to include whatever, by the Act, is included within the term "property passing on the death", to which s. 6 (2) gives a very extended and artificial meaning; that the gifts *inter vivos* did not come within the expression "gifts bequeathed" which said clause 9 in the will declared to be "free from inheritance tax"; said words "gifts bequeathed" must be construed as meaning "gifts by will", according to their present ordinary meaning and common usage; that there are no words in said clause 9 disclosing any intention of the testator to make to the persons to whom he made gifts *inter vivos* a further gift of the amount of the succession duties.

D. L. McCarthy, K.C., for the appellant.

P. E. F. Smily, K.C., for the respondent Isobel McArthur (of the same interest as appellant).

P. D. Wilson, K.C., Official Guardian, representing infant respondents (of the same interest as appellant).

G. R. Munnoch, K.C., for residuary beneficiaries, respondents.

J. F. Boland, K.C., for respondent The Toronto General Trusts Corporation (Executor and Trustee of the last will and testament and codicil of George Matthew Snowball, deceased).

The judgment of the Court was delivered by

KERWIN J.—The appeal should be dismissed for the reasons given by the Chief Justice of Ontario. The appellant succeeded in her claim before the judge of first instance, who directed that the costs of all parties be paid out of the estate, those of the executor as between solicitor and client. In the reasons for judgment of the Court of Appeal, the appellant was ordered to pay "the costs of the executor both of the motion and of this appeal, and also the residuary legatees' costs of the appeal, they having been brought in on the appeal only". Upon motion this direction was varied, and the formal judgment of the Court of Appeal orders that the costs of the original motion of the executor and trustee as between solicitor and client and of the

Official Guardian be paid out of the estate. It also orders that the costs of the appeal to the Court of Appeal of the executor and trustee as between solicitor and client and of the residuary beneficiaries and of the Official Guardian be paid out of the estate. The costs of all parties of the appeal to this Court, except those of the respondent, Isobel McArthur, and of the Official Guardian, both of whom supported the appeal, should be paid by the appellant. The costs of the Official Guardian may be paid out of the estate. This will not prejudice any claim of the executor and trustee to the proper tribunal to have its solicitor and client costs paid out of the estate.

Appeal dismissed with costs (except costs of those respondents supporting the appeal).

Solicitors for the appellant and the respondent Isobel McArthur: *Smily, Shaver, Adams, DeRoche & Fraser.*

Solicitors for the respondent The Toronto General Trusts Corporation: *Macdonell & Boland.*

The Official Guardian on behalf of the infant respondents.

Solicitors for the other respondents: *Blake, Lash, Anglin & Cassels.*

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THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES (DEFENDANT) ..... APPELLANT;

AND

DAME ROSA BELLE LAROCQUE (PLAINTIFF) ..... RESPONDENT.

* Feb. 10, 11, 12, 13.
* March 20.

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

Insurance (life)—Husband and wife—Insurance contract or policy—Change of beneficiary—Loan and surrender cash values—Cash advances by insurance company upon sole security of policy—Insured appointing his wife as beneficiary—Wife asking and receiving cash advances—Whether a "loan"—Wife endorsing company's cheque in favour of husband and proceeds deposited in his bank account—Prohibition for the consorts to confer benefits inter vivos *upon each other—*

* PRESENT:—Rinfret, Kerwin, Hudson and Taschereau JJ. and Maclean J. *ad hoc.*

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THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES v. LAROCQUE.

Obligation by the wife with or for her husband—Whether transaction in conformity with Husbands' and Parents' Life Insurance Act, R.S.Q., 1925, c. 244—Articles 1265, 1301, 1762 to 1786 C.C.

In 1917, an "ordinary life policy" of insurance for $50,000 was issued by the appellant Assurance Society upon the life of one Larocque, the latter being also styled the beneficiary. The policy contained (in general) the customary clauses usually to be found in that class and form of insurance policies. More particularly, the insured had the right to change the beneficiary by written request; and it was provided that "such change must, however, conform to the laws of the province in Canada in which the insured resides * * *". There was also inserted in the policy a table called "Table of loan and surrender values per $1,000 of insurance"; and that Table showed that, after the policy had been in force for three years, a fixed cash value for each $1,000 of insurance would be paid at the request of the insured and that 95% of such cash value was to represent what was therein called "the loan value". At any time while the policy was in force, after three full year's premiums had been paid, the appellant Assurance Society obliged itself to advance, on proper assignment and delivery of the policy and on its sole security, a sum which, with interest, would not exceed 95% of the cash value at the end of the current policy year (as stated in the Table). Interest at the rate of 6% per annum would be payable on the amount of the loan. Failure to repay such "loan", or to pay interest thereon, would not avoid the policy, except under certain specified circumstances. In 1921, the insured, exercising his right to do so and complying with the necessary formalities, appointed his wife, the present respondent, beneficiary of the insurance policy; and the change was duly accepted by the appellant Assurance Society. In 1930, i.e., over ten years after the issue of the policy, the respondent asked for and received from the appellant a cash advance of $17,000, of which $2,645.50 was applied in payment of the annual premium then due. The amount of the cheque given to the respondent by the appellant was for $15,244.21, the surplus representing the accrued dividends. The respondent then endorsed the cheque in favour of her husband and the latter deposited it in his own bank account. In connection with the advance so made, the respondent signed a document, called "special contract", wherein it was stated that the appellant had made to the respondent a cash advance, receipt being thereby acknowledged, upon the security of the value of the policy which was duly assigned to the appellant by the respondent. The respondent also therein agreed with the appellant as to the conditions upon which such advance and any future additional advances would be made, these conditions *inter alia* dealing with the payment of interest and providing that unpaid interest would be added to the existing loan; it was also agreed that, upon default in payment of any premium, "the total of all advances and any interest shall not be repayable in cash but shall be deducted by the Society from any sum * * * otherwise applicable to the purchase of paid-up or extended term insurance"; though it was also stipulated that the appellant "Society may exercise all powers necessary to effect repayment of all advances and any interest thereon". Appended to that document was a declaration signed by the insured that "I hereby consent to the execution by my wife of the foregoing agreement and to the advance or advances

made or to be made thereunder"; and, at the same time, the insured signed a "special assignment" of the policy to the appellant Society. In 1932 and 1933, the respondent applied to the appellant Society and obtained two further advances, providing mostly for payment of premiums due, thus bringing the total advances up to $21,977. Default was made in payment of annual premiums in December, 1933, and the last of several extensions of time for payment terminated in August, 1934. Thereupon, the total of the advances, with accrued interest, became deductible by the appellant Society from any sum or amount under the policy which would otherwise have been applicable to the purchase of paid-up or extended term insurance; and, as the advances and interest due were in excess of such sum or amount, the policy, as contended by the appellant Society, became null and void and was not in force at the death of the insured in December, 1936. The respondent, after her request for the payment of the amount of the policy had been refused, brought the present action against the appellant Society, alleging that the money advances were absolutely and radically null and void and of no effect, that, consequently, the policy should be held to have been still legally in force at the death of the insured and that the appellant Society should be condemned to pay the full amount of the policy. The grounds, upon which the action was based, were that, although admittedly the cheque for the money advanced was made to her order, the respondent had immediately endorsed it over to her husband, who had deposited it in his own bank account; that she had not received any of the money thus advanced; and that it followed that the whole transaction was: 1st, contrary to articles 1265 C.C., as being in some manner a benefit *inter vivos* conferred by the consorts upon each other and not in conformity with the provisions of the law under which a husband may insure his life for his wife; 2nd, a transaction whereby the wife had bound herself with or for her husband, contrary to the provisions of article 1301 C.C.; and 3rd, a transaction not in conformity with the provisions of the *Husbands' and Parents' Life Insurance Act* whereunder, exclusively, the consorts were authorized by the Civil Code to confer benefits *inter vivos* upon each other. The trial judge, holding that the cash advance to the respondent was void, maintained the respondent's action to the extent of $46,042.88, deducting part of the advances used for the purpose of the payment of the premiums due at the time of the advances. That judgment was affirmed by the appellate court "sans admettre toutes les raisons données par la cour inférieure".

Held, reversing the judgment appealed from, (Q.R. 71 K.B. 279) that the respondent's action against the appellant Assurance Society should have been dismissed. The appeal to this Court was allowed.

The money advances to the respondent were not made contrary to the provisions of article 1265 C.C.—The transfer of the policy by the insured to his wife was not a benefit *inter vivos* conferred in contravention of that article, as, by its very terms, a husband may, subject to certain conditions and restrictions, insure his life for his wife "in conformity with the provisions of the law", and, more particularly, with those contained in the *Husbands' and Parents' Insurance Act.*—Also, the endorsement by the respondent, in favour of her husband, of the cheque issued by the appellant Society was not of the Society's concern. The prohibition contained in that article is a prohibition addressed to the

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consorts themselves: they may not alter the covenants contained in their marriage contract and they cannot in any other manner confer benefits *inter vivos* upon each other; but that prohibition does not affect the appellant Assurance Society, except possibly in so far as the latter may have acted as an accomplice to the contravention of that article by the consorts themselves. Assuming, without formally deciding it, that the provisions of article 1265 C.C. would forbid a husband from insuring his life for the benefit of his wife unless he does so within the terms of the *Husbands' and Parents' Insurance Act* (the wording of the exception "in conformity with the provisions of the law" does not clearly exclude any provisions of the law found to be applicable and not expressed in the Act), the insurance policy in this case does not detract from the conditions enacted in that statute and, therefore, cannot be held to have been forbidden by, and to be contrary to, the provisions of article 1265 C.C.—As long as an insurance policy does not infringe any of the "conditions and restrictions" essentially required under that statute, the latter must be construed as authorizing the insertion of such accessory clauses as admittedly are usually to be found in ordinary insurance policies. Also, section 3 of the Act authorizes a husband to "insure his life or appropriate any policy of insurance held by himself on his life for the benefit of his wife"; and the word "any" connotes the idea of an ordinary insurance policy containing the usual and customary clauses. Moreover, the condition of the policy, upon which the respondent relies for contending that the policy was still in force at the death of her husband, is not to be found in the above statute and the necessary consequence of the respondent's argument would be that such a condition should not be read into the policy, thereby entailing a fatal result for the respondent's claim. Finally, if the conditions, which the respondent contended should be disregarded, are in conflict with the above statute, or, as an indirect consequence, in conflict with article 1265 C.C., they should be held to be contrary to public order, and, therefore, such conditions would render void the appropriation itself made under the statute: then the insured himself would have remained entitled to the benefits of the policy and the respondent would have no ground of action.

The cash advance made upon the strength of the policy by the appellant Society to the respondent was not a loan whereby the respondent *bound* herself (*s'est obligée*) either with or for her husband, contrary to the provisions of article 1301 C.C. and the obligation contracted by her was accordingly valid (although the respondent might be taken to have made to her husband an illegal gift *inter vivos* of the sums so advanced). Emphasis must be put on the word "bound" as that is the mischief, and the only mischief, which article 1301 C.C. is intended to prevent.—It was a term and condition of the policy that, at each of the periods mentioned in the "Table of loan and surrender values", the appellant Society obliged itself to advance a certain sum stated in the Table. This was one of the benefits and advantages conferred by the policy; it was, therefore, one of the benefits and advantages appropriated by the insured to his wife and conferred upon her at the date of her acceptance of the appropriation of the policy to her: she was at liberty to claim that benefit and advantage, at least after the expiration of ten years of the life of the policy. There was no new obligation assumed by either the husband or the wife in the "special contract": the respond-

ent did not, by that document, or on that date, or in respect of the advance payment made to her, bind herself to anything to which she was not already subject by having accepted the appropriation of the policy.—The appellant Society, when making the cash advance, was merely carrying out the contract which it had made long before with the insured and with the beneficiary. The appellant Society was bound to carry it out and could have been compelled to carry it out at the suit of the beneficiary: it was only paying its debt to the respondent beneficiary and it was none of its concern what the respondent would do with the money.

Hamel v. *Panet* (2 App. Cas. 121; 3 Q.L.R. 173), *Trust & Loan Co. of Canada* v. *Gauthier* ([1904] A.C. 94), *Laframboise* v. *Vallières* ([1927] S.C.R. 193), *Rodrigue* v. *Dostie* ([1927] S.C.R. 563), *Banque Canadienne Nationale* v. *Carette* ([1931] S.C.R. 33), *Banque Canadianne Nationale* v. *Audet* ([1931] S.C.R. 293), *Daoust, Lalonde & Cie* v. *Ferland & New York Life Insurance Co.* ([1932] S.C.R. 343), *Lebel* v. *Bradin* (19 R.L.n.s. 16), *Joubert & Turcotte* v. *Kieffer* (Q.R. 51 S.C. 152) and *Lacoste-Tessier* v. *The Bank of Montreal* (Q.R. K.B. 148) distinguished.

In none of the cases which have come before the courts, and in particular in none of the cases referred to in the reasons for judgment of the appellate court in this case, did the question arise of the effect of advances made by an insurance company upon a policy similar to the one now before this Court. In every one of those cases a loan had been made by a third party, generally a bank, on the security of the policy. The lender was at perfect liberty to make the loan, or not, to the wife. The transaction which the courts, in each of these cases, had to consider was not covered by an anterior contract. These circumstances are of primary importance as distinguishing those cases from the present one.

Upon the proper construction of the insurance contract or policy and also of the "special contract", the cash advance made by the appellant Society to the respondent was not a "loan" within the meaning of that word. (Articles 1762 to 1786 C.C.).

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Duclos J., and maintaining the respondent's action based upon a policy of insurance issued by the appellant Society upon the life of the respondent's husband. The appellant Society was condemned to pay to the respondent the sum of $45,622.88 with interest.

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

Aimé Geoffrion K.C., Gustave Monette K.C., and *A. H. Elder K.C.* for the appellant.

(1) (1941) Q.R. 71 K.B. 279.

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L. E. Beaulieu K.C. and *L. Beauregard K.C.* for the respondent.

The judgment of the Court was delivered by

RINFRET J.—On January 4th, 1917, The Equitable Life Assurance Society of the United States insured the life of Mr. Charles Alphonse Arsène Larocque and agreed to pay $50,000 in lawful money of the Dominion of Canada to his executors, administrators, or assigns, upon receipt of the proof of his death, provided the policy was then in force and was then surrendered properly released.

An insurance policy was accordingly issued by the Society, wherein Mr. Larocque is styled the beneficiary ("with the right on the part of the insured to change the beneficiary").

The policy contained the following material provisions:

Upon payment of the second year's premium and at the end of each subsequent policy year, the policy was to participate in the distribution of the surplus of the Society as ascertained and apportioned by it, the dividends, at the option of the insured (or of the assignee, if any), to be, in each year, either paid in cash; or applied towards the payment of premiums; or applied to the purchase of additional paid-up insurance; or left to accumulate at 3% interest, compounded annually.

The insured could, from time to time during the continuance of the policy, change the beneficiary, or beneficiaries, by a written request filed at the Home Office of the Society, such change to take effect upon the endorsement of the same on the policy by the Society, provided the change would conform to the laws in the province of Canada in which the insured resided at the time the change was requested (in this case, the province of Quebec).

If there was no beneficiary surviving at the death of the insured, the proceeds of the policy were payable to the executors, administrators or assigns of the assured.

No assignment of the policy was to be binding upon the Society unless in writing and until filed at its Home Office.

The Society assumed no responsibility for the validity of any assignment.

The policy, and the application therefor, a copy of which was endorsed on it or attached thereto, was to constitute

the entire contract between the parties. No agents were authorized to modify or, in event of lapse, to reinstate the policy or to extend the time for the payment of any premium or instalment thereof.

The insurance was granted in consideration of the payment in advance of $2,645.50 and of the payment annually thereafter of a like sum upon each 18th day of December, until the death of the insured.

All premiums were payable in advance in the city of Montreal. It was stated that the policy was based upon the payment of the premium annually (except that, upon the Society's written approval, the premium could be paid in instalments), provided that, in the event of the death of the insured, any unpaid portion of the premium for the then current policy year might be deducted of the amount of the death claim thereunder.

A grace of thirty-one days, subject to an interest charge at the rate of 5% per annum, was to be granted for the payment of any premium after the first, during which period the insurance was to continue in force. If death occurred within the days of grace, the premium for the then current policy or any unpaid instalment thereof was to be deducted from the amount payable thereunder.

Except as therein expressly provided, the payment of any premium, or instalment thereof, was not to maintain the policy in force beyond the date when the premium or instalment thereof became payable.

There was inserted in the policy a table called "Table of loan and surrender values per $1,000.00 of insurance"; and, as the policy was for $50,000, the values were to be fifty times those stated in such Table. However, the term for which extended insurance was to be granted remained the same without regard to the amount of the policy.

This Table showed that, after the policy had been in force for three years, a fixed cash value for each $1,000 of insurance would be paid at the request of the insured; that 95% of such cash value was to represent what is therein called "the loan value", which the Society undertook to advance. The Table also showed the amount of paid-up life insurance for $1,000 of insurance which the Society would issue in each of the several years therein mentioned. It also showed the number of years and months

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for which the policy would remain in force and the time for which the payment of the premiums would be extended after the policy had been in force for each of the years stated.

These several figures or values specified in the Table were susceptible of being modified according as dividend additions may be available.

In connection with the so-called loans, at any time while the policy was in force, after three full year's premiums had been paid, the Society obliged itself to advance, on proper assignment and delivery of the policy and on the sole security thereof, a sum which, with interest, would not exceed 95% of the cash value at the end of the then current policy year (as stated in the Table), less any indebtedness to the Society thereon, provided all premiums or instalments on the same had been fully paid. It was stipulated that, in such a case, interest at the rate of 6% per annum would be payable, on the amount of the "loan", on the premium anniversary date of the policy. The "loan" could be increased by the cash value of dividend additions credited to the policy, if any. Unless, however, the "loan" was for the purpose of paying premiums to the Society, the granting of the same could be deferred by the Society for a period not exceeding ninety days after receipt of application therefor. Failure to repay such "loan", or to pay interest thereon, was not to avoid the policy, unless the total indebtedness thereon should equal the total "loan value", nor until thirty-one days after notice should have been mailed to the insured and to the assignee of record, if any, at the addresses last known to the Society.

The policy was styled an "ordinary life policy" on the life of Mr. Larocque (the insured); but it was stated that, at any anniversary date during its continuance, it could be converted into a "limited payment life policy" by the payment of increased premiums for a stipulated period; after which premiums would cease. Such option was available upon the written request of the insured and the return of the policy to the Home Office of the Society for proper endorsement. At the maturity of the policy, after the insured's death and in case the insured had made no election, the beneficiary was to have the option of

getting the net sum due either paid in cash; or left on deposit with the Society during the lifetime of the beneficiary, to be paid upon the death of the beneficiary, to the beneficiary's legal representatives or assigns, with interest at the rate of 3%; or paid in a fixed number of annual instalments; or converted into a fixed income to the beneficiary for life, by the payment of a fixed amount annually for twenty years certain, said payments to be continued thereafter during the beneficiary's life as shown by a table thereto appended.

Finally, it was agreed that the terms of this insurance contract were to be subject to the laws of the Dominion of Canada, and that any action to enforce any obligation under the policy might be validly taken in any court of competent jurisdiction in the province where the policy holder resides or last resided before his decease.

It is not disputed that, at the date of its issue, the insurance policy just outlined was absolutely legal, nor that the several clauses therein regarding beneficiary, assignments, grace for payment of premiums, cash surrender value, "Loan value", paid-up insurance, paid-up extended term insurance, were (in general) the customary clauses usually to be found in that class and form of insurance policies.

Exercising his right to change the beneficiary mentioned in the policy, Mr. Larocque, on the 11th day of January, 1921, complied with the necessary formalities to appoint his wife, the present respondent, the beneficiary of the insurance policy in question. The change was duly accepted by the Society and the appropriate entries were made accordingly in the register. The fact of the change was endorsed on the policy as follows:

> Jan. 14th, 1921. Beneficiary: Rosa L. Belle Larocque, wife, if living.

On December 17th, 1930, the respondent asked for and received from the Society a cash advance of the amount of $17,000, of which $2,645.50 was applied in payment of the annual premium on the said policy payable on December 18th, 1930. The amount of the cheque given to the respondent by the appellant was for $15,244.21, the surplus representing the accrued dividends.

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In connection with the advance so made, the respondent signed a document on the nature and effect of which her contentions in the present case largely rely; and, for that reason, this document must be carefully examined.

It is called a "special contract". It states that the Society has made to the respondent a cash advance, receipt whereof was hereby acknowledged, upon the security of the value of its policy, on the life of Charles A. A. Larocque, and the dividend additions thereto, if any.

The respondent thereby assigned the policy and the dividend additions, if any, to the Society, as security for the repayment of the advances and of all additional advances which might be made thereafter upon such security (delivery of the policy being waived by the Society). The respondent therein agreed with the Society that the conditions upon which all such advances would be made were as follows:

1. Interest shall be payable to the Society from the date of such advances at the rate of 6% per annum (or such lower rate as may be stated in the policy or from time to time established by the Society) and, unless otherwise stated in said policy, such interest shall be payable upon the next premium anniversary date and annually thereafter. Interest if not paid when due shall be added to the existing loan and shall bear interest at the same rate.

2. Unless repaid to the Society prior to default in payment of any premium while said policy is in force all said advances and any interest thereon shall become due to the Society:

(*a*) When the total of said advances and interest shall equal or exceed the loan value of said policy and of the dividend additions thereto, if any. In that event such loan value shall be applied by the Society in repayment of said advances and interest, and said policy and dividend shall be cancelled without notice or upon such notice as is stated in said policy. If the loan value is not fixed by the provisions of said policy it shall be deemed to be the full reserve on the basis of the American Experience Table of Mortality, with interest at the rate of four and one-half per cent (4½%) per annum;

Or (*b*) Upon maturity or termination of said policy. In that event the total of all advances and any interest thereon shall be deducted from any sum otherwise payable on said policy and the dividend additions thereto, if any;

Or (*c*) Upon default in payment of any premium on said policy. In that event the total of all advances and any interest thereon shall not be repayable in cash but shall be deducted by the Society from any sum (including the surrender value or dividend additions, if any, to such policy) otherwise applicable to the purchase of paid-up or extended term insurance.

3. The Beneficiary, provided said policy be not assigned, or the absolute assignee, if any, of said policy, shall have the sole and exclusive right from time to time, without the execution of any additional agree-

ment, to apply for and receive additional advances upon the security of the value of said policy and the dividend additions thereto, if any, until the total advances and the interest thereon shall equal the then loan value thereof, it being understood that the Society is hereby authorized to make such additional advances to and upon the sole application of such Beneficiary or such absolute assignee, as the case may be.

4. The Society may exercise all powers necessary to effect repayment of all advances and any interest thereon including the commutation of any amount payable in instalments under said policy.

5. Nothing herein contained shall restrict any right of revocation or change of beneficiary reserved in said policy, but any such right reserved therein may be exercised in the manner therein stated, provided, however, that all the interest of the new or substituted beneficiary shall be subject to the lien of all said advances and any interest thereon; and the Society shall have the right to retain this agreement for use as evidence upon repayment of all said advances and any interest thereon.

6. The undersigned agrees to make and deliver to the Society at any time and from time to time such other or further written agreements as the Society may demand for the due performance of the conditions hereof.

7. This agreement is made and delivered and the amount of the first advance is paid and received at the Society's Home Office in the city of New York. All applications for additional advances shall be made and accepted and the amount thereof paid and received at the Society's said Home Office. All advances and any interest thereon are repayable at the Society's said Head Office and this agreement is made under and pursuant to the laws of the state of New York and shall be construed in accordance therewith, except that if the policy upon the security of the value of which an advance is made is a policy issued in Canada the provisions of this section 7 shall not apply.

The document was signed by the respondent, who acknowledged that she had executed it before a justice of the peace of the district of Montreal, who certified that the respondent had personally come before him, that she was known to him, and that she had signed it before him.

Appended to the document was the following (signed by Mr. Larocque):

I hereby consent to the execution by my wife of the foregoing agreement and to the advance or advances made or to be made thereunder.

At the same time, Mr. Larocque signed this "special assignment":

The undersigned hereby consents to the conditions of the agreement on the reverse side hereof, to the assignment of the policy therein referred to, and to the advance or advances made or to be made in accordance with said agreement, and in consideration of the sum of one dollar in hand paid, and other good and valuable considerations, receipt of which is hereby acknowledged, does hereby assign to The Equitable Life Assurance Society of the United States said policy and the dividend additions thereto, if any, as security for the repayment of such advance or advances.

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Although called "special contract" and "special assignment", the forms used in this particular transaction were the usual forms used by the Society for similar transactions in Alabama, Florida, Georgia and the Dominion of Canada; and it was not contended that the agreements signed in this instance by the respondent and her husband were not the usual agreements which insured and beneficiary respectively were called upon to sign upon cash advances being made by the Society under the provisions of an insurance policy such as we have in the premises.

On or about January 22nd, 1932, pursuant to the agreement, the respondent applied to the Society for and obtained a further or second advance of $3,379.33, to provide in part for payment, amongst other items, of the annual premium of $2,645.50 due on the policy on December 18th, 1931; thus bringing the total advances up to $20,379.33.

On or about August 23rd, 1933, the respondent, in like manner, applied to the Society for and obtained a further or third advance of $1,597.67, to provide in part, amongst other items, for payment of the then still unpaid balance of $1,587.30 and interest thereon, in respect of the annual premium on the policy, which had become due on December 18th, 1932; thus bringing the total advances up to $21,977.

Default was made in payment of the annual premium on the policy due on December 18th, 1933; and, while several extensions of time for the payment of the premium were granted by the Society to, and at the request of, the insured, in consideration of money deposits made on account, the last of these extensions of time for payment terminated on August 18th, 1934.

Thereupon, in accordance with the provisions of the agreement, the total of the outstanding advances, amounting to $21,977, and interest accrued thereon, became deductible by the Society, in so far as could be, from the sum or amount under the policy, which would otherwise have been applicable to the purchase of paid-up or extended term insurance under the provisions of the policy. The total amount of advances and interest accrued thereon to that date was in excess of the sum or amount referred to; and there being in consequence no such sum, or amount,

or any balance of any kind remaining under the policy on August 18th, 1934, the policy had no further value or effect and became null and void under the terms of the policy; and accordingly, so it was contended by the Society, was not in force and was absolutely without effect at the death of the insured, which occurred on December 24th, 1936.

When, therefore, upon the insured's death, the respondent claimed the payment of the amount, the Society, relying upon the documents and facts above stated, refused to pay, on the ground that the policy had lapsed.

The respondent brought this action against the Society, alleging that the money advances made to the respondent by the Society on the strength of the policy were absolutely and radically null and void and of no effect as having been made contrary to the provisions of arts. 1265 and 1301 of the Civil Code of the province of Quebec as well as contrary to the *Husbands' and Parents' Life Insurance Act*, being chapter 244 of the Revised Statutes of the province of Quebec, 1925; that, therefore, these advances could not be taken into consideration by the Society; and that, if they were eliminated (as they should be), there would have been in the hands of the Society sufficient reserve to carry the policy on to the death of the respondent's husband; that, consequently, the policy must be held to have been still legally in force at the death of the insured and the Society must be condemned to pay the full amount provided for in the said policy.

Article 1265 of the Civil Code reads as follows:

1265. After marriage, the marriage covenants contained in the contract cannot be altered, (even by the donation of usufruct, which is abolished), nor can the consorts in any other manner confer benefits *inter vivos* upon each other, except in conformity with the provisions of the law, under which a husband may, subject to certain conditions and restrictions, insure his life for his wife and children.

Article 1301 C.C. is as follows:—

1301. A wife cannot bind herself either with or for her husband, otherwise than as being common as to property; any such obligation contracted by her in any other quality is void and of no effect, saving the rights of creditors who contract in good faith.

The argument of the respondent was based on the fact that, although admittedly the cheque for the money advanced was made to her order, she had immediately endorsed it over to her husband, who had deposited it in

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his own bank account; she had not received one cent of the money thus advanced by the Society; and it followed that the whole transaction was: 1st, contrary to art. 1265 C.C., as being in some manner a benefit *inter vivos* conferred by the consorts upon each other and not in conformity with the provisions of the law under which a husband may insure his life for his wife; 2nd, a transaction whereby the wife had bound herself with or for her husband, contrary to the provisions of art. 1301 C.C.; 3rd, a transaction not in conformity with the provisions of the *Husbands' and Parents' Life Insurance Act* whereunder exclusively, so it was contended, the consorts were authorized by the Civil Code to confer benefits *inter vivos* upon each other.

The respondent was married to Mr. Larocque under a marriage contract stipulating separation as to property. The wife could not, therefore, bind herself with or for her husband under art. 1301 C.C.

The learned trial judge stated that the "special contract" of December 17th, 1930, was a writing whereby the respondent and the husband jointly transferred the insurance policy in question to the Society for a "cash advance"; and that, by this writing signed at her husband's request, the plaintiff clearly obligated herself with and for her husband, contrary to the provisions of art. 1301 C.C. (in support of which opinion the learned judge referred to the plaintiff's factum and to the authorities therein cited to form part of the judgment as if recited at length therein); that the respondent did not benefit in any way from "this loan"; that the Society did not plead its good faith

> and it is inconceivable that the Society was in good faith in making this loan. The loan was arranged with the husband, a cheque was handed to the husband, none of the Society's officials ever communicated with the plaintiff;

that the Company seemed to have wilfully closed its eyes to the true nature of the loan which the slightest inquiry on their part would have revealed; and that if anybody on behalf of the Society had interviewed the respondent, the truth would have immediately been known.

The parties had filed admissions of facts to the effect that the amounts and dates of the respective advances alleged by the Society were correct and that, in the event

of it being determined by final judgment that the advances were not to be taken into consideration as against the respondent on the ground of their being null and void, the policy of insurance was still in force and effect on the day of the death of Mr. Larocque, except in so far as they represented advances for the purpose of the payment of premiums in respect of the policy, in which case the policy was to be held still in force and effect on December 24th, 1936 (the date of the death of Mr. Larocque) and the amount payable thereon was $46,042.88, with interest thereon from the date of the demand, as claimed by the respondent's action.

Upon these admissions, and having come to the conclusion that the cash advance directly made to the respondent was void, but that the advances for the purpose of the payment of the premiums were to be taken into consideration, the learned trial judge maintained the action of the respondent to the extent of $46,042.88. with interest and costs.

In the Court of King's Bench (appeal side), this judgment was confirmed "sans admettre toutes les raisons données par la Cour inférieure"; but the reasons of the learned judges of the court of appeal show that they did not agree on the grounds upon which the judgment ought to stand.

Létourneau, J., based his judgment on all three points, to wit: arts. 1265 and 1301 of the Civil Code, and the *Husbands' and Parents' Life Insurance Act.* Galipeault and Walsh JJ., restricted their references to art. 1301 C.C. Barclay J., on the contrary, thought that this was not a case for the application of art. 1301 C.C.; but that nowhere in the *Husbands' and Parents' Life Insurance Act* was there any mention made of a permission to get advances whether by the assured or by the beneficiary, except for the purpose of paying the premiums. The consequence was that the advances made to the respondent, both under the special Insurance Act and under art. 1265 C.C., were totally null and void; McDougall J., sitting *ad hoc,* thought that, not only art. 1301 C.C. was an insuperable obstacle to the Society's pretentions, but, as pointed out by Barclay J., the nullity resulting from art. 1265 C.C. was equally fatal to them.

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This Court has had the benefit of a very exhaustive and extremely able argument by counsel both for the appellant and the respondent. It is now our duty to give our decision on the important points which have been raised at the argument and which are likely to affect, as we were told, a considerable number of transactions of the same character in the province of Quebec.

Our attention should first be directed to the application in the premises of art. 1265 of the Civil Code.

So far as this case is concerned, this article may be viewed from two different angles: the transfer of the insurance policy by Mr. Larocque to his wife, the respondent, may be a benefit *inter vivos* conferred in contravention of the article; or the endorsement by the respondent in favour of her husband of the cheque issued by the insurance company may be looked upon as a gift *inter vivos* from the wife to the husband, contrary to the provisions of the article.

As to the first, the simple answer is that, by the very terms of art. 1265 C.C., a husband may, subject to certain conditions and restrictions, insure his life for his wife and children "in conformity with the provisions of the law". This is an exception expressly provided in art. 1265 C.C. The fact, therefore, that Mr. Larocque insured his life for his wife does not, in itself, contravene the rule laid down in the article. The only examination that remains to be made on that ground is whether this insurance is within the conditions and restrictions contained in the provisions of the law thereto relating. This examination will have to be made when we come to discuss the *Husbands' and Parents' Life Insurance Act,* the law which, as contended by the respondent, is referred to in art. 1265 C.C.

As to the second, it must be noted that the prohibition contained in art. 1265 C.C. is a prohibition addressed to the consorts themselves; they may not alter the covenants contained in their marriage contract, and they cannot in any other manner confer benefits *inter vivos* upon each other. This prohibition does not affect the Insurance Society, appellant in the present case, except possibly in so far as the Society may have acted as an accomplice to the contravention of the article by the consorts themselves. Such might perhaps be the explanation of the

judgment of the court of appeal in *Lacoste-Tessier* v. *La Banque de Montréal and The Great West Life Insurance Company* (1).

Here, the respondent might be taken to have made to her husband an illegal gift *inter vivos* of the sum of $15,244.21, represented by the cheque of December 17th, 1930, which she endorsed in favour of her husband. But that is not the point with which we are concerned in this case. The point is whether, by receiving from the Insurance Society an advance upon the insurance policy, the respondent bound herself, contrary to the express enactment contained in art. 1301 C.C.

It has been contended by the respondent that the *Husbands' and Parents' Life Insurance Act* in question is the only Act referred to as being "the law" in conformity with which a husband may confer a benefit *inter vivos* upon his wife. The same point was raised in this Court in the case of *Grobstein* v. *Kouri and The New York Life Insurance Company and The Bank of Montreal* (2); but it was not found necessary, in that case, to express any opinion upon it.

It is to be noted that sec. 2 of the Special Act (R.S.Q., 1925, c. 244) specifically states that

> Nothing contained in this Act shall be held or construed to restrict or interfere with any right otherwise allowed by law to any person to effect or transfer a policy for the benefit of a wife or children, nor shall it apply to any insurance made in favour of or transferred to a wife under the marriage contract.

Therefore, the *Husbands' and Parents' Life Insurance Act* does not apply in the case of an insurance made in favour of or a transfer to a wife made under a marriage contract. It seems also clear that there is nothing in the general law of the province of Quebec, or more particularly in art. 1265 C.C., to prevent a father or mother from insuring his or her life for the benefit of their children.

However, article 1265 C.C., in view of the exception specifically expressed, would seem to forbid a husband from insuring his life for the benefit of his wife, unless he does so within the terms of c. 244 of the Revised Statutes of Quebec, 1925; and, without formally deciding it, we will assume that that is so.

(1) (1935) Q.R. 61 K.B. 148. (2) [1936] S.C.R. 264.

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Under the provisions of this Special Act, a husband may either insure his life, or appropriate any policy of insurance held by himself on his life, for the benefit and advantage of his wife.

Such insurance may be effected either for the whole life of the husband or for any definite period; and the sum insured may be made payable upon the death of the husband or upon his surviving a specified period of not less than ten years.

The appropriation of the policy is made by a declaration in writing endorsed upon or referring and attached to the policy appropriated. A duplicate of the declaration must be filed with the company which issued the policy, and a note of the filing of such duplicate must be endorsed by the company on the policy or on the declaration.

The husband who has effected an insurance, or who has appropriated a policy of insurance for the benefit of his wife, at any time, and from time to time thereafter, may revoke the benefit conferred by such insurance or appropriation and may declare in the revocation that the policy shall be for the benefit only of

> a person or persons for whose benefit an insurance may be effected or appropriated under these provisions.

This means that the husband may revoke the benefit conferred upon his wife and declare that hereafter his children, or one of them, will have that benefit.

It is provided in the Act that the policy shall revert to the insured when the wife for whose sole benefit it existed predeceases her husband, with or without issue. When the policy does revert to him, either in whole or in part, the husband may then be treated as if the insurance had been effected and had always been held for his own benefit.

The *Husbands' and Parents' Life Insurance Act* then provides that the insurance may be made payable to trustees, for the appointment of such trustees and for the discharge of the insurance company in such a case.

The Act further prescribes how the payment of the insurance money is to be made to the persons entitled thereto, and, in the case of minors or persons disqualified from exercising their rights, it prescribes how such money shall be invested or applied.

Section 23 enacts that the husband who has effected or appropriated an insurance for the benefit of his wife may surrender the policy to the company and accept in lieu thereof a paid-up policy for such a sum as the premiums paid may represent, if he finds himself unable to meet the premiums. In such a case, the benefit of the wife shall then be proportionately reduced.

Under sec. 24, the husband who has effected an insurance with profits may either receive the same for his own benefit or may apply the same in payment or reduction of the premiums, or direct them to be added to the insurance money. This provision applies even in the case of profits accruing after a policy has been paid up.

The husband who finds himself unable to continue to meet the premiums may also borrow on the security of the policy such sum as may be necessary to keep the policy in force. In such a case, the loans must be evidenced by a writing, of which a duplicate must be filed with the company which issued the policy and be noted by the company on the duplicate retained by the lender. Such loans are secured by privilege on the policy, and the company shall retain a sufficient amount to repay them from the insurance money. If the loans be repaid before the death of the insured, the acquittance must be filed with the company.

Policies effected or appropriated under the Act are exempt from seizure for debt, either by the insured or by the persons benefited. The insurance money, while in the hands of the company, is free from and unseizable for the debts either of the insured or of the wife and must be paid according to the terms of the policies or of any declaration of appropriation or of any revocation of the same. Such exemption, however, does not apply to any policy, or to part thereof, which may have reverted to or be held by the insured.

By the last clause of s. 30:

> The insured and the parties benefited may join in assigning any such policy.

The above are the material enactments of the statute, 1925, R.S.Q., c. 244, in so far as this case is concerned. For the sake of brevity and clarity, we have omitted the

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sections of the Act dealing with matters with which we are not presently concerned, and we have left out the references to insurance policies in favour of the children.

It is sufficient to add that this Court, in *La Banque Canadienne Nationale* v. *Carette* (1), has decided that the authority given by the Act to the insured and the parties benefited to "join in assigning any policy" does not prevail against the provisions of art. 1301 C.C. Further, the Act itself (s. 32) deals with the situation where it may be proved that the premiums were paid at a time when the person whose life was insured was insolvent, in fraud of the rights of his creditors. It is enacted therein that the creditors are entitled to recover and to receive out of the insurance money an amount equal to the premiums so paid.

It was decided by the majority of the court of appeal and it was strenuously argued in this Court by counsel for the respondent that the *Husbands' and Parents' Life Insurance Act* is a code by itself and that no insurance policy may be taken out by a husband in favour of his wife, unless it strictly and exclusively follows the provisions of the Act. As a consequence, so it was argued, any insurance policy in any way whatever detracting from the conditions specifically enacted in the statute must be held as forbidden and as contrary to art. 1265 of the Civil Code.

In connection with this argument, it must first be noted that art. 1265 C.C. does not specifically refer to a particular statute or Act under which a husband may insure his life for his wife consistently with the exception referred to in the article. The wording of the exception is: "in conformity with the provisions of the law". This language does not clearly exclude any other provision of the law which may be found to be applicable and which has not been expressed in the *Husbands' and Parents' Life Insurance Act.*

We doubt if it may be held that every possible conditions which may be inserted in the insurance policy taken out by a husband in favour of his wife are necessarily limited to those which are specifically mentioned in the Special Act and, as a consequence, have the effect of bringing the policy outside the requirements of the exception in article 1265 C.C.

(1) [1931] S.C.R. 33.

Provided the insurance policy does not infringe any of the "conditions and restrictions" essentially required under the statute, it does seem that the latter must be construed as authorizing the insertion of such accessory clauses as admittedly are usually to be found in ordinary insurance policies. It must not be taken to have been the intention of the legislature, for example, to exclude "the customary clauses which must be supplied in contracts, although they be not expressed" (art. 1017 C.C.) or such other provisions relating to life insurance in arts. 2585 & *seq.* of the Civil Code as are not specifically excluded by force of the Special Act.

Moreover, s. 3 of the Quebec statute authorizes a husband to

> insure his life or appropriate any policy of insurance held by himself on his life for the benefit of his wife.

The word "any" connotes the idea of an ordinary insurance policy containing the usual and customary clauses, except to the extent that they are specifically dealt with in the Special Act.

Finally, the respondent must be reminded that, but for the "extended term" clause whereby the policy might be maintained in force up to the death of her husband, admittedly she would have no claim against the Society, because default was made in payment of the annual premium on the said policy due on December 18th, 1933, and each subsequent year. The condition of the policy whereby the "extended term" is provided and by virtue of which the respondent is allowed to claim that, although the premium had not been paid since 1933, the policy was still in force at the death of her husband, is a condition which is not to be found in the *Husbands' and Parents' Life Insurance Act.* The necessary consequence of the respondent's argument would be that such a condition should not be read into the policy. It should be regarded as no longer written in it; and the very basis of her action, the clause upon which she relies for contending that the policy was still in force would accordingly disappear, thereby entailing a disastrous result for the respondent's claim.

It is our view, therefore, that these usual and customary clauses inserted in a policy coming under the provisions of the Quebec Act are to be held valid, provided they are not in conflict with the special provisions of the Act, and that they must be given effect to.

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In addition to what has just been said, the fact should not be lost sight of that the insurance policy now under discussion was taken out by the husband in the ordinary way and originally made payable to his executors, administrators or assigns. It cannot be disputed that, when issued, such a policy did not come under the *Husbands' and Parents' Life Insurance Act*. Its terms and conditions were undisputable at the time of the issue. It was only a little over four years afterwards that the policy was appropriated for the benefit and advantage of his wife.

The policy as issued was open to no criticism in respect of its legality and validity. S. 3 of the Quebec Act says that "any" policy of insurance on the husband's life may be appropriated for the benefit of his wife. Such language should be construed as authorizing the appropriation of the policy in question, provided the conditions and restrictions of the policy itself do not come into conflict with the specific enactments of the Act.

The only other alternative—if the appropriation of such a policy be not authorized under the Quebec Act—would be that the appropriation is illegal and invalid. Such a result evidently would not help the respondent. It would mean that the appropriation must be disregarded as contrary to public order and thereby ineffective. The wife, or the respondent in this case, would have acquired no rights whatever as a consequence of the appropriation and her case would fail entirely.

We were asked by counsel for the respondent to consider yet another alternative. This would be that, when a policy of the nature and character of that which was issued here by the appellant Society was subsequently appropriated for the benefit of the wife, it ought to be read as *ipso facto* amended so that all the clauses and conditions therein which are not specifically provided for in the *Husbands' and Parents' Life Insurance Act* should be disregarded as if they had never existed.

We would think that, in order to hold the parties to a contract so amended, one should find in the document of appropriation very express terms indicating that the parties, and in particular the Insurance Society, intended to have it so considered.

It is useless to say that no such express terms appear in the declaration in writing whereby the appropriation was

made in this case. It is abundantly clear, from the subsequent dealings of the parties and from the circumstances, that it never occurred to the husband, or the wife, or the Insurance Society, that, as a consequence of the appropriation or subsequent thereto, the insurance policy was to be regarded as amended in the manner suggested by counsel for the respondent. It does not appear anywhere that the parties, or either of them, consented to such a view of the contract. Even if one of them had any such consequence in view, the Insurance Society, at least, never assented to it. In that situation, the minds would not have been *ad idem* or, as it is usually expressed, there would not have been such meeting of minds as is necessary to constitute a contract binding on the parties. The appropriation would be null, with the result already above mentioned of defeating the respondent's claim.

The insurance policy, in this case, may not, therefore, be looked upon, as a consequence of the appropriation under the *Husbands' and Parents' Life Insurance Act,* to have been amended so as to conform with that Act, as the respondent, in this Court, wished it to be interpreted, both because no mutual consent to that effect appears to have existed and because a court of justice cannot be asked to make a contract for the parties.

The argument on that point must, therefore, be eliminated. Either the insurance policy was appropriated in the form and with the conditions on which it was originally issued, and it must be given effect to as it stands; or it could not legally be appropriated in the form in which it was, and, barring consent of all the parties, it must be held to be an invalid appropriation and contract, as a result of the *Husbands' and Parents' Life Insurance Act.*

For, if the conditions which the respondent asks the Court to disregard are in conflict with the *Husbands' and Parents' Life Insurance Act* or, as an indirect consequence, in conflict with art. 1265 C.C., they are contrary to public order; and such conditions render void the appropriation itself, under arts. 760, 989 and 990 of the Civil Code. It is only in a will that unlawful conditions, or conditions contrary to public order, should be considered as not written and do not annul the disposition.

It need only be added that if the appropriation for the benefit of the wife was null and void as being contrary

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to the *Husbands' and Parents' Life Insurance Act,* then the husband remained entitled to the benefits of the policy. The money advanced by the Insurance Society went to the husband, and the wife respondent has no ground for complaint herein.

We conceive that there is only one section of the Quebec Act which might have come in conflict with the policy now before us. Section 4 of the Act provides that the insurance covered by it may be effected either for the whole life of the person whose life is insured, or for any definite period; and that the sum insured may be payable upon the death of such person or upon his surviving a specified period of not less than ten years.

Upon that ground, it may be argued that the Quebec Act does not permit of the advances being made under the policy before a period of less than ten years. The point may be left for consideration when it occurs in a concrete case. It does not arise here, since the cash advance made by the Society to the respondent was made only after the policy had been in force for almost fourteen years. Under the circumstances, the point has no practical application.

There remains to discuss the last argument urged by the respondent, and that is that the cash advances made upon the strength of the policy by the Society to the respondent was a loan whereby the respondent bound herself either with or for her husband otherwise than as being common as to property and that the obligation contracted by her is accordingly void and of no effect, so that the payment of $17,000, or, in the alternative, $15,244.21, should be disregarded and the Society must still be held liable for the total face amount of the policy, notwithstanding the fact that it had otherwise lapsed; and that even the amount already paid should not be deducted.

On this point, reasons for the judgment in the court of appeal are largely, if not altogether, based on certain judgments of this Court and of the Privy Council:

Hamel v. *Panet* (1); *Trust & Loan Co. of Canada* v. *Gauthier* (2); *Laframboise* v. *Valliéres* (3); *Rodrigue* v. *Dostie* (4); *Banque Canadienne Nationale* v. *Carette* (5);

(1) (1876) 2 App. Cas. 121; 3 Q.L.R. 193.
(2) [1904] A.C. 94.
(3) [1927] S.C.R. 193.
(4) [1927] S.C.R. 563.
(5) [1931] S.C.R. 33.

Banque Canadienne Nationale v. *Audet* (1); *Daoust, Lalonde & Cie* v. *Ferland & New York Life Insurance Co.* (2).

to which may be added:

Lebel v. *Bradin* (3), a decision of the court of appeal of Quebec, and *Joubert & Turcotte* v. *Kieffer* (4) by Lafontaine J., and several other decisions of the Quebec Superior Court, including that of *Lacoste-Tessier* v. *The Bank of Montreal and the Great West Life Insurance Company* (5).

On that point, it may be noted that Barclay J. differed from the other judges of the court of appeal and said that art. 1301 C.C. had no application to this case. The learned judge based his judgment entirely on art .1265 C.C. and the *Husbands' and Parents' Life Insurance Act.*

At the outset, it should be remarked that, in none of the cases which have come before the courts, and in particular in none of the cases referred to in the reasons for judgment of the court of appeal, did the question arise of the effect of advances made by an insurance company upon a policy similar to the one now before us. In every one of those cases, a loan had been made by a third party, generally a bank, on the security of the policy. The lender was at perfect liberty to make the loan or not to the wife. The transaction which the courts, in each of these cases, had to consider was not covered by an anterior contract. These circumstances are of primary importance as distinguishing those cases from the present one.

Of course, what must first be inquired into in the premises is whether, by what she has done, the respondent bound herself with or for her husband; and the emphasis must be put on the word "bound". That is the mischief, and the only mischief, which art. 1301 C.C. is intended to prevent. In the French version of the Code, the word is "s'obliger".

The meaning of that word in art. 1301 C.C. has been defined in all the cases we have just referred to. In a general way, these judgments have adopted with approval the view of Chief Justice Lafontaine in *Joubert and Turcotte* v. *Kieffer* (6).

(1) [1931] S.C.R. 293.
(2) [1932] S.C.R. 343.
(3) (1913) 19 R.L.n.s. 16.
(4) (1916) Q.R. 51 S.C. 152.
(5) (1935) Q.R. 61 K.B. 148.
(6) 1916) Q.R. 51 S.C. 152, at 157.

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Une chose certaine et unanimement admise, c'est que l'acte juridique que le législateur a voulu proscrire en le frappant de nullité, c'est le contrat de garantie ou de sûreté. Or, les garanties ou sûretés en usage pour assurer le paiement d'une créance sont de deux espèces: les unes sont personnelles et les autres sont réelles. Le contrat de garantie ou de sûreté personnelle s'appelle le cautionnement. Le contrat de garantie ou de sûreté réelle s'appelle tantôt le gage et tantôt l'hypothèque.

Faut-il distinguer entre ces deux espèces de garantie ou de sûreté pour proscrire l'une et admettre l'autre, lorsqu'il s'agit d'une femme mariée qui a contracté pour son mari?

D'abord la prohibition est générale, ce qui serait conclusif, puisque la loi ne distingue pas et qu'il ne faut pas distinguer là où elle ne le fait pas, suivant la règle d'interprétation bien connue. On sait, en effet, que, suivant les auteurs, les mots obligation et engagement sont synonymes et sont souvent employés l'un pour l'autre (Larombière, vol. 7, p. 389) et que l'on peut s'obliger, c'est-à-dire s'engager, ou contracter, soit à titre personnel, soit à titre réel.

L'application de la prohibition de l'art. 1301 à ces deux espèces d'engagement s'impose également. En effet, l'objet de la loi est la conservation du patrimoine des femmes, en les soustrayant à l'influence toute puissante et aux obsessions d'un mari dissipateur, mauvais administrateur et aux abois, en les protégeant contre le danger des entraînements inconsidérés et des consentements donnés par faiblesse, sous l'assurance, et avec le secret espoir, que l'engagement n'est que temporaire et fait pour traverser une période de gêne simplement, mais que le débiteur fera honneur à sa dette, et que le garant ne sera jamais appelé à payer. Or, ces motifs sont également applicables au gage et à l'hypothèque comme au cautionnement, et il y a lieu, par conséquent, de suivre la règle *Ubi eadem ratio, ibi idem jus.*

Aussi, bien que ces deux espèces de contrats varient par leur nature et que leurs conséquences diffèrent, au fond comme résultat pratique, c'est bien la même chose, et le donneur de gage ou d'hypothèque, comme la caution, est appelé à payer et c'est le patrimoine qui répond et s'en va.

Celui qui en cautionnant s'oblige à titre personnel oblige le sien, par conséquent oblige sa chose et confère un gage à son créancier.

Celui qui donne sa chose en gage ou en hypothèque l'oblige au paiement d'une dette suivant la définition même de l'hypothèque que les auteurs appellent l'obligation d'une chose "obligatio rei", et de même il s'oblige personnellement d'une façon indirecte, au moins, puisqu'il est tenu au sacrifice de sa chose, si le débiteur ne paie pas; et d'une façon directe, même, puisque pour la sauver, en la dégageant, il est tenu de payer la dette. Il y a là suivant l'expression des auteurs *obligatio propter rem,* mais obligation tout de même. D'ailleurs ces deux catégories, espèces d'obligations, obligations personnelles, obligations réelles, sont les deux espèces d'un même genre, savoir, les obligations du patrimoine.

For the purpose of applying art. 1301 C.C. in the light of the doctrine above expounded, we must assume, of course, that the insurance policy in favour of the respondent was appropriated under the terms and conditions therein contained, since, as we have seen, if these terms and conditions were unauthorized and illegal under the *Husbands' and Parents' Life Insurance Act,* the appropriation ought to be held invalid and consequently void.

It was undoubtedly a term and condition of the policy that, at each of the periods mentioned in the "Table of loan and surrender values", the Society would advance on proper assignment and delivery of the policy a certain sum stated in the table, in the column under the head "The loan value is 95% of the cash value, less interest".

This was one of the benefits and advantages conferred by the policy. It was, therefore, one of the benefits and advantages appropriated by Mr. Larocque to his wife, the respondent.

The contrary was contended for by the respondent; but this was on the ground that a condition of that nature, though in plain terms in the policy, ought to be construed as not written and eliminated from the contract, as a result of the construction put upon the *Husbands' and Parents' Life Insurance Act* suggested by the respondent; and we have already decided against such a construction.

Mr. Larocque conferred upon his wife all the benefits and advantages of the policy, amongst which the right to this cash advance is to be found; and we see no reason why she should not have been at liberty to claim that benefit and advantage—at least after the expiration of ten years of the life of the policy.

The right of the respondent to a cash advance was a benefit and advantage conferred upon her at the date of her acceptance of the appropriation of the policy to her,—subject, of course, to the terms and conditions of the policy under which such an advance would be made. The maximum advance which she could secure would be the amount indicated in the table inserted in the policy; and the advance would be made

> on proper assignment and delivery of the policy * * * interest shall be at the rate of 6% per annum and shall be payable on the premium anniversary date of this policy. The loan may be increased by the cash value of the dividend additions credited to the policy, if any, failure to repay loan or to pay interest thereon shall not avoid this policy unless the total indebtedness hereon shall equal the total loan value, nor until thirty-one days after notice shall have been mailed to the insured, and the assignee of record, if any, to their addresses last known to the Society.

Moreover,

> except as herein expressly provided, the payment of any premium or instalment thereon shall not maintain this policy in force beyond the date when the succeeding premium or instalment thereof becomes payable.

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Even if the conduct of the respondent be treated as an agreement by her to permit the Society to set off the amount of an advance and interest thereon against any reserves under, and dividend additions to, the policy, such agreement was made at the time she accepted the appropriation of the policy; and in any view of the matter, it was an undertaking on her own behalf and for her own benefit and not for the benefit or for the purposes of her husband.

We do not find any new obligation in the document which the respondent signed on December 17th, 1930, when she received from the Society the cash advance made on that date and in which she acknowledges receipt thereof.

That document, called "Special contract", begins by stating that she assigns the policy and the dividend additions thereto to the Society as security for the repayment of said advance and all additional advances which may be made hereafter. That is, as we have seen, a condition of the policy itself.

The document goes on to say that interest shall be payable to the Society from the date of such advances at the rate of 6% per annum and that such interest shall be payable upon the next premium anniversary date annually thereafter. That is also in the policy. The interest, if not paid when due, shall be added to the existing loan and shall bear interest at the same rate. That condition is implied in the policy; but, at all events, it is in favour of the respondent; for, if it were not there, the policy would have lapsed upon the failure to pay the original interest.

Then the document stipulates that, unless repaid to the Society prior to default in payment of any premium, while the policy is in force, all the advances and any interest thereon shall become due to the Society:

(*a*) When the total of said advances and interest shall equal or exceed the loan value of said policy and of the dividend additions thereto, if any. In that event, the policy and dividend additions shall be cancelled without notice, or upon such notice as is stated in said policy;

Or (*b*) Upon maturity or termination of the policy. In that event, the total of all advances and interest thereon shall be deducted from any sum otherwise payable under the policy and the dividend additions thereto, if any;

Or (*c*) Upon default in payment of any premium on said policy. In that event, the total of all advances and any interest thereon shall not be repayable in cash but shall be deducted by the Society from any sum otherwise applicable to the purchase of paid-up or extended term insurance.

All these conditions were already inserted in the policy either expressly or impliedly.

Then the document or "special contract" provides that, if the policy has not been assigned, the beneficiary shall have the sole and exclusive right, from time to time, without the execution of any other additional agreement, to apply for and to receive other additional advances upon the security of the value of said policy and the dividend additions thereto, if any, until the total advances and interest thereon shall equal the then loan value thereof, it being understood that the Society is thereby authorized to make such additional advances to and upon the sole application of the beneficiary.

That provision was part of the policy and does not add anything thereto.

In clause 4 of the "Special contract", the Society is given the power necessary to effect repayment of all advances and any interest thereon—which means that the Society may repay itself of all the advances and interest in the manner already provided for on the policy—a power which, of course, it already had under the clauses of the policy.

Then the Special contract stipulates that nothing therein shall restrict any right of revocation or change of beneficiary reserved in the policy, provided, of course, that the new beneficiary will then be entitled only to the benefits and advantages remaining in the policy by taking into account the advances already made. For the due performance of the conditions consented to by the respondent, she agrees to effect and deliver to the Society all other and further agreements as may be required; and then follows a stipulation with regard to the place where payments are to be made.

Mr. Larocque became a party to the document for the purpose of authorizing his wife and to give "his consent in writing". This was done in order to fulfil the requirements of article 177 C.C.

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By a further addition called "Special assignment", Mr. Larocque consented to the conditions of the agreement, to the assignment of the policy, and to the advance made in accordance with the agreement; and did himself assign to the Society the policy and the dividend additions thereto, if any, for the repayment of the advance. This was made necessary, not for the purposes of the respondent, but because, notwithstanding the appropriation of the policy made in favour of his wife, he himself held rights under the policy, such as the right of revocation and the reversionary right in his favour, if his wife should predecease him.

With respect, we are unable to find in the transaction thus made an agreement whereby the respondent bound herself ("se serait obligée"), either with or for her husband. No new obligation was assumed by either of the parties in the "Special contract". The respondent did not, by that document, or on that date, or in respect of the advance payment made to her, bind herself to anything to which she was not already subject by having accepted the appropriation of the policy.

The policy calls this cash advance a "loan", and the respondent makes much of that appellation to induce the Court to regard the cash advance as a transaction whereby the respondent borrowed money from the Society. But we need not repeat here what this Court already said in *Rodrigue* v. *Dostie* (1) that:

> En pareille matière, l'enquête du juge ne saurait être limitée par les énonciations du contrat, ni se laisser arrêter par les expressions contenues dans les actes.

The substance of the transaction and not merely the form, is what must be looked at.

Here, notwithstanding the word "loan", we have no doubt that the true character of the cash advance made by the Society is not that of a loan under the provisions of the Civil Code (arts. 1762 to 1786 inclusive).

Under the Quebec law, it is of the essence of a loan that one party, called the lender, gives to another, called the borrower, a thing to be used by the latter for a time and then to be returned by him to the former (art. 1763 C.C.).

(1) [1927] S.C.R. 563, at 570.

It may be a loan of things which may be used without being destroyed, in which case it is called a loan for use; or there may be a loan of things which are consumed by use and that is called a loan for consumption (art. 1777 C.C.). In the former case, the borrower must return the identical thing; in the other case, the borrower must return a like quantity of things of the same kind and quality. In each case, however, there is an obligation to return either the thing itself or a like quantity of things of the same kind and quality. That is the fundamental character of a loan under the Code (arts. 1763 and 1777 C.C.).

There was here, in respect of the cash advance, no obligation on the part of the respondent to repay the money received from the insurance Society. The Society could not sue the respondent for the repayment of the money. Indeed, in an insurance contract of this nature, the insurer has no action to recover even the premiums.

The default in the payment of the premiums operates as a cancellation of the policy. The default to repay the cash advance, which is exclusively at the option of the insured or beneficiary, is twofold: Either, if the insurance contract continues in force, the advance is deducted from the total amount payable at the maturity of the policy; or, if the insurance contract does not continue in force, on account of the premiums not being paid or of the reserves being insufficient to extend the term, the policy is cancelled; but the insurer, at least under a policy such as we have here, is without recourse for the repayment of the cash advance either against the insured or against the beneficiary who has received the same. The insurer has paid a sum represented by the cash advances. It is entitled to deduct it when called upon to pay the total sum insured for at the maturity of the policy; or, if the policy does not reach maturity by force of the terms of the contract, the policy lapses; and that is the end of the respective rights of the parties to the insurance contract.

The respondent points to the fact that there was a stipulation of interest upon the cash advance, and argues from that that the advance partook of the nature of a loan. But interest in itself is not of the essence of the contract of loan. It may, in certain instances, be an element for the purpose of ascertaining whether there was or not a loan. A loan may be considered as such without any

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stipulation of interest. Conversely, interest may exist, either conventionally or legally, without there having been a loan, as, for example, what is well known under Quebec law as "dommages-intérêts".

In the present case, interest on the cash value was provided for because the insurance Society was requested to pay the amount before the maturity of the policy. Under the normal terms thereof, it had been contemplated that the Society would have been called upon to pay the amount insured for only at the death of Mr. Larocque. The premiums and all the other conditions of the policy had been stipulated on the basis of that occurrence. The Society, however, had agreed to make a cash payment in advance according to computations stated in the table inserted in the policy. Being requested to make this payment before the date of the maturity, the parties stipulated that such an advance would carry interest, not recoverable against the insured or the beneficiary personally, but exclusively against the amount held in reserve by the Society and, so far as the insured or the beneficiary were concerned, to be paid by them only if either of them wished to repay the cash advance and thus to reinstate the policy on the basis which it would have had if no advances had been made.

It will be noted that a stipulation of that kind is along the lines of what is known in Quebec law as a sale with the right of redemption (arts. 1546 & *seq.* of the Civil Code), where the seller stipulates the right to take back the thing sold upon restoring the price of it and reimbursing to the buyer the expense of the sale and other costs. The seller is not obliged in such a case to reimburse the buyer. He may do so in order to take back the property under his right of redemption; but he may not be condemned to effectuate the reimbursement; and if he fails to exercise his right of redemption within the stipulated term, the buyer remains the absolute owner of the thing sold. In sales of that character, interest is always, or at all events generally, stipulated on the principal amount to be reimbursed, but nevertheless such a stipulation is not regarded as having the characteristics of a loan, there is no recourse for the repayment either of principal or interest, and the only consequence of the failure to pay them is that the buyer remains absolute owner of the thing sold.

We have come to the conclusion that the cash advance, in this case, was not a loan within the meaning of that word; and we have reached that conclusion upon the construction of the insurance contract or policy and also of the special contract. This is the proper course to follow when there exists a contract between the parties. But we may add that, both in France and in the United States, where that form of policy was drafted, a cash advance of a similar character is not considered a loan.

Without referring to all the French commentators on the matter, we mention Lefort, Nouveau Traité, tome 2, p. 75, and Dupuich "L'assurance-vie", pp. 200 to 209 inclusive. He says:

La majorité des décisions se refusent à voir dans l'avance sur police autre chose qu'une avance proprement dite, c'est-à-dire un simple paiement anticipé d'une somme due par l'assureur à l'assuré.

And again:

L'avance sur police par laquelle l'assureur se désiste par anticipation de la réserve dont il avait la gestion et jouissance à charge par l'assuré de l'indemniser de ce sacrifice par un paiement d'intérêt ne constitue pas un prêt, puisqu'un débiteur ne saurait prêter à son créancier ce qui fait l'objet même de la créance, alors surtout qu'aux termes du contrat, dans aucun cas, l'assuré ne peut être contraint de reverser à la compagnie le montant de l'avance, ni de payer les intérêts stipulés, la résiliation de l'assurance étant la seule sanction du non paiement de ces intérêts; l'avance sur police serait plutôt un paiement anticipé imputable soit sur le capital assuré, soit sur la valeur de rachat, suivant que le contrat est ou non continué jusqu'à son terme (D.P. 1913, 2.289).

In the same sense do we find a decision of the Tribunal civil de la Seine (J.A. 1904-70) and also one of the Tribunal civil d'Alger, Kanoui; and, upon appeal, on the 18th October, 1909 (J.A. 1910, 163):—

As Dupuich points out (No. 179):

Il est vrai que dans l'avance sur police, à la différence de ces divers cas, la convention comporte, pour celui qui se fait escompter son dû en retirant sa mise, la faculté (non pas l'obligation, remarquons-le bien) de reverser à la compagnie le montant de l'avance. On a voulu voir là le remboursement d'un prêt, mais il s'agit de tout autre chose: l'assuré se réserve tout simplement la faculté de reconstituer sa police, si cela lui convient, conformément au principe constant que le paiement de la prime est facultatif.

And further:

182. Il est donc presque toujours impossible de traiter l'avance sur police comme un prêt.

En tout cas, alors même que, par exception, elle serait un prêt, une chose est certaine, c'est que ce n'est jamais un prêt sur gage. Il est bien

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vrai que l'assureur, en consentant l'avance, exige comme garantie que la police lui soit remise; mais cela ne veut pas dire qu'il la reçoive en gage, car, de même que toute avance n'est pas un prêt, toute garantie n'est pas un gage. Si la compagnie s'est fait déposer la police, c'est par un sentiment de précaution; ce n'est pas parce que, comme en matière de gage, le détention de la police lui assurera le recouvrement de son avance (recouvrement que la convention ne lui permet pas d'exercer); c'est pour ne pas laisser circuler un titre ayant déjà fait l'objet d'un paiement partiel.

Similarly, in the United States,

where a policy holder simply withdraws a portion of the reserve on his policy for which the life insurance company is bound and there is no personal liability,

it is not considered as a loan. (*Board of Assessors of the Parish of New Orleans* v. *New York Life Insurance Company* (1).

In that case, Mr. Justice Holmes, delivering the opinion of the United States Supreme Court, said at page 522:

This is called a loan. It is represented by what is called a note, which contains a promise to pay the money. But as the plaintiff never advances more than it already is absolutely bound for under the policy, it has no interest in creating a personal liability; and, therefore, the contract, on the face of it, goes on to provide that, if the advance is not paid when due, it shall be extinguished automatically by the counter credit for what we have called the reserve value of the policy. In short, the so-called liability of the policy holder never exists as a personal liability; it never is a debt but is merely a deduction on account from the sum that the company ultimately must pay. In settling that account, interest will be computed on the item for the reason that we have mentioned, but the item could never be sued for, any more than any other single item of a mutual account that always shows a balance against the would be plaintiff. In form, it subsists as an item until the settlement, because interest must be charged on it. In substance, it is extinct from the beginning, because, as was stated by the judges below, it is a payment, not a loan.

And Chief Justice Hughes, delivering the opinion of the United States Supreme Court, in *Williams* v. *Union Central Life Insurance Company* (2), says:

As this Court pointed out in *Board of Assessors* v. *New York Life Insurance Company* (1), such advances being against the surrender value do not create a "personal liability" or a "debt" of the insured; but are merely a deduction from the sum that the company "ultimately must pay". While the advance is called a "loan" and interest is computed in settling the account, "the item never could be sued for" and, in substance, "is a payment, not a loan".

(1) (1910) 216 U.S. Rep. 517. (2) (1934) 291 U.S. Rep. 170, at 179.

Although the decisions of the United States Supreme Court are not binding on this Court, they are, it need hardly be stated, entitled to the greatest respect.

In the present case, the Society, when making the cash advance, was merely carrying out the contract which it had made long before with the insured and with the beneficiary. It was bound to carry it out. It could have been compelled to carry it out at the suit of the beneficiary. Therefore, it was merely fulfilling its contract. It was not making to the respondent a loan in any sense of the word. It could not have successfully contended that it could refuse the cash advance to the respondent beneficiary. How then can it be said to have participated in a transaction whereby the respondent was binding herself with or for her husband? And, more particularly, how can it be held not to have paid "in good faith"? It could not do otherwise than pay. It was exactly in the position of an ordinary debtor of the wife who would be paying his indebtedness.

Under such circumstances, not only was it not put upon inquiry as to the use that the respondent would make of the money so paid, but it had no business to inquire.

The situation was the same in that respect as that referred to by Lord Wrenbury, delivering the judgment of the Privy Council in *Corporation Agencies Limited* v. *Home Bank of Canada* (1):

> When C. paid that cheque into his account at the defendant's bank, suppose the bank had asked "For what is this cheque given", would he have been bound to answer? The cheque might have been for salary or for a sum due to C. Jr. on any other account. The defendant bank had no duty to inquire as to the obligation in respect of which the cheque was given.

The Society here was only paying its debt to the respondent beneficiary. It was none of its concern what the respondent would do with the money. This payment was clothed with all the terms and conditions of the insurance Society's contract which had been made before with Mr. Larocque and which the respondent had accepted when she became beneficiary thereof.

This case, upon its facts, is not characterized by any of the circumstances which were present in the cases decided against a lender under art. 1301 C.C.

(1) [1927] A.C. 318, at 324.

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For these reasons, the appeal ought to be allowed, the judgments appealed from reversed and the action of the respondent dismissed with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Wainwright, Elder & McDougall.*

Solicitors for the respondent: *Beauregard, Laurence & Brisset.*

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* Feb. 4, 5.
* March 20.

PAMPHILE FORTIER (PLAINTIFF).....APPELLANT;

AND

JOSEPH LONGCHAMP (DEFENDANT)....RESPONDENT.

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

Water-course—Dam—Raising level of—Flooding of lands—Demolition of dam—Damages—Jurisdiction of Superior Court to entertain claim—Whether Superior Court or Public Service Commission have exclusive jurisdiction as to question of damages—Watercourse Act, R.S.Q., 1925, c. 46, section 12, as amended by 18 Geo. V (1928), c. 29.

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 that 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 he asked that the respondent be condemned to pay the sum of one hundred and fifty dollars for damages caused during the two years preceding the date of the action and, moreover, that the respondent be condemned to demolish the 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 the work done was merely to put the barrage at the same level as before, that the appellant had suffered no damages and that, in any event, the Public Service Commission had exclusive jurisdiction to adjudicate upon the appellant's claim. The appellant's action was dismissed by the trial judge, which judgment was affirmed by a majority of the appellate court.

Held, reversing the judgment appealed from (Q.R. 70 K.B. 365), that the Superior Court was clearly the sole competent tribunal to adjudicate upon the conclusions in the statement of claim, relative to the demolition of the dam.

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

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Held, also, that the Superior Court was still possessing exclusive jurisdiction to decide any question of law arising from the demand for damages, and to pronounce a condemnation for the payment of such damages, after these damages had been assessed by the Public Service Commission (now the Provincial Transportation and Communication Board).

Section 12 of the *Watercourse Act* (R.S.Q., 1925, c. 46) enacting that the "damages shall be ascertained by experts" was amended in 1928 (18 Geo. V, c. 29) by enacting that the "damages shall be assessed and fixed by the Quebec Public Service Commission."

Held that such amendment has not effected any change in the then existing legislation. The legislature has merely substituted the Public Service Commission for the experts, exactly for the same purposes as formerly: the damages, instead of being ascertained and fixed by experts, were to be, after such amendment, ascertained and fixed by the Commission. *Street* v. *Ottawa Valley Power Co.* ([1940] S.C.R. 40) followed.

Held, further, that, upon the facts of this case, the raising of the dam was illegal and, as a result, the raised part of the dam should be demolished and the barrage put back as it was before the works done; but, under the circumstances of this case, the demolition is not ordered to be immediate, as the respondent will be granted a delay during which he may seek to obtain the approval, in accordance with the *Watercourse Act,* by the Lieutenant-Governor in Council of the works done; and, it is also held that the appellant is entitled to $100 damages.

APPEAL, under leave to appeal granted by this Court (1), from the judgment of the Court of King's Bench, appeal side, province of Quebec (2) 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 appellant.

Edgar Gosselin K.C. for the respondent.

The judgment of the Court was delivered by

RINFRET J.—L'appelant a réclamé de l'intimé la somme de $150 de dommages, subis par lui pendant les deux années précédant la date de l'action, par suite du refoulement des eaux de la rivière Etchemin, dans la paroisse de Saint-Henri, dans le comté de Lévis, province de Québec. Il a attribué le refoulement de ces eaux à des travaux faits par l'intimé pour élever un barrage déjà construit dans cette

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rivière. Il a allégué que ces nouveaux travaux de l'intimé ont eu pour effet d'élever le niveau de la rivière et d'inonder la terre de l'appelant, ainsi qu'une île qu'il possède au milieu de cette rivière.

L'appelant a allégué, en outre, que les nouveaux travaux dont il se plaint ont été faits illégalement par l'intimé; et, pour cette raison, il conclut que l'intimé "soit condamné à démolir ce barrage qu'il a construit illégalement et sans droit, dans un délai de quinze jours du jugement à intervenir, et qu'à défaut par l'intimé de ce faire dans le délai susmentionné, l'appelant soit autorisé à démolir ce barrage aux frais de l'intimé."

L'intimé a plaidé que lui et ses auteurs sont propriétaires du barrage en question depuis au delà de quatre-vingts ans; que les travaux qu'il a faits n'ont eu pour but que de remettre ce barrage au niveau où il était antérieurement, vu que le sommet en avait été graduellement érodé et rongé par les eaux; que les terrains de l'appelant n'ont subi aucun dommage par suite de ces nouveaux travaux et qu'à tout événement la Commission des Services Publics seule avait juridiction en la matière.

La Cour Supérieure a rendu jugement rejetant l'action de l'appelant. Elle a décidé que ce dernier ne pouvait obtenir la démolition des travaux visés par l'action que dans le cas où, après évaluation des dommages par la Commission des Services Publics, l'intimé aurait fait défaut de payer ces dommages dans les six mois de la date de leur fixation par la Commission; et que, quant aux dommages, la Commission avait seule, en vertu de la loi, le pouvoir de les évaluer.

Il est bon de mentionner ici qu'à l'époque de ce jugement la Commission des Services Publics n'existait plus. Elle avait été remplacée par la Régie de Transports et Communications, créée par l'article 49 du statut de Québec 3 Geo. VI, c. 16, et l'arrêté ministériel n° 2519, en date du 23 novembre 1939.

La Cour du Banc du Roi en appel a confirmé ce jugement, sauf la dissidence de l'honorable juge Galipeault. Les honorables juges Rivard, Bond et Barclay ont adopté l'avis du juge de première instance sur la question de compétence de la Cour Supérieure. L'honorable juge Létourneau partageait également cette opinion quant aux dommages qui étaient réclamés; mais il fit remarquer qu'il y avait, en

outre, dans les conclusions de l'action de l'appelant, une demande en démolition des nouveaux travaux, et que cette demande était du ressort de la Cour Supérieure. Sur la question de fait, cependant, il trouva que les nouveaux travaux ne consistaient que dans une élévation qui n'avait guère dépassé vingt-deux pouces, et qu'ils restaient

dans le cadre d'une réparation ou amélioration normale et conséquemment l'accessoire nécessaire d'un ouvrage construit avant le 9 février 1918.

Il crut donc que le recours en démolition n'était pas justifié dans les circonstances et qu'il suffirait de débouter l'appelant de son action sous

réserve d'un recours en dommages à être, s'il y a lieu, évalués et fixés par la Commission des Services Publics de Québec, ou la Régie qui lui a succédé, en tenant compte de toute aggravation qu'aurait pu entraîner une élévation ou amélioration permise en loi.

Quant à l'honorable juge dissident, il exprima l'avis que les nouveaux travaux constituaient une surélévation au barrage de nature à obliger l'intimé à obtenir préalablement l'approbation du Lieutenant-Gouverneur en Conseil, conformément à la loi 8 Geo. V, c. 58; et il ajouta que la juridiction de la Cour Supérieure pour attribuer les dommages réclamés par l'appelant n'était pas exclue par l'amendement de 1928 à la *Loi du Régime des Eaux Courantes* (18 Geo. V, c. 29). Il aurait accordé à l'appelant une somme de $100 pour les dommages subis par ses terrains durant les deux années précédant l'action et, sans ordonner immédiatement la démolition du barrage, il aurait réservé à l'appelant tout recours à ce sujet contre l'intimé.

L'appelant a été autorisé à porter devant cette Cour un appel du jugement de la Cour du Banc du Roi, afin de soumettre les importantes questions qui s'y soulèvent (1). Il est évident que le point le plus sérieux, et qui est de portée générale, est celui de la juridiction de la Cour Supérieure en pareil cas.

La Cour Supérieure, dans la province de Québec, est le tribunal de droit commun autorisé à connaître de toute cause qui n'est pas attribuée à la juridiction exclusive des autres cours (*Southern Canada Power Company Limited* v. *Mercure* (2)). C'est donc le tribunal normal et ordinaire auquel une action de la nature de celle de l'appelant doit être soumise, à moins qu'une loi spéciale en ait édicté autrement.

(1) [1941] S.C.R. 193. (2) (1940) Q.R. 70 K.B. 353, at 355.

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En l'espèce, la question de juridiction est soulevée à la fois à raison de la réclamation en dommages et à raison de la conclusion à la démolition des travaux de l'intimé.

La loi dont se réclame l'intimé, dans sa prétention que les demandes de l'appelant sont soustraites à la juridiction de la Cour Supérieure, est le statut de Québec 18 Geo. V, c. 29; et, dans ce statut, l'intimé invoque l'article 1, qui a modifié l'article 12 de la *Loi du Régime des Eaux Courantes* (Statutes Refondus de 1925, c. 46) de la façon suivante:

Cet article 12, dans les Statuts Refondus de 1925, se lisait:

> 12. 1. Les propriétaires ou fermiers de ces ouvrages ou établissements restent garants de tous les dommages qui peuvent résulter à autrui par la trop grande élévation des écluses ou autrement.
>
> 2. Ces dommages sont constatés à dire d'experts dont les parties intéressées conviennent en la manière ordinaire.
>
> 3. A défaut par l'une ou l'autre des parties d'en nommer, des experts désignés par le préfet du comté agissent; et lorsqu'ils ne s'accordent pas sur la décision à rendre, les deux experts nommés en choisissent un troisième.

Par suite de la modification de la loi en 1928, le paragraphe 1 est resté tel qu'il était; mais les paragraphes 2 et 3 ont été remplacés par le suivant:

> 2. Ces dommages sont évalués et fixés par la Commission des Services Publics de Québec.

Il est admis que jusqu'à cet amendement les tribunaux s'accordaient pour décider que, nonobstant le statut à l'effet que

> ces dommages sont constatés à dire d'experts dont les parties intéressées conviennent en la manière ordinaire,

la Cour Supérieure continuait d'être compétente pour connaître d'une action en dommages résultant de la trop grande élévation des écluses ou du refoulement des eaux d'un cours d'eau par l'érection d'un barrage; mais la prétention de l'intimé est que, par suite de l'amendement, la juridiction de la Cour Supérieure s'est trouvée exclue et la Commission des Services Publics de Québec, ou la Régie qui lui a été substituée, est devenue le seul tribunal compétent en la matière.

A vrai dire, la question de juridiction ne se pose qu'à raison de la demande en dommages. Elle ne saurait affecter les conclusions relatives à la démolition des travaux.

En ce qui regarde la démolition, les honorables juges Létourneau et Galipeault ont expressément émis l'opinion

que la Cour Supérieure avait juridiction; et, d'autre part, le juge de la Cour Supérieure, ainsi que les juges Barclay et Bond, n'ont exprimé aucun avis contraire sur le principe. La raison pour laquelle ils ont décidé que la Cour Supérieure ne pouvait connaître de la demande de l'appelant, en matière de démolition, fut que, d'après eux, la déclaration, en l'espèce, n'alléguait pas de raison qui pouvait lui permettre de conclure à la démolition; ou, en d'autres termes, que la présente action n'était pas une action en démolition.

Il reste que les conclusions en démolition étaient là, qu'elles étaient attributives de juridiction et que la Cour Supérieure était au moins compétente pour décider si oui ou non ces conclusions devaient être accordées.

Mais la déclaration de l'appelant alléguait que, vu les faits susrelatés le demandeur est en droit de réclamer du défendeur une somme de $150, représentant les dommages, etc.; et, en plus, de réclamer la démolition de ce barrage fait illégalement par le défendeur, et qui est la cause des dommages que le demandeur subit chaque année par suite du refoulement des eaux.

Et cette déclaration concluait à ce que le défendeur fût condamné à payer la somme de $150 pour les dommages; et qu'en plus le défendeur fut tenu de

démolir ce barrage qu'il a construit illégalement et sans droit, dans un délai de 15 jours du jugement à intervenir, et qu'à défaut par le défendeur de ce faire, dans le délai susmentionné, le demandeur soit autorisé à démolir ce barrage aux frais du défendeur.

La déclaration alléguait donc l'illégalité des nouveaux travaux faits par l'intimé et elle concluait à leur démolition. On peut dire peut-être que l'allégation était "merely a general statement that the dam was illegally constructed"; mais l'illégalité était tout de même alléguée et l'allégation était accompagnée des conclusions nécessaires. Si l'intimé se croyait insuffisamment informé, il avait à sa disposition la demande de particularités.

D'ailleurs, l'intimé ne s'est nullement mépris sur la prétention de l'appelant; et, tant au procès que par le jugement de première instance, il est facile de voir que ce que l'appelant avait en vue en invoquant l'illégalité des nouveaux travaux, c'est qu'ils avaient été faits depuis le 9 février 1918 et que, par suite de la loi en vigueur au moment des travaux, ils auraient dû être précédés d'une approbation du Lieutenant-Gouverneur en Conseil, suivant l'article 5 de la *Loi du Régime des Eaux Courantes* (S.R.Q., 1925, c. 46).

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A l'époque où fut construit le barrage de l'intimé—et admettons pour les besoins de la discussion que cette construction eut lieu il y a au delà de quatre-vingts ans—la loi n'exigeait pas que l'emplacement où devait se faire la construction, non plus que les plans et devis, fussent approuvés par le Lieutenant-Gouverneur. Cette prescription de la loi fut introduite par le statut de Québec 8 Geo. V, c. 68, s. 1; et ce statut contenait une exception pour les "ouvrages construits avant le 9 février 1918."

La question soulevée dans la cause actuelle était de savoir si cette exception couvrait exclusivement les ouvrages tels qu'ils existaient avant le 9 février 1918, ou si elle devait englober, en outre, les réparations, les modifications ou les exhaussements faits à ces barrages après le 9 février 1918.

Pour décider cette question, il est clair que la Cour Supérieure était le seul tribunal compétent et que la Commission des Services Publics, ou la Régie, n'avait pas juridiction.

De ce seul chef, il nous paraît que le jugement de la Cour Supérieure et celui de la majorité de la Cour du Banc du Roi étaient erronés et que l'appelant ne pouvait être débouté de son action quant à cette partie des allégations et des conclusions sur le simple motif du défaut de juridiction.

La Cour Supérieure et la Cour du Banc du Roi pouvaient bien décider que les nouveaux travaux bénéficiaient de l'exemption contenue dans l'article 11 du chapitre 46 des statuts refondus de 1925 (*Loi du Régime des Eaux Courantes*); mais la juridiction pour en connaître et pour en décider appartenait exclusivement à ces tribunaux et en aucune façon à la Commission des Services Publics, ou à la Régie. L'action de l'appelant n'aurait donc pas dû être rejetée pour défaut de juridiction *ratione materiae*.

Mais, en plus, l'appelant conclut à une condamnation aux dommages.

La Cour Supérieure avait-elle juridiction pour prononcer cette condamnation?

Sur ce point, dans la cause actuelle, monsieur le juge Galipeault seul a décidé qu'il fallait répondre dans l'affirmative; et il a été d'avis que les dommages devaient être évalués à la somme de $100, tout en réservant à l'appelant tout recours en démolition.

Pour trancher cette question, il n'y a pas lieu de remonter au delà de l'année 1928, alors que fut modifiée la loi qui, jusque-là, prescrivait que les dommages seraient constatés à dire d'experts, pour y substituer:

> Ces dommages sont évalués et fixés par la Commission des Services Publics de Québec.

Jusqu'à cette date, la jurisprudence était fermement établie et, selon l'avis souvent exprimé par la Cour Suprême du Canada (*Breakey* v. *Carter* (1), *Gale* v. *Bureau* (2), *La Compagnie Electrique Dorchester* v. *Roy* (3)), la juridiction de la Cour Supérieure subsistait pour évaluer et accorder les dommages de cette nature.

Depuis l'amendement de 1928, les tribunaux de la province de Québec ont considéré que cette juridiction de la Cour Supérieure n'existait plus (*Dubé* v. *St. John River* (4), *Maclaren* v. *Lange* (5), *Street* v. *Ottawa Valley Power* (6), *Southern Canada Power Co.* v. *Mercure* (7); et la présente cause, *Fortier* v. *Longchamp* (8)).

Cependant l'une de ces dernières causes, *Street* v. *Ottawa Valley Power Co.*, est venue devant cette Cour (9). Le juge de première instance y avait décidé que les appelants Street n'avaient subi aucun dommage et il avait, en conséquence, rejeté l'action. La Cour du Banc du Roi en appel était également arrivée à la conclusion que l'action ne pouvait être maintenue, mais en se basant sur le fait que l'illégalité des travaux n'avait pas été établie, avec, en plus, le motif que la question des dommages était de la compétence exclusive de la Commission des Services Publics.

La Cour Suprême du Canada, partageant l'avis du juge de première instance que les appelants n'avaient pas réussi à prouver l'existence des dommages qu'ils réclamaient, en vint à la conclusion que ce motif était suffisant pour rejeter l'appel. Mais le juge-en-chef de cette Cour, rendant le jugement unanime du tribunal, ajouta (10):

> Another question of law of great importance was raised and argued which, in the views above expressed, it is strictly unnecessary to pass upon. I think, however, it is inadvisable to put it aside without comment.

(1) Cassels' Digest, 2nd ed. 463.
(2) (1910) 44 Can. S.C.R. 305.
(3) (1913) 49 Can. S.C.R. 344.
(4) (1933) Q.R. 72 S.C. 60.
(5) (1936) Q.R. 62 K.B. 82.
(6) (1938) Q.R. 65 K.B. 504.
(7) (1940) Q.R. 70 K.B. 353.
(8) (1940) Q.R. 70 K.B. 365.
(9) [1940] S.C.R. 40.
(10) [1940] S.C.R. 40, at 45.

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Il procéda ensuite à exprimer l'opinion que l'amendement de 1928 n'avait pas eu pour effet de changer la situation reconnue par la jurisprudence à l'égard de la loi telle qu'elle existait antérieurement.

Après avoir fait la revue de la législation depuis 1856 et des différents arrêts qui, interprétant cette législation, avaient décidé en faveur de la compétence de la Cour Supérieure en matière de dommages en pareil état de choses; après avoir souligné que, en présence de cette jurisprudence constante, la législation avait non seulement été laissée intacte par le parlement, mais qu'elle avait été réaffirmée dans un langage identique à chaque nouvelle revision des statuts (1888, 1909 et 1925), le juge-en-chef concluait:

> We start from the premise then that, by force of articles 7295 and 7296 of R.S.Q. (1909), the Superior Court would have been, so long as that legislation remained unchanged, competent to entertain such an action as the present. It must be taken that, by these articles, the Legislature declared an action for damages under article 7296 (1) to be competent in the Superior Court.
>
> The question raised by the contention of the respondents is this: by the change embodied in subsection 12, as it now appears in the Revised Statutes, has the Legislature taken away this jurisdiction?
>
> For subsection 2 of article 7296, R.S.Q. (1909) providing for the ascertainment of damages by experts, the following is substituted:
>
> > "Such damages shall be assessed and fixed by the Quebec Public Service Commission."
>
> I am very much disposed to think that something more explicit than this is required to deprive the courts of Quebec of the jurisdiction they possessed under the existing statute. The legislature is conclusively presumed to have known the effect of the re-enactment of the statute after the earlier decisions,—to have known, that is to say, that by the statute, as it stood before it was amended, the Superior Court had jurisdiction, but that the proceeding by way of assessment by experts was also available. There is at least much to be said for the view that the more natural interpretation of the action of the Legislature in amending subsection 2 is that recourse to experts is being replaced by the Public Service Commission, and that the courts have not been deprived of jurisdiction.

En s'exprimant ainsi, le juge-en-chef parlait au nom de la Cour. Bien que, comme il le dit, l'opinion qu'il émettait n'était pas strictement nécessaire pour la solution de la cause de *Street*, il analysait quand même la situation qui résultait de l'amendement de 1928, et il en arrivait à la conclusion que cet amendement n'avait pas eu pour effet d'exclure la juridiction de la Cour Supérieure qui jusque-là avait toujours été reconnue.

(1) (1940) Q.R. 70 K.B. 365.

Il importait, en effet, d'examiner attentivement la nature et la portée de cet amendement.

Nous le répétons, comme le disait monsieur le juge Rivard, dans la cause de *Southern Canada Power* v. *Mercure* (1):

> La Cour Supérieure est le tribunal de droit commun autorisée à connaître de toute cause qui n'est pas attribuée à la juridiction exclusive d'une autre cour.

En présence du texte de la loi telle qu'elle existait jusqu'à l'amendement de 1928 (S.R.Q. 1925, c. 46, art. 12):

> 2. Ces dommages sont constatés à dire d'experts dont les parties intéressées conviennent en la manière ordinaire,

la jurisprudence était devenue constante que ce texte n'avait pas pour effet d'enlever la compétence de la Cour Supérieure.

Le changement apporté par l'amendement de 1928 a substitué le texte suivant:

> 2. Ces dommages sont évalués et fixés par la Commission des Services Publics de Québec.

ou, en anglais:

> 2. Such damages shall be assessed and fixed by the Quebec Public Service Commission.

La législature n'a donc fait que substituer aux experts la Commission des Services Publics de Québec; et ce, exactement pour les mêmes fins qu'autrefois: les dommages, au lieu d'être constatés "à dire d'experts" seront dorénavant constatés par la Commission. Car il n'y a pas de distinction pertinente entre le mot "constatés" et les mots "évalués et fixés". Comme résultat de l'amendement, c'est un corps qui est substitué à l'autre .

Sans doute, la Commission est, sous certains aspects, un tribunal, et un tribunal permanent, tandis que les experts n'étaient réunis que pour les fins spéciales de la constatation des dommages; mais, dans un cas comme dans l'autre, quels que soient les pouvoirs généraux de la Commission et des experts respectivement, la référence faite par la *Loi du Régime des Eaux Courantes* est toujours, avant comme après l'amendement, une référence exclusivement dans le but de constater les dommages. Auparavant c'étaient les experts qui les constataient; à l'avenir, ce sera la Commission. Aucun autre pouvoir que celui-là n'est référé à la

(1) (1940) Q.R. 70 K.B. 365.

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Commission; et il n'est dit nulle part que la Commission sera appelée à faire autre chose que l'évaluation, ni, comme corollaire, qu'elle sera investie de la connaissance de la cause elle-même. Cette affaire ne lui est pas référé de la même façon que celles qui sont de sa compétence ordinaire et régulière. Le pouvoir d'évaluer les dommages lui est conféré, mais non pas celui de prononcer une condamnation pour le paiement de ces dommages.

Avec la loi telle qu'elle était jusque-là (S.R.Q., 1925, c. 46, art. 15):

> A défaut du paiement des dommages et indemnités ainsi fixés (par les experts) dans les six mois de la date du rapport d'experts avec l'intérêt légal à compter de telle date, celui qui y est condamné est tenu de démolir les travaux qu'il a faits, ou ils le sont à ses frais et dépens, sur jugement à cet effet, le tout sans préjudice des dommages-intérêts encourus jusqu'alors.

Cet article reste le même dans la loi telle que modifiée (18 Geo. V, c. 29, art. 4). On se contente de remplacer les mots "du rapport des experts" par les mots: "de la décision de la Commission". La loi reste donc la même qu'auparavant. Autrefois les experts constataient les dommages; maintenant, c'est la Commission. Dans chaque cas, les dommages constatés ou évalués sont payables par les propriétaires du barrage dans les six mois de la constatation ou de l'évaluation, à défaut de quoi la sanction est la démolition des travaux.

Sans doute, "la décision de la Commission sur toute question de fait de sa compétence est définitive"; mais personne n'a jamais suggéré que, dans l'état de la loi antérieure, la constatation des dommages faite par les experts pût être modifiée par le tribunal.

Il n'y a aucun changement entre le rôle et les fonctions que la Commission est désormais appelée à remplir et ceux des experts.

Le recours qui est donné à la partie réclamante reste exactement le même par suite de la décision de la Commission qu'il était par suite de la sentence des experts.

La législature a donc changé le texte, mais elle n'a nullement changé le sens de la législation. La Commission n'y a été introduite que pour une seule fin: la constatation des dommages.

Pas plus qu'aux experts, elle n'a attribué à la Commission la décision des points de droit qui pouvaient se sou-

lever ou le pouvoir de condamner au paiement des dommages. La juridiction conférée est très claire: elle s'arrête à l'évaluation des dommages et à rien autre chose.

Non seulement on ne peut inférer d'un pareil changement l'intention de la législature de conférer à la Commission des pouvoirs plus étendus que n'en avaient les experts; mais, en présence de la jurisprudence qui jusque là avait toujours reconnu la compétence de la Cour Supérieure et qui doit être tenue pour avoir été à la connaissance de la législature, on ne saurait douter que si cette dernière, par son amendement, avait voulu opérer un changement aussi important que celui d'exclure la compétence du tribunal de droit commun, elle aurait indiqué son intention dans un langage autrement précis et de la façon la plus expresse.

Cette Cour croit donc devoir décider maintenant dans le sens de l'opinion qu'elle a exprimée dans la cause de *Street* v. *Ottawa Valley Power Co.* (1).

La Commission des Services Publics, sous le nom sous lequel elle est maintenant connue, a donc acquis en la matière la juridiction qu'avaient autrefois les experts. Elle pourra évaluer les dommages lorsque les parties intéressées en conviendront en la manière ordinaire. Les tribunaux pourront lui référer l'évaluation et la fixation des dommages, comme ils auraient pu le faire aux experts en vertu de l'article 12 des statuts refondus de Québec (1925), c. 46, et comme ils peuvent encore le faire en vertu des articles 391 et suiv. du Code de Procédure civile. (N.B. Voir sur ce point ce que dit l'honorable juge Fournier, de cette Cour, dans la cause de *Jones* v. *Fisher* (2)); mais la décision des questions de droit et, en particulier, celle du droit aux dommages, indépendamment de l'évaluation de ces dommages, reste toujours de la compétence exclusive de la Cour Supérieure, et c'est à elle qu'il appartient de prononcer la condamnation pécuniaire. Les experts n'avaient pas ce pouvoir, et la Commission ne l'a pas plus. La seule sanction prévue, comme conséquence de la constatation et de l'évaluation des dommages en vertu de la *Loi du Régime des Eaux Courantes,* c'est la démolition prescrite par l'article 15 de la loi.

La Cour en étant arrivée à la conclusion que la Cour Supérieure avait juridiction en l'espèce, tant pour trancher

(1) [1940] S.C.R. 40, at 45 to 48 incl.
(2) (1890) 17 Can. S.C.R. 515, at 522, 523.

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la question du droit aux dommages que pour décider le droit à la démolition, se trouve devant le fait que, à raison de leurs jugements contraires sur ces questions de juridiction, ni le juge de première instance, ni la majorité de la Cour du Banc du Roi ne se sont prononcés sur les questions de fait dont la solution devenait nécessaire pour arriver à rendre le jugement qui aurait dû être rendu.

En règle générale, cette conséquence entraîne le renvoi du dossier à la Cour Supérieure pour que, le point de compétence se trouvant décidé, cette dernière Cour se prononce sur les autres questions qui se soulèvent dans la cause.

Cependant, cette fois, les parties ne nous ont pas demandé d'en agir ainsi; il n'en a pas été question lors de l'audition, et, les dommages réclamés étant plutôt minimes, il ne nous paraîtrait pas juste de soumettre les intéressés à des frais plus considérables que ceux qui ont malheureusement été encourus jusqu'ici.

L'appel n'aurait jamais été permis par cette Cour si le litige n'avait soulevé des questions de droit de grande conséquence et qu'il était important de faire décider définitivement.

Pour ces raisons particulières, nous croyons devoir nous prononcer sur les faits de la cause.

Et, tout d'abord nous sommes d'avis que la preuve a démontré que l'intimé, postérieurement au 9 février 1918 (date fixée par l'article 11 de la *Loi du Régime des Eaux Courantes*), a exhaussé son barrage de vingt-deux pouces. Il a bien prétendu que par cet exhaussement il n'aurait fait que rétablir le niveau antérieur du barrage. Du moment qu'il admettait l'exhaussement, c'était à lui qu'il incombait de prouver que cet exhaussement ne portait pas le barrage à un niveau plus élevé qu'auparavant. Or, malgré son affirmation, l'on peut dire que toute l'enquête a établi le contraire. Sur ce point, la preuve de l'appelant était déjà concluante; mais, sous plusieurs rapports, elle est confirmée par les témoins de l'intimé et par toutes les circonstances. Il y a, en plus, le fait que les témoins de l'appelant connaissaient tout autant la situation antérieure à l'exhaussement que la situation qui l'a suivi; tandis que, au sujet des témoins de l'intimé, il y a lieu de remarquer que véritablement aucun d'eux n'a pu faire la comparaison entre la position antérieure et la position subséquente. Ou

bien ils n'avaient connaissance que de l'état des lieux au moment de l'action et du procès, sans pouvoir rien dire de ce qui existait quelques années auparavant; ou bien ils avaient eu connaissance de l'état des lieux quelques années auparavant et ils n'étaient pas retournés sur les lieux à l'époque de l'action et du procès, de façon à pouvoir faire une comparaison.

D'autre part, nous l'avons dit, les circonstances qui ont été prouvées viennent confirmer les témoins de l'appelant; avant l'exhaussement, l'appelant pouvait traverser en voiture, et presque à pieds secs, de sa terre à l'île dont il est propriétaire dans la rivière; depuis lors, il ne le peut plus. Avant l'exhaussement, l'eau de la rivière n'était pas refoulée jusqu'à la terre de l'appelant; depuis, elle est refoulée au delà de cette terre et de l'île. Avant l'exhaussement, l'appelant pouvait cultiver l'île et les terrains en bordure de la rivière; depuis, cela lui est devenu impossible.

Nous devons en venir à la conclusion que l'intimé a donc modifié le barrage qui existait avant le 9 février 1918 et qu'il l'a exhaussé d'une façon appréciable.

Dans ces conditions, nous partageons l'avis de monsieur le juge Galipault que l'intimé

> a fait plus que maintenir son barrage, il a construit de nouveau; et, même lorsqu'il surélevait * * * il construisait encore de nouveau, il faisait une nouvelle construction, différente et distincte de celle existant en 1918, au moins pour partie.

Il s'ensuit que, de ce chef, l'intimé ne pouvait pas invoquer l'exception prévue par l'article 11 de la *Loi du Régime des Eaux Courantes*, et que, pour les nouveaux travaux qu'il a entrepris, il lui incombait de soumettre ses plans et devis à l'approbation du Lieutenant-Gouverneur en Conseil, conformément à l'article 5 de la loi.

On ne saurait, en effet, en pareille matière, reconnaître que la loi permette une élévation ou une amélioration du barrage qui pourrait être considérée comme normale ou comme "l'accessoire nécessaire d'un ouvrage construit avant le 9 février 1918."

Le statut ne peut pas vouloir dire que toute chaussée, écluse, digue ou barrage sera indéfiniment soustrait à l'application de l'article 5 du statut, simplement parce que cette écluse, chaussée, digue ou barrage existait déjà à l'emplacement où il a été construit avant le 9 février 1918.

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Ce que la loi défend, c'est l'érection d'un ouvrage de cette nature, après le 9 février 1918, sans l'autorisation du Lieutenant-Gouverneur en conseil et l'approbation du plan et des devis.

La loi n'a pas voulu se donner un caractère rétroactif pour les ouvrages déjà en existence à la date fixée, mais elle a exigé expressément l'approbation des plans et devis et l'autorisation du Lieutenant-Gouverneur en conseil pour tout ouvrage subséquent. L'article 11 emploie le mot "ouvrages", et non pas "canaux, écluses, murs, chaussées, digues, ou autres travaux semblables", que l'on trouve dans l'article 5.

Et il ne peut pas être question d'exception ou de tolérance pour un exhaussement de peu d'importance. Si on peut sans doute appliquer ici la maxime: *De minimis lex non curat,* et supposer que le tribunal ne serait pas inflexible dans le cas d'un exhaussement négligeable, il est quand même nécessaire d'appliquer la loi telle qu'elle est, en constatant qu'elle exige l'approbation du Lieutenant-Gouverneur en conseil pour tout ouvrage construit après le 9 février 1918, et qu'elle ajoute (art. 5-2):

> Si un tel ouvrage est construit sans cette approbation, ou si, après avoir été construit, il n'est pas entretenu conformément aux plan et devis qui ont été ainsi approuvés, la démolition de l'ouvrage et la remise des terrains publics ou privés dans l'état originaire ou dans un état s'y rapprochant le plus possible, peuvent être ordonnés sur action ordinaire, par tout tribunal compétent, à la poursuite de la couronne ou de tout intéressé, selon que le terrain pris, occupé ou affecté est propriété publique ou privée, sans préjudice de tout autre recours légal.

C'est l'introduction, dans cette loi spéciale, de la prescription générale du Code civil, art. 1066:

> 1066. Le créancier peut aussi, sans préjudice des dommages-intérêts, demander que ce qui a été fait en contravention à l'obligation soit détruit, s'il y a lieu; et le tribunal peut ordonner que cela soit fait par ses officiers, ou autoriser la partie lésée à le faire aux dépens de l'autre.

D'après l'article 5, si l'intimé avait construit tout son barrage après le 9 février 1918, il aurait été obligé de l'entretenir conformément aux plan et devis approuvés par le Lieutenant-Gouverneur en conseil. Il ne lui aurait pas été permis de l'exhausser sans approbation préalable. Par analogie, vu que ce barrage avait été construit avant le 9 février 1918, il n'a pas été obligé d'en faire approuver l'emplacement ni les plans et devis; mais il est évident que, dès

qu'il a jugé à propos de surélever son barrage, il a fait par là un ouvrage qui requérait l'approbation du Lieutenant-Gouverneur en conseil.

L'exhaussement étant prouvé, c'est à l'intimé qu'il incombait d'établir que cet exhaussement avait reçu l'approbation requise. Non seulement il ne l'a pas fait, mais il a pris, au contraire, la position qu'il n'avait pas à obtenir cette approbation. Il nous est impossible d'interpréter la loi dans ce sens. Il nous faut décider que l'ouvrage qu'il a construit après le 9 février 1918 était illégal et que cette illégalité entraîne la démolition de l'ouvrage et la remise du barrage dans l'état antérieur au 9 février 1918, ou dans un état s'y rapprochant le plus possible; et c'est ce que la Cour Supérieure aurait dû ordonner. Elle était le seul tribunal compétent pour ce faire; et l'appelant avait l'intérêt voulu pour conclure à cet effet, sans préjudice à ses autres recours.

Nous ne sommes cependant pas obligés d'ordonner la démolition immédiate. Nous croyons que, dans les circonstances, l'intimé devrait avoir un délai pour lui permettre de s'adresser au Lieutenant-Gouverneur en conseil, afin que ce dernier puisse approuver ou non les plans et devis des nouveaux travaux faits depuis le 9 février 1918.

Nous croyons que, pour ces fins, le délai devrait être limité à trois mois. Si des entraves imprévues empêchaient l'approbation ou la désapprobation des nouveaux travaux par le Lieutenant-Gouverneur en conseil d'ici au délai fixé, l'intimé aura le droit de s'adresser à la Cour Supérieure, district de Québec, pour faire étendre ce délai.

Quant aux dommages subis durant les deux dernières années qui ont précédé l'institution de l'action, nous sommes d'avis que la preuve ne permet pas d'en accorder à raison de l'érosion ou de l'éboulis des terres de l'appelant qui sont en bordure de la rivière. Tout au plus peut-on dire que ces érosions ont eu pour cause le mouvement des glaces et l'affluence plus rapide au printemps des eaux de la rivière, à raison du déboisement de la région depuis un certain nombre d'années.

Mais l'inondation de la terre et de l'île de l'appelant causée par l'exhaussement du barrage de l'intimé a été prouvée. Il était vraiment impossible à ce sujet de faire

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une évaluation précise. L'estimation qu'en aurait faite le juge de première instance ou la majorité de la Cour du Banc du Roi eût pu difficilement être modifiée par la Cour Suprême du Canada.

Monsieur le juge Galipeault, tenant compte de cette difficulté, est arrivé à la conclusion "qu'on peut en toute sûreté les arrêter à la somme de $100" (les dommages). Nous adoptons cette évaluation.

Comme le savant juge, nous sommes d'avis que l'intimé

a échoué totalement dans sa prétention qu'il y avait eu compensation et que par le fait de l'exhaussement du barrage, les immeubles de l'appelant recevaient une véritable protection contre le caprice et les fureurs de la rivière Etchemin.

L'appel sera donc maintenu avec dépens dans toutes les cours, et l'intimé sera condamné à payer à l'appelant la somme de $100 à titre de dommages, avec intérêt depuis la date de l'action. Il sera, en plus, ordonné que l'exhaussement de vingt-deux pouces construit depuis le 9 février 1918 soit démoli et que le barrage soit remis dans l'état où il était auparavant, ou dans un état s'y rapprochant le plus possible, et qu'à défaut par l'intimé d'opérer cette démolition lui-même, cela soit fait à la diligence de l'appelant, aux dépens de l'intimé, si toutefois ce dernier, dans un délai de trois mois de la date du présent jugement, n'obtient du Lieutenant-Gouverneur en conseil, conformément à l'article 5 de la *Loi du Régime des Eaux Courantes* (R.S.Q. 1925, c. 46), l'approbation des plans et devis de cet exhaussement, ainsi que l'autorisation du Lieutenant-Gouverneur en conseil de le maintenir en l'état actuel. Si, par suite de circonstances imprévues et ne dépendant pas du contrôle de l'intimé, cette approbation et cette autorisation ne peuvent être obtenues dans le délai de trois mois, l'intimé aura le loisir de demander l'extension de ce délai à la Cour Supérieure. Suivant que l'exhaussement sera ou non approuvé par le Lieutenant-Gouverneur en conseil dans le délai spécifié, ou dans tout autre délai qui pourra être accordé, l'ordre de démolition cessera d'avoir effet ou deviendra définitif, selon le cas. Si cet ordre de démolition devient définitif, l'intimé devra démolir l'exhaussement dans un délai d'un mois de la date où l'autorisation et l'approbation du Lieutenant-Gouverneur lui auront été réfusées, ou de la date où expirera le délai de trois mois qui lui est accordé pour obtenir cette approbation et cette

autorisation (sauf, bien entendu, toute extension de délai qui pourrait lui être accordée par la Cour Supérieure, ainsi qu'il est dit dans ce jugement, pour obtenir telle approbation ou autorisation).

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Appeal allowed with costs.

Solicitor for the appellant: *Arthur Bélanger.*

Solicitors for the respondent: *Rochette & Gosselin.*

LÉON TRUDEAU AND OTHERS (INTERVENANTS) ..... APPELLANTS;

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* Feb. 9, 10.
* March 20.

AND

JOSEPH DEVOST (PLAINTIFF) ..... RESPONDENT.

AND

THE TOWN OF COATICOOK (DEFENDANT).

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

Municipal corporation—Insane patient—Council-men ordering his confinement—Persons executing order—Dismissal of action for damages against them by patient after his discharge—Insolvency of plaintiff in the action—City council, by resolution, authorizing payment of lawyers' costs incurred by these persons—Transaction as to amount due—Action by ratepayer to annul resolution—Whether confinement of insane patient within the duties of a municipality—Article 50 C.C.P.—Cities and Towns Act, R.S.Q., 1925, c. 102, ss. 381, 411, 422.

One Kennedy, a citizen of the town of Coaticook, Quebec, was attending frequently the meetings of the city council and, on many occasions, threatened the council-men with proceedings in disqualification. In 1937, he effectively brought an action against the mayor, who resigned his office but was subsequently disqualified by the court. Some days after the issue of the writ and following a meeting of the council presided over by the acting mayor Trudeau, one of the appellants, it was decided to confine Kennedy in a lunatic asylum. The recorder of the town was called and, also, one Dr. Birs, who signed the required certificate; two ratepayers, Lavoie and Garceau, now appellants, signed and swore the forms necessary for the confinement, the whole in conformity with the *Lunatic Asylums Act.* Kennedy was then conducted to the asylum by Lavoie, who had in his possession a warrant of commitment signed by the recorder. Six weeks later, Kennedy was discharged from his confinement. Later on he succeeded before the

* PRESENT:—Rinfret, Kerwin, Hudson and Taschereau JJ. and Maclean J. *ad hoc.*

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courts in recovering damages against the doctor. He subsequently brought four other actions in damages for $1,000 each against Trudeau, Lavoie, Garceau and a council-man, Pilotte, the fourth appellant, on the ground that they had conspired together so as to achieve his confinement. A judgment dismissing these actions was affirmed on appeal. Kennedy having died insolvent, the appellants' attorneys, not being able to collect the amount of their professional services, amounting to $3,357.29, from his estate, requested the city to pay their bill, on the ground that the appellants were its agents and that the costs incurred for their defence were the result of acts done at its request. A legal opinion was asked from the town attorney who reported that, though he thought that the city was not liable, he suggested that it may be advisable to settle the matter out of court by means of a transaction. The appellant's lawyers made a reduction of $100 and the city council-men passed a resolution authorizing the payment of the reduced amount in final settlement. The respondent, a ratepayer, then brought an action against the city asking that the resolution be declared illegal and null, and he also asked for an injunction in order that payment be stopped. The city defendant decided not to contest the demand for injunction and to abide by the decision of the court as to the action. The appellants then filed an intervention and thus became the real defendants in the case. They pleaded that the respondent had not a sufficient interest to proceed as he had done, under article 50 C.C.P., as a special interest, distinct from the general interest of a ratepayer, was required under that article; that the respondent should have taken his proceedings under the provisions of the *Cities and Towns Act;* and they further alleged that they had acted as servants, officers and agents of the city, and that the latter should compensate them for the expenses incurred. The trial court dismissed the action and maintained the intervention, which judgment was reversed by the appellate court. An appeal to the Supreme Court of Canada was dismissed with costs.

Held that the respondent had an "interest" sufficient to entitle him to institute proceedings for the annulment of the resolution of the city council in the manner and form he has followed in the present action. Even assuming that the respondent had not the "special interest", distinct from that of an ordinary ratepayer, which had been held by numerous decisions to be required in order to enable him to proceed under article 50 C.C.P., the respondent was surely in possession of the "interest" required by the *Cities and Towns Act*.—Although the present action has apparently been taken under article 50 C.C.P., all the formalities of procedure followed by the respondent were in accordance with the procedure prescribed by section 411 of the above Act, under which Act a resolution of a city council, alleged to be *ultra vires*, can be challenged: so, whether the respondent should be assumed to have proceeded under either of these provisions of law, there was, in the premises, no difference in the procedure and the appellants have suffered no prejudice therefrom.—Although section 411 provides that the proceedings should be by way of a "petition", the respondent's action accompanied by a writ of summons should be considered as complying with the statute; an "action" necessarily includes a "petition".

Held, also, that the resolution of the city council was *ultra vires*.—There was no resolution of the council authorizing the appellants to effect the confinement of Kennedy. Moreover, there is no provision in the

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Cities and Towns Act which imposes any duties upon a municipality as to the confinement of insane persons, the persons indicated in the *Lunatic Asylums Act* being *personae designatae* and not acting as municipal officers or employees. Therefore, the appellants cannot be deemed to have acted on behalf of the city in performing an act which was outside its domain.—Also, a municipality cannot ratify an act which is outside of its powers, and, *a fortiori*, it can effect a "transaction" only in matters within the limits of such powers.

APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, White J., and maintaining the respondent's action for the annulment of a resolution adopted by the city council of the defendant municipality and dismissing the appellants' intervention.

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

John T. Hackett K.C. and *A. M. Watt* for the appellants.

Chs. Laurendeau K.C. and *Roger Bouchard* for the respondent.

The judgment of the Court was delivered by

TASCHEREAU J.—Il s'agit dans la présente cause d'une action intentée par l'intimé, Joseph Devost, dans laquelle il demande qu'une résolution adoptée par le Conseil de la ville de Coaticook, le 27 décembre 1939, autorisant le paiement à Samson et Gérin, avocats, d'une somme de $3,257.29 pour services professionnels, soit déclarée illégale et nulle.

Les faits qui ont provoqué cette contestation sont les suivants:—

Un citoyen de Coaticook, Charles A. Kennedy, avait l'habitude d'assister aux réunions du Conseil, où il portait souvent la parole et où, assez fréquemment, il menaçait les échevins de poursuites et de procédures en déqualification. En janvier 1937, il a donné suite à ses menaces, et a poursuivi le maire de la localité, D. B. Hopkins, qui a démissionné et qui a été effectivement déqualifié par le jugement de la Cour. Quelques jours après l'institution de ces procédures, et après une séance du Conseil présidée par le promaire Trudeau, il fut décidé d'interner Kennedy dans un asile d'aliénés. On fit venir le Recorder de la ville, ainsi que le Dr. Birs qui signa le certificat médical requis, et

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deux contribuables, Henri Lavoie, employé de la ville, et Théodore E. Garceau, ancien constable, signèrent sur-le-champ les formules nécessaires à l'internement, et les assermentèrent. Toutes ces formalités étaient exigées en vertu de la *Loi des asiles d'aliénés* qui est contenue au chapitre 190 des Statuts Refondus de Québec de 1925, article 46. Kennedy fut alors conduit à un asile par Henri Lavoie qui était porteur d'un mandat émis par le Recorder de la ville de Coaticook.

Après environ six semaines de détention à l'asile Kennedy fut libéré, et institua alors une action en dommages contre le Dr. Birs. Par jugement de la Cour Supérieure, confirmé par la cour d'appel, l'action fut maintenue, et plus tard, Kennedy institua quatre autres actions de $1,000 chacune en dommages contre le pro-maire Léon Trudeau, l'échevin Adélard Pilotte, Henri Lavoie et Théodore Garceau, les accusant tous d'avoir conspiré entre eux pour le faire interner. Ces quatre dernières actions furent rejetées et, après la mort de Kennedy, sa fille porta deux de ces jugements en cour d'appel qui les confirma.

Les quatre défendeurs, Trudeau, Pilotte, Lavoie et Garceau, avaient confié à Samson et Gérin, avocats de Coaticook, le soin de les représenter devant les tribunaux, et, Kennedy étant décédé insolvable, sa succession fut incapable de payer les frais dus à MM. Samson et Gérin. Ceux-ci s'adressèrent donc à la ville de Coaticook, en lui représentant que les quatre défendeurs étaient les mandataires de la ville, et que les frais encourus par eux pour leur défense, au montant de $3,357.29, l'avaient été comme résultat d'actes posés à la demande des autorités municipales. A une réunion du Conseil tenue le 27 décembre 1940, ce compte fut présenté pour paiement, et une résolution fut adoptée autorisant le maire suppléant et le secrétaire-trésorier à signer une transaction au nom de et pour la ville de Coaticook avec MM. Samson et Gérin, en vertu de laquelle un paiement de $3,257.29 devait être effectué en règlement complet et final.

Cette réclamation des avocats avait été au préalable soumise à l'aviseur légal de la ville, M. L. Shurtleff, qui exprima l'avis que la ville n'était pas responsable, mais qui a suggéré la possibilité de régler cette affaire hors de cour au moyen d'une transaction afin de prévenir une contesta-

tion à naître. MM. Samson et Gérin ont alors réduit leur réclamation de $100 et c'est ce qui explique que le règlement intervenu a pris la forme d'une transaction.

C'est la légalité de cette résolution qui fait l'objet du présent litige.

A l'action de l'intimé, était jointe une demande d'injonction afin d'empêcher que le paiement ne fût effectué. Cependant, la ville de Coaticook, la mise-en-cause, passa une résolution le 8 janvier 1940 donnant instruction à ses procureurs de ne pas contester l'injonction, et le 7 mars 1940 elle produisit une déclaration à l'effet qu'elle se désistait de sa contestation de l'action, et qu'elle s'en rapportait à la justice. Le 9 janvier 1940, les quatre appelants avaient produit une intervention, qui fut contestée par l'intimé, et vu les désistements ci-dessus mentionnés, c'est entre le demandeur qui attaque la résolution, et les intervenants qui en soutiennent la légalité, que le débat s'est engagé. La Cour Supérieure a rejeté l'action et maintenu l'intervention; la cour d'appel a renversé ce jugement, et a déclaré nulle la résolution autorisant le paiement de $3,257.29 à MM. Samson et Gérin.

Les appelants Trudeau et al. ont invoqué différents motifs à l'appui de leur appel devant cette Cour. Ils allèguent que Joseph Devost ne pouvait s'autoriser de l'article 50 du Code de Procédure Civile, mais qu'il devait procéder en vertu de la *Loi des Cités et Villes* pour demander l'annulation de la présente résolution. Ils soutiennent aussi que Devost n'avait pas intérêt suffisant pour instituer les présentes procédures sous l'article 50 du Code de Procédure Civile, mais qu'il lui fallait un intérêt distinct de celui des autres contribuables. De plus, ils prétendent avoir agi comme serviteurs, officiers et mandataires de la ville qui doit en conséquence les indemniser des dépenses encourues.

L'action instituée par Devost l'a été apparemment en vertu de l'article 50 du Code de Procédure Civile qui se lit comme suit:—

> A l'exception de la Cour du Banc du Roi, tous les tribunaux, juges de circuit, magistrats et autres personnes, corps politiques et corporations dans la province, sont soumis au droit de surveillance et de réforme, aux ordres et au contrôle de la Cour Supérieure et de ses juges, en la manière et la forme que prescrit la loi.

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Les appelants soumettent que la loi accorde un remède spécial pour faire mettre de côté les résolutions et les règlements d'une corporation municipale, et que dans le cas actuel, le remède dont ils devaient se servir était ce recours statutaire qui, dans l'occurrence, exclut l'application de l'article 50 C.P.C. Ce remède dont parlent les appelants se trouve dans la *Loi des Cités et Villes,* chap. 102 des Statuts Revisés de Québec de 1925, et on nous réfère aux articles 381, 411 et 422. Ces articles sont à l'effet que tout électeur municipal peut par une requête présentée à la Cour Supérieure ou à un juge de ce tribunal, demander et obtenir pour cause d'illégalité la cassation de tout règlement du Conseil avec dépens contre la municipalité. Ces articles s'appliquent également aux procès-verbaux, rôles, résolutions, et autres ordonnances du Conseil. Comme on le voit, ces articles traitent des règlements attaqués pour cause d'illégalité. La jurisprudence est unanime et maintenant parfaitement établie que, quand il s'agit d'illégalité, tout contribuable peut recourir à cette procédure spéciale indiquée par la loi, dans les délais stipulés, mais que quand il s'agit d'actes *ultra vires* il y a toujours le recours en vertu de l'article 50 du Code de Procédure Civile, pour faire constater l'existence de la nullité absolue. Le défaut de juridiction entraîne cette nullité absolue, et si, dans le cas qui nous occupe, le Conseil n'avait pas juridiction pour adopter la résolution attaquée, il n'est pas douteux que le demandeur, s'il justifiait un intérêt suffisant, pouvait procéder en vertu de l'article 50 du Code de Procédure Civile. (*Dechène* v. *Cité de Montréal* (1), *Toronto Railway Co.* v. *Corp. de Toronto* (2), *Shannon Realties Ltd.* v. *Ville de St-Michel* (3) and *Donohue Bros.* v. *La Malbaie* (4).

Les appelants prétendent que le demandeur n'avait pas un intérêt suffisant pour instituer son action. Ils soutiennent qu'il ne suffit pas, pour avoir le droit de poursuivre comme il l'a fait, d'avoir un intérêt commun à tous les contribuables: il faut, disent-ils, un intérêt individuel, particulier, qui affecte le demandeur dans sa personne ou dans ses biens.

Cette question a été souvent soumise aux tribunaux de la province de Québec, et la diversité des opinions émises par la Cour Supérieure, l'ancienne Cour de Révision et la

(1) [1894] A.C. 640.
(2) [1904] A.C. 809.
(3) [1924] A.C. 185.
(4) [1924] S.C.R. 511.

cour d'appel, montre combien elle présente de difficultés. Il suffira de consulter les arrêts suivants pour constater l'incertitude et l'hésitation de notre jurisprudence. Les uns, comme on peut le voir, soutiennent qu'il faut un intérêt direct et spécial; d'autres rendus par des juges non moins éminents sont à l'effet que l'intérêt de simple contribuable est suffisant. *Sénécal* v. *Edison Electric Co.* (1), *Bélair* v. *La Ville de Maisonneuve* (2), *Bird* v. *Merchants Telephone Co.* (3), *Emard* v. *Village du Boulevard St-Paul* (4), *Allard* v. *La Ville de St-Pierre* (5), *Tremblay* v. *La Cité de Montréal* (6), *Guay* v. *La Corporation de la Malbaie* (7), *Jacob* v. *La Cité de St-Henri* (8), *Trudel* v. *La Cité de Hull* (9), *La Cie Electrique du Saguenay* v. *La Corporation du Village de St.-Jérôme* (10), *Dionne* v. *La Corporation du Village de St-Georges de Beauce* (11). Dans *Warner-Quinlan Asphalt Co.* v. *La Cité de Montréal* (12), la cour d'appel a décidé:—

A special interest distinct from that of ordinary ratepayer is required to entitle a person to demand that a contract awarded by a municipality be cancelled, unless it is established that the proceedings at issue are fraudulent or *ultra vires*.

Dans *Robertson* v. *La Cité de Montréal* (13), il avait cependant été décidé par la même Cour:—

Le simple fait d'être contribuable d'une municipalité ne donne pas ouverture au recours d'une action pour faire annuler un règlement que concède un privilège.

Et quelques années plus tard dans *La Ville de la Tuque* v. *Desbiens* (14), M. le juge en chef Lamothe faisait une distinction nouvelle et disait:—

Pour se prévaloir de l'article 50 faut-il qu'un demandeur démontre un intérêt spécial différent de l'intérêt des autres contribuables? Si la décision attaquée est atteinte de nullité absolue, le demandeur n'a pas à alléguer ni à démontrer un intérêt special. C'est l'action populaire. Si cette décision est oppressive, injuste et abusive à l'égard de quelque contribuable, il faut que ce soit l'un de ces derniers qui se plaigne.

La cause de *Robertson* v. *La Cité de Montréal* (15) a été portée devant cette Cour qui a confirmé la décision de la cour d'appel de Québec. Et voici comment se sont exprimés les trois juges formant la majorité:—

(1) (1892) Q.R. 2 S.C. 299.
(2) (1892) Q.R. 1 S.C. 181.
(3) (1894) Q.R. 5 S.C. 445.
(4) (1907) Q.R. 33 S.C. 155.
(5) (1909) Q.R. 36 S.C. 408.
(6) (1905) Q.R. 28 S.C. 411.
(7) (1904) 11 R. de J. 29.
(8) (1894) Q.R. 6 S.C. 488.
(9) (1903) Q.R. 24 S.C. 285.
(10) (1931) Q.R. 70 S.C. 144.
(11) (1940) Q.R. 79 S.C. 59.
(12) (1915) Q.R. 25 K.B. 147.
(13) (1914) Q.R. 23 K.B. 338.
(14) (1919) Q.R. 30 K.B. 20.
(15) (1915) 52 Can. S.C.R. 30.

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Sir Charles Fitzpatrick, à la page 31:

A ratepayer who has not suffered any special injury, but only such as is public in its nature and affects all the inhabitants alike, has no interest entitling him to bring action against the city. It is against public policy that he should be permitted to do so.

M. le juge Duff, à la page 62:

I have been unable to convince myself that, apart from special enactment, the relation between the municipality and a ratepayer or an inhabitant as such imports in itself the possession by each of them of an "interest" within the meaning of article 77, Code of Civil Procedure, entitling each of them as an individual to call the council of the municipality to account in a court of law for excess or abuse of authority in the exercise or professed exercise of functions of this description.

A la page 73, M. le juge Brodeur dit:

Je considère qu'il (le demandeur) n'a pas prouvé avoir un intérêt suffisant pour lui permettre de réussir dans sa poursuite. Il ne démontre pas qu'il soit personnellement affecté par le règlement, la résolution ou le contrat en question. * * * Son intérêt est celui de tous les contribuables de la municipalité.

Il semble bien cependant qu'il ne soit pas nécessaire d'examiner si les principes établis par la majorité de la Cour Suprême dans *Robertson* v. *La Cité de Montréal* (1) s'appliquent à la présente cause. Car, même s'il fallait un intérêt spécial pour procéder en vertu de l'article 50, la simple qualité de contribuable est suffisante pour attaquer un règlement, ou un procès-verbal, ou une résolution sous la *Loi des Cités et Villes*. L'article 411 de cette loi, qui est le chap. 102 des Statuts Revisés de Québec de 1925, se lit comme suit:—

Tout électeur municipal peut par une requête présentée en son nom à la Cour Supérieure ou à un juge de ce tribunal, demander et obtenir pour cause d'illégalité la cassation de tout règlement du conseil avec dépens contre la municipalité.

Et l'article 381 dit:—

Les procès-verbaux, rôles, résolutions et autres ordonnances du conseil peuvent être cassés par la Cour Supérieure du district dans lequel est située en tout ou en partie la municipalité, pour cause d'illégalité, de la même manière, dans le même délai, et avec les mêmes effets qu'un règlement du conseil, et sont sujets à l'application des articles 393 et 421.

Le recours spécial donné par le présent article n'exclut pas ni n'affecte l'action en nullité dans les cas où elle peut avoir lieu en vertu de l'article 50 du Code de Procédure Civile.

Les formalités à suivre en vertu de la *Loi des Cités et Villes* pour faire annuler un règlement ou une résolution sont qu'il faut être électeur municipal, et présenter dans

(1) (1915) 52 Can. S.C.R. 30.

les trois mois une requête à la Cour Supérieure. Cette requête doit articuler les moyens invoqués à l'appui de la demande et être présentée au juge ou au tribunal de la Cour Supérieure. Elle doit être accompagnée d'une copie de la résolution attaquée, être signifiée au bureau du Conseil avec avis de quatre jours, et le requérant doit donner caution à défaut de quoi la requête ne peut être reçue par le tribunal.

Or, dans le cas qui nous est soumis, il est bien vrai que l'on prend comme admis que l'action a été instituée en vertu de l'article 50 C.P.C., mais la procédure adoptée ici est-elle bien différente de celle que requiert la *Loi des Cités et Villes* où tout contribuable peut se porter demandeur? Si le demandeur Devost n'avait pas l'intérêt voulu pour procéder sous l'article 50 C.P.C., il l'avait certainement pour demander la nullité de la résolution en vertu de la *Loi des Cités et Villes*. Et en réalité, n'est-ce pas cela qu'il a fait? On sait que lorsqu'il s'agit d'illégalité on peut procéder en vertu de l'article 411 dans un délai de trois mois, et que lorsque l'on attaque sous l'article 50 C.P.C., un acte d'un conseil municipal parce qu'il est *ultra vires,* cette prescription n'existe pas. La résolution *ultra vires* est illégale mais la résolution illégale n'est pas nécessairement *ultra vires*. C'est ce que le Conseil Privé a dit dans *Dechène* v. *La Cité de Montréal* (1),

> To begin with the first of these pleas, it is true that an incompetent resolution must be illegal; but it does not follow that an illegal resolution must be beyond the competence of the council.

Il s'ensuit donc que l'on peut attaquer une résolution *ultra vires* en procédant en vertu de la *Loi des Cités et Villes*.

Le demandeur Devost était électeur municipal. Il a institué son action devant la Cour Supérieure; il a invoqué les moyens nécessaires à l'appui de sa demande; il a fait signifier son action au bureau du Conseil; il a fourni un cautionnement de $500 pour garantir les frais des défendeurs, et il a institué ses procédures dans le délai requis de trois mois. Que l'on dise que la procédure a originé en vertu de l'article 50 du Code de Procédure Civile ou en vertu de l'article 411 de la *Loi des Cités et Ville,* quelle différence cela peut-il faire ici, et quel préjudice les intervenants ont-ils subi, si dans l'une ou l'autre des procédures, les formalités suivies étaient les mêmes?

(1) (1894) A.C. p. 643.

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On pourra peut-être objecter qu'en vertu de l'article 411 la procédure indiquée est par voie de requête, et que le recours prévu à l'article 50 C.P.C. s'exerce par action. Mais une action est une demande accompagnée d'un bref, et inclut nécessairement la requête. Cette question n'est pas nouvelle, et depuis longtemps nos tribunaux l'ont solutionnée. Dès 1860, dans une cause de *Thouin* v. *Leblanc* (1) la Cour du Banc de la Reine décidait qu'une tierce opposition pouvait s'exercer par requête ou par action directe.

En 1874, dans la cause de *Kellond* v. *Reed* (2) on décidait ceci:—

that the enumeration in the Code of Procedure of modes of setting aside a judgment is not exclusive, and a direct action may be brought for the purpose where the plaintiff alleges that the judgment was fraudulently obtained, without his knowledge and without service on him of the writ of summons.

Dans cette cause, M. le juge Taschereau disait à la page 312:—

Je crois que son action en la supposant pour un instant distincte d'une tierce opposition avait les mêmes conclusions et tendait au même but, et ne pouvait lui être refusée. Le fait d'y avoir ajouté le bref de sommation n'ajoute rien dont l'intimé puisse prendre avantage ni se plaindre par une défense en droit.

En 1893, dans une cause de *Ritchot* v. *Cardinal* (3) la cour d'appel présidée par Sir Alexandre Lacoste confirmait la décision de *Kellond* v. *Reed* (2) citée plus haut, et le juge en chef parlant pour la Cour, disait à la page 57:—

L'action est une requête qui ne peut être invalidée parce qu'elle est accompagnée d'un bref de sommation.

En 1912, dans la cause de *Stather* v. *Bennett* (4) Sir Horace Archambault, alors juge en chef, réaffirmait le même principe et citait avec approbation le jugement de Sir Alexander Lacoste dont je viens de donner un extrait. Et voici ce qu'il disait:—

Je suis d'opinion que l'action directe est autorisée comme la procédure spéciale prévue par le Code pourvu que les conditions exigées pour la procédure spéciale existent.

Et enfin, en 1919, dans la cause de *La Ville de La Tuque* v. *Desbiens* (5) à la page 25 M. le juge Carroll cite de nouveau, en les approuvant, les jugements de Sir Horace Archambault et de Sir Alexandre Lacoste.

(1) (1860) 10 L.C.R. 370.
(2) (1874) 18 L.C.J. 309.
(3) (1893) Q.R. 3 K.B. 55.
(4) (1912) Q.R. 22 K.B. 290.
(5) (1919) Q.R. 30 K.B. 20.

Mais si je crois que l'action inclut la requête, l'inverse n'est pas vrai, car alors il manquerait quelque chose à la demande, soit le bref, ce qui n'est pas le cas dans la cause qui nous est soumise. Lorsque la loi exige une procédure spéciale, on ne peut blâmer le demandeur de faire davantage, mais on pourra avec raison lui reprocher de ne pas se rendre aux exigences du législateur. Lorsqu'au lieu de procéder par requête, un demandeur choisit pour obtenir le redressement d'un grief ou l'affirmation d'un droit, d'annexer à sa demande un bref de sommation, et remplit toutes les conditions exigées par le statut et s'adresse au tribunal même qui devait entendre cette requête, il n'y a pas lieu de le priver de son recours. Pour en arriver à une conclusion contraire, il faudrait ignorer une jurisprudence constante de la province de Québec, et préférer au droit lui-même les subtilités de la procédure et la forme sous laquelle il doit être revendiqué. Dans le cas qui nous occupe, la procédure nécessaire a été suivie, et même si le demandeur n'avait pas intérêt voulu pour procéder sous l'article 50 C.P.C., il avait l'intérêt exigé par la *Loi des Cités et Villes* pour saisir le tribunal de sa demande, sous la forme qu'il a choisi d'adopter.

Le dernier argument soulevé par les appelants est qu'ils étaient les mandataires de la ville, et qu'en agissant comme ils l'ont fait, ils agissaient pour et au nom de la Ville de Coaticook. Il est bon tout d'abord de noter qu'il n'y a aucune résolution du Conseil autorisant les appelants à faire interner Kennedy. La décision qui a été prise d'envoyer Kennedy à l'asile, ne l'a pas été comme résultat d'un acte du Conseil, mais au cours d'une réunion d'échevins qui n'avait aucun caractère officiel. C'est alors que l'on a décidé de faire venir le Recorder de la ville et que le Dr. Birs signa le certificat médical et que Henri Lavoie et Théodore Garceau donnèrent les affidavits requis par l'article 46 de la *Loi des asiles d'aliénés* (chap. 190 des Statuts Refondus de Québec de 1925) et qui se lit de la façon suivante:—

> Dans toute cité ou ville où il y a un recorder, ce recorder, et dans les cités de Québec et de Montréal, un recorder ou un magistrat, et, dans toutes les autres parties de la province, tout juge de paix, sur dénonciation attestée sous serment de deux contribuables établissant qu'une personne interdite ou non, compromet la sécurité, la décence ou la tranquilité publique ou sa propre sécurité, accompagnée du certificat du médecin suivant les formules 2 et 3 constatant l'aliénation mentale et déclarant qu'il est urgent de l'interner dans un asile, ordonne d'office, suivant la formule 9, que tel malade soit placé dans un asile d'aliénés.

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De plus, la lecture de cet article démontre clairement que l'internement des aliénés dangereux n'est pas confié à l'administration municipale, mais que le législateur provincial a nommé d'office le recorder de la ville, qui peut ordonner l'internement d'un aliéné dangereux sur dénonciation sous serment de deux contribuables, accompagnée d'un certificat de médecin. La ville, comme corps municipal, n'a pas d'obligations ni de devoirs qui lui soient imposés par la loi, et la procédure d'internement lui est complètement étrangère. Les personnes choisies par le législateur sont des *personae designatae* et n'agissent nullement en leur qualité d'employés ou d'officiers municipaux.

Une corporation municipale n'a que les pouvoirs qui lui sont expressément délégués, et rien dans la *Loi des Cités et Villes* ne lui attribue des fonctions se rapportant à l'internement des aliénés, qui n'est pas une affaire municipale. Les intervenants, en participant à l'internement de Kennedy n'agissaient donc pas pour la ville dont la responsabilité n'est pas engagée pour les actes qu'ils ont posés. Il est bien vrai que la ville a payé le transport et l'entretien de Kennedy a l'asile, mais ces paiements ne peuvent être considérés comme une ratification des actes des appelants. Le législateur a voulu qu'une corporation municipale payât une partie du coût de l'entretien de ses aliénés, une fois qu'ils sont internés, et c'est ce qu'il a décrété en édictant l'article 62 de la *Loi des asiles d'aliénés*. Mais il a laissé à d'autres le soin de prendre l'initiative de l'internement. En remplissant une obligation imposée par la loi, la ville n'a pas pu ratifier un acte qui est en dehors de son domaine, et qui dans l'occurrence a été accompli par d'autres. Je crois donc que la résolution est *ultra vires*.

On a tenté de donner une couleur légale à cette résolution, en disant qu'elle autorisait une transaction, et on a invoqué l'article 26, paragraphe 3 de la *Loi des Cités et Villes* qui dit qu'une corporation peut:—

(3) contracter, transiger, s'obliger et obliger les autres envers elle dans les limites de ses attributions.

La prétention des appelants est à l'effet que, la ville ayant le droit de transiger, pouvait accepter la suggestion de son aviseur légal et s'autoriser de l'article 1918 du Code Civil qui se lit comme suit:—

La transaction est un contrat par lequel les parties terminent un procès déjà commencé, ou préviennent une contestation à naître, aux

moyens de concession ou de réserve faite par l'une des parties ou par toutes deux.

Il suffit, pour disposer de cette prétention, de lire le paragraphe 3 de l'article 26 qui dit que la corporation peut transiger dans les limites de ses attributions. Comme le paiement projété était frappé d'illégalité absolue, il s'ensuit qu'il n'était pas dans les attributions de la ville de transiger à ce sujet avec MM. Samson et Gérin. Les corporations municipales ne peuvent faire que ce que la loi leur permet de faire, et lorsque leur autorisation d'agir comporte des réserves, comme dans le cas actuel, celles-ci ne peuvent être ignorées. Et d'ailleurs, c'est l'article 1919 du Code Civil qui le dit:—

> Ceux-là seuls qui ont la capacité légale de disposer des objets compris dans la transaction peuvent transiger.

Or, comme la ville n'avait pas cette capacité légale de faire le paiement réclamé, il s'ensuit qu'elle n'avait pas davantage le droit d'autoriser ses officiers de l'effectuer comme elle a tenté de le faire; elle ne peut cacher son acte illégal sous le dehors de la transaction. Ce n'est pas la forme d'un acte qu'il faut examiner, mais bien sa véritable substance pour en épouver la légalité.

Je suis d'opinion que le présent appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Solicitors for the appellants: *Samson & Gérin.*

Solicitor for the respondent: *Roger Bouchard.*

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

AND

EMILY L. MERRITT ..... RESPONDENT.

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* Feb. 18, 19.
* April 28.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Assets and undertaking of company taken over by another company in 1937—Undistributed income of first mentioned company, earned prior to 1936, on hand at the time—Shareholder thereof receiving for her shares cash and shares in the other company—Shareholder assessed for income tax for year 1937 for a sum as being

* PRESENT:—Rinfret, Kerwin, Hudson, Taschereau and Masten (*ad hoc*) JJ.

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her proportion of said undistributed income—Right to so assess—S. 19 (1) of Income War Tax Act (Dom.), as enacted by s. 11 of c. 38, 1936—"Winding up, discontinuance or reorganization" of business of company—"Distribution in any form of the property of the company"—Effect of s. 22 of said Act of 1936, enacting that said s. 11 (and other sections) of that Act "shall be applicable to the income of the year 1935 and fiscal periods ending therein and of all subsequent periods"—Question as to what is referred to (as applicable to said s. 11) by "income" in said s. 22.

The assets and undertaking of S. Co. as a going concern were acquired, and its liabilities assumed, by P. Co. under an agreement between said companies which was made and became effective in 1937. S. Co. had on hand undistributed income, all earned prior to 1935. Respondent, a shareholder of S. Co., received for her shares, in 1937, pursuant to the agreement and the consideration therein provided, a sum in cash and shares in P. Co. She was assessed for income tax for the year 1937, under the Dominion *Income War Tax Act*, for an amount which included a sum as being her proportion of said undistributed income. She disputed the right so to assess her.

By s. 11 of c. 38, 1936, s. 19 (1) of said *Income War Tax Act* was enacted as follows: "On the winding-up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income."

S. 22 of said c. 38, 1936, enacted that certain sections, including said s. 11, of said c. 38 "shall be applicable to the income of the year 1935 and fiscal periods ending therein and of all subsequent periods."

Held: There was a "winding-up, discontinuance or reorganization of the business," and a "distribution of the property," of S. Co., within the meaning of said s. 19 (1); and further (reversing the judgment of Maclean J., [1941] Ex. C.R. 175; Masten J. (*ad hoc*) dissenting), the "income" mentioned in said s. 22 of c. 38, 1936, refers (as applicable to said s. 11 of c. 38, 1936) to the income of the taxpayer, and not to the "undistributed income" of the company in said s. 19 (1); and respondent was assessable for her proportionate part of said undistributed income of S. Co. (S. 19 (2) (as enacted by s. 11 of c. 38, 1936) and other provisions of the *Income War Tax Act* also referred to; and the history of the legislation relevant to the question in dispute, discussed).

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 Minister's decision affirming the assessment of said respondent for income tax.

By an agreement dated March 24, 1937, between The Security Loan & Savings Company (hereinafter called the Security Co.) and The Premier Trust Company, the latter company acquired the assets and undertaking (except un-

(1) [1941] Ex. C.R. 175; [1941] 3 D.L.R. 115.

called capital) of the Security Co. as a going concern as at the close of business on the 31st December, 1936, and assumed the liabilities and obligations (except any liability in respect of the capital stock) of the Security Co. The agreement was entered into provisionally, and was subsequently in that year (1937) approved by the said companies' respective shareholders and assented to (pursuant to s. 60 of the Ontario *Loan and Trust Corporations Act*) by His Honour the Lieutenant-Governor in Council.

The Security Co. had on hand undistributed income, all earned prior to 1935.

Respondent, a shareholder of the Security Co., received for her shares, in 1937, pursuant to said agreement, a sum in cash and a certain number of shares in The Premier Trust Company.

Sec. 19 of the *Income War Tax Act*, as amended by s. 11 of c. 38 of the Statutes of Canada of 1936, provided:

(1) On the winding up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income.

(2) Where a dividend is deemed to be received under subsection one of this section by a company incorporated or carrying on business in Canada, such dividend shall be taxable income of such incorporated company, * * *

Sec. 22 of said c. 38, 1936 (which c. 38, by s. 11 thereof, enacted said s. 19 in form as above) provided:

22. Sections one, two, three, four, six, seven, eight, nine, ten, eleven, twelve, thirteen and sixteen of this Act shall be applicable to the income of the year 1935 and fiscal periods ending therein and of all subsequent periods.

The amount claimed against the respondent for income tax in respect of her income for the year 1937 was calculated on an income increased by the sum of $10,192.60 as being her proportion of the distributable surplus of the winding-up of the Security Co. The Minister affirmed the assessment on the ground

that section 19 provides that on the winding-up, discontinuance, or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income; that Security Loan and Savings Company as part of its winding-up proceedings entered into an agreement with Premier Trust Company whereby its assets and business as a going concern were sold to the said Premier Trust Company in consideration of

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the shareholders of said Security Loan and Savings Company receiving certain shares of Premier Trust Company and/or cash at the election of the shareholders; and that such payment by the Premier Trust Company to the shareholders of Security Loan and Savings Company was a distribution by Security Loan and Savings Company to its shareholders; that the trustees for the taxpayer received the sum of $10,192.60 as her portion of the undistributed surplus of Security Loan and Savings Company, and by the provisions of section 19 of the Act this amount was taxable as income of the taxpayer. Therefore, by reason of the said section 19 and other provisions of the *Income War Tax Act* in that respect made and provided, the assessment is affirmed as being properly levied.

The respondent disputed the right to assess her in respect of the said sum of $10,192.60. She contended that what she received was the payment of the purchase price upon the sale of her shares in the Security Co. by her to The Premier Trust Company and that she received nothing from the Security Co. in the way of a payment or distribution in any shape or form; that she did not receive "on the winding-up, discontinuance or reorganization" of the business of the Security Co. any "distribution" of the "property of the company," within the meaning of said s. 19 (1). She further contended that said s. 22 of c. 38, 1936, on its proper construction and application, limited the "undistributed income" mentioned in said s. 19 (1) to "the income of the year 1935 and fiscal periods ending therein and of all subsequent periods," and that the Security Co. had no undistributed income earned during the year 1935 (or any fiscal period ending therein) or subsequent years; that, there being no undistributed earnings of the Security Co. for the year 1935 *et seq.*, there can be no liability under said s. 19 (1).

Maclean J. (1) was of opinion that there was a "winding-up" of the business of the Security Co., and held that in any event there was a "discontinuance" of the business of that company; and that what was done with that business fell within the words "winding-up, discontinuance or reorganization" within the meaning of said s. 19 (1); and that there was a distribution of the property of that company among its shareholders, in the sense contemplated by s. 19 (1), under the terms of the agreement; that it was immaterial that the consideration received by the present respondent for her shares happened to reach her directly from The Premier Trust Company and not through the medium of the Security Co.; and that, therefore, upon

(1) [1941] Ex. C.R. 175; [1941] 3 D.L.R. 115.

admission as to the accumulated undistributed income of the Security Co. on hand at the material time, and upon a consideration only of s. 19 (1), his conclusion would have been that the present respondent was liable for the tax. But he held that s. 19 (1) (as enacted by s. 11 of the amending Act of 1936) and said s. 22 (of the amending Act of 1936) should be read and construed as meaning that the "undistributed income," mentioned in s. 19 (1) and taxable as a dividend, is limited to that portion of the income of the year 1935 and subsequent periods that was undistributed, and was not intended to include income earlier earned but undistributed and on hand. It being conceded (as appears by recital in the formal judgment in the Exchequer Court) that no income was earned by the Security Co. during 1935 and subsequent years, the present respondent's appeal was allowed.

The Minister appealed to this Court.

W. J. Beaton K.C. and *E. S. MacLatchy* for the appellant.

H. G. Stapells K.C. and *W. S. Sewell* for the respondent.

The judgment of the majority of the Court (Rinfret, Kerwin, Hudson and Taschereau JJ.) was delivered by

KERWIN J.—The respondent, who is domiciled and resident in Ontario, duly filed an income tax return for the year ending December 31st, 1937, and remitted the tax payable on the basis of that return. The Department of National Revenue added to the respondent's income, as reported, the sum of $10,192.60 and levied an assessment for additional income tax thereon together with interest. The respondent objected to this assessment and ultimately the matter came before the President of the Exchequer Court who allowed the respondent's appeal from the decision of the Minister affirming the assessment, and the latter now appeals to this Court.

The respondent was the owner of shares of the capital stock of The Security Loan & Savings Company. In the year 1937 an agreement was entered into between that company and The Premier Trust Company, in pursuance of which the respondent received a certain sum of money and a number of shares of the capital stock of the Trust Company in exchange for the delivery of her shares in the Loan Company. It is admitted that the Loan Com-

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pany had on hand, at the time, undistributed income which had been earned prior to the year 1935 and that the respondent's proportion of that income is the sum of $10,192.60 mentioned above. The two specially relevant statutory provisions are section 11 (which enacted section 19 of the *Income War Tax Act*) and section 22 of chapter 38 of the 1936 statutes. These sections are as follows:

Section 11 of chapter 38 of the 1936 statutes:—

11. Section nineteen of the said Act, as amended by section four of chapter twenty-four of the statutes of 1930, by section eleven of chapter forty-one of the statutes of 1932-33 and by section ten of chapter fifty-five of the statutes of 1934, is repealed and the following substituted therefor:—

"19. (1) On the winding up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income.

(2) Where a dividend is deemed to be received under subsection one of this section by a company incorporated or carrying on business in Canada, such dividend shall be taxable income of such incorporated company, and where such a dividend is paid to a company incorporated outside of Canada and not carrying on business in Canada, the company which is being wound up, discontinued or reorganized (excepting companies specified in section two, paragraph (*p*) and section four, paragraph (*k*)) shall deduct from such dividend a tax at the rate in force for corporations in the year in which such dividend is paid and shall pay the same to the Receiver General of Canada."

Section 22 of chapter 38 of the 1936 statutes:—

Sections one, two, three, four, six, seven, eight, nine, ten, eleven, twelve, thirteen and sixteen of this Act shall be applicable to the income of the year 1935 and fiscal periods ending therein and of all subsequent periods.

It was first contended on behalf of the respondent that, within the meaning of subsection 1 of section 19 of the *Income War Tax Act* as above enacted, there was no distribution of the property of the Loan Company and no winding up, discontinuance or reorganization of its business. The learned President decided against this contention and on that point I agree with his statement of the facts and with his conclusions and have nothing to add.

The respondent also argued that the "undistributed income" referred to in subsection 1 of section 19 of the *Income War Tax Act* is confined to income of the Loan Company earned in the year 1935 or later, and that, therefore, the $10,192.60 payment could not be deemed to be the payment of a dividend. In other words, the respond-

ent contended that the "income" in section 22 of chapter 38 of the Statutes of 1936 refers to the "undistributed income" in subsection 1 of section 19 of the *Income War Tax Act*. The trial judge determined that that contention was well-founded but, with respect, I am unable to agree.

Section 19 is part of the *Income War Tax Act*. By virtue of section 9 of that Act, the respondent was subject to income tax upon her income during the year 1937. By section 3 "income" includes the dividends or profits directly or indirectly received from stocks. A winding up, discontinuance or reorganization of the Loan Company's business and a distribution of its property occurred in 1937 and, therefore, under subsection 1 of section 19 of the *Income War Tax Act* as enacted in 1936, the sum of $10,192.60 is to be deemed the payment of a dividend to the respondent. So far, I assume that, the first contention of the respondent being decided adversely to her, no question could really be raised as to the liability of the respondent to be taxed on such amount.

The learned President, however, experienced difficulty in construing section 22 of the 1936 Act. It is advisable to set out once more the provisions of that enactment:

> 22. Sections one, two, three, four, six, seven, eight, nine, ten, eleven, twelve, thirteen and sixteen of this Act shall be applicable to the income of the year 1935 and fiscal periods ending therein and of all subsequent periods.

Of the various sections referred to, eleven is the one which enacts section 19 of the principal Act.

Mr. Stapells urged that prior to 1940, in which year a definition of "fiscal period" appeared in the *Income War Tax Act*, individuals were subject to assessment to tax on income in a calendar year only, and not on income in a fiscal period; and that, therefore, the insertion of the words "fiscal periods" in section 22 indicated that Parliament had in mind the "undistributed income" of an incorporated company. This argument overlooks the provisions of subsection 2 of section 19 (as enacted by section eleven of the 1936 Act) under the terms of which "where a dividend is deemed to be received under subsection one of this section by a company incorporated or carrying on business in Canada, such dividend shall be taxable income of such incorporated company." Both subsections of section 19 must be looked at to visualize what Parliament was there dealing with.

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Furthermore, section 22 does not state that part only of section eleven shall be applicable to the income for the year 1935 and fiscal periods ending therein and of all subsequent periods. It provides, so far as relevant, that the whole of section eleven shall be so applicable. And section eleven, after repealing earlier provisions, enacts two subsections of section 19 of the principal Act, and it is to both of those subsections that we must direct our attention. The other sections of the 1936 Act referred to in section 22 thereof are concerned with matters of an entirely different nature, but, reading section 22 of the 1936 Act in connection with the whole of section 19 of the *Income War Tax Act* as enacted in 1936 and with the other provisions of the *Income War Tax Act*, I conclude that the "income" mentioned in section 22 refers (as applicable to section 11) to the income of the taxpayer.

The trial judge derived assistance in coming to his conclusion from an examination of the history of the relevant provisions of the *Income War Tax Act*. That history is rather involved, but I must state at once that my review of it has strengthened the opinion I have already expressed. In view of this difference of opinion as to the deductions to be drawn from this legislative history, it is necessary to refer to the matter in some detail.

The *Income War Tax Act* was first enacted in 1917. By section 5 of chapter 46 of the 1924 statutes, what is now subsection 1 of section 19 was enacted as subsection 9 of section 3 in the following words:—

> (9) On the winding up, discontinuance or reorganization of the business of any incorporated company the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income.

Section 8 of the 1924 Act provided:—

> (1) Sections one, two and three hereof shall be deemed to be applicable to the income for the taxation period 1923 and subsequent periods.
>
> (2) Sections four, five and six hereof shall be deemed to be applicable to the income for the taxation period 1921 and subsequent periods.

As to subsection 2 of section 8, the President considered that the word "income" therein must have been intended to relate to the "undistributed income" mentioned in section 5. It is unnecessary to express any opinion upon the

question because, whatever one might think, it appears to me to be beside the point in view of the subsequent history.

Subsection 9 of section 3 of the *Income War Tax Act* as enacted in 1924 appeared as section 19 of chapter 97 of the Revised Statutes of Canada, 1927. It was pointed out by Mr. Stapells that according to Appendix I to the Revised Statutes of 1927, section 8 of the 1924 Act was not repealed nor consolidated. Whatever the effect of this may be, it has, I think, no bearing upon the matter under review.

By section 4 of chapter 24 of the 1930 Statutes, section 19 of chapter 97 of the Revised Statutes was repealed and two subsections substituted therefor. Section 4 read:—

> 4. Section nineteen of the said Act is repealed and the following is substituted therefor:—
>
> "19. (1) On the winding up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income earned in the taxation period 1930 and subsequent periods.
>
> (2) Notwithstanding anything in the Act contained, where a dividend is deemed to be received under subsection one by a company incorporated or carrying on business in Canada, such dividend shall be taxable income of such incorporated company, and where such a dividend is paid to a company incorporated outside of Canada and not carrying on business in Canada, the company which is being wound-up, discontinued or reorganized shall deduct from such dividend a tax at the rate in force for corporations in the year in which such dividend is paid and shall pay the same to the Receiver General of Canada."

It will be observed that the new subsection 1 of section 19 is the same as the previous section 19 except for the words at the end "earned in the taxation period 1930 and subsequent periods." Section 7 of the 1930 Act provided:—

> 7. This Act shall be deemed to have come into force at the commencement of the 1929 taxation period and to be applicable thereto and to fiscal periods ending therein and to subsequent periods, except section four hereof which shall be deemed to have come into force at the commencement of the 1930 taxation period and to be applicable thereto and to fiscal periods ending therein and to all subsequent periods.

The learned President, in his judgment, referred only to the first limb of this section and for that reason found a conflict between it and subsection 1 of section 19 as enacted in section 4. It is, of course, the latter part of section 7 that applies to section 4 and the conflict mentioned by the President does not exist. A difficulty different from that

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envisaged by him might have occurred in view of the legislation in force (R.S.C., 1927) prior to the enactment of the 1930 Act, but, as the events with which we are concerned did not occur in that period, I do not pause to elaborate.

A proviso was added to subsection 1 of section 19 in the Statutes of 1932-33 but this amendment is not relevant. In 1934, the Act was further amended by chapter 55, section 10 whereof provided:

> 10. Subsection one of section nineteen of the said Act, as enacted by section four of chapter twenty-four of the statutes of 1930 and amended by section eleven of chapter forty-one of the statutes of 1932-33, is repealed and the following is substituted therefor:—
>
> "19. (1) On the winding up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income.
>
> Provided, however, that this subsection shall not apply to the distribution of the property of a private investment holding company to the extent that its undistributed income is made up of income from British and foreign securities and interest bearing securities of Canadian debtors when the business of such holding company is and has been carried on in Canada, and all of its shares (less directors' qualifying shares) are and have been beneficially owned since its incorporation by a non-resident individual, or by such an individual and his wife or any member of his family, or by any combination of them. In determining the extent to which the undistributed income of any such private investment holding company on hand at the date of winding up is made up of income received by way of dividends from Canadian companies, all dividends or disbursements of such holding company which have been paid or made prior to the date of winding up shall be deemed to have been paid out of income received from British and foreign securities and interest bearing securities of Canadian debtors."

It will be observed that this 1934 amendment removed from subsection 1 of section 19 the words at the end thereof that had been included for the first and only time in 1930, "earned in the taxation period 1930 and subsequent periods". Then, in 1936, came sections 11 and 22 of chapter 38, which have already been transcribed.

In view of this history of the legislation, it appears to me that the proper conclusion to be drawn from the fact that the words "earned in the taxation period 1930 and subsequent periods" were dropped in 1934 is that Parliament intended to alter the law as it existed under the 1930 legislation. The respondent must, therefore, account for her proportionate part of the undistributed income of The Security Loan & Savings Company which that company had on hand. In my view, that conclusion follows

from a consideration of the two relevant sections as well as from a consideration of the history of the *Income War Tax Act*. It appears to me to be not only in accord with the letter but also the spirit of that Act.

The appeal should be allowed, the judgment of the Exchequer Court set aside and the assessment made by the Minister affirmed, with costs throughout.

MASTEN J. (*ad hoc*) (dissenting)—This is an appeal by the Minister of National Revenue from the judgment of the Honourable Mr. Justice Maclean dated the 19th March, A.D. 1941, whereby he allowed the appeal of the respondent from the certificate of the Minister disallowing an appeal by the respondent (under the provisions of sec. 58 of the *Income War Tax Act*) from her assessment by the Commissioner of Taxation.

There is no conflict in the evidence; the facts are not in dispute; and they are so lucidly and adequately detailed in the reasons of judgment of the learned President of the Exchequer Court that I refrain from repeating them at length. Accordingly, I mention only such outstanding matters as appear essential to an understanding of this judgment.

(1) The transaction out of which arises the present claim for income tax was a sale by The Security Loan and Savings Company (hereinafter called the Security Company) to The Premier Trust Company (hereinafter called the Trust Company) of all its assets and undertaking as a going concern.

(2) Under *The Loan and Trust Corporations Act*, R.S.O., 1927, c. 223 (hereinafter more fully referred to), the initial proceeding toward a transfer of assets between companies like the present, consists in the execution of a provisional agreement of sale containing the proposed terms and conditions of the transfer. Such an agreement was signed on the 24th day of March, 1937. The parties to it were the two companies above mentioned. No shareholder in either company was a party to the agreement. It contains, among other, the following provisions which appear to be relevant to the two questions arising on the present appeal.

4. Provided, however, that, notwithstanding anything herein contained, the Vendor and the Purchaser, until this Agreement shall become

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effective are each to be at liberty to and shall carry on business in the same manner as heretofore so as to maintain each as a going concern and for the purpose of carrying on as aforesaid each may sell, assign, exchange, convey, appropriate, lease, surrender, charge, mortgage, pay out or otherwise deal with its property and enter into contracts or engagements in the usual and ordinary course of its business in such manner as to each may seem best, but from and after the date of this Agreement the Vendor shall not accept subscriptions for, allot or issue any shares of its capital stock nor issue any debentures nor declare any dividend except with the consent of the Purchaser * * *

5. The consideration for the assets and property hereby agreed to be sold and purchased will be as follows:—

(a) The Purchaser shall within thirty (30) days after the date when this Agreement shall become effective allot and issue and/or pay to each shareholder of the Vendor of record as of the close of business on such date or his respective nominee,

(i) Fully paid shares of the par value of $100 each of the capital stock of the Purchaser at the rate of one and a half such shares for each fully paid share of the capital stock of the Vendor held by such shareholder: fractions of shares of the Purchaser resulting therefrom to be adjusted by payment in cash at the rate of $102 per full share, or;

(ii) At the option of such shareholder of the Vendor, exercisable by written notice delivered to the Purchaser within such period of thirty (30) days, cash and fully paid shares of the capital stock of the Purchaser at the rate of $102 cash and one-half share for each fully paid share of the capital stock of the Vendor held by such shareholder; any fractions of shares of the Purchaser resulting therefrom to be adjusted by the issue in respect of each fraction of one fully paid share and the proportionate reduction (at the rate of $102 per full share) of the said cash payment.

The second option as quoted above was accepted by the respondent on September 14th, 1937.

(3) The provisional agreement of sale appears to have been duly confirmed by the shareholders in accordance with the provisions prescribed by sections 55 to 64 of *The Loan and Trust Corporations Act,* R.S.O., 1927, c. 223, by which the procedure and ensuing rights of the parties are governed.

Section 60 of that Act provides that after its approval by the shareholders the agreement shall be submitted to the Lieutenant-Governor in Council for his assent, and subsection 3 of section 60 reads as follows:

(3) After the assent of the Lieutenant-Governor in Council thereto the agreement or offer shall be deemed to be the agreement and act of union, amalgamation and consolidation of the corporations, or *the agreement and deed of purchase and acquisition of the assets of the selling corporation* by the purchasing corporation.

Section 63 provides, in part, as follows:

(1) In the case of a purchase and sale of assets so assented to the assets of the selling corporation shall become absolutely vested in the

purchasing corporation on and from the date of such assent without any further conveyance and the purchasing corporation shall thereupon become and be responsible for the liabilities of the selling corporation.

* * *

(5) Where the Lieutenant-Governor in Council assents to an agreement for the sale of the assets of a corporation, or to an agreement for the amalgamation of two or more corporations, the selling corporation, or the several corporations amalgamated, as the case may be, shall, from the date of such assent, be dissolved except so far as is necessary to give full effect to the agreement.

(4) The Order in Council providing for the assent of the Lieutenant-Governor to the agreement was passed on the 23rd day of June, 1937, and it would consequently appear that on that date all the assets and undertaking of the Security Company passed to the Premier Trust, as more fully appears from the certificate of the Attorney-General, which reads as follows:

DEPARTMENT OF INSURANCE

PROVINCE OF ONTARIO

IN THE MATTER of the Loan and Trust Corporations Act and in the matter of the sale under the said Act of the assets of the Security Loan and Savings Company, St. Catharines, to The Premier Trust Company.

THE ACTING ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO, being the Minister under whose direction the Loan and Trust Corporations Act of the said Province is administered, HEREBY CERTIFIES THAT, Pursuant to the said Act an agreement for the sale of the assets of the Loan Corporation known as The Security Loan and Savings Company, St. Catharines, to the Trust Company, known as The Premier Trust Company, bearing date the 24th day of March, 1937, and duly executed by the Directors of The Security Loan and Savings Company, St. Catharines, and ratified and confirmed by the shareholders thereof on the 15th day of May, 1937, also duly executed by the Directors of The Premier Trust Company and ratified by the shareholders on the 15th day of May, 1937, was by Order in Council approved on the 23rd day of June, 1937, by His Honour the Lieutenant-Governor in Council, and that on, from and after the 15th day of May, 1937, the said agreement took effect as the sale, transfer and conveyance to the said The Premier Trust Company to its own use of all the assets, business, rights, property and good will of the said The Security Loan and Savings Company, St. Catharines, as in the said agreement more fully set out; and that on, from and after the said 15th day of May, 1937, all terms, provisions, and conditions of the said agreement and of the said The Loan and Trust Corporations Act relating thereto went into full force and effect. A copy of the said agreement is annexed hereto and forms part of this certificate.

THIS CERTIFICATE is given under Section 61 of the said The Loan and Trust Corporations Act, being Chapter 223 of the Revised Statutes of Ontario, 1927.

GIVEN in triplicate under my hand and seal of office this 6th day of July, 1937.

H. C. NIXON,
Acting Attorney-General.

"seal"

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(5) Among the assets sold and transferred to The Premier Trust Company was a sum of $212,431.41, accumulated and undistributed income of the Security Company, no part of which accrued during 1935 or in any subsequent year, as is admitted by the appellant.

(6) The proportionate share of this accumulated income to which the respondent would have been entitled on its distribution by the Security Company was $10,192.60, no part of which accrued in 1935 or later.

(7) This sum of $10,192.60 was paid by The Premier Trust Company to the respondent on October 5th, 1937, as a portion of its cheque of that date for $26,690.75 made in favour of the trustees of the respondent.

(8) The Minister of National Revenue claims in this proceeding the sum of $3,454.80 as income tax on the said sum of $10,192.60.

(9) His claim is based on section 19 (1) of the *Income War Tax Act* as enacted by section 11 of chapter 38 of the Statutes of Canada for the year 1936. That section provides that:

> (1) On the winding up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income.

Along with sec. 11 of c. 38, 1 Edward VIII, is to be read sec. 22 of that Act, as follows:

> 22. Sections one, two, three, four, six, seven, eight, nine, ten, eleven, twelve, thirteen and sixteen of this Act shall be applicable to the income of the year 1935 and fiscal periods ending therein and of all subsequent periods.

The contention of the respondent in answer to the claim of the Minister is twofold: First, that by section 22 of the Statute of 1936, the operative scope of section 19 (1) is limited to income accumulated during the year 1935, or during any subsequent year; Secondly, that the transaction in question, so far as it relates to the respondent and to the shares in question, does not fall within the provisions of section 19 (1) quoted above, as a distribution resulting from the winding-up, discontinuance or reorganization of the business of the Security Company, but was a separate and independent transaction between the Trust Company and the respondent by which the

Trust Company purchased from the respondent the shares in question and paid for them with its own money and not as a distribution of the assets of the Security Company.

The learned President of the Exchequer Court agreed with the first mentioned contention of the respondent and dismissed the claim of the Minister, but at the same time he expressed the view that the second ground of defence failed. I agree with both of the opinions so expressed by the learned President, and also with the grounds stated by him, but I desire to add certain further observations.

The grounds of appeal as set forth by the appellant are as follows:

1. The appellant respectfully submits that the learned trial judge was correct in holding that the shares and cash received by the respondent constituted a distribution on the winding up, discontinuance or reorganization of the Security Loan & Savings Company within the meaning of section 19 (1) of The Income War Tax Act, but contends that he was in error in holding that section 22 of chapter 38 of the statutes of 1936 had the effect of limiting the deemed dividend to undistributed income earned in 1935 and subsequent years.

2. The sole point at issue is, therefore, whether income of Security Loan & Savings Company *earned prior* to 1935 and on hand and undistributed in 1937 was subject to taxation in the hands of the respondent upon a distribution within the meaning of section 19 (1) of The Income War Tax Act.

On the argument in this Court counsel for the respondent sought to maintain both of the grounds of defence above mentioned, and I proceed first to consider the respondent's claim that section 19 (1) deals exclusively with income accumulated during and after 1935.

In his reasons for judgment the learned trial judge traces from the year 1920 down to 1936 the history of income tax legislation so far as it culminated in section 19 of the statute of that year. He finds himself thereby assisted toward a construction of the statute limiting its operation to 1935 and succeeding years. The result of his historical review may not be legally conclusive, though it may be morally persuasive, and is not to be disregarded in seeking to ascertain the intention of Parliament in a doubtful case.

The right to examine the pre-existing law in order to clear up any doubt as to the meaning of an Act is supported by the highest authority, and is generally recognized as a proper method of assisting in ascertaining the true intent of the legislature. I refer to Craies on Statute Law, 4th Ed., p. 94, where the general rule is stated and the cases in its support are cited.

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Limitations on this general rule appear to be indicated in recent judgments of the House of Lords and of the Privy Council. I refer to the observation of Lord Chancellor Simon in *Barnard* v. *Gorman* (1); to that of Lord Atkin in *Windsor Education Board* v. *Ford Motor Co. of Canada Ltd.* (2), and to that of Lord Chancellor Simon in *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board* (3).

I have carefully considered these recent observations with the result that, while I think that in the present case we are warranted in examining the legislative history of section 19 for the purpose of securing, if possible, a sidelight on the intention of Parliament, yet I am firmly of the opinion that the rights of the parties must in the end be determined by reading together and construing sections 11 and 22 of c. 38 of the Statutes of 1936.

The history of section 19, so far as relevant, appears to be that the statute of 1930 changed the former law and placed a limitation on the period of accumulation. That law remained in force until 1934 when the law was again changed and the unlimited period of accumulation was restored. The statute of 1934, making the period of accumulation unlimited, remained in force and unrepealed until the statute of 1936 came into force, and simultaneously with its repeal sections 11 and 22 came into force, prescribing once more, in my view, a limited period for accumulation.

These oscillations in the course of legislation afford little assistance in construing the statute which governs the transaction in question. They do, however, establish that at times Parliament recognized that undistributed income or profits accumulated during earlier years might subsequently, during years of depression, become dissipated and lost and so undistributable, while at other times this point of view was either overlooked or negatived. It may, perhaps, be suggested that these alternating legislative acts indicate a readiness to change the unlimited provision of 1934 to a limited provision in 1936. That seems to be about all that can be derived from the historical process.

Turning, then, to a consideration of sections 11 and 22. I quite agree with Mr. Justice Kerwin that section 22

(1) [1941] A.C. 378, at 384. (2) [1941] A.C. 453, at 461.
(3) [1941] A.C. 308, at 322.

applies equally to both subsections of section 19. If it had been intended to apply solely to one or the other subsection, section 22 would have specified to which of them it was applicable, but, as it stands, section 22 applies to both subsections of section 19 as enacted by section 11 of chap. 38. The question then is, are we warranted in saying that, notwithstanding that section 22 purports to apply to the whole of section 11, nevertheless the intention of Parliament was to confine its operations to subsection (2)?

If not, then I think that assistance in ascertaining the intention of Parliament may be gained by a consideration of the new law enacted in 1936 contemporaneously with the repeal of the prior law. Reading the substance of section 22 in immediate juxtaposition to section 19, subsection 1, the enactment would run as follows:—

> On the winding up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income; and this provision shall be applicable to the income of the year 1935 and fiscal periods ending therein and of all subsequent periods.

It seems to me that, so read, the words are strongly indicative of an intention to limit the period of accumulation of income to 1935 and succeeding years. *Mentio unius exclusio alterius.* In other words, the specific mention of the period "1935 and succeeding years" to which section 19, subsection 1, is to apply, excludes an unlimited period of accumulation.

In *Young* v. *Mayor, etc., of Leamington* (1), Lord Blackburn said that the Courts "ought in general, in construing an Act of Parliament, to assume that the Legislature knows the existing state of the law." Much more, therefore, must it be taken that the Legislature carried in mind the wide general provision of section 19 (1) as set forth in section 11 of the Act of 1936 when it enacted the succeeding section 22, and must be assumed to have intended a limitation on its generality. Standing by itself, section 19 (1) covered all income accumulated either before or after 1935. Hence in making section 22 applicable to section 11 it must be

(1) (1883) 8 App. Cas. 517 at 520.

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assumed that the Legislature intended to do something, viz., to modify the generality of section 19 (1) by providing that its ambit should be limited to the period specified in section 22, for if not, then section 22, so far as the action of Parliament in passing it relates to section 19 (1), was futile and wholly ineffective.

Supplementing the foregoing, which I take to be the principal argument of the appellant, I note, at page 9 of the factum, the following paragraphs:

> It is, therefore, submitted that section 22 of chapter 38 of the statutes of 1936 was merely an enabling section, and Parliament did not intend that the words of this section 22 be read as a proviso to section 19. Section 22 was for the purpose of making the amendment retroactive to the taxation year 1935; otherwise it would have become effective on the date the Act received Royal Assent, on June 23rd, 1936. Therefore, as the distribution in connection with the sale of the Security Loan & Savings Company did not take place until 1937, section 22 of the Act of 1936 should be disregarded for the purposes of this appeal.
>
> In any event, it is submitted that section 12 makes it quite clear that dividends shall be taxable income for the year in which they are paid or distributed, and, as this undistributed income was paid in 1937, it is, by section 19 (1), deemed to be a dividend in that year, and is income of the year 1937, and hence does not offend against section 22.

With reference to the argument that as section 22 was enacted for the sole purpose of making the amendment retroactive to the taxation year of 1935 since otherwise it would have become effective only on the date when the Act received the Royal Assent, it is sufficient to point out that there is no indication of any such limited application contained in the words of section 22. To repeat it once more, "section 11 of this Act shall be applicable to the income of the year 1935 and fiscal periods ending therein and of all subsequent periods." These words are general. There is nothing in them to indicate that they came to an end as soon as the year 1935 was over, nor are they limited to subsection 2 of section 19. They apply equally to subsection 1 of section 19, and create the law governing the present transaction.

With reference to the appellant's contention that, in any event, the $10,192.60 received by the respondent in 1937 was a dividend and became taxable under section 12 when it was paid, it suffices to point out that, prior to the discontinuance or reorganization of the Security Company, this sum was capital available to the Security Company for any of its operations. Moreover, it could not be trans-

formed into dividend available to a shareholder except by a declaration to that effect by the directors of the Security Company and no such declaration was ever made. As between the Security Company and the respondent, it passed to her as part of her proportionate share of the net assets of the Security Company, that is to say, as capital, while, as between *the respondent and the Minister of National Revenue for purposes of taxation only,* this sum of $10,192.60 is to be treated as if it were a dividend; but solely by force of section 19. Hence it follows that the Minister's claim arises solely under section 19, and if, by virtue of section 22 of chapter 38 of the 1936 statutes, section 19 does not apply, then the appellant's claim must fail, for the sum in question never became a dividend and section 12 has no application.

Any suggestion that the limitation period "1935 and succeeding years" prescribed by section 22 has reference to the date when the winding-up, discontinuance or reorganization might occur and not to the period during which the income in question is accumulated, seems to me to be met by the very words of section 22, which on their face relate to the income of 1935 and succeeding years, and not to its distribution.

But if not conclusive, the statute is at least doubtful and ambiguous, and according to the rule well-established by the decisions cited by the respondent it is ineffective to warrant the imposition of the tax in question on the respondent.

It remains to consider the second defence raised by the respondent.

The provisional agreement here in question involved two main objectives (the other provisions being collateral and subsidiary). *First,* the transfer to the Trust Company of the assets and undertaking of the Security Company. *Second,* the distribution to the shareholders of the Security Company of the consideration for the sale.

A consideration of those provisions of *The Loan and Trust Corporations Act* and of the provisional agreement as hereinbefore quoted leads me to the conclusion that when on the 23rd day of June, 1937, the Lieutenant-Governor by Order in Council sanctioned the provisional agreement of sale, all the assets and undertaking of the Security Company passed absolutely to the Trust Com-

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pany. What remained to be done under the provisional agreement was to distribute the consideration among the parties entitled.

Not only did its assets and undertaking pass from the Security Company but under section 63 of the statute the Security Company became emasculated of all its corporate rights and powers "*except so far as is necessary to give full effect to the agreement.*" What remained to be done was the distribution of the consideration to the parties entitled. The Security Company continued its corporate existence emptied of all assets and deprived of all corporate rights and powers save only the right to distribute among its shareholders the consideration for the sale. The shareholders themselves held no contractual rights against the Trust Company. They were not parties to the provisional agreement, but the Security Company, though deprived of everything else, still retained its corporate existence and the right and duty to see that each of its shareholders received his proportionate share of the consideration. Its duty was similar to that of a liquidator in a voluntary winding-up. Had the consideration consisted wholly of cash, the normal method would have been for the Trust Company to pay over the purchase price to the Security Company, leaving it to make the distribution.

Owing to the alternate options which the agreement gave to shareholders, this course was not practicably convenient. Nonetheless, the consideration payable by the Trust Company was the property of the Security Company and was not the property of its shareholders. The directors of the Security Company would plainly have been guilty of a breach of trust if they had agreed to give away the assets of their solvent company for nothing. The provisional agreement as drawn is elliptical and confusing. The draftsman might have met the difficulty by a clause declaring that from and after the passing of the Order in Council approving the agreement the Trust Company held the stipulated consideration as trustee for the Security Company and as its agent for distribution of that consideration to the shareholders of the Security Company. I think that is what both parties did in fact agree, and, in effect, it is what they carried out; also I think that to this elliptical agreement such a construction can be given without undue straining of the words used.

The result is that the sum of $10,192.60 here in question was received by the respondent from the Security Company as a distribution of its property on a reorganization or discontinuance of its business, but as it consisted of income wholly accumulated prior to 1935, it is not taxable.

I ought, perhaps, to add a word respecting the suggested sale of shares by the respondent to the Trust Company. The handing over of the share certificate to the Trust Company appears to me to have been an idle ceremony. No power-of-attorney to transfer was given, and no transfer in the share register of the Security Company ever took place. When the last of the Security shareholders received his proportion of the consideration, the provisional agreement was completely executed and the Security Company was, in the words of section 63, "dissolved", and with it the shares in question perished.

The foregoing reasons were prepared on the assumption that "income" in section 19 is identical in its meaning and content with "income" in section 22, and that in both sections this term (income) meant a surplus over and above the original capital; which surplus accrued to the Security Company as earnings or profits arising from its operations, and in the present case amounted to $212,431.41; I also assumed that this was not in controversy, but I now realize that my assumptions were incorrect and that appellant's suggestion is that, while "income" in section 19 (1) relates to surplus earnings, profits or accretions to the capital assets of the company, "income" in section 22 relates to income to shareholders by way of dividends, and that this income accrued to the respondent in 1937 within the period prescribed by section 22.

I understand also that it is now suggested on behalf of the appellant that section 19 makes the sum of $10,192.60 here in question a dividend *for all purposes* and not merely a sum subject to income tax as if it were a dividend.

After most respectful consideration of the above suggestions I find myself unable to agree.

Apart from the inherent difficulty of ascribing to the term "income" occurring in two co-related sections of the same Act, such widely different meanings, it seems to me that section 22 must relate to the income of the company,

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not to the income of the respondent shareholder, for an individual shareholder does not have fiscal periods such as are mentioned in section 22.

With respect to the $10,192.60 received by the respondent as portion of the cheque for $26,690.75, I think it was not originally income or dividend and never became such. It could be created a dividend only by a resolution of the directors of the Security Company. The Parliament of Canada when enacting an income tax Act cannot make that a dividend which is not dividend any more than it can make a woman a man. What it can do is to impose a liability for income tax on the shareholder in respect of the whole or any portion of the $26,690.75 received by her, but it cannot make that sum or any part of it a dividend, because that sum plus the shares in the Trust Company received by the respondent was and remains her proportionate share of the purchase price received by the Security Company from the Trust Company.

This will more clearly appear from a consideration of the procedure under which the transaction in question was carried on. When the provisional agreement of March, 1937, was executed, the undistributed surplus of $212,431.41 was an asset of the Security Company owned by it as a corporate entity. No shareholder had any property in it. The Security Company sold it to the Trust Company and it passed to the Trust Company along with and as part of the undertaking of the Security Company, and the Security Company received as consideration the obligation of the Trust Company already described. Then in pursuance of that obligation the Trust Company transferred to the respondent her proportionate share of the purchase price due by it to the Security Company.

It is quite true that the respondent received the benefit of her proportion of the undistributed surplus, but she did not get it as income or as dividend. She got her proportionate share of the purchase price, on a portion of which, if it had accrued in 1935 or subsequently, section 19 imposed an income tax, for which purpose (and for that alone) it is "deemed to be a dividend".

But the statute does not purport to do the impossible and make that a dividend which is in fact a part of the purchase price.

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For these reasons, I am of opinion that "income" means the same in sections 19 and 22; that the sum of $10,192.60 never became income or dividend; that sections 3, 9 and 12 of the Act have no application, and that this appeal should be dismissed with costs.

Appeal allowed with costs.

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

Solicitor for the respondent: *H. G. Stapells.*

CANADA PERMANENT MORTGAGE CORPORATION ..... APPELLANT;

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*Oct. 8, 9, 10.

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*May 5.

AND

JOHN CHEESE .....(APPLICANT)

AND

THE CHIEF COMMISSIONER OF THE BOARD OF REVIEW..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Debtor and creditor—Farmers' Creditors Arrangement Act (Dom.), 1934—Jurisdiction of Board of Review to entertain proposal—Grounds against proposal raised by way of certiorari—Creditor's debt reduced to amount below value of security—Present and prospective capability of debtor to perform obligations prescribed—Prospective value of farm upon which creditor has security—Whether proposal formulated in fairness and justice to debtor and creditors—Farmers' Creditors Arrangement Act, 1934, (Dom.) ss. 5, 7, 12 (7) (8) (9) (10).

The applicant Cheese farmed a certain land which was subject to a first mortgage held by the Corporation appellant. He made a proposal to his creditors for a composition, extension of time or scheme of arrangement under the *Farmers' Creditors Arrangement Act*, 1934, and amendments. The proposal not having been approved by the creditors before the Official Receiver, a request was made by the debtor to the Board of Review to formulate an acceptable proposal under the Act. Of all the claims against the debtor set out in the proposal, the Board dealt only with the claim of the Corporation appellant for an amount of $689.25, no proposal having been asked of the Board as to some of them and the others having been paid. The Board of Review found that the debtor was entitled to the benefit of the Act, formulated a proposal and subsequently confirmed it. Under the proposal, the Corporation appellant's claim was reduced to $400 payable in ten equal consecutive annual instalments with

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

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interest at six per cent. The appellant applied to the Court of Appeal for Saskatchewan for an order that a writ of *certiorari* be issued out of that Court for the return of the proposal and that the proposal and its confirmation be quashed as having been made without jurisdiction. The grounds raised in the Court of Appeal and before this Court were that (*a*) the proposal deprived the appellant of its security in that the appellant's claim was reduced to a figure below the value of its security, (*b*) that the proposal was based on considerations other than the present and prospective capability of the debtor to perform the obligations prescribed and the prospective values of the farm upon which the appellant had security and (*c*) the proposal was not formulated in fairness and justice to the creditors. Other grounds were raised by the appellant for the first time before this Court, but it was held that they ought not to be given effect to. The appellant's application was dismissed by a majority of the appellate court.

Held, affirming the judgment appealed from ([1941] 1 W.W.R. 337), that the Board of Review had jurisdiction to entertain the application of the debtor and to formulate and confirm the proposal in this case; and that such proposal ought not to be quashed on the grounds raised by the appellant.

Per the Chief Justice.—The jurisdiction of the Board of Review is incontestable to entertain the debtor's application to formulate and to confirm an acceptable proposal. This Court cannot give effect to the points of law or contentions raised by the appellant without holding that the impeached proposal and confirmation of it constitute an erroneous adjudication upon matters that were within the jurisdiction of the Board of Review; and it would be inadmissible to quash the proposal upon that ground.—All questions touching the present and prospective capability of the debtor to perform his obligations and touching the productive value of the farm, to which subsection 8 of section 12 relates, are obviously matters to be determined by the Board; and the Board's decision upon such matters is not subject to review in any court, unless (and no opinion is expressed on this point) it is reviewable by the court of bankruptcy established by section 5.—Also, the explicit words of subsection 9 of s. 12 leave the matter of fairness and justice to the Board for determination.—As to the specific point raised by the appellant that the effect of the proposal was to reduce the mortgage debt below the value of the security, which, it is alleged, would be *ultra vires* of the Board: it cannot be affirmed as a proposition of law, on the material before the Court, that such is the effect of the proposal. The Board may have proceeded upon the view that, in point of fact, the sum to which the mortgage debt was reduced was not less than the value of the farm, and it is not competent to this Court to review the proposal or its confirmation on the ground that it involves an erroneous adjudication upon a matter of fact.—No opinion is expressed on the question whether either the Court of Appeal for Saskatchewan or this Court has any jurisdiction to grant *certiorari* on the grounds upon which the present appeal is based.

Per Rinfret, Crocket and Taschereau JJ.—It is not necessary, for the purpose of this appeal, to decide the point, either in its legal aspect or from the viewpoint of jurisdiction conferred upon a Board of Review by the Act, whether a Board has jurisdiction to reduce the

claim of a secured creditor at a sum less than the value of its security.—The Court, in this case, is not in a position to find whether, as a matter of fact, the proposal has the effect of making such reduction, and there is nothing which enables the Court to say that the value of the respondent's farm is greater or less than $400. The fact itself whether the appellant's debt was so reduced must have been part of the inquiry of the Board; and, at all events, that inquiry was committed by the Act to the Board, the only tribunal competent to determine that fact, and such inquiry cannot be questioned on *certiorari*.—As to the ground that the proposal was not formulated in fairness and justice to the creditors, such a question does not affect the competency and jurisdiction of the Board of Review nor challenge the authority of the Board to formulate a proposal: such an issue raises questions of pure fact and cannot be made the subject of an inquiry by a superior court through the procedure of *certiorari*.—If the Board should fail to act "in fairness and justice" to the debtor and creditors, the controlling authority on a question of that kind would be the county or district court acting under section 5 of the Act.

Per Hudson J.—In formulating and confirming a proposal as to a secured debt, it is within the jurisdiction of the Board of Review under the Act to reduce the debt to an amount below the value of the security.—As to the question of fairness and justice to debtor and creditors, this Court is not in possession of all the information possessed by the members of the Board and, in the absence of a much more complete statement of facts, it cannot be held that the Board has been unfair to the Corporation appellant in reducing its mortgage, according to statements made during argument, by a sum of only about $42.25. In any event, such a question has been rightly held by the appellate court not to be open to the court.

APPEAL, by special leave granted by the Court of Appeal for Saskatchewan, from the decision of that Court (1) dismissing the application of the Corporation appellant by way of *certiorari* to quash a proposal and confirmation thereof made by a Board of Review under the *Farmers' Creditors Arrangement Act*, 1934 (Dom.), relating to the affairs of the applicant Cheese.

W. N. Tilley K.C. and *T. D'Arcy Leonard K.C.* for the appellant.

C. R. Davidson K.C. and *David Mundell* for the respondent.

THE CHIEF JUSTICE—I had written a judgment dealing with all the points of law raised by the appellants. I desire, however, to put my judgment on a ground which conforms substantially to the ground upon which my brother judges are proceeding, viz.: that we cannot give

(1) [1941] 1 W.W.R. 337; [1941] 2 D.L.R. 246; 22 Can. B.R. 225.

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effect to these contentions without holding that the impeached proposal and confirmation of it constitute an erroneous adjudication upon matters that were within the jurisdiction of the Board of Review; and quashing the proposal upon that ground, which, of course, is inadmissible.

The jurisdiction of the Board of Review is incontestable to entertain the application, to formulate and to confirm an acceptable proposal.

It has never been suggested that the respondent was not competent to invoke the statute; that, for example, he was not a farmer; nor is there any ground for affirming that the procedure of the Board was irregular, or that it was characterized by any departure from the principles of natural justice.

Subsections 8 and 9 of section 12 of the *Farmers' Creditors Arrangement Act* are in the following words:—

(8) The Board shall base its proposal upon the present and prospective capability of the debtor to perform the obligations prescribed and the productive value of the farm.

(9) The Board may decline to formulate a proposal in any case where it does not consider that it can do so in fairness and justice to the debtor or the creditors.

All questions touching the present and prospective capability of the debtor to perform his obligations and the productive value of the farm to which subsection 8 relates, are obviously matters to be determined by the Board; and the Board's decision upon such matters is not subject to review in any court unless—and upon this point I express no opinion—it is reviewable by the court of bankruptcy established by section 5.

Subsection 9 presents a parallel case. In the most explicit words that subsection leaves the matter of fairness and justice to the Board for determination. The specific point upon which the appellants rely in connection with these subsections is this: it is argued that the effect of the proposal is to reduce the mortgage debt to a level at which it is less than the value of the security, which, it is said, is *ultra vires* of the Board. I should like to make it very clear that I am not agreeing that the major premise of this argument is sound in point of law, but I am expressing no opinion upon that. It cannot be affirmed as a proposition of law, on the material before us, that such is the

effect of the proposal. The Board may have proceeded upon the view that, in point of fact, the sum to which the mortgage debt was reduced was not less than the value of the farm, and it is not competent to us to review the proposal or its confirmation on the ground that it involves an erroneous adjudication upon a matter of fact.

Other points taken for the first time in this Court ought not to be given effect to. One of them, that a proposal in respect of one debt only is not competent under the statute, rests upon an assumption of fact which is not supported by any evidence. The other, that the Board had no jurisdiction because the appellants, not having valued their security, had no debt provable in bankruptcy, must, I think, be taken to have been waived. I wish, however, to say that I must not be understood as intending to give any countenance to the view that either of these points has any merit in it.

I ought further to add that I must not be understood as giving any adherence to the view that either the Court of Appeal for Saskatchewan or this Court has any jurisdiction to grant *certiorari* on the grounds upon which this present appeal is based.

I cannot think that anybody would suppose it to be open to doubt that section 5 is one of the essential provisions of this statute. The statute was enacted for the purpose of doing something to prevent farmers leaving the land—to set up machinery by which, in a summary method, a Board, presided over by a judge of the bankruptcy court, could devise a scheme of arrangement of the affairs on an insolvent farmer which the Board might make binding on everybody, debtors and creditors alike, including secured creditors.

In the vast majority of cases persons applying for relief under the Act would be farmers possessing a few hundred acres of land who had got into difficulty with their creditors, usually, it may be supposed, with their mortgagees. Everybody reading this statute must realize that any acute lawyer could, in almost any case, raise plausible legal questions in proceedings under it. The statute does not deal with the situation, as it might have done, by making the decisions of the Board of Review, constituted as it is, unimpeachable in a court of law, but it does, by the wise enactments of section 5, require that all questions relating

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to bankruptcy matters arising from the fyling of a proposal shall be within the exclusive jurisdiction of a local court for determination. All matters dealt with by the enactments of the statute are necessarily matters relating to bankrupcy and insolvency. It must have been evident to Parliament that, in the absence of some such provision, the statute would be mere waste paper. The appeal before us is an excellent example of the kind of thing, it might well be thought, Parliament had determined to prevent. The amount involved is a very few hundred dollars and thousands of dollars have been wasted already in these proceedings.

I have put my judgment, however, upon a ground which makes it strictly unnecessary to give a decision upon this point and I pronounce no decision upon it.

The appeal should be dismissed with costs.

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

RINFRET J.—This is an appeal by special leave from the Court of Appeal for Saskatchewan.

The debtor, John Cheese, farms a certain land which he holds under an agreement for sale from the Government of the province of Saskatchewan, Department of Natural Resources, and another land which is subject to a first mortgage now held by the appellant. He made a proposal for a composition, extension of time, or scheme of arrangement under *The Farmers' Creditors Arrangement Act*, 1934, and amendments.

The claims against Cheese appeared as follows:—

The Government of the province of Saskatchewan under the agreement for sale, $914.50;

Rural Municipality of Emerald No. 277 for taxes, $194.23;

Canada Permanent Mortgage Corporation (the appellant) secured by a first mortgage, $689.25;

International Harvester Company of Canada Limited, secured by lien on a binder, $119.40;

Joe Bozek, $401.62;

Bank of Montreal, $135;

Wadena Union Hospital, $51.75.

The proposal not having been approved by the creditors before the Official Receiver, a request was made by the debtor to the Board of Review to formulate an acceptable proposal under the Act.

The Board of Review formulated a proposal; and subsequently, on the second day of November, 1940, confirmed the same.

The Board found that the debtor was entitled to the benefit of the Act.

It stated, as to the claim of the Government of Saskatchewan, that

> no proposal is asked of the Board in connection therewith and the Board does not make a proposal with regard thereto.

As to the claim of the Rural Municipality of Emerald for taxes, the Board also stated that it did not make a proposal.

But it proceeded to fix the amount of the claim of the appellant at four hundred dollars ($400) as at the first day of November, 1939, and ordered

> that such fixed amount be paid in ten equal consecutive annual instalments payable on the First day of November in each year commencing on the First day of November, 1941, with interest at the rate of six per cent per annum from the First day of November, 1939, payable on the First day of November in each year commencing on the First day of November, 1940.

Certain other provisions and conditions relating to that claim were inserted in the Board's proposal; but it is unnecessary to refer to them, as they have no bearing on the questions that we have to discuss.

The Board further stated that

> As to the claims of the remaining Creditors against the Debtor, the Board is advised that each of these claims have been paid and accordingly does not make a proposal with regard to any of them.

By the terms of the proposal,

> the Debtor is to have the privilege of prepaying the whole or any part of any moneys payable under this Proposal at any time without notice or bonus upon first paying any arrears that may have accrued thereunder.

And

> The terms and provisions of all existing securities and documents, including any right of acceleration on default, shall continue in full force and effect except as hereby expressly modified.

The appellant applied to the Court of Appeal of Saskatchewan for an order that a writ of *certiorari* do issue

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out of that court for the return of the proposal formulated by the Board and that the proposal and its confirmation by the Board be quashed so far as the same related to the mortgage of the appellant, as having been made without jurisdiction, upon certain grounds enumerated in the notice of motion, but which may be summed up as follows:

(*a*) The proposal deprives the appellant of its security in that the appellant's claim was reduced to a figure below the value of its security;

(*b*) The proposal is based on considerations other than the present and prospective capability of the respondent to perform the obligations prescribed and the prospective value of the farm upon which the appellant has security;

(*c*) The proposal is not formulated in fairness and justice to the Creditors.

In this Court, the appellant raised the three questions already submitted to the Court of Appeal; but, in addition thereto, sought to support its application upon the following grounds:

(1) The appellant did not have a debt provable in bankruptcy and did not prove for any debt; and, therefore, the Board did not have jurisdiction to formulate a proposal with respect to the appellant's claim secured by mortgage;

(2) The Board exceeded the powers conferred upon it in that it purported to reduce the claim of the appellant notwithstanding that such claim was within the ability of the debtor to pay it;

(3) The proposal of the Board was not a proposal for a composition, nor for a scheme of arrangement, nor for an extension of time within the terms of the *Farmers' Creditors Arrangement Act;*

(4) The proposal is made in respect of one debt only and, on that account, is not competent under the statute.

As to the four points raised in this Court for the first time, I do not think that they are properly before us, nor that they ought to be considered on an appeal such as this, where the appellant is seeking relief through the exceptional remedy by way of *certiorari.*

This, at least, may be said in respect of each of these points that they are peculiarly bankruptcy matters and that they belonged properly to the jurisdiction of the County Court or District Court, to which, under the *Farmers' Creditors Arrangement Act*, these matters are specifically referred under s. 5 (1) of the Act.

Dealing, therefore, with the first two points raised before the Court of Appeal, the difficulty standing uppermost in the way of the appellant is that of ascertaining, in the words of Mackenzie J.A., "the factual considerations which affected the Board in making the proposal."

Section 7 of the Act expressly gives to a Board of Review, in a proposal formulated and confirmed by it, the power to provide for a

> compromise or * * * a scheme of arrangement in relation to a debt owing to a secured creditor.

And the power so attributed to the Board has been authoritatively interpreted, both by this Court and by the Judicial Committee, as making it possible for the Board "to force the terms of a composition upon a secured creditor by which a secured creditor may be compelled to submit to a reduction of the debt owing to him by the insolvent" (*Reference re Farmers' Creditors Arrangement Act* (1)).

Lord Thankerton, delivering the judgment of the Privy Council on the same reference (*Attorney-General for British Columbia* v. *Attorney General for Canada* (2)), expressed the same view as follows:

> The appellant further maintains that, under sec. 7, the secured creditor may be deprived of that which is his property. To deal first with the last contention, their Lordships are clearly of opinion that s. 7 does not enable any creditor to be deprived of his security, but does enable the proposal for composition to provide for the reduction of the debt itself, or an extension of time for its payment, which is a familiar feature of compositions.

We admit that the appellant's proposition might not be entirely covered by the decisions just referred to, for the appellant contends that, even if it is competent for the Board to reduce the personal debt, yet it may not reduce it to a figure below the value of the security.

But, in the present proceedings, we do not feel that we are called upon to decide such a point, either in its

(1) [1936] S.C.R. 384, at 394. (2) [1937] A.C. 391, at 403.

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legal aspect or from the viewpoint of the jurisdiction conferred upon a Board of Review by the *Farmers' Creditors Arrangement Act.*

This Court is not in a position to find whether, as a matter of fact, the proposal has the effect of reducing the appellant's debt below the value of its security.

There is nothing before us which enables us to say, for the purpose of this appeal, that the value of the respondent's farm is greater or less than $400.

Certainly it cannot be asserted that the Board was not competent to ascertain and fix the value of the farm. That would seem to be peculiarly a matter for the Board; and s. 12 of the Act does not allow of the slightest room for doubt that the intention of Parliament was that it should be so.

That section provides that the Board should formulate an acceptable proposal to be submitted to the creditors and the debtor and that the Board shall consider representations on the part of those interested. The word "creditor" includes a secured creditor (s. 2-*d*).

The Board is specifically given the authority to direct

> any one or more of its members on its behalf to inspect and investigate any or all circumstances of any request for review and report to the Board (s. 12-7).

It is to ascertain

> the present and prospective capability of the debtor to perform the obligations prescribed and the productive value of the farm (s. 12-8);

and,

> for the purpose of the performance of its duties and functions hereunder,

the Board has

> the powers of a Commissioner appointed under the *Inquiries Act* (s. 12-10).

The Board, therefore, may act, not only upon the evidence actually submitted to it by the interested parties, including the secured creditor, but it is authorized to act upon the knowledge acquired through the particular facilities accorded under the several sections of the Act just referred to.

What evidence of value was or was not before the Board is not apparent on the face of the proposal itself; and it cannot be said that such evidence had to be set out in

the proposal. Further, no ground of appeal or for the issue of the writ of *certiorari* was made by the appellant in respect of the omission, in the proposal, of any reference to the evidence upon which it is based.

We do not doubt that the fact itself whether the appellant's debt would be reduced below the value of the security, must have been part of the inquiry of the Board; and, at all events, such an inquiry was committed by the Act to the Board and cannot be questioned on *certiorari*. The Board of Review is the only tribunal competent to determine that fact; and it is impossible for this Court to say, from the record in the present case, what facts, what evidence, what "representations" were before the Board, were considered by it, or induced it to act as it did.

In order to intervene in this matter, the Court must first be asked to find as a fact that, in this particular case, the Board of Review reduced the appellant's claim below the value of the appellant's security. It is evident that, on an application for *certiorari*, this Court cannot go into that question, which is a question of fact exclusively within the purview of the Board of Review. The Court of Appeal, to which the appellant's application was made, was not concerned with the preponderance of the evidence in the premises, nor as to the basis for the Board's findings in that regard.

From a perusal of the record, and taking into consideration that the Board was entitled to act as a result of its own investigation, it is not possible to come to the conclusion that, in this case, the Board has not acted according to proper principles.

If there was substance in the appellant's contention on that ground, the matter should have been submitted to the county or district court specially named in s. 5 of the Act as having exclusive jurisdiction to deal with it, subject to appeal, as therein provided.

Without, therefore, deciding whether a Board of Review has jurisdiction to reduce the claim of a secured creditor at a sum less than the value of its security, we are compelled to the conclusion that the fact itself of the reduction of the claim below the security is not apparent in the record before this Court; and, for that reason, the appellant's points in that regard cannot be entertained.

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Coming now to the third ground submitted to the Court of Appeal on the appellant's application, to wit: That the proposal was not formulated in fairness and justice to the creditors, we would say that, *a fortiori,* the point fails, because it is without any basis in fact.

Clearly a question of that character does not affect the competency and jurisdiction of the Board of Review. It does not challenge the authority of the Board to formulate the proposal.

The Act undoubtedly contemplates that the Board should act "in fairness and justice" to the debtor and creditors (s. 12-9). If it should fail to do so, the controlling authority on a question of that kind would be the county or district court acting under s. 5 of the Act.

Fundamentally, such an issue raises questions of pure fact. They cannot be made the subject of an inquiry by a superior court through the procedure of *certiorari.*

The basis for the appellant's argument on that point was that the proposal apparently deals only with the appellant's debt.

However, the Court was told, at the hearing, that the claims of the Government of Saskatchewan and of the Rural Municipality of Emerald represented debts incurred after the 1st of May, 1935, which, by force of s. 19 of the Act, could not be dealt with by the Board. This was evidently a sufficient reason why the Board was not asked to make a proposal with regard thereto.

As for the claims of the remaining creditors, the proposal states that the Board was "advised that each of these claims have been paid", and, accordingly, it did not make a proposal with regard to any of them. It is not to be assumed that the settlements arrived at with these creditors were made outside the knowledge of the Board. At all events, the proposal implies that these settlements were approved of by the Board, since no exception to them was expressed in the proposal.

It is not inconsistent with anything before us that these other creditors may have offered concessions or suffered reductions as good or better than the appellant is called upon to make as a result of the Board's proposal.

The material point is that we know nothing of the circumstances relating to the payments; and it would be quite impossible to order the issue of a writ of *certiorari,*

or to quash the proposal without the issue of the writ, on the assumptions that we are asked to make by the appellant.

The appeal should be dismissed with costs.

HUDSON J.—The Board of Review of the province of Saskatchewan under the *Farmers' Creditors Arrangement Act*, 1934, formulated and confirmed a proposal by which the amount payable on a farm mortgage to the appellants was reduced.

The appellants applied to the Court of Appeal of Saskatchewan for a writ of *certiorari* addressed to the Board requiring a return to the Court of the proposal and confirmation and for an order quashing the same.

Several grounds were put forward in support of this application but only two of these were deemed worthy of consideration in the Court of Appeal. The first and important ground was that the effect of the direction of the Board was to deprive the appellant of its security in that the amount secured by their mortgage was reduced to a sum below the value of the land. The second ground was that the proposal was not formulated in fairness and justice to the creditors.

The application was refused by the Court of Appeal. Mr. Justice Martin was of the opinion that the applicants had no right to a writ of *certiorari*, basing his decision on a case of *Rex* v. *Nat Bell Liquors Limited* (1), but said that he did not think that the Court should dispose of the application on this ground because of the importance of the question raised as to the jurisdiction of the Board. On that question he came to the conclusion that the Board was within its powers. Mr. Justice Mackenzie was also of the opinion that the Board had jurisdiction and that the application should be dismissed, although stating that he had been impressed by the argument of counsel for the appellant "directed to the novel and discriminatory nature of the proposal."

Mr. Justice Gordon on the other hand held that the proposal and confirmation should be quashed on the ground that it was not formulated in fairness and justice to the creditors. He was also of the opinion that the Board had no jurisdiction, although he did not base his decision on this ground.

(1) (1922) 37 C.C.C. 129.

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On the question as to the jurisdiction of the Board, I agree with Mr. Justice Martin.

The *Farmers' Creditors Arrangement Act* in purpose and effect was in some respects a departure from ordinary bankruptcy legislation. Its purpose is set forth in the preamble as follows:

> Whereas in view of the depressed state of agriculture the present indebtedness of many farmers is beyond their capacity to pay; and whereas it is essential in the interest of the Dominion to retain the farmers on the land as efficient producers and for such purpose it is necessary to provide means whereby compromises or rearrangements may be effected of debts of farmers who are unable to pay;

To effect this purpose it provides that a farmer who is unable to meet his liabilities as they become due may make a proposal for a composition or extension of time or scheme of arrangement in respect of his debts. This proposal is submitted to the creditors who may accept or reject the same. If accepted, the proposal becomes binding on all parties; if rejected, the matter may then be dealt with by a Board of Review consisting of three members, one of whom must be a judge of the Superior Court. This Board is given very extensive powers.

The novelty of this legislation at once gave rise to doubts as to its constitutional validity. However, on submission it was held to be valid by this Court (1) and by the Judicial Committee of the Privy Council (2).

It was strongly contended before both of these courts that the Act was invalid, because it in effect enabled the Board of Review to take away the security of a secured creditor and, because of that, interfered with property and civil rights, and was not properly bankruptcy legislation at all. The courts nevertheless sustained the legislation.

It is not for the courts to question the wisdom or fairness of the legislation, but to loyally carry out its purpose in so far as that purpose is expressed in the Act.

The sections of the Act have been analyzed in the court below by Mr. Justice Martin and I accept his interpretation. It seems to me that any other interpretation would be to defeat the whole intent and purpose of the Act.

(1) [1936] S.C.R. 384. (2) [1937] A.C. 391.

On the question of fairness, there appears to have been some misapprehension in the court below as to the amount of the reduction. When the application was originally made, the amount payable on the mortgage was $689.25. It was stated during argument that prior to the final direction of the Board $247 had been paid on account of this, leaving the balance payable on the mortgage at $442.25. The amount at which the mortgage was reduced was $400, leaving a balance of $42.25. It is not easy to see why the Board thought it necessary to make such an insignificant reduction as this, but it is quite apparent that this Court is not in possession of all the information possessed by the members of the Board and, in the absence of a much more complete statement of facts, I would be very loath to hold that a Board of Review headed by the Chief Justice of King's Bench of Saskatchewan had been unfair to the applicant company in reducing its mortgage by a sum of only about $42.25. In any event, I agree with the majority in the court below in the present proceedings that this question is not open to the court.

There was another point raised during the argument before us and not set out particularly in the applicant's original application, that is, that the Board lacked jurisdiction because the applicant company appeared to be the sole creditor of the farmer debtor at the time the direction of the Board was made. Even if this were the fact, it seems to me that the objection is unfounded. Under the stricter rules of the Bankruptcy Act the court has power to consider cases where there is only a single creditor: see *In re Geiger* (1) and *In re Hacquard* (2); Williams on Bankruptcy, page 99.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Thom, Bastedo, Ward & McDougall.*

Solicitor for the respondent: *C. R. Davidson.*

(1) [1915] 1 K.B. 439.

(2) (1886) 24 Q.B.D. 71, at 76.

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*April 28, 29.
*June 26.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF STANSTEAD

ALBERT SIDELEAU (PETITIONER) .....APPELLANT;

AND

ROBERT GREIG DAVIDSON (DEFENDANT ..... RESPONDENT.

ON APPEAL FROM THE DECISION OF SURVEYER AND MCDOUGALL JJ.

Election law—Dominion Controverted Elections Act—Petition to annul election—Corrupt practices—Knowledge by candidate or official agent—"Agent" in s. 49 including unofficial agent—Distribution of liquor and money—Presumption of corrupt practices—Definite mandate by candidate not necessary to constitute an "agent"—Political organization in charge of election—Accredited members and persons employed by it deemed to be "agents"—Exoneration clause in s. 54—Burden of proof—Dominion Controverted Elections Act, R.S.C., 1927, c. 50, ss. 49, 54, 76.

The respondent was, on March 27th, 1940, declared elected member of the House of Commons for the county of Stanstead. On April 20th, 1940, a petition was presented under the provisions of the *Dominion Controverted Elections Act* to have the respondent's election annulled on the grounds that he, personally and through his agents, had committed corrupt and illegal practices, consisting particularly in the distribution of whisky and money. The organization of the campaign on behalf of the respondent was entirely left in the hands of the Liberal Organization of the county, the joint-presidents being one Wilkinson and one Jubinville. The latter exercising his activities as chief organizer in the town of Coaticook, received from the former a sum of $1,200 which in part served to purchase whisky afterward deposited at the hotel of one Maurice in Coaticook, and the balance was distributed to local organizers in the surrounding municipalities who were not asked to give any account of their disbursements. Moreover, Maurice bought an additional quantity of whisky, saw personally to its distribution and on the day of the election treated a number of electors whether they had voted or not. Many other persons also treated electors within the limits of the places where they were organizing and working on behalf of the respondent. Some whisky was also served to voters in the street, in private houses, in automobiles and inside some industrial premises. On a smaller scale, some voters received money for their votes and some others were the recipient of unexpected gifts, which were termed as having been made for "charitable purposes". The trial judges dismissed the petition and the appellant appealed to this Court.

Held that all the acts established by the evidence in this case amount to corrupt practices and that they are sufficient to void the election, although the respondent himself and his official agent have not been parties to those practices.

* PRESENT:—Rinfret, Kerwin, Hudson and Taschereau JJ. and Maclean J. *ad hoc*

When section 49 of the *Dominion Controverted Elections Act* enacts that "any corrupt practice * * * committed by a candidate * * *, or by his agent" renders the election void, the word "agent" does not mean only the "official agent", but includes any unofficial agent.

The distribution of moneys to local organizers who were not asked to give any account of their disbursements creates a presumption and allows a court to draw the inference that it was intended for the corruption of the electors. *Belleau* v. *Dussault* (Lévis case, 1885, 11 Can. S.R. 133) and *Gallery* v. *Darlington* (St. Ann's case, 1906, 37 Can. S.C.R. 563) followed.

Even if there was evidence that an elector had treated another elector or had given him money to induce him to vote for a candidate, the election should not be voided unless the so-called agent is linked in some way to the candidate himself; but it is not necessary that there should be a definite mandate by a candidate to one of his supporters in order that the latter be termed an agent within the meaning of the *Dominion Controverted Elections Act, Brassard* v. *Langevin* (Charlevoix case, 1877, 1 Can. S.C.R. 145) cited.

When a candidate and his official agent rely upon a political organization to promote the campaign and bring the election to a successful conclusion, the accredited members of the association should be held to be the agents of the candidate, and all those employed by the association are, within the limits of their duties, in the same sense the agents of the candidate himself.

A candidate, in order to be relieved from the consequences of corrupt practices by the operation of section 54 of the *Dominion Controverted Elections Act* (exonerating clause), must bring himself strictly within all its terms; and the respondent in this case has failed to show that he should be allowed to take advantage of that section. Although it has been established that he and his official agent have committed no reprehensible acts, it is not in evidence (and the burden of proof was upon the respondent) that the corrupt practices were committed contrary to the order of the candidate or his official agent, and nothing in the record can lead the court to the conclusion that they have taken all reasonable means for preventing the commission of corrupt practices.

Judgment of the trial judges reversed, petition maintained and election of the respondent annulled (1).

APPEAL from the judgment of Surveyer and McDougall JJ. sitting as trial judges under the provisions of the "Dominion Controverted Elections Act," R.S.C. (1927), c. 50, in the matter of the controverted election of a member for the electoral district of Stanstead, in the

(1) *Reporter's note.*—A motion by the respondent for a stay of proceedings pending an application to the Judicial Committee of the Privy Council for special leave to appeal was dismissed with costs by Hudson J. in chambers, July 16th, 1942. This judgment is reported below, p. 318.

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House of Commons of Canada, rendered on the 8th of October, 1941, dismissing the appellant's petition for the voiding of the election.

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

J. C. Samson for the appellant.

D. Landry K.C. for the respondent.

The judgment of the Court has been delivered by

TASCHEREAU J.—The respondent Robert Greig Davidson, was on the 27th day of March, 1940, declared elected member of the House of Commons for the county of Stanstead, by a majority of 306 votes over his opponent, Alphonse Girard of Magog.

On April the 20th, a petition was presented by Albert Sideleau of Coaticook and Telesphore Goyette of Magog, under the provisions of the *Act Respecting Controverted Elections of Members of the House of Commons*, R.S.C., 1927, chap. 50, to have the respondent's election annulled, and on the 8th of October, 1941, the Honourable Justices Fabre Surveyer and McDougall of the Superior Court for the province of Quebec, dismissed the petition with costs.

The appellant now appeals from that decision.

The petition alleges that the respondent personally and through his agents has committed corrupt and illegal practices, consisting particularly in the distribution of whisky and money.

The learned trial judges came to the conclusion that some reprehensible acts have been committed by some of the organizers of the respondent's campaign, but were of the opinion, without making any reference to the exoneration clause, which is section 54 of the Act, that they were not sufficient to prevent the election from having been "very decent". In the last paragraph the trial judges conclude their judgment as follows:—

> On the whole, we are disposed to believe that the respondent has taken very little part in this election, and that his official agent neither committed nor encouraged any reprehensible acts. As to the unofficial agents, one may say, with witness Leclerc, who seems to have witnessed many others, that, as elections go, the present one was very decent.

The *Act Respecting Controverted Elections of Members of the House of Commons* contains amongst others the following clause:—

> 49. If it is found by the report of the trial judges that any corrupt practice has been commited by a candidate at an election, or by his agent, whether with or without the actual knowledge and consent of such candidate, or that any illegal practice has been committed by a candidate or by his official agent or by any other agent of the candidate with the actual knowledge and consent of the candidate, the election of such candidate, if he has been elected, shall be void.

By this section, it will be seen that any corrupt practice committed by a candidate or by his agent, whether with or without the consent and knowledge of the candidate, renders the election void.—As to an illegal practice, the election is void if such illegal practice has been committed by the candidate, or by his official agent, or by any other agent with the actual knowledge and consent of the candidate.

It was argued on behalf of the respondent that the word "agent" in the first part of this section 49 means only the "official agent" and that, therefore, if any corrupt practices have been committed by an unofficial agent, the election cannot be voided.

We come to the conclusion that this contention cannot be sustained and we cannot see how the word "agent" in the first part of the section can have such a limited meaning. The Act taken as a whole, and particularly the reading of sections 54 and 76 must irresistibly lead us to a different conclusion.

Section 54, which is the exoneration section which may be invoked on behalf of a candidate, contains subsection (*d*) which says that the election is not void, when the judges have found that

> in all other respects the election was free from any corrupt or illegal practice on the part of such candidate and of his agents.

Section 76 authorizes the trial judges to condemn the agents to pay costs when the election is void by reason of any act of an agent committed without the knowledge and consent of the candidate.

These two sections clearly show that corrupt practices even without the knowledge and consent of the candidate are in certain cases sufficient to void an election and, there-

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fore, these two sections would be meaningless if we were to interpret section 49 in the manner suggested by the respondent.

With due deference, we have to come to the conclusion that in the present case, corrupt practices have been committed, to which however it must be said, the respondent himself and his official agent have not been parties.

The organization of the campaign on behalf of the respondent was entirely left in the hands of the Liberal Organization of the county of Stanstead, the joint-presidents of which were Frank Wilkinson and Noé Jubinville.

For the purpose of organizing the election, the county of Stanstead was divided into two sections with headquarters at Magog and Coaticook. The evidence does not allow us to reach the conclusion that there were any corrupt practices at Magog sufficient to void the election, and on that point the evidence is contradictory as to whether there was any liquor served at a "smoker" held at Magog. If there were any, it is very doubtful if it was served with the knowledge and consent of the organizers of the respondent.

But, we are confronted with a different state of facts as to what happened at Coaticook and in the vicinity where Noé Jubinville was exercising his activities as chief organizer. In that capacity, he received from Frank Wilkinson a sum of approximately $1,200 which in part served to purchase whisky which was afterwards deposited at the hotel of Adrien Maurice at Coaticook, and the balance was distributed to local organizers in the surrounding municipalities who were not asked to give any account of their disbursements.

This immediately creates a presumption, and allows us to draw the inference that it was intended for the corruption of the electors.

In the *St. Ann's* election case (1), Mr. Justice Davies says:—

> We are asked to believe that this money was intended to be honestly paid to "locators" so called, for bona fide and necessary work to be done by them, while in the same breath we are told that at least one-half of those to whom the money was to be paid, and actually was paid, were electors whom the receipt of these moneys for alleged services in connection with the elections would actually disfranchise.

(1) *Gallery* v. *Darlington*, (1906) 37 Can. S.C.R. 563, at 566.

The money paid to these chairmen of committees was not counted, no receipt was taken, no memorandum of payments made, no account kept by those to whom it was paid, of those electors and others to whom they paid the money and no evidence or the slightest possible that any actual bona fide work was done by those to whom it was paid, or if and where any work was done by any or by which of them.

In the *Levis* case (1), it was held, affirming the judgment of the court below that when an agent of a candidate receives and spends for election purposes large sums of money, and does not render an account of such expenditure, it will create a presumption that corrupt practices have been resorted to.

In the present case, we have not only the presumption which has been thus created, but we have the uncontradicted evidence that Noé Jubinville not only sent this quantity of whisky to Maurice for distribution, but distributed some personally to other organizers and voters. Adrien Maurice, the hotelkeeper and one of the organizers, was obviously not satisfied with the quantity of whisky which he had received from Jubinville but purchased an additional quantity from the Quebec Liquor Commission. He saw personally to the distribution of that whisky, and on the day of the election he treated a number of electors whether they had voted or not. On that point, he is quite frank, for in his evidence he says:—

Q. A tout événement, les personnes savaient que vous en aviez un dépôt chez-vous pour les fins de l'élection?

A. On avait ça pour s'en servir.

Joseph Laroche, Charles-Emile Audet, Arthur Leclerc, Kenneth Akhurst, René Jean-Marie, Georges Primeau, Thomas Handy, also treated electors within the limits of the places where they were organizing and working on behalf of the respondent. Some whisky was served to voters in the street, in private houses, in automobiles, and, Georges Primeau treated some employees of the Kilgour Chair Company which he had been asked to bring to the polls, and the same conduct was followed by Kenneth Akhurst with the voters employed by the Belding Corticelli Company.

On a smaller scale however, some voters received money for their votes, and some others were the recipients of unexpected gifts, which have been termed by one of the

(1) *Belleau* v. *Dussault,* (1885) 11 Can. S.R. 133.

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witnesses for the respondent to have been made for "charitable purposes". The organizers guilty of these particular acts of corruption are Charles-Emile Audet and Arthur Leclerc.

With due deference, we believe that all these acts amount to corrupt practices and that they are sufficient to void the election. More than once, this Court has annulled elections for isolated cases of corruption and in other cases for practices which did not have the serious character which the evidence reveals in the present case.

We might refer to *Larue* v. *Deslauriers* (1); *Colter* v. *Glenn* (2); *German* v. *Rothery* (3); *Hackett* v. *Larkin* (4), and *Gallery* v. *Darlington* (5).

The question has been raised as to whether all those who worked on behalf of the respondent, and who have committed corrupt practices were agents of the respondent for which, within the meaning of the *Dominion Controverted Elections Act,* he can be held responsible.

There can be no doubt that if an elector choses to treat another elector or to give him money to induce him to vote for a candidate, the candidate's election cannot be voided if the so-called agent is not linked in some way to the candidate himself. But, it is not necessary that there should be a definite mandate by a candidate to one of his supporters in order that the latter be termed an agent within the meaning of the Act. As it has been said in *Brassard* v. *Langevin* (6):—

> Let us remark here that the law does not require that the agency should be established by means of a written or even a verbal authority; it is inferred from the relations of the parties—from the bona fide support which the agent affords to the candidate with the sincere view of ensuring his election. The agent here in question is not the one specified by section 121 of the Election Act whose name should be notified by the candidate to the returning officer, but is the one specified by section 101; that is, the one who, with the formal or implied consent of a candidate, in good faith supports his candidature.

In the present case, the respondent himself did not take a very active part in his own election, and we do not think, except for a few cases with which we will deal later, that he appointed expressly any agents to work on his behalf.

(1) (1880) 5 Can. S.C.R. 91.
(2) (1889) 17 Can. S.C.R. 170.
(3) (1892) 20 Can. S.C.R. 376.
(4) (1897) 27 Can. S.C.R. 241.
(5) (1906) 37 Can. S.C.R. 563.
(6) (1887) 1 Can. S.C.R. 145, at 191.

At the time the election was held, the weather was not favourable, the roads were closed in many sections of the county and the respondent who addressed only a few meetings stayed most of his time at Katevale, his home town.

In his examination on discovery, he tells us however that there was a Liberal Organization in the county of Stanstead, called the Stanstead County Liberal Organization. He was aware that there were two presidents at the head of this organization, namely, Frank Wilkinson and Noé Jubinville, and he frankly admits that he was the official candidate for the Liberal party and chosen by the Liberal Association of the county. One of the important features of his evidence is that, it was the Liberal Association which was to secure his election. Here are his exact words:—

Q. Is there any official or any Liberal organization in the county of Stanstead?

A. Yes.

Q. How do you call that association?

A. Stanstead County Liberal Organization.

Q. Who was the president, at the time of the election, of that association?

A. I am not sufficiently familiar with it, I know there are two,—Frank Wilkinson and Noé Jubinville.

Q. Mr. Noé Jubinville was joint-president for the Liberal Association of the county of Stanstead?

A. As I understand.

Q. And you were the official candidate for the Liberal Association, or the Liberal party?

A. Yes, sir.

Q. Could you, Mr. Davidson, give other names of members of the Liberal Association for the county of Stanstead?

A. Well, yes.

Q. I suppose there was a membership at the head of that organition.

A. There was an organization, but I must confess I don't know them all.

And further:—

Q. After you had been chosen, Mr. Davidson, as official candidate for the Liberal party for the county of Stanstead for the election held on the 26th of March, 1940, were those gentlemen you just mentioned, were they to secure your election?

A. I presume they would.

Q. Is it to your knowledge that they did work to secure your election?

A. Yes, from what I could understand, or what I could see.

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And still further:—

Q. My point is this: You had been chosen as official candidate for the Liberal party for the county of Stanstead. There was in Stanstead a Liberal organization, which no doubt had for its purpose the election of its official candidate?

A. Yes.

He also states that Mr. Léon Dubé was the secretary of the association and gives the name of a number of other members whom he knew belonged to the organization, as F. E. Patch of Magog, Antonio Robert, Edwin Chadsey, Fred Gilbert, Adrien Maurice. He believes also that Joseph Laroche and David Lefebvre of Coaticook did some work on his behalf after he had been chosen as the official candidate. He also relied upon Mr. Wilkinson, the president of the association, and Mr. Noé Jubinville, the joint-president, to take a special interest and part in his election.

The official agent for the respondent was Mr. Roger Bouchard of Coaticook. To his knowledge the organizers of the respondent at Coaticook were Noé Jubinville, Adrien Maurice, Joseph Laroche, Azarias Boivin and Léon Dubé. He was fully aware of the part taken by the Liberal association of the county and, according to the conversations he had with the respondent, the latter knew that Noé Jubinville, Azarias Boivin, Léon Dubé and Joseph Laroche were taking an active part in promotion of the election.

We have no doubt that the respondent and his official agent were relying particularly upon the Liberal Organization of the county of Stanstead to secure his election. As we have already pointed out, the mere fact that a man gives his support to a candidate does not make him an agent, but, we are of opinion that when a candidate relies upon an organization to promote his campaign, and bring the election to a successful conclusion, the accredited members of the association are the agents of the candidate, and all those employed by the association are, within the limits of their duties, in the same sense the agents of the candidate himself. Taunton, 1 O'M. & H. 185:—

Generally speaking, whenever a person is in any way allowed by a candidate, or has the candidate's sanction to try to carry on his election and to act for him that is some evidence to show that he is his agent.

In the *Borough of Stroud* case (1), Baron Pigott said:—

It is clear that a person is not to be made an agent of a sitting member by his merely acting, that is not enough; he must act in promotion of the election, and he must have authority, or there must be circumstances from which we can infer authority.

In the present case, all those, which we find as having acted as agents, were not expressly appointed by the candidate himself, but they were well accredited members of the association or entrusted by the official organizers of the respondent to do some election work and to promote his election.

In *Borough of Dungannon* (2), Baron Fitzgerald said:—

If that part of the business of an election which ordinarily and properly belongs to the candidate himself be done to the knowledge of the candidate by some other person, it appears to me that that other person is an agent of the candidate, and the candidate is responsible for any corrupt act done by that person.

In the *Haldimand Election* case (3), Mr. Justice Gwynne says at page 187:—

* * * and in pursuance of it in the character of a committeeman acting in the interest of and as agent of the candidate, just as if he had been appointed by the candidate himself.

In the same case, at page 194, Mr. Justice Paterson says:—

If I find that a candidate who takes the field as the nominee of the party that acts through an organized association, whether the organization is strict and formal, or loose and elastic, depends upon the efforts of the association to promote his election or relies upon such efforts, I must, as I understand the principles of the law, hold all persons accredited by the association to be the agents of the candidate. Whether a particular individual does or does not come within the description is a question of fact.

The evidence reveals, as we have already pointed out, that Noé Jubinville, Adrien Maurice, Joseph Laroche, Charles-Emile Audet, Arthur Leclerc, Kenneth Akhurst, René Jean-Marie, Georges Primeau and Thomas Handy have been guilty of corrupt practices. They were not expressly appointed agents for the respondent except, perhaps, Joseph Laroche and Charles-Emile Audet who were bearers of a proxy signed by the respondent authorizing them to represent him as his agents in certain polls. But, all these persons were members of the organization which was in charge of the election or were expressly appointed agents by the accredited members of the organi-

(1) (1874) 3 O'M. & H. 7, at 11. (2) (1880) 3 O'M. & H. 101, at 102.
(3) (1890) 17 Can. S.C.R. 176.

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zation. It follows that the respondent, having entrusted the fate of his election to these persons, must bear all the consequences of their acts however severe and far-reaching they may be. It would indeed be strange if it were otherwise, and if we were to accept the opposite views. For, in such a case, the successful candidate whose election is contested before the courts could always seek refuge behind his political campaigners to whom he has expressly or impliedly confided the care of his election, and repudiate after the polls are closed the reprehensible and corrupt acts committed by them. This view, if accepted, would defeat the object of the act and imperil the honesty of elections.

The respondent has argued that even if some corrupt practices have been proved, the election could not be voided on account of the application of section 54 of the Act which is called the exoneration clause. This section reads as follows:—

54. Where, upon the trial of an election petition, the trial judges report that a candidate at such election was guilty by his agent or agents of any offence that would render his election void, and further find

(*a*) that no corrupt or illegal practice was committed at such election by the candidate personally or by his official agent and that the offences mentioned in the said report were committed contrary to the order and without the sanction or connivance of such candidate or his official agent; and

(*b*) that such candidate and his official agent took all reasonable means for preventing the commission of corrupt and illegal practices at such election; and

(*c*) that the offences were of a trivial, unimportant, and limited character; and

(*d*) that in all other respects the election was free from any corrupt or illegal practice on the part of such candidate and of his agents;

then the election of such candidate shall not, by reasons of the offences mentioned, be void, nor shall the candidate be subject to any incapacity therefor.

It may be stated that a candidate may be relieved from the consequences of corrupt practices by the operation of this section when he brings himself strictly within all its terms.

In the *West Prince Election* case (1), after quoting what in 1897 was our present section 54, the Chief Justice adds at page 247:—

But, as Mr. Justice Vaughan Williams held in the *Rochester* case, in order to obtain the benefit of this section a candidate must bring himself strictly within its terms.

(1) (1897) 27 Can. S.C.R. 241.

The burden was upon the respondent to show that the offences mentioned in the report of the trial judges were committed contrary to the order and without the sanction of the candidate or his official agent, that they took all reasonable means for preventing the commission of corrupt and illegal practices, that the offences were of a trivial, unimportant, and limited character, and that in all other respects the election was free from any corrupt practices on the part of such candidate and of his agents.

We believe that the respondent has failed to show that he may be allowed to take advantage of this section. Although it has been established that he and his official agent have committed no reprehensible acts, it is not in evidence that the corrupt practices were committed contrary to the order of the candidate or his official agent, and nothing in the record can lead us to the conclusion that they have taken all reasonable means for preventing the commission of corrupt practices.

In *Veilleux* v. *Boucher* (1), confirmed by this Court (2), it was held by Coderre and Denis, JJ.:—

> A defendant who neglects, whether by himself or his official agent, to give orders forbidding all other agents, and generally all persons working at the election in his interest, to refrain from all corrupt practices, is not admitted to invoke exoneration under section 54 of the *Dominion Controverted Elections Act*.

Moreover, the offences were not of a trivial, unimportant, and limited character, and we have seen, when analysing the evidence, that the election was not free from corrupt practices on the part of the agents of the candidate. Even if they had been of a limited character, as it had been submitted to us, subsection (*c*) would still be of no benefit to the respondent, for the offence of treating is surely not trivial—and the limited number of the acts and their triviality are two different elements which must be found to coexist.

We, therefore, come to the conclusion that the appeal should be allowed, the petition maintained and the election of the respondent declared elected on the 27th of March, 1940, annulled. It is ordered that the Registrar shall certify to the Speaker of the House of Commons the judgment of this Court, after settlement of the minutes thereof, annulling the decision of the trial judges. The appellant will be entitled to his costs in the Court below and in this

(1) (1932) Q.R. 70 S.C. 339. (2) [1933] S.C.R. 65.

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Court according to the tariff of the Supreme Court of Canada, and the deposit which has been made by the appellant will be returned to him.

Taschereau J.

Appeal allowed with costs.

Solicitor for the appellant: *J. C. Samson.*

Solicitors for the respondent: *Dalma Landry and Roger Bouchard.*

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* July 9.
* July 16.

CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF STANSTEAD

ALBERT SIDELEAU (PETITIONER) .....APPELLANT;

AND

ROBERT GREIG DAVIDSON (DEFENDANT) ..... } RESPONDENT.

Practice and procedure—Election law—Judgment of Supreme Court of Canada annulling election of member for House of Commons—Report made to Speaker by Registrar—Motion subsequently made for stay of proceedings—Ruling also as to costs—Dominion Controverted Elections Act, R.S.C., 1927, c. 50, ss. 68, 69, 70, 75.

When a judgment of this Court, holding that the election of the respondent to the House of Commons should be annulled, has been duly reported to the Speaker by the Registrar pursuant to section 68 of the Dominion Controverted Elections Act, a motion made subsequently by the appellant for a stay of proceedings pending an application to the Judicial Committee of the Privy Council for special leave to appeal from that judgment should be dismissed.

The Act clearly does not contemplate any proceedings in court after the report to the Speaker is made, except in the matter of costs (s. 75). This Court has then no power to delay or forbid any action which the House of Commons or Parliament may see fit to take following such report.

When the substantive portion of the judgment has passed beyond the control of this Court, a stay of proceedings in respect of costs would not be justified, especially in view of the fact that the Judicial Committee has consistently refused leave to appeal in respect of judgments in contested election cases.

MOTION by the appellant for a stay of proceedings pending an application to the Judicial Committee of the Privy Council for special leave to appeal from a judgment of this Court annulling the election of the respondent to the House of Commons (reported *supra* p. 306).

Auguste Lemieux K.C. for motion.

Jean Genest K.C. and *J. C. Samson* for the respondent.

* PRESENT:—Hudson J. in chambers.

HUDSON J.—This is a motion for a stay of proceedings pending an application to the Judicial Committee of the Privy Council for special leave to appeal from a judgment of this Court.

On the 26th of June, judgment was given by this Court reversing a judgment of the trial judges and holding that the election of the respondent to the House of Commons for Canada should be annulled (1). It also awarded to the petitioners the costs of their petition throughout.

On the 30th of June, 1942, the Registrar of this Court certified to the Speaker of the House of Commons the judgment and decision of this Court pursuant to the provisions of sec. 68 of the *Dominion Controverted Elections Act,* R.S.C., Cap. 50.

On the said 30th of June the Speaker of the House of Commons communicated to the House of Commons the report and certificate of this Court, as required by the provisions of sec. 70 of the *Dominion Controverted Elections Act.*

On the 3rd of July notice of this motion was served on the Speaker of the House of Commons and on the agent for the appellant's solicitors.

The judgment of this Court awarding the petitioners the costs of the petition and appeal has not yet been transmitted by the Registrar of this Court to the trial court for enforcement.

On the hearing of this motion before me counsel for the appellant and respondent appeared, but the Speaker of the House of Commons was not represented. Objection was made to the stay of proceedings on two grounds: first, that the Court was *functus,* inasmuch as its report had been made to the House of Commons pursuant to sec. 68 of the Act; and secondly, that in any event the matter was not one in which leave to appeal would be granted by the Judicial Committee of the Privy Council. On the first ground the provisions of the Act are as follows:

> 68. The Registrar shall certify to the Speaker the judgment and decision of the Supreme Court of Canada, confirming, changing or annulling any decision, report or finding of the trial judges upon the several questions of law as well as of fact upon which the appeal was made, and therein shall certify as to the matters and things as to which the

(1) [1942] S.C.R. 206.

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trial judges would have been required to report to the Speaker, whether they are confirmed, annulled or changed, or left unaffected by such decision of the Supreme Court of Canada; and such decision shall be final.

69. The Speaker shall, at the earliest practicable moment after the receives the certificate and report or reports, if any, of the trial judges or the Supreme Court of Canada, give the necessary directions, and adopt all the proceedings necessary for confirming or altering the return, or, except as hereinafter mentioned, for the issuing of a writ for a new election, for which purpose the Speaker may address his warrant, under his hand and seal, to the Chief Electoral Officer, or for otherwise carrying the determination into execution, as circumstances require.

70. The Speaker shall, without delay, communicate to the House of Commons the determination, report and certificate of the trial judges or of the Supreme Court of Canada and his own proceedings thereon; and, when the trial judges or the Supreme Court of Canada make a special report, the House of Commons may make such order in respect of such special report as they think proper.

The statute clearly does not contemplate any proceedings in court after the report to the Speaker is made except in the matter of costs, which is provided for by sec. 75 of the Act. The jurisdiction to hear election petitions is special and does not extend beyond what is specified in the statute.

This Court has no power to delay or forbid any action which the House of Commons or Parliament may see fit to take as a consequence of the judgment as reported to the Speaker.

When the substantive portion of the judgment has passed beyond the control of the Court a stay of proceedings in respect of costs would not be justified, especially in view of the fact that the Judicial Committee has consistently refused leave to appeal in respect of judgments in contested election cases. As early as 1876, in the case of *Théberge* v. *Landry* (1), an application was made to the Judicial Committee for leave to appeal from a decision of the Superior Court of the province of Quebec in respect of a contested provincial election and there, while not deciding directly that the prerogative right of appeal had been taken away, the Judicial Committee yet held that in matters of this kind leave to appeal should not be granted. At p. 108 it was stated:

In the opinion of their Lordships, adverting to these considerations, the 90th section, which says that the judgment shall not be susceptible of appeal, is an enactment which indicates clearly the intention of the

(1) (1876) 2 App. Cas. 102.

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Legislature under this Act,—an Act which is assented to on the part of the Crown, and to which the Crown, therefore, is a party,—to create this tribunal for the purpose of trying election petitions in a manner which should make its decision final to all purposes, and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative.

This decision was followed in the case of *Kennedy* v. *Purcell* (1). It was also cited with approval in the case of *Moses* v. *Parker* (2). The question has come up several times in Canadian courts in respect of provincial elections. An early case is that of *Re Gimli (No. 3)* (3). In this case an application was made to the Manitoba Court of Appeal for leave to appeal to the Judicial Committee in respect of a contested provincial election decision. The Manitoba court, after careful consideration and reviewing all of the relevant authorities, unanimously refused leave. Again in this Court, in the case of *Cross* v. *Carstairs* (4), this Court refused to hear an appeal from a provincial court in respect of a provincial election petition.

For these reasons I would dismiss the motion with costs.

Motion dismissed with costs.

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* May 28, 29
* June 26.

DAME ROSE-ANNA GENDRON AND ANOTHER (PLAINTIFFS) ..... APPELLANTS;

AND

DAME JEANNE DURANLEAU AND ANOTHER (DEFENDANTS) ..... RESPONDENTS.

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

Will—Notarial form—Formalities—Declaration that testator was unable to sign—No declaration by testator himself—Validity of the will—Arts. 843 C.C. and 975 C.N. not identical—French doctrine and jurisprudence not entirely applicable—Authentic writing—Improbation—Notary acting as public officer—No presumption that will not entirely read—Arts. 843, 855, 1208, 1211 C.C.

* PRESENT:—Rinfret, Kerwin, Hudson and Taschereau JJ. and Bond J. *ad hoc.*

(1) (1888) 59 L.T.R. 279.
(2) [1896] A.C. 245.
(3) (1913) 23 Man. R. 863.
(4) (1913) 47 S.C.R. 559.

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Where a will in notarial form contains at the end the words: "The testator being unable to sign on account of illness, gave his consent to these presents and declared them to contain his last will * * *", such statement must be held to comply with the formalities (to be strictly observed on pain of nullity—art. 855 C.C.) required by article 843 C.C. which enacts that "the testator signs the will or declares that he cannot do so," principally when the facts and circumstances in this case are taken into consideration: the wording necessarily implies that the testator has given his consent to the statement made by the notary that he "was unable to sign on account of illness."

The text of article 975 C.N. is not identical with the text of article 843 C.C. and many other articles of the two codes relative to wills are not similar. When a court has to apply the principles and the rules of law governing a matter which must be decided according to the law of Quebec, the French doctrine and jurisprudence ought not to be strictly applied.

A will is an authentic writing received before a public officer and makes proof of his contents until contradicted and set aside as false in whole or in part upon improbation (Arts. 1208, 1211 C.C.); and, taking into account the character of the officer, a notary, and his declaration that the will has been read to the testator, the court cannot presume that the deed had not been entirely completed when so read.

Judgment of the appellate court (Q.R. 71 K.B. 243) 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, Curran J. (2) and dismissing the appellants' 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.

Ernest Bertrand K.C. and *S. V. Ozero* for the appellants.

Antonio Perrault K.C. and *Albert Mayrand* for the respondents.

The judgment of the Court was delivered by

RINFRET J.—Le testament de Joseph-Alfred Gendron, décédé à Montréal le 19 octobre 1938, objet de ce litige, a été fait en faveur de l'intimée et a été attaqué par l'appelante, qui est la sœur de Gendron. Les deux cours qui en ont décidé jusqu'ici se sont trouvées d'accord pour conclure que les moyens invoqués à raison d'influence indue ou d'incapacité testamentaire n'étaient en aucune façon

(1) (1941) Q.R. 71 K.B. 243. (2) (1940) 47 R. de J. 115.

justifiés et que la preuve n'avait rien établi à l'effet que le *de cujus* ne fût pas en état de tester ou que son testament n'ait été fait en toute liberté et de son plein gré.

Les juges ont également exprimé l'opinion que ce testament s'expliquait parfaitement et qu'il n'avait rien d'injuste ou de contre nature, selon que l'avait suggéré l'appelante.

Les jugements dont il y a appel n'ont retenu qu'une seule question, basée sur la prétendue illégalité du testament; et c'est le point unique sur lequel ont porté les argumentations devant cette Cour.

Bien que le testateur fût de langue française, son testament a été rédigé en anglais, pour des raisons expliquées au dossier et dont il n'y a pas lieu de s'occuper pour les fins de notre décision. Il a été reçu devant Mtre Erigène Godin, notaire public de la province de Québec, pratiquant à Montréal, en présence de George M. Wilson, agent d'assurance de Lachine, et de Sydney A. Windsor, manufacturier de Saint-Jean.

Le document débute comme suit:

> Appeared: Joseph Alfred Gendron, of Montreal, carter.
>
> Who declared unto the said notary and witnesses the following as and for his last will and testament, namely:

Viennent ensuite trois clauses où il révoque tout testament antérieur qu'il aurait pu faire; il donne tous ses biens à l'intimée en pleine propriété; et il nomme George M. Wilson son exécuteur testamentaire avec pouvoirs s'étendant au delà de l'an et jour prévus par la loi.

Puis le document poursuit:

> The present last will and testament was thus executed in the said city of Montreal, at the Royal Victoria Hospital on the day, month and year hereinbefore written and remains of record in the office of the undersigned notary under the number sixteen thousand and ten.
>
> And after the said will had been read to the testator by the said Mtre Godin in the presence of the said witnesses, the testator, being unable to sign on account of illness, gave his consent to these presents and declared them to contain his last will in the presence of the said notary and witnesses each of whom signed in the presence of the two others and of the testator, all being present at the same time.
>
> (Signed) Sydney A. Windsor.
>
> Erigene Godin, Notary. G. M. Wilson.

L'article 843 du Code Civil prescrit ainsi qu'il suit:

> 843.—Le testament en forme notariée ou authentique est reçu devant deux notaires, ou devant un notaire et deux témoins; le testateur en leur

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présence et avec eux signe le testament ou déclare ne le pouvoir faire après que la lecture lui en a été faite par l'un des notaires en présence de l'autre, ou par le notaire en présence des témoins. Il est fait mention à l'acte de l'accomplissement des formalités.

Ici nous avons un testament en forme notariée, ou authentique, qui a été reçu devant un notaire et deux témoins. Lecture en a été faite par le notaire en présence des témoins. Mais le testateur ne l'a pas signé; et l'appelante prétend que l'acte ne fait pas mention que le testateur ait "déclaré ne pouvoir le faire". Elle en a conclu qu'à raison de cette omission le testament était nul; et, par son action, elle a demandé qu'il soit mis de côté comme n'ayant aucun effet légal.

La Cour Supérieure et la majorité des juges de la Cour du Banc du Roi ont été d'avis contraire, et ils ont rejeté l'action.

L'article 855 du Code civil est bien catégorique:

> Les formalités auxquelles les testaments sont assujettis par les dispositions de la présente section (du Code civil) doivent être observées à peine de nullité, à moins d'une exception à ce sujet.
>
> Néanmoins le testament fait apparemment sous une forme et nul comme tel à cause de l'inobservation de quelque formalité, peut être valide comme fait sous une autre forme, s'il contient tout ce qu'exige cette dernière.

Or, sur le point qui est soulevé, le code ne contient aucune exception; et il s'ensuivrait, d'après les prétentions de l'appelante que l'inobservation de la formalité dont elle se plaint entraîne la nullité du testament.

Il faut bien préciser, en effet, que les formalités, en pareils cas exigées par le code, sont essentielles. Il faut les appliquer avec rigueur; et les tribunaux ne sauraient les traiter à la légère.

Ainsi donc, pour que le testament authentique soit reconnu valide, il faut, entre autres choses, qu'il soit signé par le testateur en présence du notaire et des témoins, ou que le testateur

> déclare ne le pouvoir faire après que lecture lui en a été faite par le notaire en présence des témoins.

Il y faut ou bien la signature, ou bien la déclaration du testateur, et déjà Vazeille (Successions, tome 2, page 449, paragraphe 6) expliquait

> que la loi ne donne pas au notaire la mission de vérifier ou de certifier la capacité ou l'incapacité du testateur pour la signature. Le notaire doit seulement constater la déclaration que le testateur lui fait à cet

égard. Mais ce devoir est indispensable. Si le notaire, au lieu de rapporter cette déclaration, s'était borné à dire que le testateur n'a su ou n'a pu signer, il paraîtrait ne présenter que son jugement propre, et l'acte pourrait être annulé.

Le code veut que ce soit le testateur qui déclare qu'il ne sait ou ne peut signer (voir Troplong, Donations et Testaments, tome 3, paragraphe 1591, pages 130 et 131). Et Laurent (tome 3, page 418, numéro 361) dit:

> La loi veut qu'il y ait une déclaration spontanée du testateur, que le notaire ne fait que constater. Pourquoi la déclaration doit-elle émaner du testateur et non du notaire? La signature est l'élément essentiel du testament; elle doit être l'expression de la libre volonté du défunt, pour mieux dire, c'est en signant qu'il donne le sceau à sa volonté et qu'il marque que les dispositions écrites par le notaire sont bien les siennes; or, la déclaration de ne savoir ou de ne pouvoir signer tient lieu de la signature, il faut donc qu'elle émane du testateur, afin que l'on ait la certitude qu'il entend tester et qu'il fait sien le testament écrit par la notaire * * * Vainement le notaire ferait-il en son nom la déclaration que le testateur n'a pas signé, parce qu'il ne savait ou ne pouvait signer: cette déclaration est inefficace, parce que le notaire n'a pas le droit de la faire; c'est donc comme s'il n'y avait aucune déclaration; donc il n'y a pas de signature et partant point de testament.

Demolombe (tome 21, n° 311) s'exprime dans le même sens:

> Vainement aussi la mention faite par le notaire que le testateur n'a pas pu signer serait-elle appuqée sur des preuves matérielles résultant du testament lui-même, et qui témoigneraient, en effet, matériellement de l'impossibilité où il était de signer.
>
> Ces testaments n'en seraient pas moins nuls; car la mention ne porte que sur le fait de l'impossibilité; elle ne porte pas sur la déclaration de cette impossibilité par le testateur lui-même.

L'on peut dire que les auteurs et les arrêts, en France, s'accordent à reconnaître cette règle (Baudry-Lacantinerie, tome 11, n° 2090; Aubry et Rau, 5e éd. tome 10, par. 670, pp. 655-656; Planiol et Ripert, tome 5, n° 565, p. 590; Louis Josserand, 1932 D. Hebd. Chron. pp. 75 et 76; Savatier, Revue trimestrielle, 1934, tome 33, p. 457, et Revue Trimestrielle, 1939, tome 38, p. 798).

Cette Cour doit donc d'abord poser comme principe de loi qu'à défaut de la signature du testateur sa déclaration personnelle qu'il ne peut signer est impérative et essentielle à la validité du testament.

Mais, lorsqu'il y a lieu d'appliquer le principe et la règle à une affaire qui doit être jugée suivant la loi de la province de Québec, il faut se garder de s'inspirer aveuglément de la doctrine et de la jurisprudence fran-

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çaises, parce que le texte de l'article 973 du Code Napoléon n'est pas identique à celui de l'article 843, qui y correspond dans le Code civil de Québec.

L'article du code français n'est pas exactement le même. Il se lit:

> Le testament doit être signé par le testateur; s'il déclare qu'il ne sait ou ne peut signer, il sera fait dans l'acte mention expresse de sa déclaration, ainsi que de la cause qui l'empêche de signer.

Dès l'abord, il y a donc lieu de signaler une différence dont il faut tenir compte, en vertu de la règle que le législateur n'est jamais censé parler pour ne rien dire et que, dans l'interprétation de sa volonté, il faut donner un sens à tous les mots qu'il a employés.

Ici, le code français exige une mention expresse. Ce mot n'est pas dans le code de Québec. En plus, le code français exige mention " de la cause qui l'empêche de signer "; rien de tel dans le code de Québec.

En plus, l'on ne saurait écarter de cette discussion le fait que le droit et la faculté de tester, dans la province de Québec, offrent avec ceux de la loi française des divergences fondamentales dans leur principe et importantes dans l'exécution des formalités exigées. Il n'est pas nécessaire de les signaler toutes; mais il convient de ne pas oublier que la base de la loi testamentaire dans le Québec est la liberté de tester " sans réserve, rectriction ni limitation " (Art. 831 C.C.), qui n'existe pas sous l'empire de la loi française. Au point que les commentateurs français considèrent que l'ordre normal de la transmission des biens par suite de décès est le chapitre des successions, que le citoyen français qui fait un testament " élève sa volonté au-dessus du règlement que la loi avait fait elle-même " (Grenier, Traité des dons et testaments, 3e éd. 1926, n° 240, p. 550); et que " le testateur déroge à la loi qui établit l'ordre légitime des successions " (Laurent, vol. 13, n° 141, p. 147).

Par suite, les auteurs sont d'avis que, pour admettre cette dérogation à la loi, suivant leur expression, les tribunaux doivent se montrer beaucoup plus exigeants sur l'accomplissement des formalités. Et alors, par exemple, que l'article 855 du Code Civil de Québec admet des exceptions à la nullité que peut entraîner l'inobservation de quelque formalité, l'article 1001 C.N. n'en admet aucune. Alors

que l'article 846 C.C., tout en défendant les legs au notaire et aux témoins, n'en rend pas nulles les autres dispositions du testament, l'article 975 C.N., en pareil cas, décrète la nullité du testament tout entier. Alors que l'article 839 C.C. ne crée pas de présomption légale de suggestion ou de défaut de volonté à cause seulement des relations de prêtre, ou ministre, ou médecin, avocat ou procureur qui existent chez le légataire à l'égard du testateur; l'article 909 C.N., à raison des mêmes relations, empêche ces derniers de profiter des dispositions qui pourraient être faites en leur faveur.

Alors que l'article 843 C.C. n'exige pour la validité d'un testament authentique que la présence de deux notaires, ou seulement d'un notaire et de deux témoins; l'article 971 C.N. requiert deux notaires en présence de deux témoins, ou un notaire en présence de quatre témoins.

Alors que l'article 972 C.N. exige pour l'authenticité d'un testament qu'il ait été dicté par le testateur et écrit par le notaire; ces prescriptions ne se trouvent pas dans la loi de Québec; et ainsi de suite.

A une loi différente dans la province de Québec, on ne saurait donc strictement appliquer la jurisprudence et la doctrine telles qu'on les trouve en France. Il faut donner un sens et une portée à l'absence du mot " expresse " dans l'article 843 C.C., à la suite du mot " mention ", alors qu'il se trouve dans l'article 973 du code français. Ce mot a été omis délibérément par les codificateurs et par le législateur canadien. Il ne serait pas conforme à la saine interprétation d'éviter de donner à cette omission la signification qu'elle doit avoir.

D'ailleurs, les codificateurs s'en sont expliqués formellement. On trouve dans le premier rapport la déclaration suivante:

* * * dans quelques circonstances, il leur a semblé à propos de s'écarter de l'ordre suivi dans le code civil françcais.

* * *

Les Commissaires auraient été sans excuse, s'ils avaient poussé le respect pour leur modèle jusqu'à reproduire des fautes avérées. Ils ont tâché de les éviter et en ont cherché les moyens dans les sources de la législation sur le sujet, dans les écrits des grands jurisconsultes de la France tant ancienne que moderne, et dans la comparaison attentive de ses lois avec les changements qu'y ont apportés notre législation locale et notre jurisprudence, ou qui sont nés silencieusement de la condition et de l'état de notre population.

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Et plus spécialement en ce qui a trait aux testaments, on lit dans le cinquième rapport (vol. 2, p. 171):

> La forme des testaments traités dans la section seconde offre une grande complication à cause de la co-existence des formes reconnues et admises dans l'un et l'autre droits, savoir celui de la France et celui de l'Angleterre. Les Commissaires se flattent d'avoir, au moyen d'amendements peu nombreux, rapproché les éléments de ces formes, de manière à présenter sur la matière un droit proprement canadien, qui ne s'éloigne pas essentiellement de l'une ou de l'autre de ses origines.

Puis, à la page 173:

> Les changements portent surtout sur la manière dont un testament doit être déclaré et reconnu par un testateur. Avec la latitude donnée par les formes anglaises, il eût été contradictoire de s'en tenir à la rigidité de la forme sacramentelle de *dicté et nommé,* telle qu'appliquée et interprétée. * * * Ces remarques rendent compte du but et de l'esprit dans lequel toute la section a été rédigée.

C'est nécessairement dans cet esprit que l'on doit interpréter les modifications introduites dans le Code civil de Québec.

D'ailleurs, même en France, malgré l'existence de la "mention expresse" dans l'article 973 C.N., l'on constate une tendance marquée à admettre la doctrine des "équivalences" ou des "équipollences". Il n'y a pas nécessité, en la présente cause, d'élaborer cette doctrine, parce que nous sommes d'avis que, dans le document soumis, la mention que le testateur a déclaré ne pouvoir signer se conforme aux exigences de l'article 843 C.C.

La preuve est à l'effet que, depuis un certain temps, le testateur "n'était pas capable de signer à cause de sa vue" et que, pour la transaction de ses affaires (qu'il avait confiée à l'intimée), cette dernière "lui faisait faire une croix" devant deux témoins. Il appert également que le jour du testament il était très faible et gravement malade. On a mis une plume entre ses mains et on lui a demandé s'il pouvait signer. Le témoin Wilson déclare dans son témoignage:

> I gave Mr. Gendron a pen. I put my pen into his hand and asked him if he could sign.

Le testament lui-même est écrit sous forme de déclaration:

> Appeared: Joseph Alfred Gendron, of Montreal, carter.
>
> Who declared unto the said notary and witnesses the following as and for his last will and testament:

Puis vient la clause finale:

And after the said will had been read to the testator by the said Mtre Godin in the presence of the said witnesses, the testator, being unable to sign on account of illness, gave his consent to these presents and declared them to contain his last will, etc.

Dans cette clause encore il y a deux déclarations; D'abord: "declared them to contain his last will", bien que le mot "declared" ici vient après les mots: "being unable to sign on account of illness" et l'on peut dire peut-être qu'il ne s'applique qu'à ce qui suit dans la clause et que l'on ne saurait le reporter à ce qui précède.

Il n'en est pas ainsi cependant des mots: "gave his consent to these presents", constituant l'autre déclaration dans la clause en question. Ces mots s'appliquent évidemment à tout le testament et, en particulier, aux mots qui les précèdent immédiatement dans cette clause: "being unable to sign on account of illness". Ils impliquent nécessairement que le testateur a donné son consentement à la déclaration qu'il était incapable de signer par suite de maladie. A cet égard, ils doivent se lire comme suit: "gave his consent to the statement that he was unable to sign on account of illness." Ils manifestent donc, de la part du testateur, un assentiment à la déclaration qu'il ne pouvait signer; et, en d'autres termes (peut-être pas en termes formels, mais certainement en termes suffisants pour rencontrer les exigences du code), ils constituent de la part du testateur une déclaration qu'il était incapable de signer.

A ce document ainsi rédigé par le notaire, après qu'il lui eût été lu, le testateur, ayant été interpellé pour savoir s'il contenait sa volonté et s'il représentait bien ce qu'il entendait et voulait faire, a répondu expressément: "Oui". Puis, les témoins et le notaire ont signé dans l'ordre indiqué, en présence les uns des autres.

Il s'agit ici d'un document authentique reçu par un officier public. Il doit être tenu pour véridique. L'appelante ne pouvait en attaquer la véracité et l'authenticité que par le moyen d'une procédure en faux. Non seulement elle ne l'a pas fait; mais elle ne prétend pas que le document est faux. Elle a simplement demandé au tribunal de se prononcer sur le texte même du document. La Cour doit donc prendre pour acquis l'exactitude et l'authenticité de tout ce que le document contient.

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L'on ne saurait pour un instant, en tenant compte du caractère de l'officier qui l'a reçu et de la déclaration que le document a été lu au testateur, présumer, comme l'appelante l'a suggéré, que, lorsque le notaire y déclare qu'il a lu le testament au testateur, l'acte n'avait pas été complété intégralement, tel qu'il se trouve dans la minute du notaire, dont une copie certifiée a été versée au dossier. La Cour ne saurait se laisser induire à faire une supposition de ce genre. La pratique notariale dans la province de Québec et la haute conscience des officiers publics qui exercent la profession de notaire imposent d'une façon absolue la conclusion que, lorsque le notaire déclare qu'il a lu l'acte en présence des témoins, il entend dire l'acte tout entier, contenant à la fois les trois clauses qui constituent les dispositions testamentaires proprement dites et les deux autres clauses par lesquelles l'acte se termine.

Le notaire a donc lu au testateur la déclaration que

being unable to sign on account of illness, (he) gave his consent to these presents and declared them, etc.

Dans les circonstances de cette espèce, nous sommes d'avis, comme les deux jugements qui ont été rendus en Cour Supérieure et en Cour du Banc du Roi, que le testament attaqué est valide et qu'il rencontre les exigences de l'article 843 du Code civil.

L'appel doit être rejeté et les jugements de la Cour Supérieure et de la Cour du Banc du Roi doivent être confirmés avec dépens.

Appeal dismissed with costs.

Solicitors for the appellants: *Bertrand, Pinard, Pigeon & Ozero.*

Solicitors for the respondents: *Mayrand, Deslauriers & Trépanier.*

ASHLEY COLTER LIMITED (DEFENDANT) ..... APPELLANT;

AND

W. J. SCOTT (PLAINTIFF) ..... RESPONDENT.

1941
* Oct. 27.
1942
* June 26.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Promissory notes—Notes endorsed for accommodation of payee, discounted at bank by payee, and, upon non-payment, charged back by bank to endorser—Action by endorser against maker—Partial failure of consideration as between maker and payee—Circumstances alleged as affecting endorser's right of recovery against maker—Bills of Exchange Act, R.S.C., 1927, c. 16, ss. 55, 56 (2), 57, 70, 135.

Plaintiff sued for $3,673.75 and interest, upon three promissory notes which were made by defendant to S. and, after endorsement by plaintiff, were discounted by S. at a bank, and upon non-payment were charged by the bank to plaintiff. The notes were renewals in respect of drafts accepted by defendant in connection with a contract for sale of lumber by S. to defendant, which provided that S. should ship lumber on receipt of orders, that defendant should pay for lumber 30 days after shipment, and accept drafts up to $5,000, that payments for shipments made should be deducted from the amount of the drafts accepted, that the title to the lumber was to pass to and remain in defendant as soon as any drafts were accepted by it.

The trial Judge found that there was a partial failure in respect of the consideration for the notes; that the lumber shipped fell considerably short of the estimate, and on the basis of actual quantity the amount that would be coming to S. under the contract was only $1,054.48. He further found that plaintiff was not damnified by reason of the notes being charged to his account; that he was a guarantor, as endorser, of S.'s account with the bank to an amount of over $30,000; that he was assisting S. financially in his lumbering operations; that he had full knowledge of said contract, and his endorsements were made for S. with the understanding that the proceeds of the lumber would be applied to reduce S.'s liability at the bank, and, as a result, to reduce plaintiff's liability; that this was done; that the notes when discounted were credited to S.'s account, reducing his as well as plaintiff's liability, and when charged back again plaintiff's liability was the same as before less payments made from proceeds of the lumber; that the consideration for the notes was the providing of lumber by S.; that was the sole purpose for which they were given and the only way by which they were to be paid, and this was understood by plaintiff when he endorsed them and when they were finally transferred to him; that plaintiff was an accommodation endorser; and took the notes after they were overdue, without giving value; and he held that plaintiff was in no

* PRESENT AT THE HEARING:—Duff C.J. and Rinfret, Crocket, Kerwin and Taschereau JJ. By reason of illness, Crocket J. took no part in the judgment.

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better position, as to recovery from defendant, than was S.; and he gave judgment for only the said sum of $1,054.48 (which defendant had tendered and paid into court) less defendant's costs.

The Supreme Court of New Brunswick, Appeal Division, reversed the judgment at trial and gave judgment to plaintiff for the full amount claimed (15 M.P.R. 385). Defendant appealed.

Held: The appeal should be dismissed.

The Chief Justice would dismiss the appeal on grounds fully stated in the judgment of Baxter C.J., 15 M.P.R. 385, at 389-399.

Per Rinfret, Kerwin and Taschereau JJ.: There was consideration for the drafts (and so, therefore, for the promissory notes which replaced them); the giving of them was part of defendant's obligations under its contract with S.; they were part of the consideration for the contract itself. No restriction was stipulated between the parties to the contract as to S.'s right to negotiate the drafts. Upon their acceptance, the title to the lumber passed to and remained in defendant. The contract merely called for an adjustment after all shipments had been made, should the lumber fall short of the quantity estimated. To all purposes, the acceptance of the drafts was the equivalent of a payment on account of the total purchase. Therefore there was no defect of title affecting the drafts or notes at their maturity; nor were they subject to any inherent equities affecting rights of a holder for value. Partial failure of consideration between the immediate parties to a bill cannot affect the title of remote parties (*Robinson* v. *Reynolds,* 2 Q.B. 196; *Thiedemann* v. *Goldschmidt,* 1 De G. F. & J. 4). The bank gave value, and was a holder in due course. Plaintiff was a holder for value. When the notes were charged back to plaintiff, from all points of view he gave payment for them. He was an accommodation endorser who had received no value therefor. His title to the notes was in no way defective within the meaning of the *Bills of Exchange Act.* Further, assuming that the notes were charged to him after their maturity, he derived his title to them through a holder in due course, and, not being a party to any fraud or illegality affecting them, he had all the rights of that holder in due course as regards defendant. Accordingly, having been compelled as endorser to pay the notes, he could recover their amount from defendant. To escape liability it was necessary for defendant to show that plaintiff was controlled by an equity inherent in the transaction and which was not compatible with the assignment of the notes after they became due; and no such equity here existed. Plaintiff's endorsements were not given pursuant to any agreement in respect of defendant.

Bills of Exchange Act, R.S.C., 1927, c. 16, ss. 55, 56 (2), 57, 70, 135, referred to.

APPEAL by the defendant from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), allowing the plaintiff's appeal from the judgment of Richards J.

(1) 15 M.P.R. 385; [1941] 2 D.L.R. 192.

The plaintiff's claim was for the amount of three promissory notes made by the defendant in favour of one Gordon Scott and endorsed by the plaintiff and discounted by Gordon Scott at the Royal Bank of Canada at Fredericton, N.B., which were not paid by the defendant (except as to a tender, which was rejected, of what the defendant claimed to be the only amount owing, as hereinafter mentioned), and were charged by the bank to the plaintiff.

The notes were renewals in respect of certain drafts accepted by the defendant in connection with the agreement hereinafter mentioned.

By an agreement of June 18, 1930, between the said Gordon Scott and the defendant, the said Gordon Scott agreed to sell and the defendant agreed to purchase all the merchantable white pine lumber owned by Gordon Scott which was then piled at McPherson Siding and which was estimated to be 250,000 feet; Gordon Scott agreed to load the lumber on cars immediately on receipt of orders from defendant to do so; the price to be paid by defendant was $25 per thousand F.B.M.—F.O.B. cars McPerson Siding; defendant was to pay for all lumber shipped 30 days after date of shipment and to accept drafts up to $5,000; any payments for shipments made were to be deducted from the amount of the drafts accepted; if defendant had not given orders for shipment by December 31, 1930, defendant was to pay all interest charges from that date; the title to the said lumber was to pass to and remain in defendant as soon as any drafts were accepted by defendant under the terms of the contract.

Defendant accepted drafts, which were discounted by Gordon Scott at the said bank, after being endorsed by plaintiff. The drafts were renewed from time to time, lumber was shipped and the proceeds applied against the drafts. Later the drafts were changed to promissory notes signed by defendant. The notes sued on were the last renewals.

The plaintiff claimed in all the sum of $3,673.75 and interest thereon. The defendant had tendered to the bank the sum of $1,054.48, as being the amount due under the contract, and paid this sum into court.

The trial Judge, Richards J., gave judgment for the plaintiff for only the said sum of $1,054.48, less defend-

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ant's costs. He found that there was a partial failure in respect of the consideration for the notes; that the quantity of lumber fell considerably short of the estimate; and that, calculated on the basis of the actual quantity, and taking into account the interest overpaid on drafts for an amount greater than that justified by the quantity of lumber, the amount that would be coming to Gordon Scott under the contract would be only the said sum of $1,054.48. The trial Judge further found that the plaintiff was not damnified by reason of the notes being charged to his account; that he was a guarantor, as endorser, of Gordon Scott's account with the bank to an amount of over $30,000; that he was assisting Gordon Scott financially in his lumbering operations; that plaintiff had full knowledge of the contract between Gordon Scott and defendant and the endorsements were made by plaintiff for Gordon Scott with the understanding that the proceeds of the lumber would be applied to reduce the liability of Gordon Scott at the bank, and, as a result, to reduce the liability of the plaintiff; that this was done; that the notes when discounted were credited to Gordon Scott's account, reducing his liability as well as that of the plaintiff, and when charged back again the plaintiff's liability was the same as before less such payments as were made from the proceeds of the lumber; that the consideration for the notes was the providing of lumber by Gordon Scott; that that was the sole purpose for which they were given and the only way by which they were to be paid; that that was fully understood by plaintiff when the notes were endorsed by him and when they were finally transferred to him; that plaintiff was an accommodation endorser; and took the notes after they were overdue, without giving value. He held that the plaintiff was in no better position, as to recovery from defendant, than was Gordon Scott. He refererd to s. 70 (1) of the *Bills of Exchange Act*, held that the term therein "defect of title" is equivalent to the former expression "equity attaching to the bill," as used in cases which he referred to; and that partial failure of consideration is an equity attaching to a bill and is a good defence *pro tanto* by the acceptor against the claim of an endorsee without value, of an overdue bill; also that the clearly implied agreement between defendant and Gordon Scott that the original drafts and subsequent renewal notes

(including the notes sued upon) were to be paid only to the extent covered by the value of the lumber, constituted an equity attaching to the notes.

On appeal by the plaintiff to the Supreme Court of New Brunswick, Appeal Division, that Court allowed the appeal and gave judgment to the plaintiff for the full amount claimed, for reasons which are reported (1).

The defendant appealed to this Court.

P. J. Hughes K.C. for the appellant.

C. L. Dougherty for the respondent.

THE CHIEF JUSTICE—The grounds on which I think this appeal should be dismissed are fully stated in the judgment of the Chief Justice of New Brunswick (2).

The appeal should be dismissed with costs.

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

RINFRET J.—In my opinion, this appeal should be disallowed.

The respondent sued the appellant on three promissory notes, of which he became the holder in the following way:

The appellant had purchased from Gordon G. Scott, of Fredericton, "all the merchantable white pine lumber owned by the [latter] which is now piled at McPherson Siding, on the Canadian National Railway." The lumber was estimated at 250,000 feet, of which 220,000 was of a two-inch thickness and 30,000 of one-inch.

Gordon Scott agreed to load the pine on cars immediately on receipt of orders from appellant to do so.

The price to be paid by the appellant was fixed at $25 per thousand F.B.M.—F.O.B. cars McPherson Siding.

The appellant agreed to pay for all lumber shipped thirty days after date of shipment and to accept drafts up to $5,000. The payments for shipments were to be deducted from the amount of the drafts accepted.

It was also agreed that, if the appellant had not given orders for shipment by December 31st, 1930, appellant would then pay all interest charges from that date.

(1) 15 M.P.R. 385; [1941] 2 D.L.R. 192.
(2) 15 M.P.R. 385, at 389-399 (Baxter C.J.).

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It was "further agreed that the title to the said lumber shall pass to and remain in the said Ashley Colter Limited as soon as any drafts are accepted by the said Ashley Colter Limited under the terms of this contract."

In June, 1930, the appellant accepted a draft from Gordon Scott for $1,000; in February, 1931, one for $725; and, in June of 1931, another for $4,000.

The two drafts for $1,000 and $4,000 obviously covered the full amount for which the appellant had agreed to accept drafts; but it was explained in the evidence that the other draft of $725 was to cover a further amount required by Gordon Scott to provide for compensation or insurance in connection with the lumber.

The drafts were renewed from time to time; lumber was shipped and the proceeds were applied against the drafts. Later, the drafts were changed to promissory notes signed by the appellant. The notes sued on are the last renewals thereof.

The learned trial Judge found that, according to the evidence, the lumber shipped by Gordon Scott fell considerably short of the estimate. Taking into account the interest paid on drafts for an amount greater than the amount justified by the quantity of lumber, and accepting the appellant's calculation, the learned Judge found that the amount due Gordon Scott by the appellant was $1,054.48, after the last of the lumber covered by the contract had been shipped, in June, 1934.

Gordon Scott had died in the preceding month.

The notes were then held by The Royal Bank of Canada, at its Fredericton branch, where they had been discounted.

The appellant delivered a cheque for the amount of $1,054.48; but the bank refused to accept it on the ground that the amount was insufficient (although the manager of the branch also says it was not accepted on instructions of the respondent).

The amount of the notes was then charged to the account of the respondent on October 3rd, 1934, the cheque of $1,054.48 being returned to the appellant.

The action was commenced on October 18th, 1934, and the appellant paid the amount of $1,054.48 into court with the delivery of the defence on January 8th, 1935.

The appellant contended that consideration for the notes failed by reason of the fact that there was insufficient lumber to cover the amount of the drafts.

The learned trial Judge found as a fact that there was a partial failure in respect of the consideration for the notes. He admitted, however, that such a fact, in itself, would not be sufficient to constitute a defence; but he said it was clear, from the evidence, that the respondent "was not damnified by reason of the notes being charged to his account". He was a guarantor and endorser of Gordon Scott's account to an amount of over $30,000. He was assisting him financially in his lumbering operations; he had full knowledge of the contract between Gordon Scott and the appellant,

> and the endorsements were made by him for Gordon G. Scott with the understanding that the proceeds of the lumber would be applied to reduce the liability of Gordon G. Scott at the Bank, and as a result to reduce the liability of the [respondent] * * * The notes when discounted were credited to Gordon G. Scott's account, reducing his liability as well as that of the [respondent]; and, when charged back again, the [respondent's] liability was the same as before, less such payments as were made from the proceeds of the lumber.

In the opinion of the learned trial Judge, Gordon Scott could not have recovered from the appellant more on the notes than the balance due on the lumber which, as already stated, he found to be $1,054.48; and he did not think the respondent was in any better position because he, as accommodation endorser, took back the notes after they were due without giving value; and he referred to section 70 of the *Bills of Exchange Act*, which is:

> When an overdue bill is negotiated, it can be negotiated only subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which had the person from whom he took it.

Accordingly, and in view of the tender made with the defence, the learned trial Judge dismissed the respondent's action with costs.

In the Appeal Division, the appeal was allowed and the respondent's action was maintained; and, as already indicated, my view is that the judgment of the Appeal Division should be affirmed.

There cannot be any doubt that there was consideration for the drafts given by the appellant, and so, therefore, for the promissory notes which replaced them. The giving

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of the drafts was part of the obligations undertaken by the appellant under the agreement with Gordon Scott. They were part of the consideration for the contract itself. No restriction was stipulated between the immediate parties to the contract as to the right of Gordon Scott to negotiate these drafts or, subsequently, the notes.

Immediately upon accepting the drafts, the title to the lumber passed to and remained in the appellant.

The agreement merely called for an adjustment after all the shipments of lumber had been made, if it should happen that the lumber fell short of the quantity estimated. To all purposes, the acceptance of the drafts was the equivalent of a payment on account of the total purchase.

As a consequence, there was no defect of title affecting the drafts or notes at their maturity, nor were the notes subject to any inherent equities which might have affected the rights of a holder for value.

Assuming there be partial failure of consideration between the immediate parties to a bill, such a failure cannot affect the title of remote parties (See: Lord Denman, C.J., in *Robinson* v. *Reynolds* (1), of which the Lord Chancellor said, in *Thiedemann* v. *Goldschmidt* (2), that the authority had never been questioned; Byles, on Bills, 18th Ed. at p. 137).

The bank gave value for the bills or notes, and it was a holder in due course. The respondent was a holder for value. When the notes were charged back to the account of the respondent, from all points of view, the respondent gave payment for them. He was himself an accommodation endorser who had received no value therefor (*Bills of Exchange Act,* sec. 55 of ch. 16 of R.S.C., 1927). The title of the respondent to the notes was in no way defective within the meaning of the Act. He had not obtained them "by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration * * * or under such circumstances as amount to a fraud" (sec. 56 (2)).

Further, assuming that the notes were charged to the respondent's bank account after their maturity, the respondent derived his title to the notes through a holder in due course; and, under sec. 57 of the Act, not being himself a party to a fraud or illegality affecting the

(1) (1841) 2 Q.B. 196.

(2) (1859) 1 De G. F. & J. 4.

notes, he had all the rights of that holder in due course as regards the appellant which signed the notes. Accordingly, the respondent, having been compelled as endorser to pay the notes, may recover the amount thereof from the appellant, which was the promissor thereof (sec. 135). To escape liability, as was said by the learned Chief Justice of the Appeal Division, it was necessary for the appellant "to show that the [respondent was] controlled by an equity inherent in the transaction and which [was] not compatible with the assignment of the notes after they [had] become due—if they are to be treated as overdue before assignment." No such equity existed in the present case. The respondent's endorsements on the notes were not given pursuant to any agreement in respect of the appellant.

When it is stated that the endorser of an overdue bill takes it back subject to its equities, that means: the equities of the bill, not the equities of the parties. He does not take it subject to a mere right not inherent in a contractual relation represented by the bill. (The *Swan* case (1), Malins, V.C., at p. 359).

For these reasons, the appeal ought to be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Peter J. Hughes.*

Solicitors for the respondent: *Hanson, Dougherty & West.*

ERNEST STANLEY DALLMAN .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

1942
* May 26, 27.
* June 10.

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

Criminal law—Constitutional law—War Measures Act, 1914—Foreign Exchange Control Board—Orders in Council establishing Board with certain powers, prohibiting importation of property into Canada without licence and providing for fine or imprisonment on summary con-

* PRESENT:—Rinfret, Kerwin, Hudson and Taschereau JJ. and Bond J., *ad hoc.*

(1) *In re Overend, Gurney, & Co.; Ex parte Swan,* (1868) L.R. 6 Eq. 344.

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viction or indictment—Whether ultra vires or inoperative—Status of complainant—Accused not entitled to exercise option as to mode of trial—Conspiracy—Whether illegal importation an indictable offence within s. 573 Cr. C.—War Measures Act, 1914, R.S.C., 1927, c. 206, sections 2, 3 (1) (2) 4—Interpretation Act, R.S.C., 1927, c. 1.

The appellant was convicted of having imported Dominion of Canada bonds from the United States of America into Canada without having obtained from the Foreign Exchange Control Board a licence so to do and of having conspired with others so to import. The conviction was affirmed by the appellate court, St. Germain J. dissenting.—The Governor-in-Council, by ss. 1 of s. 3 of the *War Measures Act*, 1914, was authorized to make orders and regulations for the security, etc., of Canada, which were declared by ss. 2 to have the force of law. By s. 4, the Governor-in-Council may prescribe penalties, in case of violation of these orders and regulations, which may be imposed upon summary conviction or upon indictment. In September, 1939, an Order in Council (P.C. 2716) established the Foreign Exchange Control Board with certain powers. Subs. 1 of par. 22 prohibited importation of goods, etc., into Canada except under a licence granted by the Board and subs. 1 of par. 40 prescribed that any person guilty of an offence under the order would be liable on summary conviction to fine or imprisonment, or both. By an Order in Council (P.C. 3799) issued in November, 1939, the words "or on indictment" were added after the words "summary conviction".

Held that the appeal should be dismissed and the conviction of the appellant affirmed.

The contention of the appellant, that the whole of the Order in Council (P.C. 2716) was *ultra vires* because it gave power to the Board to pass regulations that only the Governor-in-Council was authorized to promulgate under the provisions of the *War Measures Act*, must fail. The Board had not passed any regulations affecting the appellant with respect to the charges against him; what the appellant did was in contravention of ss. 1 of par. 22 of the Order, which had the same force as if it had been enacted by Parliament itself.

The provisions of the Orders in Council permitting prosecutions to be either on summary conviction or on indictment are not inoperative. Section 4 of the Act permits the Governor-in-Council to prosecute by one or the other method of procedure: no objection was found with paragraph 40 as it originally stood and nothing in the Act prohibits the Governor-in-Council to act as he did by the amending order in council.

There is nothing in the order in council requiring a prosecution to be commenced by any particular official or individual, or that the latter required a special authorization from the Board. In any event, evidence disclosed that the complainant in this case had authority in fact. Moreover, the contention that an accused is the only one entitled to exercise the option as to the mode of trial cannot prevail.

Section 573 of the Criminal Code provides that "every one is guilty of an indictable offence * * * who * * * conspires with any person to commit any indictable offence." The contention of the appellant that, because par. 40 of the order states that every person guilty of an offence shall be liable "on summary conviction or on indict-

ment" the offence of importing is not an indictable offence, is unsound. The words "indictable offence" in s. 573 Cr. C. merely mean an offence, as to which conspiracy is charged, which may be prosecuted by indictment. That requirement is met by the terms of par. 40, even in cases where proceedings had been commenced under the summary conviction provisions of the Code.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming (St. Germain J. dissenting) the conviction of the appellant for having imported bonds into Canada without having obtained from the Foreign Exchange Control Board a licence so to do and for having conspired with others so to import in contravention of section 573 of the Criminal Code.

The questions of law before this Court on this appeal, upon which the dissent in the court below was based, are sufficiently set out in the reasons for judgment now reported.

The appeal to this Court was dismissed.

Henry Weinfield K.C., Lucien Gendron K.C. and *S. D. Rudenko* for the appellant.

G. Fauteux K.C. for the Attorney-General for Quebec.

R. Genest K.C. and *P. Brais K.C.* for the Attorney-General for Canada.

The judgment of the Court was delivered by

KERWIN J.—The appellant was convicted of having imported Dominion of Canada bonds from the United States of America to Canada without having obtained from the Foreign Exchange Control Board a licence so to do, and of having conspired with others so to import. An appeal from that conviction was dismissed by the Court of King's Bench, province of Quebec, appeal side, with Mr. Justice St. Germain dissenting. The appellant now appeals on the questions of law upon which that dissent was based.

The first four grounds of appeal refer to the charge of importing as to which the *War Measures Act,* R.S.C., 1927, chapter 206, and Order in Council P.C. 2716 as amended by Order in Council P.C. 3799 require consideration. By section 2 of the Act, the issue of a procla-

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mation is to be conclusive evidence that a state of war exists. Such a proclamation was issued and, therefore, by subsection 1 of section 3, the Governor in Council might do and authorize such acts and things, and make from time to time such orders and regulations as he might deem necessary or advisable (*inter alia*) for the security, defence, peace, order and welfare of Canada. By subsection 2 of section 3, all orders made under the section are to have the force of law, and by section 4:—

> 4. The Governor in Council may prescribe the penalties that may be imposed for violations of orders and regulations made under this Act, and may 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.

Order in Council P.C. 2716 was accordingly issued on September 15th, 1939. Provision was made therein for the establishment of the Foreign Exchange Control Board, which was given certain powers, and by subsection 1 of paragraph 22:—

> 22. (1) No person shall import any goods, currency, securities or other property into Canada except under and in accordance with the terms of a licence granted by the Board; provided that this subsection shall not apply to any property which has been shipped to Canada from the Country of export prior to the date on which this Order comes into force.

By subsection 1 of paragraph 39, every person is guilty of an offence who

> (*d*) violates or attempts to violate any other provision of this Order or any regulation of the Board.

And by subsection 1 of paragraph 40:—

> Every person guilty of an offence under this Order shall be liable on summary conviction to a fine not exceeding Two Thousand Dollars or to imprisonment for not more than one year, or to both fine and imprisonment.

By a subsequent Order in Council (P.C. 3799, dated November 29th, 1939), this subsection was amended by adding after the words "summary conviction" the words "or on indictment".

The first ground of appeal is thus stated in the appellant's factum:—

> The substantive offence of which appellant has been convicted, was illegally created by an enactment of the Governor-in-Council delegating without right to the Foreign Exchange Control Board the power of con-

trolling "Foreign Exchange", which power was already delegated to the Governor-in-Council by an Act of Parliament, namely: *The War Measures Act*, Chapter 206, Revised Statutes of Canada, 1927.

Under this heading, it was argued that the whole of Order in Council P.C. 2716 was *ultra vires* because the Foreign Exchange Control Board might, it was suggested, pass regulations that only the Governor in Council was authorized to promulgate under the provisions of the Act. That argument is founded upon the maxim *delegata potestas non potest delegari*. However, it appears that the Board has not passed any regulations affecting the appellant with respect to the charges against him. What he did was in contravention of subsection 1 of paragraph 22 of the Order in Council. It has already been pointed out that by subsection 2 of section 3 of the Act, all orders made under that section have the force of law and, therefore, the paragraphs of the Order in Council establishing the Board and requiring that a licence to import be obtained from the Board have the same force as if they had been enacted by Parliament itself. The power of Parliament, and hence of the Governor in Council, to do this is beyond question. In that connection reference need only be made to the decision of this Court in *In re Gray* (1), and to the decisions of the Privy Council therein referred to in *The Queen* v. *Burah* (2), *Hodge* v. *The Queen* (3), and *Power* v. *Appollo Candle Company* (4). The other paragraphs of the Order in Council need not be considered because, even if any question could be raised as to them, they do not imperil the validity of the Order in Council at large and do not affect the particular offence charged and the particular proceedings taken in this case (*Rex* v. *Nat Bell Liquors Ltd.* (5) and the maxim relied on can have no application.

The second ground of appeal is thus put by the appellant:—

The said Order in Council, dated the 15th September, 1939, as amended by that of the 29th November, 1939, seeing that it did not prescribe in what manner and by what courts the penalty enacted for the commission of the said substantive offence was to be imposed—that is to say, whether these penalties were to be imposed after proceeding by way of summary conviction or whether by way of indictment—is inoperative as regards the prosecution for said offence.

(1) (1918) 57 Can. S.C.R. 150.
(2) (1878) 3 A.C. 889, at 904.
(3) (1883) 9 A.C. 117, at 132.
(4) (1885) 10 A.C. 282, at 289.
(5) [1922] 2 A.C. 128, at 137.

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The argument is that the Governor in Council must prescribe how alleged violators of the orders or regulations shall be prosecuted. That is, he may state that such violators shall be prosecuted by summary conviction or he may state that they shall be prosecuted upon indictment, but he may not give to someone else an option which, by the Act, was conferred only upon himself. No objection is found with paragraph 40 as it originally stood and we fail to see anything in the Act to prohibit the Governor in Council acting as he did, by the amending Order in Council. Section 4 of the Act permits the Governor in Council to prescribe one or more methods of procedure. The decision in *The King* v. *Singer* (1) can have no application. All that was there decided was that no penalty or other mode of punishment being expressly provided for infraction of an Order in Council, that particular Order in Council, on its construction, did not fall within the term "Act of the Parliament of Canada" as used in section 164 of the Criminal Code.

The third ground of appeal is as follows:—

> The complainant had no authority to make the choice of procedure to be followed in connection with the complaint lodged against appellant, and, moreover, could not optate to proceed by way of indictment rather than by way of summary conviction.

It was suggested that the complainant, Constable Desaulniers, required a special authorization from the Foreign Exchange Control Board. There is nothing in the Orders in Council under review requiring a prosecution to be commenced by any particular official or individual and in any event evidence was adduced to indicate that the constable had authority in fact.

However, the gist of this ground of appeal is that the appellant is the only one entitled to exercise the option as to the mode of trial. It would be strange if that were so as it would mean that a person against whom it was decided to prefer charges would first have to be found in order to ascertain his wishes in that regard; and we are clearly of opinion that this contention cannot prevail.

(1) [1941] S.C.R. 111.

In view of the conclusions already reached, it is necessary to deal only with the appellant's fifth ground of appeal which relates to the conviction for conspiracy. That conviction is based upon section 573 of the Criminal Code:—

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

It is said that the importation of the bonds into Canada is not an indictable offence within the meaning of this section because paragraph 40 of P.C. 2716 as amended does not provide that every person guilty of an offence under the order shall be liable on indictment to fine, etc. If paragraph 40 did read in that way, there could be no complaint in view of the provisions of section 28 of the *Interpretation Act* (R.S.C., 1927, chapter 1):—

> 28. Every Act shall be read and construed as if any offence for which the offender may be
>
> (*a*) prosecuted by indictment, howsoever such offence may be therein described or referred to, were described or referred to as an indictable offence;
>
> (*b*) punishable on summary conviction, were described or referred to as an offence; and
>
> all provisions of the Criminal Code relating to indictable offences, or offences, as the case may be, shall apply to every such offence.
>
> 2. Every commission, proclamation, warrant or other document relating to criminal procedure, in which offences which are indictable offences, or offences, as the case may be, are described or referred to by any names whatsoever, shall be read and construed as if such offences were therein described and referred to as indictable offences, or offences, as the case may be.

It is contended that because paragraph 40 states that every person guilty of an offence shall be liable "on summary conviction or on indictment", the offence of importing is not an indictable offence. In our view that contention is unsound since all that is meant by "indictable offence" in section 573 of the Criminal Code is that the offence as to which a conspiracy is charged may be prosecuted by indictment. That requirement is met by the terms of paragraph 40 even in cases where proceedings had been commenced under the summary conviction provisions of the Code.

The appeal should be dismissed.

Appeal dismissed.

1941
*Nov. 13.
1942
*June 26.

J. E. KALLIO (DEFENDANT).....APPELLANT;

AND

RUSSELL TIMBER COMPANY LIMITED (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Practice and Procedure—Set-off—Judgments—Defendant seeking to set off, against plaintiff's execution on judgment in action in Supreme Court of Ontario for damages for trespass, judgments obtained by Workmen's Compensation Board in District Court through certificates filed under s. 108 of Workmen's Compensation Act, R.S.O., 1937, c. 204, and assigned to defendant—Whether mutual debts—Judicature Act, R.S.O., 1937, c. 100, ss. 123, 124—Propriety of the procedure taken—Appeal to Supreme Court of Canada on question of practice in Ontario.

In an action commenced on June 4, 1931, in the Supreme Court of Ontario, plaintiff, on July 7, 1939, recovered judgment against defendant for damages for trespass, and issued execution.

The Workmen's Compensation Board of Ontario had issued five certificates against plaintiff, at various times in the years 1927 to 1934, pursuant to the provisions of what is now s. 108 of *The Workmen's Compensation Act*, R.S.O., 1937, c. 204. The certificates were duly filed with the clerk of a district court and, under said s. 108, when so filed, they would become orders, and be enforceable as judgments, of that court. Executions were issued thereon and kept renewed and were, on the dates hereinafter mentioned, in full force and effect. The Board on December 6, 1934, assigned all its rights, title and interest in said certificates and orders of the court, and all moneys recoverable thereunder, to one who, on February 3, 1936, assigned the same to defendant.

Defendant, on August 2, 1939, paid a sum to the sheriff on plaintiff's execution against him, and claimed to set off the balance as being the amount owing by plaintiff in respect of the five judgments of the Board (obtained through said certificates filed), acquired by defendant as aforesaid. Plaintiff disputed (*inter alia*) defendant's right of set-off. The trial of an issue was directed to determine whether defendant was entitled to set off against the amount of plaintiff's judgment the amount of the Board's judgments acquired by defendant; and whether plaintiff's execution had been satisfied or how much was owing thereunder.

On this issue, Greene J. held that defendant was entitled to such a set-off, subject to the amount thereof being determined by a reference; any amounts embodied in the Board's judgments in the nature of penalties not to be included in computing the total amount due under them. The Court of Appeal for Ontario ([1941] O.W.N. 472; [1942] 2 D.L.R. 120) reversed that decision and held that the claims indicated by the cross judgments were not in their nature mutual debts and there was no right, therefore, to set them off; and moreover, that defendant had not proceeded, on his claim for relief, in the proper way. Defendant appealed to this Court.

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

Held: The appeal should be dismissed, without prejudice to any application that defendant might be entitled to make to the Ontario courts to give effect to his equity to set off the judgments secured against plaintiff by said Board and assigned to defendant.

Per the Chief Justice, and Kerwin, Hudson and Taschereau JJ.: This Court should not interfere with the order of the Court of Appeal in this case on the question of practice in Ontario. But (disagreeing with the Court of Appeal), in plaintiff's said action, judgments against plaintiff in another court, which had been assigned to defendant, could be set off, under ss. 123 and 124 of *The Judicature Act* (R.S.O., 1937, c. 100); all that is required by these sections is that there should be a mutual debt; the debts here sought to be set off are mutual debts; the operation of the statute is not limited to cases of debts arising out of or connected with the same transaction. *Bennett* v. *White,* [1910] 2 K.B. 643; *Edwards* v. *Hope,* 14 Q.B.D. 922, at 927; *Kohen* v. *Culley Breay & Dover Ltd.,* 57 O.L.R. 533, at 535, referred to. If above conclusion that the debts are mutual debts is right, it may be possible for defendant, by apt proceedings, to secure a pronouncement giving effect thereto; whether that be so or not is a question that should be dealt with by the Ontario courts.

Disagreement expressed with plaintiff's contention that there was no power in the Workmen's Compensation Board to assign its judgments.

Per Davis J.: Before issue of plaintiff's execution, there were proceedings or applications which defendant might have taken for the purpose of his relief now claimed. *Quaere,* whether there was any authority to make the order directing trial of the issue, after judgment and issue of execution. The issue of a writ of *fi. fa.* is an order of the court to make the money—the sheriff's authority comes from the court, not from the plaintiff (*Mahaffy* v. *Bastedo,* 38 O.L.R. 192). S. 21 of *The Execution Act* and s. 5 of *The Creditors' Relief Act* (R.S.O., 1937, chs. 125, 126) referred to. There must be an inherent jurisdiction in the court over its own process, but there would seem to be no authority for dealing with an execution after it has been placed in the sheriff's hands in the manner in which the proceedings in question were taken and continued. One can quite understand under special circumstances the court invoking an equitable jurisdiction to prevent a levy under execution where the execution debtor has a plain claim of a definite and fixed amount against the execution creditor. But where, as here, defendant acquired and held the Board's judgments (which, moreover, admittedly were subject to review as to amount in view of alleged payments upon them, and, further, included statutory penalties, which in any event were not subject-matter for a set-off) over three years before judgment in the action was given and took no step either to stay entry of judgment or issue of execution, there is no ground for intervention of any equitable jurisdiction there may be in the court. The matter is one of practice and procedure in Ontario. (*Executors of Elliott* v. *Crocker,* 1 Ont. P.R. 13, referred to).

APPEAL by the defendant from the order of the Court of Appeal for Ontario (1) allowing the plaintiff's appeal from the judgment of Greene J.

(1) [1941] O.W.N. 472; [1942] 2 D.L.R. 120.

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KALLIO v. RUSSELL TIMBER CO. LTD.

In an action commenced on June 4, 1931, in the Supreme Court of Ontario, the plaintiff, on July 7, 1939, recovered judgment against the defendant for $14,007.40 (and costs to be taxed) for damages for trespass. Plaintiff issued execution thereon, which was delivered to the sheriff of the District of Thunder Bay, who demanded from the defendant payment of $15,887.63 (the above amount plus interest and sheriff's costs). The defendant, on August 2, 1939, paid to the sheriff $6,413.35 and claimed to set off the balance as being the amount owing by the plaintiff in respect of five judgments obtained by the Workmen's Compensation Board and acquired by the defendant, as hereinafter mentioned.

The Workmen's Compensation Board of Ontario had, for default in payment of assessments, issued five certificates against the plaintiff, at various times from September, 1927, to September, 1934, pursuant to the provisions of what is now s. 108 of *The Workmen's Compensation Act*, R.S.O., 1937, c. 204. The said certificates were duly filed with the clerk of the District Court of the District of Thunder Bay, and, under said s. 108, when so filed, they would become orders of that Court and might be enforced as judgments of that Court. Thereafter executions were issued against the plaintiff and were renewed from time to time, and were, on August 2, 1939 (the date of defendant's claim of set-off above mentioned) in full force and effect.

On December 6, 1934, the Board, in consideration of $1,214.92, assigned all its rights, title and interest in the assessments levied and in the certificates and orders of the court under said s. 108, and all interest due or thereafter to become due and all moneys recoverable thereunder, to one who, on February 3, 1936, assigned to the defendant all his right, title and interest in and to plaintiff's indebtedness to the Board and the certificates and in the orders of court and executions issued thereunder and all interest due or thereafter to become due and all moneys recoverable thereunder.

The plaintiff refused to admit the defendant's right of set-off. Plaintiff also (in pleadings subsequently delivered) disputed the amount claimed by the defendant as owing under the executions, alleged that the Board's claim had been satisfied, and disputed the validity of the Board's assignment, and claimed that in any event the defendant

was only entitled as against the plaintiff by virtue of such assignment (if to any amount) to what was actually paid to the Board for its assignment.

By an order of Kelly J. of August 31, 1939, the trial of an issue was directed to determine whether the defendant was entitled to set off against the amount of the judgment of the plaintiff in the action the amount of the said five judgments recovered by the Board against the plaintiff and assigned to and now held by the defendant; and whether the writ of *fieri facias* issued by the plaintiff had been fully satisfied either by payment, set-off or partly by one and partly by the other or in any other manner whatsoever, or if not so satisfied, how much was now owing thereunder. By a subsequent order of McKay J. delivery of pleadings was directed, and (on consent) proceedings to enforce the plaintiff's writ of execution were stayed.

The issue came on for trial before Greene J. He gave judgment declaring that defendant was entitled to set off against the said judgment recovered against him by plaintiff the amount of the said judgments recovered by the Board against plaintiff and assigned as aforesaid, subject to the amount of such set-off being determined by a reference, and he directed a reference to ascertain the total amount owing on such judgments, and directed that any amounts embodied in such judgments in the nature of penalties should not be included in computing the total amount due under such judgments.

On appeal by the plaintiff to the Court of Appeal for Ontario, that Court allowed the appeal and directed judgment declaring that defendant was not entitled to set off against the said judgment recovered against him the amount of the said judgments recovered by the Board and assigned to him, but permitting either party to have a reference to ascertain the total amount owing on such judgments. That Court (1) held that the claims indicated by the cross judgments were not in their nature mutual debts even when the plaintiff's claim was liquidated, and there was no right, therefore, to set them off; and moreover, that defendant had not proceeded, on his claim for relief, in the proper way.

(1) [1941] O.W.N. 472; [1942] 2 D.L.R. 120.

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The defendant appealed to this Court. By the judgment now reported, the appeal was dismissed, without prejudice to any application that defendant might be entitled to make to the Ontario courts to give effect to his equity to set off the judgments secured against plaintiff by the Workmen's Compensation Board and assigned to him. (No costs of the appeal were, by the majority of the Court, given to either party. Davis J. would dismiss the appeal with costs, without prejudice to any other proceedings that appellant might be advised to take in respect of the assigned certificates or judgments of said Board held by him).

Glyn Osler K.C. and *Archibald Laidlaw* for the appellant.

J. R. Cartwright K.C. for the respondent.

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

KERWIN J.—This is an appeal by J. E. Kallio from a judgment of the Court of Appeal for Ontario reversing a judgment of Greene, J., after the trial of an issue. What this issue was and how the order directing its trial came to be made may be better understood by a recital of certain prior events.

On June 4th, 1931, the respondent, Russell Timber Company Limited, issued a writ in the Supreme Court of Ontario against Kallio for damages for trespass. An order was ultimately made referring the action for trial to a District Court Judge but before the trial Kallio secured an assignment of certain judgments recovered by the Ontario Workmen's Compensation Board against the respondent. Between 1927 and 1934, under the provisions of what is now section 108 of the *Workmen's Compensation Act*, R.S.O., 1937, chapter 204, the Board had issued certificates stating that assessments under the Act had been made and showing the amounts remaining unpaid on them and that they were payable by the respondent. These certificates had been filed with the Clerk of a District Court and, by virtue of the section, they became orders of that Court and might be enforced as judgments for the amounts mentioned in the certificates. They had been assigned by the Board to an intermediate assignee, who, on February 3rd, 1936, assigned them to Kallio.

In 1939, judgment was given in the original action in the amount of $14,007.40 and costs to be taxed. It is stated in the appellant's factum and has not been controverted that, without waiting to tax its costs, the respondent issued execution on this judgment for the above amount with interest and sheriff's costs. On August 2nd, 1939, Kallio paid the sheriff $6,413.35 and claimed to set off the balance as being the amount owing by the respondent to him in respect of the Board's judgments. The respondent refused to admit this claim, and Kelly, J., on Kallio's application, made an order staying proceedings under the execution and directing the trial of an issue to determine whether or not the appellant was entitled to a set-off as claimed and the amount, if any, owing under the Board's judgments.

This was the issue tried by Greene, J. At the trial it was admitted that writs of execution had been issued on the Board's judgments, that the judgments and writs had been assigned by the Board, and by its assignee to Kallio, and that the writs of execution had been renewed from time to time and were in full force and effect on August 2nd, 1939, when the payment of $6,413.35 was made by Kallio to the sheriff. The proceedings resulting in the order of Kelly, J., were launched shortly thereafter. Greene J. determined that a right of set-off existed subject to the amount of such set-off being determined on a reference to be had before a Master who was directed, in accordance with subsection 1 of section 124 of the Ontario *Judicature Act,* R.S.O., 1937, c. 100, that any amounts in the nature of penalties included in such judgments should not be taken into consideration in computing the total amount due. As has been stated, the judgment of Greene J. was set aside by the Court of Appeal, and hence this appeal.

In addition to the circumstance that some of the certificates had been filed by the Board after the respondent had commenced its action for damages for trespass, there is also the fact, as pointed out by Mr. Justice Middleton in the Court of Appeal, that the assignment to Kallio had occurred subsequent to the issue of the writ of summons. In that learned Judge's view, under the Ontario Rules of Practice, Kallio should have set up any claim he had by way of counterclaim in the original action, and this was not accomplished. At page 37 of

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the record appears a reference to a judgment of Mr. Justice McTague, which I understand is the one reported in [1937] O.W.N. 12 (1). Apparently, after the order referring the issues in the original action for trial to a District Court Judge, Kallio had secured an order from the latter permitting him to file a counterclaim setting up the very claim he now advances, and the Timber Company filed a defence to that counterclaim. The application to McTague J. was to set aside the order of the District Court Judge on the ground of lack of jurisdiction. McTague J. made the order as asked but refused Kallio's application, made at the same time, to refer for trial the issue created by the District Judge's order. It also appears on the same page of the record that an application for leave to appeal to the Court of Appeal from the order of McTague J. had been refused.

I would not interfere with the order of the Ontario Court of Appeal in this case on a question of practice in that province, particularly when the reasons therefor are given by such a master of that practice as Mr. Justice Middleton. Mr. Justice Middleton, however, stated that he preferred to deal with the matter by placing his decision on the merits of the case and, on the merits, he determined that the claims indicated by the Board's judgments and the judgment for damages for trespass were not in their nature mutual debts even when the Timber Company's claim was ascertained by judgment. He therefore concluded that, assuming that Kallio was justified in remaining silent until after judgment was secured against him by the respondent, he (Kallio) had to proceed having regard to the rules of practice in that behalf. Apparently the learned judge considered that in a proper case such an application might have been made under the provisions of Rule 523. While Mr. Justice Masten's grave doubts as to whether Rule 523 was applicable had not been fully resolved, he stated they were not sufficient to warrant him expressing a dissenting opinion and he agreed with Mr. Justice Middleton. It is obvious, however, that the latter considered that even if the application to Kelly J. could have been treated as made under Rule 523, no right of set-off existed because of his view that the debts were not mutual.

(1) *Russell Timber Co. Ltd.* v. *Kallio,* [1937] O.W.N. 12.

With deference, I am unable to agree that in the action by the respondent for damages for trespass, judgments against the respondent in another court, which had been assigned to the appellant, could not be set off under the provisions of sections 123 and 124 of the *Judicature Act*. All that is required by these sections is that there should be a mutual debt, that is, one owing to A by B and not by someone else. By the very terms of subsection 1 of section 124 "mutual debts may be set against each other, notwithstanding that such debts are deemed in law to be of a different nature." The operation of the statute is not limited to cases of debts arising out of or connected with the same transaction. In *Bennett* v. *White* (1), the Court of Appeal in England decided that a defendant might set off a debt which had been owing by the plaintiff to another person and which had been assigned to the defendant.

In England, even before the Judicature Acts and prior to the statutes providing for the assignment of choses in action, one court might permit a set-off against a judgment of its own of a judgment in another court. In *Edwards* v. *Hope* (2), Lord Justice Bowen said, at page 927:—

> The Courts before the present rules had an equitable jurisdiction to set off against each other cross judgments in the same action or in different actions and in the same or in different courts. The old practice is explained in Chitty's Practice, 8th ed., p. 625; and it appears that in consequence of a diversity in the practice of the Court of Queen's Bench and that of the other courts, rule 93 of 2 Wm. 4, was passed, which is in the same terms as rule 63 of the Rules of Hilary Term, 1853, and which protected the solicitor's lien where the set-off was asserted in different actions.

And in Ontario, Mr. Justice Middleton, speaking for the Appellate Division in *Kohen* v. *Culley Breay & Dover Ltd.* (3),—dealing, it is true, with an entirely different matter,—remarks as follows at page 535:—

> The right of a litigant to set off a sum, for which he has already recovered judgment, against a sum which his debtor may recover against him, is an equity which it is the duty of the Court to give effect to. This is established by a series of cases, of which *Throckmorton* v. *Crowley* (4) and *Moody* v. *Canadian Bank of Commerce* (5) will serve as examples. This equity may be given effect to either at the trial or upon a substantive application. To avoid expense and confusion it is desirable that the Judge on the hearing should determine the question without putting the parties to the expense of a substantive application.

(1) [1910] 2 K.B. 643.
(2) (1885) 14 Q.B.D. 922.
(3) (1925) 57 O.L.R. 533.
(4) (1866) L.R. 3 Eq. 196.
(5) (1891) 14 P.R. 258.

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It should be emphasized that so far as Kallio's claim is concerned, we are here dealing with judgments of a District Court. If I am right in the conclusion that the debts are mutual debts, it may be possible for the appellant, by apt proceedings, to secure a pronouncement giving effect thereto. Whether that be so or not is a question that should be dealt with by the Ontario Courts. While I would therefore dismiss the present appeal, I would do so without prejudice to any application that Kallio may be entitled to make to have effect given to the equity referred to. I should add that, having fully considered the point, I am unable to agree with Mr. Cartwright's argument that there was no power in the Workmen's Compensation Board to assign its judgments.

The Court of Appeal determined that there should be no costs of these proceedings to either party. The costs of this appeal might very well be disposed of in the same manner.

DAVIS J.—It is important to observe at once that we are not dealing in this appeal with a set-off in an action before judgment. We are dealing with the case of an execution in the hands of a sheriff.

What the appellant, as execution debtor, seeks to do is to set off against the amount of the execution debt the amount of an indebtedness which the execution creditor originally owed to the Ontario Workmen's Compensation Board (such indebtedness being represented by statutory certificates of the Board which were filed as judgments of the court many years ago and renewed from time to time) and which debt the appellant by assignment acquired and now holds. But the appellant acquired these certificates or judgments representing the indebtedness of the execution creditor to the Workmen's Compensation Board some three years before judgment was pronounced in the action out of which the execution in question arose. Moreover, these certificates or judgments are admitted by the parties to be subject to review in that the execution creditor claims to have made some payments upon them; further they include certain statutory penalties which in any event are not proper subject matter for a set-off. The certificates appear to have been purchased by the execution debtor at a great discount and he seeks to be given credit for their full face value.

The action out of which the execution in question arose was one for damages in trespass. Notwithstanding that the defendant (now execution debtor) held these certificates or judgments for three years before any judgment was pronounced in the action, he apparently said nothing and did nothing about them until after the execution was issued. If they could not be used as a set-off in the action, they could have been brought in by way of counterclaim. At any rate, when judgment was pronounced a stay of the entry of judgment for the purpose of obtaining proper credits could have been applied for, or a stay of execution. Nothing of this sort was done. Subsequently an application was made in the action and an order made for the trial of an issue to determine:

(*a*) Whether the defendant is entitled to set off against the amount of the judgment recovered by the plaintiff, Russell Timber Company Limited, in this action the amount of five several judgments recovered by the Workmen's Compensation Board in the District Court of the District of Thunder Bay against the plaintiff, Russell Timber Company Limited, and assigned to and now held by the defendant.

(*b*) Whether the writ of *fieri facias* issued by the plaintiff, Russell Timber Company Limited, pursuant to its judgment in this action to the sheriff of the District of Thunder Bay has been fully satisfied either by payment, set-off or partly by one and partly by the other or in any other manner whatsoever, or if not so satisfied, how much is now owing thereunder.

It is unnecessary, in the view I take of the appeal, to consider whether there was any authority to make such an order in the action, after judgment and the issue of execution. The issue of a writ of *fi. fa.* is an order of the court to make the money; in other words, the authority of the sheriff comes from the court, not from the plaintiff. *Mahaffy* v. *Bastedo* (1).

Section 21 of *The Execution Act,* R.S.O., 1937, ch. 125, provides that,

Subject to the provisions of *The Creditors Relief Act* the sheriff shall pay over to the party who sued out the execution the money so paid or recovered * * *

Section 5 of *The Creditors Relief Act,* R.S.O., 1937, ch. 126, provides that,

(1) Where a sheriff levies money under an execution against the property of a debtor, * * * he shall forthwith make an entry in a book to be kept in his office open to public inspection * * *

(2) The money shall thereafter be distributed rateably among all execution creditors and other creditors whose executions or certificates

(1) (1916) 38 O.L.R. 192.

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given under this Act were in the sheriff's hands at the time of the levy or receipt of the money, or who deliver their executions or certificates to the sheriff within one month from the entry, * * *

There must be an inherent jurisdiction in the court over its own process but I know of no authority for dealing with an execution after it has been placed in the sheriff's hands in the manner in which these proceedings have been taken and continued. One can quite understand under special circumstances the court invoking an equitable jurisdiction to prevent a levy under an execution where the execution debtor has a plain claim of a definite and fixed amount against the execution creditor. But where, as here, the execution debtor acquired and held the certificates of judgment of the Workmen's Compensation Board over three years before judgment in the action was given and took no step either to stay the entry of judgment or the issue of execution, I cannot see any ground for the intervention of any equitable jurisdiction there may be in the court.

The matter is one of practice and procedure in the Province of Ontario. As far back as 1851, Chief Justice Draper, in *The Executors of Elliott* v. *Crocker et al.* (1), refused to allow judgment debtors to set off against the amount of an execution against them the amount of a judgment against the execution creditor which they had bought up for that purpose. It did not appear whether the defendants even obtained the assignment of the judgment until after the return day of the execution in the cause. Chief Justice Draper discharged a rule *nisi* to set off the judgment, on the ground that the defendants, instead of paying the plaintiffs what they had recovered, expended money which might have been so applied in buying up a judgment against the plaintiffs. Mr. Justice Middleton, the recognized authority on practice matters in the Province of Ontario, relied upon that decision in his judgment in this case and said "that authority has never been departed from in Ontario."

I should dismiss the appeal with costs.

In the view I take of the appeal, it has been unnecessary to consider the question of the validity of the assignments of the certificates or judgments of the Workmen's Compensation Board or the rights of the appellant, if any,

(1) 1 Ont. Practice Rep. 13.

thereunder against the respondent, and I should therefore make the dismissal of the appeal without prejudice to any other proceedings the appellant may now be advised to take.

Appeal dismissed without prejudice to any application that appellant may be entitled to make to the Ontario courts to give effect to his equity to set off the judgments secured against respondent by the Workmen's Compensation Board and assigned to him. No costs of the appeal to either party.

Solicitors for the appellant: *McComber & McComber.*

Solicitor for the respondent: *Cyril V. O'Connor.*

THE INSURANCE COMPANY OF NORTH AMERICA (PLAINTIFF)... APPELLANT;

AND

COLONIAL STEAMSHIPS LIMITED (DEFENDANT) ..... RESPONDENT.

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* Nov. 26, 27, 28.
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* June 26.

ON APPEAL FROM THE ONTARIO ADMIRALTY DISTRICT OF THE EXCHEQUER COURT OF CANADA

Shipping—Insurance—Insurance of cargo of wheat—Wheat, while in winter storage on berthed vessel, damaged by vessel sinking—Insurer paying insurance, taking over the damaged wheat, partially salvaging it, and, as endorsee of bills of lading, suing carrier for damages—Whether right of action—Bills of Lading Act, R.S.C., 1927, c. 17, s. 2—Counterclaim by carrier for contribution in general average.

There was insured with appellant certain wheat shipped on respondent's upper lakes steamer *Mathewston* for carriage to Montreal via Port Colborne. The bills of lading were deposited with a bank, through which the shipper's purchase of the wheat had been financed, and which was named in the bills of lading as consignee. When wheat from the upper lakes is destined for Montreal, the practice is to discharge it from the upper lakes vessel into the government elevator at Port Colborne and then load it into canal sized vessels. The wheat was discharged into the elevator at Port Colborne and kept there for a time; then the shipper paid the freight to Port Colborne and the elevator charges, and arranged for the wheat to be loaded at Port Colborne for winter storage there on two vessels, one of which was respondent's vessel *Northton*. Appellant by endorsement provided that part of the insurance covered the wheat then on the

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

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Northton "at and from Fort William and/or Port Arthur to Port Colborne, including winter storage while there on board the S/S *Northton* and thence to Montreal". Later the *Northton,* with its wheat on board, sank at its winter berth. Appellant paid in full the insurance on, and took over, the wheat on the *Northton,* receiving original bills of lading (duly endorsed, appellant alleged, to it) to cover the quantity, had the wheat partially salvaged, and, as endorsee of the bills of lading under which it was shipped on the *Mathewston* (and not basing its claim on right of subrogation), sued respondent for damages. Respondent counterclaimed for contribution in general average.

Held: It must be found upon the evidence that the bank's endorsement (assuming it to have been sufficiently proved) on the bills of lading was merely for the purpose of permitting the shipper of the wheat to present its claim for insurance, and that appellant took over the damaged wheat by reason of its insurance obligations. It is not every endorsee, who, by reason of s. 2 of the *Bills of Lading Act* (R.S.C., 1927, c. 17), is vested with the rights of action in respect of goods mentioned in the bill of lading, as if the contract therein contained had been made with himself; it is only an endorsee to whom *the* property in the goods passed *upon or by reason of the endorsement* (*Sewell* v. *Burdick,* 10 App. Cas. 74). As appellant did not come within this requirement, it could not succeed in the action.

Held also (Davis J. dissenting): Respondent should succeed on its counterclaim, as appellant had become the owner of the wheat before the general average expenses were incurred.

Per Davis J. (in dissenting as to the counterclaim): Appellant dealt with the damaged goods as an insurance company in the ordinary course of the adjustment and settlement of the insurance; it was not the consignee or the owner of the goods; there was no contract by it, express or implied, to pay; and it was not liable for contribution to general average loss. Respondent may have had a possessory lien upon the damaged grain for a general average contribution but it did not attempt to exercise any such lien or to withhold delivery until any general average contribution due to it had been paid. (*Scaife* v. *Tobin,* 3 B. & Ad. 523, referred to). Moreover, a contract of carriage of goods by water (assumed in what has been said above) did not, on the evidence, exist at the time of the loss; the original contract of carriage through to Montreal having been terminated and a new arrangement made for winter storage—a mere bailment of goods to which the rule of general average might not apply at all.

APPEAL by the plaintiff from the judgment of the District Judge in Admiralty of The Ontario Admiralty District of the Exchequer Court of Canada (1) in an action brought to recover from the Defendant the sum of $48,370.28 by reason of damage to grain. The grain was part of a cargo of wheat shipped at Port Arthur and/or Fort William, Ontario, on the

(1) Barlow D.J.A. 8 Ins. L.R. 121.

defendant's steamer *Mathewston,* for carriage to Montreal via Port Colborne. While the wheat so shipped was being held in winter storage at Port Colborne on two vessels, one of which was the defendant's steamer *Northton,* the *Northton,* with its wheat on board, sank. The plaintiff had insured the wheat and it paid in full the insurance on, and took over, the wheat on the *Northton,* receiving original bills of lading (duly endorsed, plaintiff alleged, to it) to cover the quantity, had the wheat partially salvaged, and, as endorsee of the bills of lading under which it was shipped on the *Mathewston,* sued the defendant for damages. The District Judge in Admiralty dismissed the plaintiff's claim with costs, and also gave judgment to defendant for $4,059.67 with costs on a counterclaim for contribution in general average.

The material facts of the case, so far as relevant to the grounds of decision in this Court, are sufficiently stated in the reasons for judgment in this Court now reported. The appeal was dismissed with costs, Davis J. dissenting as to the counterclaim.

F. King K.C. and *C. R. McKenzie K.C.* for the appellant.

F. Wilkinson K.C. and *R. J. Dunn* for the respondent.

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

KERWIN J.—The Insurance Company of North America instituted an action in the Exchequer Court of Canada against Colonial Steamships Limited, claiming $48,370.28 damages caused by injury to 115,600 bushels of wheat while on the latter's steamship *Northton.* The damages were caused when the *Northton* sank while berthed for the winter at Port Colborne, Ontario. The wheat was insured by Reliance Grain Company, Limited, with the Insurance Company, which, however, does not advance any claim in these proceedings under the doctrine of subrogation but contends it is entitled to damages as endorsee of certain bills of lading. The Steamship Company counterclaimed for $4,059.67 general average. The action came on for trial before the District Judge in Admiralty for the Ontario Admiralty Division, who dismissed the claim and allowed the counter-claim. There is no dispute as to the correctness of the respective amounts, but the Insurance Company appeals on both questions of liability.

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In the autumn of 1938, Reliance Grain Company, Limited (hereafter called Reliance), purchased 225,005-30 bushels of wheat on instructions from, and for and on account of, Consolidated Shippers Limited (hereafter called Consolidated). Consolidated also instructed Reliance to ship the wheat by the respondent's steamer *Mathewston* at the head of the lakes, for carriage to Montreal, Quebec, via Port Colborne, and this was done. The transaction was financed by Reliance through the Bank of Nova Scotia but, the former requiring a margin on its purchase, Consolidated agreed to pay the respondent the freight of five cents per bushel. The respondent issued bills of lading covering the shipment, showing the shipper to be Reliance and the consignee to be the Bank. These bills of lading were deposited with the Bank. They appear to be in the usual form and in accordance with the provisions of *The Water Carriage of Goods Act, 1936* (Dominion), each bears the following endorsement in the margin:—

> Notwithstanding anything contained herein to the contrary, this bill of lading shall have effect, subject to the provisions of the rules scheduled to The Water Carriage of Goods Act, 1936, as applied by that Act.

The appellant had previously issued an open or blanket marine insurance policy covering Reliance and, by a certificate dated October 14th, 1938, it certified that the wheat shipped by Reliance on the *Mathewston* was insured for $168,754 under the policy. While the ship was proceeding down the lakes, Consolidated, thinking that there might be a better market at Port Colborne, decided to hold the wheat there and not have it taken, at least immediately, to Montreal. It accordingly arranged with the respondent to terminate the shipping contract at Port Colborne and to pay the freight charges to that point, which were settled at two cents per bushel. The *Mathewston* is an upper lakes vessel and when a cargo of wheat from the upper lakes is destined for Montreal, the practice is to discharge the wheat from such a ship into the Government elevator at Port Colborne and then load the cargo into canal sized vessels for the remainder of the voyage. The *Mathewston* arrived at Port Colborne on October 19th and discharged the wheat into the elevator. A free time of fifteen days is allowed by the elevator but, on instructions from Consolidated, the wheat was kept there until the 24th and 25th of November, 1938. Consolidated paid the respondent

the agreed freight charges to Port Colborne and the elevator storage charges. It also arranged with the respondent to load the wheat for winter storage on two vessels, the *Northton,* owned by the respondent, and the *Gilchrist,* owned by Sarnia Steamships, Limited. One of these companies is a subsidiary of the other and both are operated under one management and from one office.

On November 24th, part of the wheat was loaded on the *Gilchrist,* and on November 25th, 115,600 bushels were loaded on the *Northton.* By a certificate similar to the one already mentioned, the appellant certified that on October 11th, 1938, it insured, under its policy, $86,700 on 115,600 bushels of grain valued at seventy-five cents per bushel

shipped on board of the *Mathewston* at and from Fort William and/or Port Arthur, Ont., to Port Colborne, including Winter Storage while there on board the SS. *Northton* to Montreal, Que.

This certificate is dated October 14th and while it is clear that it was antedated, the reason for so doing is not apparent. In any event, on November 25th the appellant issued an endorsement to be attached to its first certificate and amending the latter so as to cover $86,798 on 115,730–30 bushels of wheat

at and from FORT WILLIAM and/or PORT ARTHUR to MONTREAL via PORT COLBORNE

and $81,956 on 109,275 bushels of wheat

at and from FORT WILLIAM AND/OR PORT ARTHUR, ONTARIO, TO PORT COLBORNE, INCLUDING WINTER STORAGE WHILE THERE ON BOARD THE S/S *RALPH GILCHRIST* AND THENCE TO MONTREAL.

Finally, on November 28th, when the exact quantity loaded on the *Northton* was known, the appellant issued a second endorsement to be attached to the first certificate cancelling and replacing the endorsement of November 25th. So far as material it was there provided that the certificate should cover $86,700 on 115,600 bushels of wheat

at and from FORT WILLIAM AND/OR PORT ARTHUR TO PORT COLBORNE, INCLUDING WINTER STORAGE WHILE THERE ON BOARD THE S/S *NORTHTON* AND THENCE TO MONTREAL.

In the meantime, upon the delivery of the wheat to the *Northton* and the *Gilchrist,* and in accordance with the practice of the elevator, receipts signed by the respondent

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were given by it to the elevator in the form of two documents each of which is headed "Memorandum Bill of Lading From Trans-Shipping Port". The one with reference to the *Northton* reads as follows:—

Memorandum Bill of Lading From Trans-shipping Port.

GOVERNMENT ELEVATOR

PORT COLBORNE, ONTARIO, November 25th, 1938.

SHIPPED in apparent good order and condition at and from the port of PORT COLBORNE, ONTARIO, by Reliance Grain Company Ltd., as agents and forwarders for account and at the risk of whom it may concern, on board the vessel *Northton* whereof . . . . . is Master, now in the port of PORT COLBORNE, ONTARIO, and bound for Montreal, Que., the property herein described, to be delivered in like order and condition (the dangers of navigation, fire and collision excepted) to the order of The Bank of Nova Scotia at Montreal, Que., as specified in original Bill of Lading.

The several portions of this shipment are subject to all the terms and provisions of the respective Bills of Lading therefor issued at original port of loading of upper lake vessel.

This instrument is a memorandum only and is NOT NEGOTIABLE. Original bill of lading of lake steamer named hereon, and for like quantity, which is now outstanding, will be required before delivery of this cargo.

CARGO consisting of One Hundred & Fifteen Thousand Six Hundred (115,600) bushels No. Two (2) Northern Manitoba Wheat loaded in All Over.

CONSIGNED in original bill of lading of lake steamer to the order of Bank of Nova Scotia to be delivered as specified therein.

Notify Reliance Grain Company Ltd., care of Winnipeg, Manitoba, ex lake steamer *Mathewston,* Oct. 17/38, holds 2-4-6, from Ft. Wm. & Pt. Arthur, Oct. 11/38. Elevator

R. H. Marshall,
Agent for Vessel.

It will be noted that this memorandum bill of lading states that all the terms and provisions of the original bills of lading should apply and that the latter would be required before delivery of the cargo; and that the wheat was shipped on the *Northton* "bound for Montreal, Que.", and was to be delivered to the order of the Bank of Nova Scotia at Montreal "as specified in original Bill of Lading".

The *Northton* was laid up for the winter at Port Colborne with the 115,600 bushels of wheat on board. On November 25th the respondent wrote the following letter to Consolidated:—

> This is to advise that our Steamer *Ralph Gilchrist* loaded grain yesterday, November 24, for winter storage, ex our Steamer *Mathewston*, B/L October 11, 1938, and that our Steamer *Northton* is loading the balance of this grain for storage to-day.
>
> Please arrange to forward us storage contracts to cover these two cargoes.

On November 26th, Sarnia Steamships, Limited, wrote Consolidated as follows:—

> We are herewith enclosing copies of bills of lading covering cargoes of grain loaded at Port Colborne, Ont., for storage by our Strs. *Gilchrist* and *Northton*.

The enclosures were the two memoranda bills of lading and four other documents, one of which is the original and the others copies of a form of "Canadian Lake Grain Bill of Lading" similar to the forms of the original bills of lading. On the back of each of these forms is a form of "Special Contract for Private Storage of Grain and/or Seed". Both on the face and the back of each document is a stamp similar to the endorsement in the margin of the original bills of lading, making applicable the rules scheduled to *The Water Carriage of Goods Act, 1936*. These documents are merely unsigned forms and even the spaces left blank for use in particular instances are not filled in.

The respondent contends that because of what had occurred, including the sending of these documents to Consolidated (Reliance's principal), its liability as a carrier under the original bills of lading and under the provisions of *The Water Carriage of Goods Act, 1936*, was altered to that of a mere warehouseman. We are not concerned with what the position might be as between Reliance and the respondent. Nor, even though the original consignee was never consulted about any new arrangements and had no knowledge of them or of the blank forms, need we consider the situation that might have developed with respect to the Bank. The validity of the claim of the present appellant need not be determined upon the basis of the legal relationships that might conceivably have existed between the respondent, on the one hand, and, on the other, the shipper or consignee named in the original bills of lading, or both.

It was on February 1st or 2nd, 1939, that the *Northton* sank and its cargo of wheat was damaged. The appellant was notified, the ship was raised, and the appellant decided

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to pay Reliance as for a total loss and take over the damaged wheat. It requested Reliance to submit as part of the proofs of loss a sufficient number of the original bills of lading, endorsed to the appellant, to cover the quantity of wheat on board the *Northton*. On February 4th, Reliance gave the Bank, in whose possession the bills of lading had remained, a bailee receipt wherein it acknowledged having received the bills "endorsed to our order for purpose of presenting claim to Insurance Company." The trial judge stated that, if it were necessary for the determination of the action, he would be forced to find that it was not proved that the Bank had endorsed the bills. I do not find it necessary to come to any conclusion on the point, as I assume in the appellant's favour that the evidence is sufficient. I am satisfied, however, that it is shown that Reliance endorsed and delivered the bills to the appellant. On February 9th, the appellant issued its cheque for the total amount of the insurance and telegraphed its representative in Winnipeg, Manitoba, that it was "taking over the salved grain". It did take over the damaged wheat, sold it, credited the proceeds against the value, and sued the respondent for the difference.

As stated at the outset, the appellant does not base its claim on its right of subrogation but as endorsee of those original bills of lading issued with reference to the *Mathewston* that covered the quantity of wheat subsequently loaded on the *Northton*. The question therefore is whether, within the meaning of section 2 of the *Bills of Lading Act*, R.S.C., 1927, c. 17, the appellant is an "endorsee of a bill of lading to whom the property in the goods therein mentioned passes upon or by reason of such * * * endorsement". It is not every endorsee who by reason of this section is vested with the rights of action in respect of goods mentioned as if the contract contained in the bill of lading had been made with himself. It is only an endorsee to whom *the* property in the goods passed *upon or by reason of the endorsement*. *Sewell* v. *Burdick* (1). Here the appellant took over the damaged wheat by reason of its obligations under its policy, certificate and attached endorsement. It is quite evident from the bailee receipt given by Reliance to the

(1) (1884) 10 App. Cas. 74.

Bank that the bills of lading, even if endorsed by the Bank, were so endorsed merely for the purpose of permitting Reliance to present its claim for insurance under the documents issued by appellant. For this reason the appellant cannot succeed, and without expressing any opinion as to the other questions referred to in the judgment appealed from or in the arguments presented before the Court, the appellant's action must stand dismissed.

As the appellant had become the owner of the wheat before the general average expenses were incurred, the respondent is entitled to judgment on its counterclaim.

The appeal should be dismissed with costs.

DAVIS J. (dissenting in part)—I agree that the appeal in so far as the appellant's claim in the action is concerned must be dismissed, but I should allow the appeal in so far as the judgment on the respondent's counterclaim is concerned.

The appellant put its claim solely as the holder by endorsement of the bill of lading that was issued in favour of the Bank of Nova Scotia, Montreal, as the named consignee, and calls upon the respondent as carrier to pay for failure to deliver. But though challenged at the trial to do so, the appellant failed to make proof of the due execution of an endorsement of the bill of lading by the Bank of Nova Scotia or that the delivery of the alleged endorsement of the bill of lading was intended by the Bank "to pass the property in the goods therein mentioned by reason of such endorsement" within the meaning of sec. 2 of the *Bills of Lading Act*, R.S.C., 1927, ch. 17. It would appear that the Bank held the bill of lading as security for moneys advanced to the shipper to purchase the grain and that if the Bank did endorse and deliver the bill of lading to the shipper who was the real owner of the cargo, it was merely to enable the latter to make out its proofs of loss against the appellant, its insurer. The appellant's action failed and was dismissed with costs.

The respondent sought by counterclaim to recover from the appellant contribution to the general average loss and recovered judgment at the trial on the counterclaim in the amount claimed, $4.059.67, with costs. But the appellant dealt with the damaged goods in question as an insurance company in the ordinary course of the adjust-

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Davis J.

ment and settlement of the insurance; it was not the consignee or the owner of the goods; nor was there any contract by it, express or implied, to pay; and, in my opinion, it is not liable for contribution to general average loss. The respondent may have had a possessory lien upon the damaged grain for a general average contribution but it did not attempt to exercise any such lien or to withhold delivery until any general average contribution due to it had been paid. See *Scaife* v. *Tobin* (1). What I have said is on the assumption that there was a contract of carriage of goods by water at the time of the loss. But I think the evidence discloses that the original contract of carriage for a through journey to Montreal had been terminated by the parties at Port Colborne and a new arrangement made there for the storage of the grain during the winter months—a mere bailment of goods to which the rule of general average might not apply at all.

I should allow the appeal to the extent only of setting aside the judgment on the counterclaim and direct judgment dismissing the counterclaim with costs. The respondent's costs of the appeal in the action should be paid by the appellant and the appellant's costs of the appeal in the counterclaim should be paid by the respondent.

Appeal dismissed with costs.

Solicitors for the appellant: *King & Reynolds.*

Solicitors for the respondent: *Wright & McMillan.*

1942

* May 28.

THE COCA-COLA COMPANY OF CANADA LIMITED AND KEN GUITEAU (DEFENDANTS) ..... APPELLANTS;

AND

JOHN FORBES (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Appeal—Functions of appellate court when dealing with verdict of jury—Collision of motor trucks—Questions as to negligence causing or contributing to accident—Findings of jury—Conclusiveness thereof unless verdict so wholly unreasonable as to show that jury could not have been acting judicially.

* PRESENT:—Rinfret, Kerwin, Hudson, Taschereau and Bond (*ad hoc*) JJ.

(1) (1832) 3 B. & Ad. 523.

APPEAL by the defendant from the judgment of the Court of Appeal for Saskatchewan (1) allowing the plaintiff's appeal from the judgment of Taylor J.

The action arose out of a collision between the defendant company's motor truck, driven by the defendant Guiteau, and the plaintiff's motor truck, which collision occurred as Guiteau was proceeding to pass the plaintiff's truck and the plaintiff was turning his truck left to enter a filling station.

There was conflicting evidence on certain questions, including the question whether or not the plaintiff gave the proper signal before making the left turn. Also the trial judge ruled that the plaintiff's rear view mirror did not comply with the statutory requirements.

The jury, in answer to questions submitted to them, found that the injuries received by the plaintiff and damages to his truck were sustained in consequence of the negligence of the defendant Guiteau; that such negligence consisted " (1) in failing to take reasonable precautions in attempting to pass the plaintiff's truck; (2) in disregarding plaintiff's signal of his intention to turn left; (3) in failing to sound horn soon enough "; and that the plaintiff was not guilty of contributory negligence.

The trial Judge, however, upon motion for judgment, heard argument and subsequently ordered that the action be dismissed with costs. He held that it was quite clear that plaintiff's truck was not equipped with a mirror to answer the statutory requirements; also that the evidence incontrovertibly established contributory negligence on the part of the plaintiff; that plaintiff, by his own negligence and by driving at the time in a defectively equipped truck, such defect contributing to the accident, was barred from recovering.

The Court of Appeal for Saskatchewan (1) reversed the judgment of the trial Judge and gave judgment for the plaintiff for the amount of damages found by the jury.

The defendants appealed to this Court.

G. P. Campbell K.C. and *C. M. Pyle* for the appellants.

E. M. Hall K.C. for the respondent.

(1) [1941] 3 W.W.R. 909; [1942] 1 D.L.R. 184.

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COCA-COLA COMPANY OF CANADA LTD. v. FORBES.

After hearing the argument of counsel for the appellants, the members of the Court retired for consultation, and, on their returning to the Bench, without calling on counsel for the respondent, Rinfret J. (presiding) delivered the judgment of the Court as follows:

RINFRET J. (oral)—Mr. Hall, the Court has come to the conclusion that they do not need to hear you.

We are unanimously of the opinion that the appeal fails. We must say that Mr. Campbell has put his case as completely as it could be done, and in a certain way that really enables us to come to a conclusion at once, because we think we have everything before us to enable us to give a decision.

We have had on any number of occasions the opportunity of stating how this Court looks upon its functions when it is dealing with the verdict of a jury. Perhaps an instance of that is in the case of *Canadian National Railways* v. *Muller* (1), where the present Chief Justice expressed himself in the following way:

> We premise that it is not the function of this Court, as it was not the duty of the Court of Appeal, to review the findings of fact at which the jury arrived. Those findings are conclusive unless they are so wholly unreasonable as to show that the jury could not have been acting judicially;

and he there referred to the decision of the House of Lords in the case of *Metropolitan Ry. Co.* v. *Wright* (2). Then the Chief Justice goes on to say:

> In construing the findings, moreover, one must not apply a too rigorous critical method; if, on a fair interpretation of them, they can be supported upon a reasonable view of the evidence adduced, effect should be given to them.

Now in this case we are of the same opinion as the Court of Appeal, that it cannot be said that the verdict at which the jury arrived was so wholly unreasonable as to show that the jury could not have been acting judicially. It is true that at the conclusion of the plaintiff's case the trial Judge intimated that he might enter a non-suit, but the defence, of course, must stand the consequences from the fact that it decided to adduce evidence, and it was certainly open to the jury, when it came to consider its

(1) [1934] 1 D.L.R. 768; 41 Can. Ry. Cas. 329.

(2) (1886) 11 App. Cas. 152, at 156.

verdict, to take into consideration not only the evidence given for the plaintiff but also the evidence given for the defendant.

On the whole—and, I must say, having the advantage of the decision of the Court of Appeal, which was unanimous—we cannot see that we can disturb the judgment of the Court of Appeal and the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Thom, Bastedo, Ward & McDougall.*

Solicitors for the respondent: *Hall & Maguire.*

ROBERT C. DAWES AND CRESCENT CREAMERY CO. LTD. (PLAINTIFFS). } APPELLANTS;

AND

ARTHUR N. GAYE (DEFENDANT) ..... RESPONDENT.

1942
* May 21, 22.
* Oct. 6.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Motor vehicles—Negligence—Collision at street intersection—Responsibility for the accident—Duties of drivers—Nature of roads and intersection—Advantages of trial judge on questions of fact—Visit by trial judge to site of accident—Duties as to yielding right of way, stopping before turning, and (s. 52 (1) of Highway Traffic Act, Man.) as to driving "wherever practicable" on right half of highway.

In an action for damages arising out of a collision at a street intersection between plaintiff company's truck, proceeding westerly, and defendant's automobile, which had been proceeding northerly and was turning right to go easterly, the trial judge (Adamson J.) gave judgment for the plaintiffs (49 Man. R. 288, at 289-290), which was reversed (by a majority) in the Court of Appeal for Manitoba (49 Man. R. 288). The Supreme Court of Canada now restored the judgment of the trial judge, holding that his findings should be accepted because, the questions involved being almost entirely questions of fact, he manifestly had advantages over an appellate tribunal and had the additional advantage of having visited the site of the accident, the visit having been considered by counsel and the judge to be necessary in order to appreciate the evidence. This Court agreed with the trial judge that defendant was negligent in not stopping and giving the truck driver the right of way. As to conduct of the truck driver, this Court held that, even assuming (contrary to

* PRESENT:—Rinfret, Kerwin, Hudson, Taschereau and Gillanders (*ad hoc*) JJ.

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the trial judge's view) that it was "practicable" for him to drive upon the right half of the highway (as required, "wherever practicable," by s. 52 (1) of the *Highway Traffic Act*, Man.), yet the actual position of his vehicle was merely a *sine qua non* and not a *causa causans*.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Manitoba (1) which, by a majority of three to two, reversed the judgment of Adamson J. at trial (2).

The action was brought to recover damages for injuries and damage suffered in a collision between the defendant's automobile, driven by the defendant, and a truck driven by the plaintiff Dawes and owned by the plaintiff company, Dawes' employer.

The collision occurred on January 10, 1940, about 12.15 o'clock in the afternoon, at or near the intersection of Fisher avenue and Third avenue, in Portage la Prairie, Manitoba. The plaintiff Dawes was driving westerly on Fisher avenue and his intended course was to drive on westerly past Third avenue. Third avenue does not go northward beyond Fisher avenue. The defendant had been driving northerly on Third avenue and his intended course was to turn to the right and drive easterly on Fisher avenue. There was conflicting evidence as to just at what spot or in what manner the collision occurred and as to the position, speed or movement of the cars at the time. The plaintiffs alleged that the accident was caused solely by negligence of the defendant, and the defendant alleged that it was caused solely by negligence of the plaintiff Dawes, or, if defendant was negligent, which was denied, that Dawes was guilty of contributory negligence which should be taken into account when awarding damages, if any, to plaintiffs, and also that Dawes had in law the last opportunity of avoiding the accident, of which opportunity he deprived himself by his own actions.

The trial took place in June, 1941, before Adamson J., who, at the request of counsel for both parties, visited the scene of the accident. He found, in his reasons for judgment, that said two streets, neither of which was paved, were "just like an ordinary country road with a slight

(1) 49 Man. R. 288; [1942] 1 W.W.R. 273; [1942] 1 D.L.R. 792.
(2) 49 Man. R. 288, at 289-290; [1941] 2 W.W.R. 588.

grade," that "it is possible to drive down on the side of the road [Fisher Ave.], but, in the ordinary way and especially in winter when there is snow on the street as there was at this time, that is not done." He found that the accident took place at the intersection, and he held that defendant should have stopped and given Dawes the right of way, "not only by the rules of the road, but that course was also dictated by the obvious situation"; that "the plaintiff was right in assuming that the defendant would stop." He gave judgment for the plaintiffs, to Dawes for $2,489.65 for personal injuries, and to the company for $515.76 for damage to its truck.

In the Court of Appeal, that Court, *per* Prendergast C.J.M., and Dennistoun and Robson JJ.A. (Trueman and Richards JJ.A. dissenting), allowed the defendant's appeal and dismissed the action. Dennistoun J.A. held that, "when the cars came together the plaintiff was not on his proper right-hand side of the road. He was well over the crown of the road and so much to his left that there was no room for another car to pass him"; that this was the sole cause of the accident; that "the defendant when attempting to make his turn was proceeding at slow speed. His car never projected over the centre line of Fisher avenue. If the plaintiff had been in his proper place, there would have been no collision"; that the drivers saw each other before the turn was reached; and the position of defendant's car, close to his right-hand curb, was an indication that he proposed to make the right turn, and "that being so, it was the duty of the plaintiff to have moved to the right-hand side to leave clear room for the defendant. This he did not do." Robson J.A. held that "Dawes in plenty of time saw the defendant turning in on the east leg of the 'Y' to take to Fisher avenue and to go east. From that moment Dawes should have recognized that he had a joint occupant of the road proceeding to pass him, and he should have guided his car accordingly. He had no justification whatever for asserting a prior right to the road"; and, after referring to the evidence, held that "it was the plaintiff's own negligence that substantially caused the injury." Prendergast C.J.M. agreed with Dennistoun and Robson JJ.A. Trueman J.A., dissenting,

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agreed with the trial judge and with Richards J.A. Richards J.A., dissenting, agreed with the trial judge, and held that "it was possible to drive slowly along the north half of the road [Fisher Ave.]", but it was not "practicable"; that "it would set a very dangerous precedent to hold that paramount importance should be given to" s. 52 (1) of *The Highway Traffic Act,* R.S.M., 1940, c. 93 ("Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall wherever practicable drive it upon the right half of the highway * * *") to the exclusion of ss. 50 (1) (yielding right-of-way at intersection to vehicle on right) and s. 56 (1) (driver before turning from a direct line must use reasonable care to ascertain that such movement can be made in safety, and indicate intention by signal); that "the defendant saw or should have seen that the crown was the used portion of the road [Fisher Ave.] and that traffic would follow it", and that he should have stopped until any approaching car had passed. He stated that the law seemed to be settled in favour of the plaintiff by *Swartz Bros. Ltd.* v. *Wills* (1).

The plaintiffs appealed to this Court (special leave to do so being granted to the plaintiff company by the Court of Appeal for Manitoba).

Walter F. Schroeder K.C. and *P. G. DuVal K.C.* for the appellants.

B. V. Richardson K.C. for the respondent.

The judgment of the Court was delivered by

HUDSON J.—In this action there is a claim by the plaintiffs for damages arising from the collision of two motor cars at a street intersection in the City of Portage la Prairie. The action was tried before Mr. Justice Adamson without a jury. There was some conflict of oral evidence and a plan of the locality was put in but gave an inadequate picture of the scene of the accident. At the request of counsel for both parties, the learned trial judge visited the site and it appears from his judgment that his conclusions were influenced in a considerable degree by what he saw with his own eyes. The learned trial judge held that the defendant

(1) [1935] S.C.R. 628.

was guilty of negligence and that such negligence was the cause of the accident. He also held that the plaintiff Dawes who was driving the car in question was not guilty of negligence, and awarded damages to both plaintiffs.

In the Court of Appeal, by a majority of three to two, the judgment was reversed and the action dismissed.

The questions involved are almost entirely questions of fact. In actions of this kind the trial judge manifestly has advantages over an appellate tribunal and, to the advantages normally operating, there was here added the fact that the trial judge had an opportunity of visiting the site, which visit, according to the views of counsel for both parties and of the trial judge himself, was necessary in order to appreciate the evidence given at the trial. For that reason, I am of the opinion that the findings of the learned trial judge should be accepted.

On the question of negligence of the defendant, I agree entirely with the views of the trial judge. The latter considered that the plaintiff Dawes was not guilty of negligence because, in his view, it was not practicable for Dawes to drive his vehicle "upon the right half of the highway", as required by subsection 1 of section 52 of the Manitoba *Highway Traffic Act*. This conclusion is, perhaps, not entitled to as great weight, because the two highways were not in the same condition so far as regards snow at the time of the accident and at the time of the trial judge's view. However, assuming that it was practicable for Dawes to drive upon the right half of the highway, the actual position of his vehicle was merely a *sine qua non* and not a *causa causans*.

For this reason, I think the appeal should be allowed and the judgment at the trial restored, with costs here and below.

Appeal allowed and judgment at trial restored, with costs throughout.

Solicitors for the appellants: *Guy, Chappell, DuVal & McCrea.*

Solicitors for the respondent: *Richardson & Johnson.*

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* June 15.
* Oct. 6.

OTTO MARSHMENT (PLAINTIFF).....APPELLANT;

AND

CARL BORGSTROM (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Master and servant—Negligence—Responsibility of master for injury to servant arising from use of defective system of working supplied and operated by independent contractor.

Plaintiff was employed by defendant to assist in sawing wood on defendant's farm. The sawing equipment was supplied and operated by one L., who was paid for it, including his own labour, at $1.25 per hour. In the course of the operations, a large cast iron fly-wheel on the equipment burst and a section of it struck and injured plaintiff, who sued defendant for damages.

There were findings at trial, held in this Court to be justified on the evidence, that the accident occurred while the saw was running free and that the excessive speed at which it was then operated caused the fly-wheel to burst; that the method of the sawing operations was a defective system and that, having regard to the danger, L. was not a competent person to take charge of and operate the equipment; and that plaintiff's injury was due primarily to the dangerous system of working.

Held: Assuming (as defendant contended) that L. was an independent contractor, nevertheless defendant was liable. It was defendant's duty to plaintiff to supply and install proper equipment for sawing the wood and a proper system of work so far as care and skill could secure these results, and to select properly skilled persons to manage and superintend the equipment, and this obligation is personal to the employer who cannot free himself from his duty by a mere delegation (*Wilsons & Clyde Coal Co.* v. *English*, [1938] A.C. 57; [1937] 3 All E.R. 628); and the employer can no more escape the consequences of non-performance of said personal obligation to his employee merely by employing an independent contractor than he could by placing the responsibility on the shoulders of another employee (this is implicit in the reasons in the *Wilsons'* case, *supra*).

Per the Chief Justice: It flows from the reasoning in the judgments in the *Wilsons'* case (in the House of Lords, *supra,* and in the Court of Session, 1936, S.C. 883) that the obligation which the law imposes upon the employer, and which is involved in the contract, is that he shall provide a safe system of working in so far as the exercise of reasonable care and skill will enable him to do so; but he does not perform this obligation by simply employing an agent who is an independent contractor to whom he delegates the performance of it. (*McKelvey* v. *Le Roi Mining Co.*, 32 Can. S.C.R. 664, and other cases in this Court, also discussed).

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

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MARSHMENT v. BORGSTROM.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) which (without written reasons) reversed the judgment of the trial judge, Roach J. (2), which was given in favour of the plaintiff for $4,000 damages for injury to him caused by his being struck by a section of a fly-wheel which burst during the course of the operations of a certain equipment, supplied and operated by one Laidlaw, which was being used for sawing wood on the defendant's farm. The plaintiff had been employed by the defendant to work in connection with the sawing of the wood and was so employed when the accident happened. The material facts of the case and the questions involved in the appeal sufficiently appear in the reasons for judgment in this Court now reported.

The formal judgment of the Court of Appeal ordered that judgment be entered dismissing the action, "but reserving to the plaintiff the right to bring action against any other persons whom he conceives have done him an injustice."

By the judgment of this Court now reported, the appeal to this Court was allowed and the judgment of the trial judge restored, with costs throughout.

H. F. Parkinson K.C. for the appellant.

T. N. Phelan K.C. for the respondent.

THE CHIEF JUSTICE—I have had an opportunity of reading the judgment of my brother Kerwin and I agree with it. I am writing mainly for the purpose of calling attention to some earlier decisions of this Court.

For the purpose of ascertaining the principle of law applicable for the decision in this appeal, I quote some passages from the judgments of the Lords in *Wilsons & Clyde Coal Co.* v. *English* (3). At p. 640 Lord Wright says:

> In *Lochgelly Iron & Coal Co. Ltd.* v. *M'Mullen* (4), this House overruled the decision of the Court of Appeal in *Rudd's* case (5), on the scope of the employer's liability to his workpeople for breach of a statutory duty. In *Rudd's* case (5), the Court of Appeal, applying their

(1) Noted in [1941] 4 D.L.R. 804. No written reasons were delivered.
(2) [1941] O.W.N. 197; [1941] 3 D.L.R. 428.
(3) [1937] 3 All E.R. 628.
(4) [1934] A.C. 1.
(5) *Rudd* v. *Elder Dempster & Co. Ltd.*, [1933] 1 K.B. 566.

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general views which I have just stated, held that the employers could escape liability by showing that they had appointed competent servants to see that the duty was fulfilled. This House held that, on the contrary, the statutory duty was personal to the employer, in this sense, that he was bound to perform it, by himself or by his servants. The same principle, in my opinion, applies to those fundamental obligations of a contract of employment which lie outside the doctrine of common employment, and for the performance of which employers are absolutely responsible. When I use the word absolutely, I do not mean that employers warrant the adequacy of plant, or the competence of fellow-employees, or the propriety of the system of work. The obligation is fulfilled by the exercise of due care and skill. But it is not fulfilled by entrusting its fulfilment to employees, even though selected with due care and skill. The obligation is threefold, "the provision of a competent staff of men, adequate material, and a proper system and effective supervision."

The points in this statement which, I think, may usefully be emphasized are, first, that the duties specified as the duties of the employer are "fundamental obligations of a contract of employment", and, in the next place, that these obligations fall within the same category as a statutory duty in respect of the characteristic that the employer cannot fulfil them by entrusting their fulfilment to competent employees.

No doubt an employer may perform a duty by an agent who is an independent contractor, but, if the employer does not perform it and if it is not performed either by his servant or by his agent, then the result is that it is not performed; in other words, there is a breach of duty. At page 643, Lord Wright proceeds:—

> The true question is, what is the extent of the duty attaching to the employer? Such a duty is the employer's personal duty, whether he performs, or can perform, it himself, or whether he does not perform it, or cannot perform it, save by servants or agents. A failure to perform such a duty is the employer's personal negligence. This was held to be the case where the duty was statutory, and it is equally so when the duty is one attaching at common law. A statutory duty differs from a common law duty in certain respects, but in this respect it stands on the same footing. As Lord Macmillan said, in the *Lochgelly* case (1), with reference to a duty to take care:
>
> "It appears to me quite immaterial whether the duty to take care arises at common law or is imposed by statute. It is equally imperative in either case and in either case it is a duty imposed by law."
>
> To the same effect Lord Atkin says, at p. 9:
>
> "Where the duty to take care is expressly imposed upon the employer and not discharged, then in my opinion the employer is guilty of negligence and of 'personal' negligence."

(1) [1934] A.C. 1, at p. 18.

The same opinion is expressed by the other members of the House who took part in that case. The House, in overruling *Rudd's* case (1), did, I think, inferentially overrule *Fanton's* case (2).

Lord Maugham says at p. 646:—

> The proposition would be more correctly stated to be that his duty is to supply and install proper machinery so far as care and skill can secure this result.

And he proceeds to point out the consequences emerging from the circumstance that the duty of the employer is a duty springing from the contract of employment:

> * * * but it would need an altogether new implied term in the contract between employer and employee before a court could properly hold that this delegation has the result of freeing the employer from his liability. This becomes apparent if we imagine the contract between employer and workman to be written out in full, with all the implied clauses. There would be, for the reasons given by the Lord Justice-Clerk in *Bain* v. *Fife Coal Co.* (3), and by your Lordships, no clause to the effect that the employer was to be freed from his special obligations to the workmen if he delegated them to an agent; and, in the absence of such a clause, the employer would plainly remain liable if the agent was guilty of not using proper care and skill, since, in the contract law of Scotland, as in England, it is impossible to transfer a liability towards the other party to the contract without the consent of that party.

A similar line of reasoning is found in the judgment of the Lord Justice-Clerk in the Court of Session, *English* v. *Wilsons and Clyde Coal Co.* (4):

> The doctrine of collaborateur has always been formulated as a doctrine of implied contract. The law presumes that, when a servant engages to perform work for a master, in the absence of express stipulation he contracts on the footing that he takes the risk of the negligence of his fellow servants, but that his master shall be responsible for his own negligence. As was said by Lord Cairns, L.C., in *Merry & Cunningham* (5): "The master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do." * * * * *
>
> Bringing the matter to this test, the question is, Upon what terms and conditions is the servant to be presumed to contract in the absence of express stipulation? First, is it a reasonable presumption that the servant contracts upon the basis that the fellow servants selected by his master with whom he shall work shall be persons of reasonable skill and competence? Second, is it reasonable to presume that the servant contracts on the basis that the plant and resources, with which the master's work is to be carried on, shall be adequate plant and proper resources so as not to expose the servant to the risk of injury? Third, is it reasonable to presume that the servant contracts on the footing that the master shall

(1) [1933] 1 K.B. 566.
(2) *Fanton* v. *Denville,* [1932] 2 K.B. 309.
(3) 1935 S.C. 681.
(4) 1936 S.C. 883, at 910.
(5) *Wilson* v. *Merry and Cunningham,* 6 Macph. (H.L.) 84, at p. 89, L.R., 1 H.L.Sc. 326.

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carry on his business on a system or method, so far as reasonably practicable, which will not subject him to danger or unnecessary risk? All these can fairly be postulated, in the absence of contrary stipulation, as implied conditions in every contract of service. They are reasonable conditions of service, and the risk of their non-fulfilment is a master's risk. The master cannot say, "They are my duties, but I have left the performance of them to someone else." That does not mean warranty, but it means that the master cannot plead his servant's negligence, *quoad* these duties, as excusing himself.

The judgments in *Wilsons'* case neither in the House of Lords (1) nor in the Court of Session (2) deal with the case of delegation to an independent contractor in explicit terms. It flows, nevertheless, I think, from the reasoning in these judgments, that the obligation which the law imposes upon the employer, and which is involved in the contract, is that he shall provide a safe system of working in so far as the exercise of reasonable care and skill will enable him to do so; but he does not, I repeat, perform this obligation by simply employing an agent who is an independent contractor to whom he delegates the performance of it. As Lord Wright points out in his judgment, difficulty may often arise in deciding in a particular case whether the default which has caused the damage is

> a mere misuse of, or failure to use, proper plant and appliances, due to the negligence of a fellow-servant, or a merely temporary failure to keep in order or adjust plant and appliances, or a casual departure from the system of working,

where such matters can be regarded as the casual negligence of the managers, foremen, or other employees, or to the negligent failure to provide a proper system.

In the present case the learned trial judge has found:—

> The doctrine of common employment does not relieve the defendant. The plaintiff's injuries were due primarily to the dangerous system of working, the danger consisting in the absence of any device which would regulate the maximum speed of the saw, beyond which maximum the centrifugal force would cause the flywheel or the saw to fly apart.

I think this finding is adequately supported by the evidence and that it brings the case within the doctrine I have been discussing.

Attention ought to be called to the fact that the principle of responsibility of the employer for injuries arising from a failure on his part to provide a proper system of working was laid down forty years ago in the judgment

(1) [1937] 3 All E.R. 628. (2) 1936 S.C. 883.

of Mr. Justice Davies in *Grant* v. *The Acadia Coal Co.* (1). The judgment of Mr. Justice Davies is based upon the passages in the judgments of the Lords in *Smith* v. *Baker* (2), at pp. 339, 353 and 362 respectively, which are quoted and applied by the Lords in *Wilsons'* case (3). The judgment of Mr. Justice Davies was concurred in by Mr. Justice Girouard, but it cannot be said that it was adopted by the majority of the Court because Mr. Justice Mills, who concurred with Mr. Justice Davies in the result, put his judgment on different ground. In the same year, however, in *McKelvey* v. *Le Roi Mining Co.* (4), Mr. Justice Davies laid down the same doctrine as the basis of his judgment at p. 673, and in that case his reasons were adopted expressly by Mr. Justice Taschereau and Mr. Justice Sedgewick and impliedly by Mr. Justice Girouard. The principle received the sanction of this Court in that case and, apart altogether from the decisions I have been discussing, we should be bound by it in disposing of this appeal.

The question of the duty of the employer with regard to plant was dealt with in two later cases, *Ainslie Mining & Railway Co.* v. *McDougall* (5), and *Brooks* v. *Fakkema* (6), in which it was held that the employer's duty in respect of providing proper plant could not be performed by delegating the performance of it to an employee. The application of the principle was considered in *Western Canada Power Co.* v. *Bergklint* (7). The majority of the Court considered that the doctrine of *McKelvey* v. *Le Roi Mining Co.* (4) and *Ainslie Mining & Railway Co.* v. *McDougall* (5) and the other two cases mentioned, was not applicable to the circumstances disclosed in the evidence. There the Court had to consider the case of *Toronto Power Co. Ltd.* v. *Paskwan* (8). This case is discussed by Lord Wright in *Wilsons'* case (3) and he says at p. 643 that he thinks the decision was correct and that its effect is accurately stated in the headnote. The headnote is in these words:—

(1) (1902) 32 Can. S.C.R. 427, at 438, 439 and 440.
(2) [1891] A.C. 325.
(3) [1937] 3 All E.R. 628.
(4) (1902) 32 Can. S.C.R. 664.
(5) (1909) 42 Can. S.C.R. 420.
(6) (1911) 44 Can. S.C.R. 412.
(7) (1914) 50 Can. S.C.R. 39 (*Bergklint* v. *Western Power Co.*), and (1916) 54 Can. S.C.R. 285.
(8) [1915] A.C. 734.

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Duff C.J.

The duty towards an employee to provide proper plant, as distinguished from its subsequent care, falls upon the employer himself, and cannot be delegated to his servants. He is not bound to adopt all the latest improvements and appliances; it is a question of fact, in each particular case, whether there has been a want of reasonable care in failing to install the appliance the absence of which is alleged to constitute negligence.

Lord Wright's view as expressed in *Wilsons'* case (1) at p. 644 is that:—

> The obligation to provide and maintain proper plant and appliances is a continuing obligation.

It is unnecessary now to consider whether the majority of this Court was right in its view that the principle of the earlier cases did not apply to the facts in *Bergklint's* case (2). It is clear that the reasoning upon which the decisions of this Court were based in the cases mentioned that were decided in 1902, 1909 and 1911 received the sanction of the House of Lords in *Wilsons'* case (1).

The appeal should be allowed and the judgment of the learned trial judge restored, with costs throughout.

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

KERWIN J.—The appellant, Marshment, is a labourer who was injured while working for the respondent, Borgstrom, on the latter's farm in the County of Peel, in the Province of Ontario. In an action brought to recover damages for such injuries, the appellant succeeded at the trial and was awarded $4,000 by the trial judge, Roach J. The Court of Appeal for Ontario set aside this judgment and dismissed the action.

The following statement from the judgment of the trial judge clearly sets forth the facts:—

> The plaintiff, a labourer, was employed by the defendant to assist in sawing wood on the defendant's farm. The wood was being sawed by what is described as a portable sawing outfit. This outfit consisted of a frame on which a steel shaft was mounted. A circular saw was affixed to one end of this shaft and on the other end was a large cast iron fly wheel and a pulley. The shaft was made to revolve by power supplied from an old automobile which was placed at a convenient distance from this outfit. The rear end of the automobile was elevated and one of the rear wheels blocked. A canvas belt was placed around the other rear wheel and around the pulley on the shaft. When the automobile

(1) [1937] 3 All E.R. 628.

(2) (1914) 50 Can. S.C.R. 39 and (1916) 54 Can. S.C.R. 285.

engine was started and it was placed in gear, the free rear wheel revolved and the attached belt revolved the shaft. The volume of power transmitted from the engine was controlled by a throttle on the dash board of the automobile, and as this throttle was pulled out or pushed in the amount of gas fed to the engine was accordingly increased or diminished. The power thus generated and regulated could be made constant. The speed depended upon the resistance at the saw. When the saw was actually engaged cutting wood, that resistance diminished the speed, and when it became disengaged the speed would again accelerate. There was no governor to control the maximum speed.

During the sawing operations part of the pile from which the wood was being carried to the saw rolled, resulting in some entanglement, and while the plaintiff and some of the other men were engaged in straightening out the entanglement the saw was running free. During this interval the flywheel burst and a section of it struck the plaintiff's leg below the knee almost completely severing it. * * *

The whole outfit, that is the saw and the automobile, were supplied by one Laidlaw under an arrangement made with him by the defendant's agent, Campbell, whereby he (Laidlaw) was to supply everything, including his own labour and excluding other necessary labour and to be paid $1.25 per hour. The other labour was supplied by the defendant.

Two main questions were argued before us,—the first being as to the cause of the bursting of the fly-wheel. Watts, an expert witness called on behalf of the respondent, testified that the causes might be "excessive speed or a defect in the fly-wheel due to being severely handled, or possibly a combination of both." He was not asked as to whether there was any defect in the fly-wheel and his evidence as to whether there was excessive speed is unsatisfactory. Hastings, an expert called on behalf of the appellant, found no flaw either in the fragment of the fly-wheel which struck the appellant or in the other piece that remained; and he found no evidence of the wheel having received any heavy blow. His view was that it was never intended that the saw should be driven by power supplied by an automobile in the manner that here existed, as such method involved operating without the use of a governor to control the speed of the saw when running free. The trial judge found that the accident occurred while the saw was running free and that the excessive speed at which it was then operated caused the fly-wheel to burst. We do not know what view the Court of Appeal took of this question, as no reasons were given for their dismissal of the action. We think that the matter is not left in the realm of conjecture and that the finding of the trial judge was fully justified.

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The second main submission on behalf of the respondent was that he had employed Laidlaw as an independent contractor to furnish and operate the equipment and that, therefore, he (the respondent), although the appellant's master, was freed of all responsibility. Presumably this contention found favour with the Court of Appeal, as its order reserves to the appellant "the right to bring action against any other persons whom he conceives have done him an injustice."

It is now definitely settled by the decision of the House of Lords in *Wilsons and Clyde Coal Co.* v. *English* (1) that the duty of the respondent to the appellant was to supply and install proper equipment for sawing the wood and a proper system of work so far as care and skill could secure these results, and to select properly skilled persons to manage and superintend the equipment. This obligation is personal to the employer who cannot free himself from his duty by a mere delegation. Thus in *Wilsons'* case (1), Lord Thankerton, at page 70, states:

> If he [the employer] appoints a servant to attend to the discharge of such duty, such servant, in this respect, is merely the agent or hand of the master, and the maxim *qui facit per alium facit per se* renders the master liable for such servant's negligence as being, in the view of the law, the master's own negligence.

At page 75, Lord Macmillan states:—

> The owner remains vicariously responsible for the negligence of the person whom he has appointed to perform his obligation for him, and cannot escape liability by merely proving that he has appointed a competent agent.

At page 78, Lord Wright puts it thus:—

> The obligation is fulfilled by the exercise of due care and skill. But it is not fulfilled by entrusting its fulfilment to employees, even though selected with due care and skill.

At page 88, Lord Maugham says:—

> He [the employer] can, and often he must, perform this duty by the employment of an agent who acts on his behalf; but he then remains liable to the employees unless the agent has himself used due care and skill in carrying out the employer's duty.

Lord Atkin agreed with all of these opinions.

(1) [1938] A.C. 57.

It was pointed out by counsel for respondent that in *Wilsons'* case (1) the master's duty had been delegated to an employee. That is true,—although the manager was one of a class to which, by statute, the Wilsons Company was obliged to resort. It was also argued that in the present case Laidlaw was an independent contractor. We may assume, for the purposes of this appeal, that this is so. The employer can no more escape the consequences of non-performance of his personal obligation to his employee merely by employing an independent contractor than he could by placing the responsibility on the shoulders of another employee. That is implicit in the reasons of the peers who heard the appeal in *Wilsons'* case (1), each of whom emphasized the personal nature of the employer's obligation. On the evidence, we are satisfied that the trial judge came to the right conclusion that the use of the automobile in conjunction with the saw frame was a defective system. The furnishing of it by Laidlaw, therefore, even if he be an independent contractor, does not assist the respondent. Furthermore, while similar equipment may have been used generally, and in fact this very automobile and saw frame, the danger is such that the trial judge's finding that Laidlaw was not a competent person to take charge of and operate the equipment must also be upheld.

No question was raised before us as to the amount of damages nor (although it was argued at the trial) whether the appellant was *volens*. The appeal should be allowed and the judgment of the trial judge restored, with costs throughout.

Appeal allowed and judgment of the trial judge restored, with costs throughout.

Solicitors for the appellant: *Parkinson, Gardiner & Willis.*

Solicitors for the respondent: *Roebuck, Bagwell, McFarlane, Walkinshaw & Armstrong.*

(1) [1938] A.C. 57.

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*June 18, 19, 22.
*Oct. 6.

THE CORPORATION OF THE TOWNSHIP OF TISDALE, P. H. MURPHY AND B. W. LANG (DEFENDANTS) ..... APPELLANTS;

AND

ALLAN G. CAVANA AND WILLIAM GRIFFITH BINGHAM (EXECUTOR OF THE ESTATE OF HORACE A. BINGHAM, DECEASED) (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and taxation—Mines and minerals—Owner of mineral land transfering surface rights—Non-assessability of his mining rights thereafter—Invalidity of subsequent tax sale in so far as purporting to affect mining rights—The Assessment Act, R.S.O., 1927, c. 238, ss. 40 (4) (5) (10), 181; R.S.O., 1937, c 272, ss. 14 (1), 15 (1)—The Conveyancing and Law of Property Act, R.S.O., 1927, c. 137, ss. 15, 16, 17.

C., the owner of certain mineral land in Ontario, transferred to F. on December 30, 1930, by transfer registered on February 12, 1931, the surface rights thereof, and thus, according to certificate of ownership issued under the Ontario *Land Titles Act*, became the owner in fee simple with an absolute title, of only the mines, minerals and mining rights of said land. The defendant township in 1939 purported to sell the land for taxes, and C. brought action attacking such sale in so far as it purported to affect his interest in the land.

Held: (1) A settlement in an action brought in December, 1931, was, so far as C. was concerned, a settlement for all taxes for 1930 and 1931, and no lien for any taxes for those years against his interest in the land then remained; and in the subsequent years in question C. was not, nor were his mining rights, in fact assessed.

(2) After the severance of estates created by said transfer to F., C.'s mining rights—being ownership of the ores, mines and minerals, and such right of access for the purpose of winning them as is incidental to a grant of ores, mines and minerals—were not assessable. *The Assessment Act*, R.S.O., 1927, c. 238, s. 40 (4) (5) (10) (the word "minerals", in the enactment in s. 40 (4) that "the minerals in, on or under such land shall not be assessable", held synonymous with "mining rights"); *The Conveyancing and Law of Property Act*, R.S.O., 1927, c. 137, ss. 15, 16, 17; *Bucke* v. *Macrae Mining Co. Ltd.*, [1927] S.C.R. 403, particularly referred to.

As to ss. 14 (1) and 15 (1) of *The Assessment Act*, R.S.O., 1937, c. 272—The right of access was appurtenant to the minerals and, like the latter, was exempt from assessment.

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

There being no taxes on C.'s mining rights in arrears for any period for which they could be sold, s. 181 of *The Assessment Act*, R.S.O., 1927, c. 238, had no application.

Judgment of the Court of Appeal for Ontario, [1942] O.R. 31, affirming judgment of Roach J. (*ibid*) which (*inter alia*) declared that the tax sale in question, in so far as it included or purported to include C.'s estate or interest in the land, was illegal and void, affirmed.

APPEAL by the defendants from the judgment of the Court of Appeal for Ontario (1) dismissing their appeal from the judgment of Roach J. (2) which (*inter alia*) declared that a certain tax sale of land in question, in so far as it included or purported to include the estates or interests of the plaintiffs in the land, was illegal and void.

The plaintiff Cavana had been, prior to December 30, 1930, the owner of the land in question, which was mineral land, and on that date, by transfer registered on February 12, 1931, he transferred the surface rights thereof to one Ferguson. The tax sale in question by the defendant Township of Tisdale took place in 1939. The plaintiff Bingham was the owner of a certain lease dated June 1, 1934, from Cavana of the mines, minerals and mining rights of the land. The defendant Murphy was the treasurer of the Township. The defendant Lang was the purchaser at the tax sale in question.

The material facts of the case are sufficiently set out in the reasons for judgment of this Court now reported and in the reasons for judgments below (1) (2). The appeal to this Court was dismissed with costs.

H. E. Manning K.C. and *T. R. Langdon* for the appellants.

R. L. Kellock K.C. for the respondents.

The judgment of the Court was delivered by

KERWIN J.—This action is concerned with a tax sale held by the Township of Tisdale in the Province of Ontario in the year 1939. In 1909, the plaintiff, Allan G. Cavana, purchased the fee simple in the north part of broken lot 1, concession 5, in the Township of Tisdale, in the Province of Ontario, registered in the Land Titles Office as parcel

(1) [1942] O.R. 31; [1942] 1 D.L.R. 465.
(2) [1942] O.R. 31, at 31-38.

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1125 in the register for Algoma, North Section. It is admitted that these lands were mining lands. On December 30th, 1930, Cavana transferred to Charles D. Ferguson the surface rights in the lands, which in the meantime had become parcel 818 in the register for Sudbury, North Division. According to the certificate of ownership, issued under the *Land Titles Act*, Cavana thus became the owner in fee simple, with an absolute title, only of the mines, minerals and mining rights of the lands described. Ferguson became the owner of the surface rights of the same lands, entered as parcel 3191 in the register for Whitney and Tisdale.

In the assessment rolls of the Township of Tisdale for each of the years 1930 and 1931, Cavana is assessed as the owner of these lands without any reference to surface rights or mining rights. By a letter dated April 17th, 1931, Cavana notified the Clerk of the Township that he was not the owner of the lands assessed in his name. Presumably Cavana had paid the taxes assessed against the lands from 1909 to 1929 inclusive. The taxes for 1930 and 1931 were not paid and in December, 1931, an action to recover them was commenced by the Township against Cavana and Ferguson. Apparently Ferguson did not defend the action. Cavana did defend but ultimately a settlement was arrived at between him and the Township. Without entering into the details, I agree with the trial judge and Masten J. and Henderson J., that so far as Cavana was concerned, this was a settlement of the claim for the total amount of taxes for both years, and, this claim being settled, no lien for the taxes for those years could continue to exist. The claim of the Township to uphold the tax sale in question on the basis of there being any taxes in arrears for either of those years therefore fails.

Hence the assessment roll for 1932 is the earliest that need be examined. Under column 2 of the roll for that year, Charles D. Ferguson was assessed as owner. In the second part of that column (divided from the first by a vertical line), under the address of Ferguson,—" Orillia, Ont.", appears " also A. G. Cavana, Orillia ". Opposite this last entry but under column 6, which is headed " Occupation ", appear the words " mining rights ". While the rolls for the years 1933, 1934 and 1935 are not exactly

the same, it may be stated that for all practical purposes similar entries appear. In no case does Cavana's name appear in the appropriate part of column 2 (what may be termed the first half), to designate him as the owner assessed. Thereafter Cavana's name does not appear in any way on the assessment rolls, so that the same remark applies to the years subsequent to 1935. The statement of defence alleges that Ferguson was the only person assessed during the years 1932 to 1939 inclusive but, even without such allegation, I would have no hesitation in coming to the conclusion that he was in fact the only person assessed.

It is contended that, notwithstanding that a severance occurred in 1930 of the mining rights and the surface rights, the former were assessable. It is true that, by section 1 of *The Assessment Act*, R.S.O., 1927, chapter 238:—

(*h*) "Land," "Real Property" and "Real Estate" shall include:—

* * *

3. All mines, minerals, gas, oil, salt, quarries and fossils in and under land;

and that by section 4

All real property in Ontario * * * shall be liable to taxation, subject to the following exemptions:—

none of which exemptions apply. The question, however, is to be determined by a consideration of the provisions of subsections 4 and 5 of section 40 and also of subsection 10, which was added by section 2 of chapter 39 of the 1928 Statutes. These subsections read:—

(4) The buildings, plant and machinery in, on or under mineral land, and used mainly for obtaining minerals from the ground, or storing the same, and concentrators and sampling plant, and, subject to subsection 8, the minerals in, on or under such land, shall not be assessable.

(5) In no case shall mineral land be assessed at less than the value of other land in the neighbourhood used exclusively for agricultural purposes.

(10) Where any estate in mines, minerals or mining rights has heretofore or may hereafter become severed from the estate in the surface rights of the same lands, whether by means of the original patent or lease from the Crown, or by any act of the patentee or lessee, his heirs, executors, administrators, successors or assigns, such estates after being so severed shall thereafter be and remain for all purposes of taxation and assessment separate estates notwithstanding the circumstance that the titles to such estates may thereafter be or become vested in one owner.

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The argument that because section 40 is one of several that appear in *The Assessment Act* under the heading "Valuation of Lands", subsection 4 thereof deals only with the valuation and not an exemption, was advanced in this Court in *Township of Bucke* v. *Macrae Mining Co. Ltd* (1), and was rejected (p. 409). Subsection 4 declares in explicit terms that (subject to subsection 8, which has no bearing in this case) the minerals in, on or under mineral land shall not be assessable. If there had been no severance, the mineral land purchased by Cavana in 1909 would have fallen within the terms of subsection 5, but, after severance, only the surface rights were assessable. Subsection 4 refers only to "minerals" but the judgment in the *Macrae* case (1) treats that expression as synonymous with "mining rights" It is suggested that that part of the judgment dealing with this point is *obiter*. Assuming that to be so, I have no hesitation in expressing my concurrence in that opinion.

That view is confirmed by sections 15, 16 and 17 of *The Conveyancing and Law of Property Act,* R.S.O., 1927, chapter 137. By force of these provisions, the expression "surface rights" in the transfer from Cavana to Ferguson is to be construed as covering the lands described, with the exception of the ores, mines and minerals on or under the land and such right of access for the purpose of winning the ores, mines and minerals as is incidental to a grant of ores, mines and minerals. Cavana, therefore, was the owner of the ores, mines and minerals and the right of access specified, and all these mineral rights in the lands were not assessable. Subsection 10, which was enacted after the decision in *Bucke* v. *Macrae Mining Co. Ltd.* (1), refers to a case where, after severance, the two so-called estates became vested in one owner. The fact that the legislature enacted that, notwithstanding such vesting, the two estates should remain separate for taxation and assessment purposes, indicates that the conclusion expressed above is the correct one.

The tax sale took place in 1939. By that time the Revised Statutes of Ontario, 1937, were in force wherein *The Assessment Act* appears as chapter 272. Subsection 1

(1) [1927] S.C.R. 403.

of section 14 and subsection 1 of section 15 of that Act are relied on by the appellants. These subsections are as follows:—

14. (1) Where an easement is appurtenant to any land it shall be assessed in connection with and as part of such land at the added value it gives to such land as the dominant tenement, and the assessment of the land which as the servient tenement, is subject to the easement shall be reduced accordingly.

15. (1) Where land sold for arrears of taxes was a dominant tenement at the time of sale and was so sold after the 3rd day of April, 1930, the easements appurtenant thereto shall be deemed to have passed to the purchaser.

The right of access is appurtenant to the minerals and, like the latter, was exempt from assessment.

There is nothing inconsistent with the above in the reasons for judgment in *Township of Tisdale* v. *Hollinger Consolidated Gold Mines Limited* (1). What Mr. Justice Cannon was there dealing with was an entirely different matter; the effect of a severance in connection with assessability was not in issue.

Reference was made to what certain expressions used in clauses (*k*), (*m*), (*n*) and (*o*) of section 1 of *The Mining Act,* R.S.O., 1927, chapter 45, should be taken to mean or include, but no assistance in the determination of this appeal may be gained from a consideration of those provisions. Section 181 of the 1927 *Assessment Act* (see now section 185 of R.S.O., 1937, chapter 272) was also relied on by the appellants. That section is in these terms:—

181. If any part of the taxes for which any land has been sold in pursuance of any Act heretofore in force in Ontario or of this Act, had at the time of the sale been in arrear for three years as mentioned in section 130, and the land is not redeemed in one year after the sale, such sale, and the official deed to the purchaser (provided the sale was openly and fairly conducted) shall notwithstanding any neglect, omission or error of the municipality or of any agent or officer thereof in respect of imposing or levying the said taxes or in any proceedings subsequent thereto be final and binding upon the former owner of the land and upon all persons claiming by, through or under him, it being intended by this Act that the owner of land shall be required to pay the taxes thereon within three years after the same are in arrear or redeem the land within one year after the sale thereof; and in default of the taxes being paid or the land being redeemed as aforesaid, the right to bring an action to set aside the said deed or to recover the said land shall be barred.

The Township purported to sell Cavana's mining rights. A settlement was made of the taxes for 1930 and 1931, which taxes were based on the assessment rolls for those

(1) [1933] S.C.R. 321.

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years. Cavana's mining rights were not assessable in the remaining years and were not in fact assessed. Therefore, there were no taxes on those rights in arrears for any period for which they could be sold, and the section has no application.

It was argued that Cavana was in law and in equity the owner at all material times of all the interests in the fee simple, of both the mining and the surface rights, in the lands in question. This is based upon the fact that in the transfer to Cavana and in the certificate of ownership issued to him after the severance, he is described as a trustee. The argument is that there was a resulting trust when he, as trustee, conveyed the surface rights to Ferguson. Whatever might be the position as between Cavana and Ferguson, it is impossible for the appellants to raise any such issue in these proceedings.

Certain defects in the assessments and the tax sale were alleged by the respondents, which need not be considered. The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant Township of Tisdale and the appellant Murphy: *Langdon & Langdon.*

Solicitors for the appellant Lang: *Lang & Michener.*

Solicitors for the respondents: *Mason, Foulds, Davidson & Kellock.*

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* June 17, 18
* Oct. 6.

BERTHA McFADYEN AND DOUGAL McFADYEN (PLAINTIFFS) ..... APPELLANTS;

AND

C. A. HARVIE (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Physicians and surgeons—Negligence—Patient injured by a burn during operation—Cause of burn not established—Procedure followed in operation in accordance with recognized practice—Extent of responsibility of operating surgeon—Evidence—Onus of proof—Applicability of maxim res ipsa loquitur.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Ontario (1) dismissing their appeal from the judgment of McFarland J. dismissing their action.

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

(1) [1941] O.R. 90; [1941] 2 D.L.R. 663.

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MCFADYEN v. HARVIE.

The action was for damages for alleged negligence in connection with an operation performed on the appellant Bertha McFadyen by the respondent, a physician and surgeon.

J. R. Cartwright K.C. for the appellants.

D. L. McCarthy K.C. and *W. R. West* for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—We are of opinion that this appeal should be dismissed. We agree with the reasons delivered by the Chief Justice of Ontario (1) and find it unnecessary to add anything to them.

Appeal dismissed with costs.

Solicitor for the appellants: *Hugh W. Grant.*

Solicitors for the respondent: *McCarthy & McCarthy.*

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*May 7, 8
*Oct. 6.

VANCOUVER MOTORS U-DRIVE LIMITED (DEFENDANT) ..... APPELLANT;

AND

CALVIN WALKER (DEFENDANT)

AND

EDWIN GORDON TERRY (PLAINTIFF). RESPONDENT.

VANCOUVER MOTORS U-DRIVE LIMITED (DEFENDANT) ..... APPELLANT;

AND

CALVIN WALKER (DEFENDANT)

AND

ROBERT L. MORROW (PLAINTIFF).... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Automobile—Negligence of driver of car rented to driver—Statutory liability of owner—Driver acquires car through false representation—"Consent express or implied" to driver's possession—Motor-vehicle Act, R.S.B.C., 1936, c. 195, s. 74A.

The respondents were injured owing to the negligence of the defendant W. when driving an automobile which he had rented from the

(1) [1941] O.R. 90; [1941] 2 D.L.R. 663.

*PRESENT:—Rinfret, Kerwin, Hudson and Taschereau JJ. and Gillanders J. *ad hoc*.

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VANCOUVER MOTORS U-DRIVE LTD. v. TERRY.
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appellant company. W. rented a car, but he brought it back owing to engine trouble a few hours later and another car was given to him in substitution. He had no driver's licence, and was given the first car by falsely representing that he was one H., whose licence he had in his possession and in whose name he signed the rental contract. On bringing the car back, the appellant company's employee then on duty (not the same employee who carried out the original transaction) looked up the hire contract and asked W. if his name was H., and W. replied "Yes". The employee, being satisfied that W. was the individual who had rented the car brought in, delivered him the second car. Subsection 1 of section 74A of the *Motor Vehicle Act* deals with the civil responsibility of an owner for "loss or damage sustained * * * by reason of a motor-vehicle on any highway * * *" where the "person driving or operating the motor-vehicle * * * acquired possession of it with the consent, express or implied, of the owner * * *".

Held, affirming the judgment appealed from (57 B.C.R. 251), Taschereau J. dissenting, that W. acquired possession of the car with the express consent of the employees of the appellant company, within the meaning of s.s. 1 of section 74A of the *Motor Vehicle Act,* even though the action of these employees was induced by W.'s false statements: an express consent is given, within the meaning of the enactment, when possession was acquired as the result of the free exercise of the owner's will.

Per Taschereau J. dissenting.—There was no "consent" within the meaning of section 74A, s.s. 1.—In certain cases, a consent obtained through fraud is only voidable; but when one party, as in this case, is deceived as to the identity of the other party, there is no contract at all, there being no consent, no concurrence of the wills. There was a unilateral consent that H. should take possession of the car, but there was no consent that W. should. In order to obtain "possession" within the meaning of that section, which possession is not a mere physical possession but also the right to control, enjoy and manage it legally, it must be the result of a consent "unclouded by fraud, duress or sometimes even mistake". The consent given in this case did not confer such a possession to W.; it is as valueless as it would have been if extorted by threats or compulsion.

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 the respondent's actions for damages resulting from the negligence of the defendant Walker when driving an automobile rented to him from the appellant.

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

(1) (1942) 57 B.C.R. 251; [1942] 1 W.W.R. 503; [1942] 1 D.L.R. 407.
(2) (1941) 56 B.C.R. 460; [1941] 2 W.W.R. 402; [1941] 3 D.L.R. 752.

J. R. Cartwright K.C. and *L. St. M. DuMoulin* for the appellant.

W. F. Schroeder K.C. for the respondents.

The judgment of Rinfret, Kerwin and Hudson JJ. and of Gillanders J. *ad hoc* was delivered by

KERWIN J.—The question on this appeal is whether Walker had acquired possession of the appellant's motor vehicle with the express consent of the appellant. The facts in connection with the transaction between Walker and the appellant are stated by the trial judge and no quarrel is found with his statement. The proper inferences and conclusions from the facts, however, are the subject of dispute. My view is first, that all that transpired between Walker and the appellant's employees should be treated as one transaction, i.e., as if Walker had secured possession of but one car by falsely representing that he was Hindle and the possessor of a subsisting driver's licence. Second, these employees were not concerned with the identity of Walker but merely with the question whether he had such a licence. This is shown, I think, by the answer of Jardine, one of the employees, to a question asked him by counsel for the appellant:

> Q. If you had known that he was other than the James G. Hindle he said he was, and if you had known he was not the holder of a subsisting licence, would you have rented him a car?
>
> A. No.

I think it proper to state this latter conclusion although in my view it has no particular bearing upon the determination of the legal point as to whether there was express consent by the appellant. Our duty is to construe a subsection of a statute. This statute deals with motor vehicle traffic on highways and contains provisions dealing with licences, owners, drivers, and the responsibility for damage sustained by reason of motor vehicles being on a highway. Section 43, for instance, imposes a duty upon all who, as the appellant, carry on the business of letting motor vehicles for hire without drivers, of ascertaining by inspection of a licence or permit produced by the person to whom the motor vehicle is let that he is the holder of a subsisting driver's licence under the Act for the operation of that motor vehicle, or the holder of a subsisting driver's or operator's licence or permit referred to in another provision.

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VANCOUVER MOTORS U-DRIVE LTD. v. TERRY. VANCOUVER MOTORS U-DRIVE LTD. v. MORROW.

Kerwin J.

Section 74 makes the owner of a motor vehicle responsible for any violation of the Act by any person entrusted by the owner with the possession of that motor vehicle. It is not necessary to express an opinion but, for the purpose of determining whether a quasi criminal responsibility is imposed under that section, the word "entrusted" may conceivably be given a meaning different to that to be ascribed to the word "consent" in subsection 1 of section 74A. That subsection deals with the civil responsibility of an owner for loss or damage sustained by reason of the motor vehicle on a highway where the person driving the motor vehicle acquired possession of it with the consent, express or implied, of the owner.

In the present case, the appellant physically transferred the possession of the motor vehicle to Walker. Does the fact of Walker's false statement that he was Hindle and the holder of a subsisting driver's licence, accompanied by the forgery of Hindle's name, vitiate the consent that was in fact given? There may be no difficulty in two of the hypothetical cases put in argument, (1) where a motor vehicle is stolen from a garage, and (2) where possession is obtained from the owner by duress. In the first there would be no consent in fact and in the second the owner would not have been at liberty to exercise his free will. On the other hand, the class of owners under subsection 1 of section 74A is not restricted to those who carry on such a business as the appellant and circumstances may be imagined where an owner loaned his automobile to a friend on the latter's statement that he possessed a subsisting driver's licence, which statement might be false either because he never had possessed such a licence or because his current licence had been revoked; or again, where A secured possession of an automobile by falsely representing himself in a telephone conversation with the owner of the vehicle to be a neighbour's chauffeur. It is impossible to conceive all the various circumstances that might give rise to the question to be determined here but in my view an express consent is given, within the meaning of the enactment, when possession was acquired as the result of the free exercise of the owner's will.

As to the argument that the decision in *Lake* v. *Simmons* (1), or at least the speech of Viscount Haldane, is relevant,

(1) [1927] A.C. 487.

it should be noticed that that decision dealt with the meaning to be ascribed to the word "entrusted", in a policy of insurance. It was held that delivery of certain jewellery had been obtained by a trick and that there was no sale or bailment for want of real consent. Such a decision can, I think, have no bearing upon the construction of a statute. Viscount Sumner declined to consider what effect apparent consent obtained by a trick might have on the "consent" mentioned in a section of the *Imperial Factors Act,* 1889 (*see* R.S.B.C. 1936, c. 250, sec. 2, ss. 1). That Act, he states, "was framed for the benefit and protection of third persons, into whose hands commercial documents of title have passed for value and in good faith on their part. The action which prejudices them is action which only becomes possible because an unauthorized person has got the documents under circumstances that lead others to act in the belief that the true owner has given his consent. An argument may well arise in such circumstances that, as against the third party who has changed his position, the original owner cannot deny a consent which is not only apparent but is invested with this appearance by what he has done. What they have to be protected against is not confined to the results of his intelligent and consensual action but against the results of any action on his part at all."

These remarks, of course, are obiter and I quote them merely for the purpose of more fully explaining the reason that I think the decision in the case is of no assistance in this appeal. As Viscount Sumner pointed out, there has been a conflict of authoritative opinion in the decisions under the Factors Act but, in any event, I think it would only be confusing to endeavour to apply decisions under such a statute to the problem with which we are concerned. The victims of the negligence of the driver of a motor vehicle do not change their position because of the incidence of ownership of the vehicle.

The word "consent" may have different meanings in different statutes. In the present case it has, in my opinion, the meaning already indicated and, on that construction, express consent was given by the employees of the appellant to Walker's possession of the motor vehicle even though the action of the employees was induced by Walker's false statements.

The appeal should be dismissed with costs.

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Taschereau J.

TASCHEREAU J. (dissenting).—The appellant company operates the business of renting automobiles driven by those to whom they are rented.

The hirer of one of these cars, Calvin Walker, and the appellant have been sued together before the Supreme Court of British Columbia by the respondents Terry and Mr. and Mrs. Morrow for injury and damages sustained when struck on the sidewalk on the west side of Granville street, in the city of Vancouver, by an automobile belonging to the appellant but driven by Walker. The trial judge maintained the actions against both defendants with costs and awarded to Terry $1,242.50, and to Morrow and his wife respectively $2,783.33 and $4,000. The Court of Appeal confirmed this judgment. We are concerned only with the appeal of Vancouver Motors U-Drive Limited.

The facts which have given rise to this litigation are very simple and the narrative of events is briefly this:

On the 5th of February, 1941, at about three o'clock in the afternoon, Calvin Walker went to the office of the company and asked to rent a car. He was requested by an employee of the company named Jardine to show his driver's licence, and he produced a licence in the name of J. G. Hindle, the possession of which he had obtained probably by theft. Jardine being under the impression that the applicant was really J. G. Hindle, prepared the usual rental contract, which was signed by Walker who assumed the name of Hindle. Jardine compared the signature on the licence and on the contract and found that they looked alike; he further asked Walker if he had previously rented a car from the company, and having received an affirmative reply, he checked the records of the company and found that several months before a car had been rented to J. G. Hindle. Walker then made a deposit of $10 and was given a car bearing licence No. 91-006.

At about one o'clock a.m. during the night, Walker drove the car back to the garage and complained that the car was not in good running order and was giving him mechanical trouble. In exchange he was given a new car, a Ford Mercury, and the contract previously signed was slightly altered by putting in the licence number of the

Mercury car instead of the number of the car which had been returned. It was while driving this car that Walker injured the plaintiffs.

The liability of Walker is not contested, and the only question which is raised is as to the liability of the company in view of section 74 (*a*) of the *Motor Vehicles Act* of British Columbia which reads as follows:

> 74 (*a*). Every person driving or operating a 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.

The appellant submits that on the undisputed facts of the case Walker did not acquire the motor vehicle with the consent of the company within the meaning of section 74 (*a*) of the *Motor Vehicle Act*. It further alleges that Walker obtained possession of the motor vehicle by false and fraudulent misrepresentations of fact, namely, by representing that he was Hindle, that he was the individual named on the licence, that he had previously rented a car from the company, and by committing forgery when he signed Hindle's name to the contract.

The respondent's submission is that the consent required under section 74 (*a*) is consent in fact and not necessarily consent in law. They further argue that in any event, if the contract has to be considered, it is a voidable contract but not void *ab initio*, and that the personal identity of the hirer was not a fundamental element in the transaction.

In order to reach a proper judicial conclusion, it is of foremost importance to deal with two features of the case, which to my mind are the determining factors of the issue. The first one is that it cannot be seriously contended, and the respondents do not raise that point, that Walker in order to obtain possession of the car resorted to misrepresentations, personation, forgery and theft. He told the employee of the company, that he was Hindle; he signed Hindle's name on the contract, and his signature had such similarity that it induced the employee in error; he produced a licence stolen from Hindle and represented that he was the man who had previously rented a car. The fact that both Hindle and Walker were in the Air Force added to the confusion. There was a fraud of a

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very serious nature, and no negligence can be imputed to the appellant or its employee, for not having disbelieved these untrue but plausible representations.

The second feature is that it is these false representations that determined the appellant's employee to consent to the hiring of the car. An important factor why the "consent" was given is that Hindle was the owner of a driver's licence issued by the Government of British Columbia. It is an imperative section of the law that says:

> No person carrying on the business of letting motor vehicles for hire without drivers shall let for hire any motor vehicle without first having ascertained that the person to whom it is let is the holder of a driver's licence under this Act, or operator's licence or permit referred to in subsection (2) of section 20, and having him sign his name to an entry in a record-book to be kept by the person so carrying on business, showing the name and address of the person to whom the motor vehicle is let and the number of his licence or permit. Every person who is required to keep a record-book under this section shall produce the record-book for inspection at any time upon the demand of any police officer or constable.

It is, therefore, unlawful to hire a car to a driver who has no licence, and it cannot be presumed that the appellant would have done so if it had been aware of the true facts, and had not been tricked by Walker.

It is a protection for the company to know that the applicant is a licensed driver. His fitness and ability have already been tested, because under the *Motor Vehicle Act* of British Columbia (section 17, par. 5), no licence may be issued by the Provincial Government unless such fitness and ability have been demonstrated. In leasing a car to a licensed driver, the company deals with a man whose qualifications are to be presumed, and whose driving will not be a menace to the public.

I have no doubt that if Walker had said that he was personating Hindle and that he had no licence he would not have obtained possession of the automobile. Jardine says in his evidence:

> Q. If you had known that he was other than James Hindle he said he was, and if you had known he was not the holder of a subsisting licence, would you have rented him a car?
>
> A. No.

The appellant's manager Glinn Rhys corroborates him as follows:

Q. If a man has not got a subsisting driver's licence would you rent him an automobile?

A. Decidedly not. This is against the law.

The learned trial judge came to a similar finding and he says, dealing with the possession of the car:

True, Jardine would not have done so but for his mistaken belief caused by Walker's fraudulent misrepresentation that Walker had a driver's licence.

It is my opinion that the personal identity of the applicant was the fundamental element in the transaction, and that the consent was given to the possession of the car, because Walker represented himself as being Hindle.

Now what are the legal consequences that flow from these facts? Does an error respecting the person with whom another contracts, annul the agreement? If the person with whom the contract is to be entered into is an ingredient of the contract, I have no doubt that the contract is void, and void *ab initio,* because there has been no contract at all, there being no consent, no concurrence of the wills.

The law has been clearly laid down by Anson "On contracts" (18th Edition 1937). He writes at page 151:

Mistakes of this sort can only arise when A contracts with X, believing him to be M: that is, where the offeror has in contemplation a definite person with whom he intends to contract. It cannot arise in the case of general offers which any one may accept, such as offers by advertisement or sales for ready money. In such cases the personality of the acceptor is plainly a matter of indifference to the offeror.

Halsbury (Hailsham Ed.), Vol. 7, page 96:

Where an offer made by one person is accepted in the belief that it was made by another, or, conversely, an offer intended to be made to one person is accepted by another, there is no contract if the identity of the person with whom the agreement was intended to be made was an inducement to the other to enter into the agreement—but if the agreement is of such nature that the identity of the person is immaterial and it might, without prejudice to the other party, equally have been made with anybody the want of mutuality does not, in the absence of fraud, affect the validity of the transaction.

And in 1927 in the House of Lords (1), Viscount Haldane, citing Pothier (Traité des Obligations, Sec. 19), speaks as follows:

Jurists have laid down, as I think rightly, the test to be applied as to whether there is such a mistake as to the party as is fatal to there being any contract at all, or as to whether there is an intention to contract with a *de facto* physical individual, which constitutes a contract

(1) *Lake* v. *Simmons* [1927] A.C. 487, at 501.

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that may be induced by misrepresentation so as to be voidable but not void. It depends on a distinction to be looked for in what has really happened. Pothier (Traité des Obligations, section 19) lays down the principle thus, in a passage adopted by Fry, J. in *Smith* v. *Wheatcroft* (1).

"Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent, and consequently annuls the contract. * * * On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the contract with any person whatever as with him with whom I thought I was contracting, the contract ought to stand."

In this case it was surely not a "matter of indifference" as to with whom the appellant was dealing; the "identity of the person was not immaterial", on the contrary the consideration of the person entered as an "element into the contract". What determined the apparent consent but not the real assent, was the belief that Walker was really Hindle, and that possession of the automobile was given to the latter.

In the case of *Lake* v. *Simmons* (2), Viscount Haldane also says at page 500:

> The appellant thought that he was dealing with a different person, and it was on that footing alone that he parted with the goods. He never intended to contract with the woman in question. It was by a deliberate fraud and trick that she got possession.

And at page 505 of the same case, Viscount Haldane proceeds with the following words:

> As it is, there was no contract and nothing to avoid.

In certain cases, a consent obtained through fraud is only voidable, but when one party, as in the present case, is deceived as to the identity of the other party, there is no contract at all. The appellant, although it thought it was dealing with Hindle, did not enter into any agreement with him, and never intended to contract with Walker. There was a unilateral consent that Hindle should take possession of the car but there was no consent that Walker should.

The case of *Cundy* v. *Lindsay* (3) is very similar to the one at bar. Lindsay was a manufacturer in Ireland; Alfred Blenkarn, who occupied a room in a house looking into

(1) (1878) 9 ch. D. 223, at 230. (2) [1927] A.C. 487.
(3) (1878) 3 A.C. 459.

Wood Street, Cheapside, wrote to Lindsay, proposing a considerable purchase of Lindsay's goods, and in his letter used this address—"37, Wood Street, Cheapside," and signed the letters (without any initial for a christian name) with a name so written that it appeared to be Blenkiron & Co." There was a respectable firm of that name, "W. Blenkiron & Co.," carrying on business at 123, Wood Street. Lindsay sent letters, and afterwards supplied goods, the letters, the goods, and the invoices accompanying the goods, being all addressed to "Messrs. Blenkiron & Co., 37, Wood Street."

It was held that no contract was made with Blenkarn, that even a temporary property in the goods never passed to him, so that he never had a possessory title which he could transfer to the defendants, who were consequently liable to the plaintiffs for the value of the goods.

The Lord Chancellor said at page 465:

> Now, my Lords, stating the matter shortly in that way, I ask the question, how is it possible to imagine that in that state of things any contract could have arisen between the Respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time, rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or any contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required.

And at page 466 he adds:

> The result, therefore, my lords, is this, that your Lordships have not here to deal with one of those cases in which there is *de facto* a contract made which may afterwards be impeached and set aside, on the ground of fraud; but you have to deal with a case which ranges itself under a completely different chapter of law, the case namely in which the contract never comes into existence.

In the same case, at page 469 Lord Hatherley reaches exactly the same conclusion:

> The whole case, as represented here, is this: from beginning to end the Respondents believed they were dealing with Blenkiron & Co., they made out their invoices to Blenkiron & Co., they supposed they sold to Blenkiron & Co., they never sold in any way to Alfred Blenkarn; and therefore Alfred Blenkarn cannot, by so obtaining the goods, have by possibility made a good title to a purchaser, as against the owners of the goods, who had never in any shape or way parted with the property nor with anything more than the possession of it.

True, a consent was given to the applicant; Walker took physical possession of the automobile, but within the

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meaning of section 74 (*a*), the word "possession" cannot be construed so restrictively. Possession implies a fact and a right—the fact of the real detention of the thing, and the right to control, enjoy and manage it legally. In order to obtain such a possession, it must be the result of a consent "unclouded by fraud, duress or sometimes even mistake". (Words & Phrases Judicially Defined, vol. 2, page 1438). The consent given here did not confer such a possession to Walker; it is as valueless as it would have been if extorted by threats or compulsion.

With deference, I would allow the appeals, and dismiss the actions against the appellant with costs throughout.

Appeal dismissed with costs.

Solicitor for the appellant: *L. St. M. DuMoulin.*

Solicitor for the respondent Terry: *W. W. Walsh.*

Solicitor for the respondent Morrow: *G. Roy Long.*

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*May 12.
*Oct. 6.

THE ATTORNEY-GENERAL FOR ALBERTA (DEFENDANT) ..... APPELLANT;

AND

MAJESTIC MINES LIMITED (PLAINTIFF) ..... RESPONDENT.

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

Mines and minerals—Grant of lands by Dominion—Petroleum rights and royalties—Transfer of Natural Resources to provinces—Reservation of royalty—Rights of provinces.

In 1908, a patent from the Crown (Dom.) was issued to the predecessors in title of the respondent, granting them title to all minerals other than precious metals. At that time, there was a royalty on coal prescribed by regulation, but there was none in respect of petroleum. The contentions of the appellant are that, having in mind the provisions of the habendum clause and the regulations in force at the time of the issue of the patent, the Crown (Dom.) could have imposed a royalty on petroleum recovered from the land and that the Crown (Provincial) has succeeded to such rights by virtue of the agreement of transfer of the Natural Resources of 1930; and the appellant also contended that at the time of the grant royalties

* PRESENT:—Rinfret, Kerwin, Hudson and Taschereau JJ. and Gillanders J. *ad hoc.*

were authorized in petroleum discovered by prospectors and that the language of the patent was wide enough to make such regulations applicable.

Held that the provisions of the patent were not such as to reserve to the Crown (Dom.) a right to impose new royalties in the future. If the Crown, like any other vendor, desires to reserve such rights, such reservations must be expressly stated.—The regulations do not prescribe any royalty in respect of the minerals granted by the patent in question and such being the case there was no royalty reserved by the Dominion which could pass to the province.—The rights acquired under a grant in freehold made for a definite purchase price, as in this case, are altogether different from rights which are acquired under a prospector's licence.

Judgment of the Appellate Division ([1942] 1 W.W.R. 321) affirmed.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of the trial judge, O'Connor J. (2), which had declared that the province of Alberta was not entitled to petroleum rights in certain lands and not entitled to exact a royalty on petroleum produced from certain other lands.

W. S. Gray K.C. for the appellant.

S. W. Field K.C. for the respondent.

The judgment of the Court was delivered by

HUDSON J.—The question involved in this case is whether or not the province of Alberta is entitled to levy a royalty in respect of petroleum drawn from a parcel of land in that province.

On the 11th of March, 1908, a patent from the Crown in the right of the Dominion was issued to the predecessors in title of the plaintiff, granting them title to the minerals other than precious metals. The relevant provisions of the patent were as follows:

Now Know Ye that We do by these Presents grant, convey and assure unto the said The Canada West Coal Company, Limited, its successors and assigns all minerals other than gold and silver which may be found to exist within, upon or under the following lands, that is to say, all that Parcel or Tract of Land, situate, lying and being in the Ninth Township, in the Seventeenth Range, West of the Fourth Meridian, in the Province of Alberta, in Our Dominion of Canada and being composed of the Northeast quarter of Section Twenty-six of the said Township, containing by admeasurement One hundred and sixty (160) acres,

(1) [1942] 1 W.W.R. 321; [1942] 1 D.L.R. 474.
(2) [1941] 2 W.W.R. 353.

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more or less, together with full power to work the same and for that purpose to enter upon and use and occupy the said lands or so much thereof and to such extent as may be necessary therefor, or for the effectual working of the mines, pits, seams and veins containing such minerals, subject to the payment of compensation to the owner or occupant of such lands as provided by any regulations of Our Governor in Council in that behalf.

To have and to hold the said minerals and all such rights and powers as aforesaid unto the said The Canada West Coal Company, Limited, its successors and assigns forever: Yielding and paying unto Us and Our Successors, the royalty, if any prescribed by the regulations of Our Governor in Council, it being hereby declared that this grant is subject in all respects to the provisions of any such regulations with respect to royalty upon the said minerals or any of them, and that our Minister of the Interior may by writing under his hand declare this grant to be null and void for default in the payment of such royalty or for any cause of forfeiture defined in such regulations, and that upon such declaration these presents and everything therein contained shall immediately become and be absolutely null and void.

The application for the patent was for coal rights only but, as mentioned, the patent when finally issued granted all minerals, except gold and silver. At that time, there was a royalty on coal prescribed by regulation, but there was none in respect of petroleum.

The appellant contends that having in mind the provisions of the habendum clause and the regulations in force at the time of the issue of the patent, the Governor in Council could have imposed a royalty on petroleum recovered from the land, and that the Lieutenant-Governor in Council has succeeded to such rights by virtue of the agreement of transfer of the Natural Resources, which became effective on October 1st, 1930. *See* statutes of Canada 1930, chapter 3, and statutes of Alberta 1930, chapter 21.

It is urged on behalf of the appellant that the words "if any prescribed" in the habendum clause must refer to the future because the words "if any" would not be necessary if the royalties referred to were only royalties then prescribed, namely, coal royalties, and that the words to have any proper meaning must necessarily apply to the future. This argument to me is unconvincing. As pointed out by Mr. Justice Ewing in the court below,

> the grant includes all minerals other than gold and silver. One of these other minerals, viz., coal, was at that time subject to royalty, but the others were not so subject. In this situation the words "if any" may quite consistently be used.

It was further contended that at the time of the grant royalties were authorized on petroleum discovered by prospectors and that the language of the patent is wide enough to make such regulations applicable.

The regulation relied upon by the appellant is dated May 31st, 1901, and provides:

> Should oil in paying quantities be discovered by a prospector on any vacant lands of the Crown, and should such discovery be established to the satisfaction of the Minister of the Interior, an area not exceeding 640 acres of land, including and surrounding the land upon which the discovery has been made, will be sold to the person or company making such discovery, at the rate of $1 an acre, provided such lands are available at the time application therefor is made.
>
> A royalty at such rate as may from time to time be specified by Order in Council will also be levied and collected upon the sales of the petroleum. * * *

At the trial before Mr. Justice O'Connor, he held that this Order in Council had in effect been rescinded by subsequent Orders in Council.

In the Court of Appeal, Mr. Justice Clark said:

> My conclusion is that the regulations do not prescribe any royalty in respect of the minerals granted by the patent in question and such being the case there was no royalty reserved by the Dominion which could pass to the province.

I agree with the statement of Mr. Justice Clarke. The rights acquired under a grant in freehold made for a definite purchase price, as in the present case, are altogether different from rights which are acquired under a prospector's licence.

The real question in the appeal is whether or not the provisions of the patent were such as to reserve to the Crown a right to impose new royalties in the future. I think that if the Crown, like any other vendor, wishes to reserve such rights, such reservations must be expressly stated.

Parliament and, the Legislature within its jurisdiction, of course, have power to impose new taxes, but the imposition of a royalty on lands or goods of a subject by Executive order could be justified only by the clearest and most definite authority from the competent legislative body.

It was argued by Mr. Gray on behalf of the appellant that the grant from the Crown must be construed favourably to the Crown. In so far as this is a rule of construction, it could only operate in a case of ambiguity and, in my opinion, there is no ambiguity here.

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Having arrived at this conclusion, it is unnecessary to consider the extent of the rights and powers transferred by the Dominion to the Province by the agreement of 1930.

I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. J. Frawley.*

Solicitors for the respondent: *Field, Hyndman & McLean.*

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* May 5, 6, 7.
* Oct. 6.

ALFRED WILLIAM LUDDITT AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

GINGER COOTE AIRWAYS LTD. (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Carrier—Aviation—Air transport company—Licensed air carrier of passengers—Forced landing—Injury to passengers and loss of baggage through negligence of company—Condition on ticket relieving company from liability—Validity of—Effect of fixing of fare by statutory regulation—Whether air company a "common carrier"—Whether a "carrier" within definition enacted by Transport Act—Liability of company as common carrier—Transport Act, 1938 (Dom.), 2 Geo. VI, c. 53, ss. 3, 13, 17, 19, 20, 21, 22, 25, 26, 32, 33—Aeronautics Act, R.S.C. 1927, c. 3—Air Regulations, 1938—Railway Act, R.S.C., 1927, c. 170, ss. 340, 345, 346, 347, 348.

The plaintiffs appellants took passage by the defendant respondent's aeroplane from Vancouver to Zeballos, B.C., and, during the flight, a fire started on board forcing the plane to land. The appellants lost their baggage and were severely injured. They brought action against the respondent, an air transport company, alleging that the accident was caused by its negligence. The tickets issued by the respondent to each of the appellants were expressed to be subject to the conditions that the flight was at their own risk against all casualties to themselves or their property and that the respondent should in no case be liable to the passengers for loss or damage to the person or property of such passengers, whether the injury, loss or damage be caused by negligence, default or misconduct of the respondent, its servants or agents or otherwise. The respondent was operating its air transport service under a licence issued under the authority of the *Aeronautics Act*, and it also held a licence issued by the Board of Transport Commissioners under the *Transport Act*, 1938. The trial

* PRESENT:—Rinfret, Kerwin, Hudson and Taschereau JJ. and Gillanders J. *ad hoc.*

judge held that the term contained in the ticket, that passengers travelled at their own risk entirely, did not bind them; but the appellate court, reversing that judgment, held that the respondent was within its rights in issuing such special ticket.

Held, affirming the judgment appealed from ([1942] 1 W.W.R. 465), Kerwin and Taschereau JJ. dissenting, that the appellants' action was barred by the term of the special contract contained in the ticket and, therefore, the respondent was relieved of any liability towards them.—The respondent company (it being immaterial whether it should be regarded as common carrier) is a "carrier" within the definition contained in the interpretation section of the *Transport Act,* its licence was issued by the Board and the charge of $25 asked from and paid by each of the appellants was made in accordance with a special tariff duly filed with the Board. Such tariff therefore must be examined in the light of the *Transport Act* and of the general orders and regulations of the Board; and, as a result, it must be held that the respondent company has complied with the provision of the Act and with these orders and regulations. The special tickets were issued to the appellants under a special tariff which, by the Act itself, is declared to "specify a toll or tolls lower than in the standard tariff," and the conditions of which were governed by regulations of the respondent deemed to have been assented by the Board, not having been disallowed by it, with special reference to the terms and conditions of these passenger tickets. It cannot be assumed, although not specifically established in evidence, that the Board allowed the special tariff and its regulations to come and to remain into force in the form in which they were made and filed by the respondent, without taking cognizance of the terms and conditions of the company's passenger tickets to which the schedules and regulations made special reference and which were stated to govern the liability of the company in respect of the transportation by it of its passengers. The terms and conditions of the tickets were made part of the special tariff and schedules, and, accordingly, were valid and binding under the *Transport Act* and the general orders and regulations of the Board, the latter having full authority to allow the issue of passenger tickets in the form of the tickets issued to the appellants.—Section 348 of the *Railway Act* does not apply in the case of transport by air, that section having apparently been deliberately omitted in the *Transport Act;* but, even if it did apply, the form of the contract or ticket in issue in this case should be taken to have been authorized by the Board within the meaning of that section.—This case is governed by the decision of the Privy Council in *Grand Trunk Railway Co.* v. *Robinson* ([1915] A.C. 740).

Per Kerwin and Taschereau JJ. (dissenting)—The terms and conditions on the back of the tickets, which excluded the respondent's liability for negligence, are void, and the judgment of the trial judge, maintaining the appellants' action, should be restored.—The contract upon which the respondent relies is not in compliance with the provisions of the *Transport Act* and the Board's orders and regulations.—Moreover, whether or not section 25 of the *Transport Act,* taken in conjunction with other provisions of the Act and the relevant parts of the Board's orders, constitutes the respondent company a common carrier of passengers at common law, the evidence disclosed that it held itself as being such; and, if so, the contract absolving the respondent from

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its liability for negligence is invalid. As a common carrier of passengers, the respondent's duty was to take due care to carry its passengers safely; and the company is not entitled, at common law, to rely upon such a contract without having given the appellants the option of travelling at a higher fare without any such condition: *Clarke* v. *West Ham Corporation* ([1909] 2 K.B. 858) approved.—The same result follows if no such common law liability exists. By force of the *Transport Act,* the licence issued to the respondent and the Board's orders, the respondent was under a statutory duty to carry at the only scheduled rate all unobjectionable passengers. This case should be decided upon the principle laid down in the following decisions which held that a company empowered by statute to construct works for the use of the public and to take tolls from persons using its works was bound to take all reasonable care to have its works in a safe condition: *Parnaby* v. *Lancaster Canal Co.* (11 Ad. & E. 223) and *Mersey Docks Trustees* v. *Gibbs* (Q.R. 1 H.L. 93). The same principle is applicable to the respondent, and the latter cannot escape the performance of its duty by demanding a contract relieving it of its liability for negligence without some consideration other than the payment of the scheduled fare.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Smith J. (2) and dismissing the appellants' 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.

Paul D. Murphy for the appellants.

Charles W. Tysoe for the respondent.

The judgment of Rinfret and Hudson JJ. and of Gillanders J. *ad hoc* was delivered by

RINFRET J.—The appellants' claim in damages is for loss and injury suffered by each of them on and about the 29th day of November, 1940, as a result of the negligence of the respondent, its servants or agents, in connection with their passage in a certain aeroplane owned and operated by the respondent.

In the Supreme Court of British Columbia, the plaintiffs recovered damages; and the question of negligence or the quantum of damages are not in issue in this appeal. The whole case of the respondent is that the action was barred

(1) [1942] 1 W.W.R. 465; 57 B.C.R. 176; [1942] 2 D.L.R. 29.
(2) [1941] 2 W.W.R. 397; 56 B.C.R. 401; [1901] 3 D.L.R. 504; 53 C.R.T.C. 60.

by special contract, the appellants' tickets each containing a term that passengers travelled at their own risk entirely. The trial judge held that the term did not bind them.

The special contract relied upon by the respondent read as follows:

This ticket is expressly subject to the conditions below:

In consideration of the Ginger Coote Airways Ltd. of Vancouver, B.C., permitting me, at my own risk against all casualties, to fly as a passenger in any aircraft owned or operated by the said Ginger Coote Airways Ltd., I hereby agree with the Ginger Coote Airways Ltd. that such flight is, and shall be at my own risk against all casualties to myself or my property and that I take all risk of every kind, no matter how caused, and I hereby release and discharge the Ginger Coote Airways Ltd., and indemnify it of and from all actions, claims and demands of every nature and kind whatsoever, which I, or my heirs, executors, administrators or assigns may now, or may or can at any time hereafter, have against the Ginger Coote Airways Ltd., for or on account of any loss, damage or injury to me, my person or property while so flying, and whether in or on any such aircraft or getting to or from, into or off, or in or out thereof; or in any manner in connection with or in consequence of such flight, and whether any such loss, damage or injury be caused by negligence, default or misconduct of the Ginger Coote Airways Ltd. itself, servants, agents or members, or otherwise howsoever.

It is further agreed that Ginger Coote Airways Ltd. is not bound to carry any passenger or baggage except when space is available, nor shall it be liable for any delay or detention of any passenger or baggage for any reason whatsoever. Ginger Coote Airways Ltd. may refuse to commence or complete any flight whatsoever for any reason without any liability.

Thirty-five (35) pounds of baggage only per passenger shall be carried free; any excess subject to charge at the Company's rates.

I hereby acknowledge having read and agreed to the above conditions.

(Signed): (Passenger's signature.)

Witness:

M. Lane.

Each of the appellants signed such a ticket; and the evidence shows that they knew of its terms and understood them.

The respondent set up these special tickets on which the appellants travelled and claimed that, as a result of the contract thereby entered into by the parties, the respondent was released of any liability.

The appellants replied that the respondent was a common carrier and that the appellants received no consideration for agreeing to any conditions of carriage.

The respondent rejoined that if it was a common carrier, which it denied, it did not contract as such.

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At the material time, the respondent operated its Air Transport Service under a licence granted to it under the Air Regulations 1938 and amendments thereto and issued under the authority of the *Aeronautics Act*. This licence authorized the respondent to operate a schedule service over the route Vancouver-Zeballos, via Tofino, and contained several conditions and provisions to which it is unnecessary to refer for the purposes of this appeal.

The respondent also held a licence to transport passengers and/or goods by aircraft, issued by the Board of Transport Commissioners for Canada under the *Transport Act 1938*. The written conditions stated in this licence were to the effect that the licensee shall be subject at all times to the *Aeronautics Act* and any other statutes of the Parliament of Canada and any other general or specific regulations from time to time made thereunder.

It provided that the licence may be cancelled at any time for

(*a*) non-compliance by the licensee, or his employees, with the *Transport Act, 1938;*

(*b*) non-compliance by the licensee, or his employees, with any regulation of the Board of Transport Commissioners for Canada;

* * *

(*d*) failure to comply with the *Aeronautics Act* and Air Regulations, 1938, or any other regulations from time to time made thereunder; or any other statute of the Parliament of Canada.

The regulations for the carriage of passengers and goods on the licensed service of the respondent under the provisions of the *Transport Act* effective at the time of the accident provided, amongst other matters:

(1) As to liability, that these rules and regulations cover transportation over the routes of Ginger Coote Airways Ltd. in accordance with the terms and conditions of the company's passenger tickets. The company is responsible for the transportation only over its own lines.

* * *

Refusal of Passage

(3) Ginger Coote Airways Ltd. reserves the right to refuse to carry, or to put off en route, any person whose status, physical or mental condition is such, in the Company's opinion, as to:

(*a*) Render him incapable of caring for himself.

(*b*) Make him objectionable to other passengers.

(c) Involve hazard to himself, other persons or property, and the sole responsibility of the Company shall be to refund the unused portion of the fare.

These regulations were filed in the Record Office of the Transport Commission.

The charge asked, and paid for by each of the appellants, for transportation between Vancouver and Zeballos was the sum of $25.

Such a charge was made in accordance with a special passenger and goods tariff duly filed with the Transport Commission, to which was appended the following provision:

All charges for passengers and goods and minimum charges for special trips between airports listed herein, governed, except as otherwise provided, by regulations for carriage issued by Ginger Coote Airways Ltd.

The Board of Transport Commissioners for Canada was established by an Act (2 Geo. VI, c. 53) assented to on the 1st of July, 1938, under the title *The Transport Act.*

It was given authority in respect of transport by railways, ships and aircraft.

In the Act, " aircraft " is stated to mean and comprise all machines which can derive support in the atmosphere from reaction of the air.

" Carrier " means any person engaged in the transport of goods or passengers for hire or reward to whom the Act applies, and includes any company which is subject to the *Railway Act.*

" Licensee " means a person licensed under the Act to engage in transport by water or by air.

" Toll " or " charge " means and includes any toll, rate, charge or allowance charged or made in connection with the transport of passengers * * * and includes also any toll, rate, charge or allowance as charged or made in connection with any instrumentality or facility of shipment or transport irrespective of ownership, or of any contract express or implied with respect to the use thereof.

The interpretation section of the Act says that:

Unless it is otherwise provided or the context otherwise requires, expressions contained in this Act shall have the same meaning as in the *Railway Act.*

Under sec. 3 of the *Transport Act 1938,* it is the duty of the Board to perform its functions with the object of co-ordinating and harmonizing the operations of all carriers

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engaged in transport by railways, ships and aircraft, and the Board is instructed to give to the *Transport Act* and *Railway Act* such fair interpretation as will best attain the object aforesaid.

The provisions of the *Railway Act* relating to orders and decisions of the Board are made applicable in the case, amongst others, of every application or other proceeding under the Act; and the Board exercises and enjoys the same jurisdiction and authority as was vested in the Board by the *Railway Act*.

Before any application is granted for the transport of goods and passengers under the Act, the Board must determine whether public convenience and necessity requires such transport; and, in so determining, it must take into consideration, *inter alia*, the quality and permanence of the service to be operated by the applicant and his financial responsibility, including adequate provision for the adequate protection of passengers, shippers and the general public by means of insurance.

Now, under Part III, which is entitled "Transport by air", it is provided that, notwithstanding anything contained in the *Aeronautics* Act, the Board may license aircraft to transport passengers, prescribing in the licence the route or routes which the aircraft may follow and the schedule of services which shall be maintained; and no passenger shall be transported by air other than by means of an aircraft licensed under this Part.

In respect of tolls to be charged, the licensee, under Part IV, is governed as follows:

Every licensee must file a standard tariff of tolls with the Board for approval; and it may also file such other tariffs as are ordered by this Part. The tariffs which are thus authorized are divided into five classes, three of which concern freight, and the two others are the "standard passenger tariffs" and the "special passenger tariffs".

The standard tariff must specify the maximum mileage tolls to be charged for passengers; and it requires the approval of the Board before it becomes effective.

The special tariff must specify a toll or tolls lower than in the standard tariffs.

Every licensee must, according to his powers and within the limits of the capacity of the ships or aircraft specified

in the licence, afford to all persons and companies all reasonable and proper facilities for the receiving, forwarding and delivering of traffic (s. 25).

The Board may disallow any tariff or any portion thereof which it considers unjust or unreasonable or contrary to any provisions of the *Transport Act;* and it may require the licensee, within a prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tolls in lieu of the tolls so disallowed (s. 26).

Notwithstanding anything in the Act contained, a licensee engaged in transport may carry traffic free or at reduced rates to the same extent and subject to the same restrictions, limitations and control as are applied in the case of a railway company under the *Railway Act* (s. 32). This apparently is a reference to ss. 345, 346 and 347 of the *Railway Act.*

Section 33 deals with the regulations which the Board may make and contains several provisions, of which it is only necessary to refer to the last one, which is as follows:

(i) provide generally for such matters as, in the opinion of the Board, may be required for the purpose of this Act.

The above appear to be the only sections of the *Transport Act* which are material for our present purposes.

Acting under the powers given by the Act, the Board issued General Order 580 governing the construction and filing of air transport tariffs with the Board and stipulating that all tariffs must conform to the regulations therein contained.

According to that Order, the word "schedule", as used therein, means a tariff or supplement.

Section 5 provides that, in the order named, the title page of every tariff and supplement shall show:

(*a*) On the upper right-hand corner, each tariff shall be numbered beginning with No. 1. Such number shall be shown as follows:
C.T.C. No. .....

(*b*) When tariffs are issued cancelling a tariff or tariffs previously filed, the C.T.C. number or numbers of the tariff or tariffs cancelled must be shown in the upper right-hand corner immediately under the C.T.C. number of the new tariff.

* * *

(*e*) Whether tariff is standard, special or competitive.

A note at the foot of this section reads as follows:

See Appendix B for example of title page of a freight tariff conforming to this rule. Passenger tariffs to be similarly arranged.

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Then, section (6) states that schedules shall contain:

* * *

(*e*) All rules and regulations which govern the tariff stated in clear and explicit terms so as to leave no doubt as to their proper application.

And, under s. (8) of this Order, a separate tariff may be filed containing rules and regulations. Such rules and regulations may be made part of the rate tariff by the following reference therein:

Governed, except as otherwise provided, by rules and regulations published in C.T.C. No. ....., supplements thereto or re-issue thereof.

This order is dated the 16th December, 1938.

On the 23rd day of March, 1939, the Board issued General Order No. 584, adding to Rule No. 6 regulating what schedules shall contain, the following subsection:

(*g*) Specific rules setting out the conditions under which service will be provided to each point to or from which a rate is published.

There can be no doubt that the respondent company, for purposes of transport by air, of licences, of tolls or charges and of tariffs, comes under the provisions of the *Transport Act, 1938,* and of the General Orders Nos. 580 and 584. It is a carrier engaged in the transport of passengers for hire, to whom the Act, the Orders and the Regulations apply. Its licence was issued by the Board; its tariffs were filed with the Board and must be examined in the light of the *Transport Act* and of the general orders and regulations of the Board.

If they are so examined, we find that the charge or toll of $25 for transportation from Vancouver ,B.C., to Zeballos is the charge provided for in a tariff the title page of which designates it as " Special Passenger and Goods Tariff ".

This, as we have seen, is in accordance with the requirements of subs. (*e*) of s. 5 of General Order 580.

Indeed, this special tariff is exactly in the form of Appendix B referred to in General Order 580.

It contains at the foot of the schedule of charges, as already stated, the words: " Governed, except as otherwise provided, by regulations for carriage issued by Ginger Coote Airways Ltd.", which are also the words in the form contained in Appendix B. And the regulations for the carriage of passengers thus referred to, and by which it is stated that the charges for passengers are to be governed,

are those already mentioned above in this judgment, among other things stipulating, with regard to liability towards passengers,

> These rules and regulations cover transportation over the routes of Ginger Coote Airways Ltd. in accordance with the terms and conditions of the Company's passenger tickets. The Company is responsible only for transportation over its own lines.

It will be seen, therefore, that the terms and conditions of the Company's passenger tickets are there specially referred to.

And then, we find the tickets issued to each of the appellants in particular, accepted and signed by each of them; and whereby, in consideration of the respondent permitting each of the appellants to fly as a passenger in the aircraft owned and operated by the respondent, each appellant agreed that the respondent would be relieved of any liability for damage or injury, " no matter how caused ", * * * " in connection with or in consequence of such flight ".

This constitutes a special contract entered into between each of the appellants and the respondent which evidently covered the claim for damages now asserted by the appellants and which undoubtedly has the necessary effect of releasing and discharging the respondent of and from such a claim and its consequences, unless the appellants succeed in showing that the contract is illegal and void.

It seems immaterial to inquire whether the respondent in the premises must be regarded as a common carrier. The *Transport Act* does not in so many words make it a common carrier.

In our view, it is sufficient to note that the respondent comes within the definition of a " carrier ", in the interpretation section of *The Transport Act*. As such, it is and was subject to the prescriptions of that Act. We have, therefore, to examine whether, in respect of the matters herein concerned, the provisions of the Act, including the regulations and orders made thereunder, have been followed in what the respondent did.

It is not claimed that the licence issued to it by The Board of Transport Commissioners was not issued strictly in accordance with the Act.

As for the tariff of tolls, the charge of $25 made to the appellants is the charge indicated for the transport which they sought, in a tariff filed with the Board as a special passenger tariff.

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By force of s. 22 of the Act, such a special tariff specifies a toll lower than the standard tariffs.

The standard tariffs require the formal approval of the Board, as they provide for the maximum mileage tolls to be charged for passengers. But the special tariffs are merely filed with the Board; and, as soon as they are filed, they are deemed to be approved, so long as the Board does not disallow them or requires a substituted tariff satisfactory to the Board to be filed in lieu thereof (s. 26).

The schedules, conditions and regulations accompanying this special tariff were authorized by General Orders 580 and 584, which, among other things, permitted the setting out of the "conditions under which service will be provided to each point to and from which a rate is published."

The schedule containing the rules, regulations and conditions in respect thereto was duly filed with the Board and must be taken to have been approved by it, as it does not appear to have been disallowed.

These regulations contained a special reference to the question of liability, wherein it was stated that transportation by the respondent was undertaken "in accordance with the terms and conditions of the Company's passenger tickets"; and the tickets themselves contained an agreement, accepted and signed by each of the appellants, whereby it was stipulated that the flight was to be at the appellants' own risk against all casualties, no matter how caused, and the respondent was released and discharged of all claims "in any manner in connection with or in consequence of such flight and whether any such loss, damage or injury be caused by negligence, default or misconduct of the Ginger Coote Airways Ltd. itself, servants, agents or members, or otherwise howsoever."

The consequence is that the special tickets under which the appellants were being transported were issued to them under a special tariff which, by the Act itself, is declared to "specify a toll or tolls lower than in the standard tariff", and the conditions of which were governed by regulations deemed to have been assented to by the Board, with special reference to the terms and conditions of these passenger tickets. It cannot be assumed, although not specifically established in evidence, that the Board allowed the special tariff and its regulations to come and to remain into force in the form in which they were made and filed by the Com-

pany without taking cognizance of the terms and conditions of the Company's passenger tickets to which the schedules and regulations made special reference and which were stated to govern the liability of the Company in respect of the transportation by it of its passengers. The terms and conditions of the tickets were made part of the special tariff and schedules. Accordingly, they were valid and binding under *The Transport Act* and the General Orders Nos. 580 and 584.

In our view, the Board had full authority to allow the issue of passenger tickets in the form of the tickets issued to the appellants. The special tariff and the rules, regulations and conditions therein contained are linked together.

We do not think s. 348 of *The Railway Act* applies in the case of transport by air. On the contrary, we think that section was deliberately omitted in *The Transport Act*. But even if it did apply, it would seem to us that the form of the contract or ticket in issue in this case, relieving the company from liability in respect of the carriage of passengers, should be taken to have been authorized by the Board within the meaning of that section.

As a consequence, we fail to see why the case should not be governed by the judgment of the Privy Council in *Grand Trunk Railway Co.* v. *Robinson* (1).

In that case, it will be remembered, the respondent Robinson, by arrangement with the owner of a horse, travelled in charge of it upon the appellant's railway. The owner's representative, in the presence of the respondent, signed a live stock special contract in a form authorized by the Board of Railway Commissioners for Canada. This contract provided for the carriage of the horse and contained upon its face a condition relieving the appellant from liability for death or injuries, even where caused by negligence, to a person permitted to travel with the horse at less than full fare. The document was handed to the respondent in order, as he knew, to show that he was travelling with the horse, but neither he nor the owner's representative read the conditions. A half fare was charged for the conveyance of the respondents, and, together with the freight for the horse, was payable by the owner upon delivery. Across the face of the contract was printed in

(1) [1915] A.C. 740.

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large red type "Read this special contract"; and at the side was written (but not as a part of the authorized form) "Pass man in charge half fare".

The respondent, having been injured during the journey by the negligence of the railway company, sued to recover damages.

It was held, (1) that the inference was that the respondent accepted the document knowing that it contained a contract made on his behalf for his conveyance and that he was bound by the condition on its face exempting the appellants from liability; (2) that the railway company was entitled, under s. 340 of *The Railway Act* (R.S.C. 1906, c. 37) to rely upon the form of contract authorized by the Railway Board, giving them complete freedom from liability in the case of negligence, notwithstanding s. 284, sub-s. 7 of that Act.

Viscount Haldane, L.C., delivered the judgment of their Lordships of the Judicial Committee and said (p. 744):

> Apart from statute a carrier is liable in Canada, as in England, for injury arising from negligence in the execution of his contract to carry unless he has effectively stipulated that he shall be free from such liability. * * * Their Lordships think that where, under s. 340 and the other sections which deal with special tariffs, forms of stipulation limiting liability have been approved by the Board, and the conditions for making them binding have been duly complied with, the companies are enabled in such cases to contract for complete freedom from liability for negligence.

And, at page 747:

> There are some principles of general application which it is necessary to bear in mind in approaching the consideration of this question. If a passenger has entered a train on a mere invitation or permission from a railway company without more, and he receives injury in an accident caused by the negligence of its servants, the company is liable for damages for breach of a general duty to exercise care. Such a breach can be regarded as one either of implied contract, or of a duty imposed by the general law, and in the latter case as in form a tort. But in either view this general duty may, subject to such statutory restrictions as exist in Canada and in England in different ways, be superseded by a specific contract, which may either enlarge, diminish or exclude it. If the law authorizes it, such a contract cannot be pronounced to be unreasonable by a Court of Justice. The specific contract, with its incidents either expressed or attached by law, becomes in such a case the only measure of the duties between the parties, and the plaintiff cannot by any device of form get more than the contract allows him.

And then, at page 748:

> In a case to which these principles apply, it cannot be accurate to speak, as did the learned judge who presided at the trial, of a right to be

carried without negligence, as if such a right existed independently of the contract and was taken away by it. The only right to be carried will be one which arises under the terms of the contract itself, and these terms must be accepted in their entirety. The company owes the passenger no duty which the contract is expressed on the face of it to exclude, and if he has approbated that contract by travelling under it he cannot afterwards reprobate it by claiming a right inconsistent with it. For the only footing on which he has been accepted as a passenger is simply that which the contract has defined.

We see no reason why the decision in the above case should not completely govern the facts and the legal points arising in the present case.

And it must be noticed that the judgment of the Judicial Committee in that case was based strictly on the contract itself between the passenger and the railway company. No question is there raised about the particular obligation of a common carrier, or with regard to the reasonableness of the terms and conditions of the contract, or as to whether the passenger had been offered the option of paying the normal or maximum charge in order to avoid the stipulation of limited liability on behalf of the railway company. The decision is not made to depend upon any of these considerations. It states that there was this contract between the company and its passenger and that the terms thereof must be held to govern.

Of course, the present case is stronger than that of *Grand Trunk Railway* v. *Robinson* (1), since here there existed no possible doubt that the appellants had accepted the conditions of the ticket or contract; and it is common ground that they read and understood the nature and effect of the conditions therein, to which they affixed their signature freely and voluntarily, without reservation of any kind.

In view of what we have already said, there does not seem to be any necessity of referring to any of the other cases relied on either by the appellants or by the respondent or mentioned in the judgments of the courts of British Columbia.

In *Peek* v. *North Staffordshire Railway Company* (2), the advice of Mr. Justice Blackburn shows that, up to the adoption of the *Railway and Canal Traffic Act* (1854)—17 & 18 Vict., c. 31—it had become established law that a carrier might, by a special notice, make a contract limiting

(1) [1915] A.C. 740. (2) (1863) 10 H.L.C. 473.

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his responsibility, even for gross negligence or fraud on the part of its servants and for all loss or injury, however caused. His opinion was that a condition of that kind was looked upon as incorporated into the agreement with the carrier; it operated by way of contract and the passenger became bound by the contents. In his advice, Mr. Justice Blackburn reviews all the decisions under the common law up to the year 1862, date of the hearing before the House of Lords, and his opinion is based upon this exhaustive review.

Of this conclusion, Bankes, L.J., in *Great Northern Railway Company* v. *L.E.P. Transport & Depository Ltd.* (1), had this to say:

> The elaborate review of the law by Blackburn, J., in his advice to the House of Lords in *Peek* v. *North Staffordshire* (2), seems to me to indicate plainly that a common carrier can limit his liability by contract while still retaining his common law character of common carrier.

And, in the same case, at page 771, Atkin, L.J., referring to Blackburn, J.'s advice to their Lordships in the *Peek* case (2) adds:

> It is an authoritative exposition of the law, and was accepted as such by the House of Lords in that case.

The learned trial judge, who maintained the appellants' action and whose judgment was reversed by the majority of the Court of Appeal, based his decision entirely on *Clarke* v. *West Ham Corporation* (3). Without going into an analysis of the judgments delivered in that case, we think, with respect, that the reasoning therein can have no application here. That case, in our view, turned purely on the construction of the statutes governing the defendant; and whatever general principles may be found there expounded cannot prevail against the plain terms of *The Transport Act* and the conditions of the special contract here existing between the parties; more particularly in light of the decision of the Judicial Committee, in 1915, in *Grand Trunk Railway Co.* v. *Robinson* (4).

In Canada, as stated by the Lord Chancellor in that case, under the existing law and statutes, a carrier of passengers can contract out of the liability which attaches to him, by

(1) [1922] 2 K.B. 752, and 754.
(2) (1863) 10 H.L.C. 473.
(3) [1909] 2 K.B. 858.
(4) [1915] A.C. 740.

the use of apt words in the contract or ticket which he issues, provided the conditions for making them binding have been duly complied with.

For these reasons, the appeal should be dismissed with costs.

The judgment of Kerwin and Taschereau JJ. (dissenting) was delivered by

KERWIN J.—While being carried as paying passengers on the respondent's aeroplane from Vancouver to Zeballos on Vancouver Island, the appellants were severely burned and injured and their personal effects were destroyed. It is not now contested that this unfortunate ending of the trip resulted from the respondent's negligence but liability is denied by the respondent because of the contracts entered into between it and the appellants. The contracts are identical. One appears on the back of the ticket issued by the respondent to each appellant and is signed by each appellant. It is in the following terms:

This ticket is expressly subject to the conditions below:

In consideration of the Ginger Coote Airways Ltd. of Vancouver, B.C., permitting me, at my own risk against all casualties to fly as a passenger in any aircraft owned or operated by the said Ginger Coote Airways Ltd., I hereby agree with the Ginger Coote Airways Ltd. that such flight is, and shall be at my own risk against all casualties to myself or my property and that I take all risk of every kind, no matter how caused, and I hereby release and discharge the Ginger Coote Airways Ltd. and indemnify it of and from all actions, claims and demands of every nature and kind whatsoever, which I, or my heirs, executors, administrators or assigns may now, or may or can at any time hereafter, have against the Ginger Coote Airways Ltd., for or on account of any loss, damage or injury to me, my person or property while so flying and whether in or on any such aircraft or getting to or from, into or off, or in or out thereof; or in any manner in connection with or in consequence of such flight, and whether any such loss, damage or injury be caused by negligence, default or misconduct of the Ginger Coote Airways Ltd. itself, servants, agents or members, or otherwise howsoever.

It is further agreed that Ginger Coote Airways Ltd. is not bound to carry any passenger or baggage except when space is available nor shall it be liable for any delay or detention of any passenger or baggage for any reason whatsoever. Ginger Coote Airways Ltd. may refuse to commence or complete any flight whatsoever for any reason without any liability.

Thirty-five (35) pounds of baggage only per passenger shall be carried free; any excess subject to charge at the Company's rates.

I hereby acknowledge having read and agreed to the above conditions.

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Kerwin J.

If valid, the contract is undoubtedly a good defence to the action. The trial judge decided against its validity as he concluded that whether the respondent was or was not a common carrier of passengers, it was bound to carry all persons not in an unfit condition for whom it had accommodation in its aeroplane and who tendered the legal fare. He considered this to be the effect of section 25 of *The Transport Act, 1938*, c. 53 (Dominion), and that, in any view of the matter, the respondent's duty was to take all due care and to carry its passengers safely as far as reasonable care and forethought could attain that end. He agreed with the appellants' contention that the respondent could only operate its aircraft under the licence which it obtained under the provisions of *The Transport Act* and at the approved scheduled fare of $25 from Vancouver to Zeballos; that the fare being established under the statutory regulations, conditions could not be attached to the contract of carriage to abolish the respondent's liability, at least without a new and valuable consideration; that the case was indistinguishable from *Clarke* v. *West Ham Corporation* (1); and he accordingly gave judgment for the appellants for damages.

The Court of Appeal for British Columbia reversed this judgment and dismissed the action. The Chief Justice of British Columbia and Sloan J. deemed the *West Ham* case (1) to have been wrongly decided and that, in any event, it was inconsistent with the decision of the Privy Council in *Grand Trunk Ry. of Canada* v. *Robinson* (2). The appellants do not seek to support their appeal on the basis suggested by the dissenting judge in the Court of Appeal, McQuarrie, J., but rely on the judgment of the trial judge and the reasoning in the *West Ham* case (1).

Under the provisions of the *Aeronautics Act*, R.S.C. 1927, c. 3, and the Air Regulations, 1938, the respondent was licensed to operate a secheduled air transport service for mail, passengers and goods. The "schedule of service" authorized by this licence included

"Return trips: Vancouver-Zeballos—Tri-Weekly."

And by clause 19 of the licence:

> 19. Flights must take place according to schedules stated in the licence subject to weather conditions and except during the freeze-up and break-up periods.

(1) [1909] 2 K.B. 858. (2) [1915] A.C. 740.

The respondent was also authorized to transport passengers and/or goods by aircraft between Vancouver and Zeballos by a licence issued by the Board of Transport Commissioners for Canada. This Board was established under the provisions of *The Transport Act,* section 13, whereof authorizes the issuance of such a licence. Subsection 1 of section 17, sections 19, 20, 21, 22 and 25 read as follows:

17. (1) Every licensee shall file a standard tariff or tariffs of tolls with the Board for approval and may file such other tariff or tariffs as are authorized by this Part.

19. When a tariff is filed with and approved by the Board, where approval is necessary under this Act, the licensee shall thereafter, until such tariff is disallowed or suspended by the Board, or superseded by a new tariff, charge the toll or tolls as specified therein.

20. The tariff of tolls which a licensee shall be authorized to issue under this Part shall be divided into five classes:—

(*a*) Standard freight tariffs;

(*b*) Special freight tariffs;

(*c*) Competitive freight tariffs;

(*d*) Standard passenger tariffs;

(*e*) Special passenger tariffs.

21. (1) The standard tariff or tariffs shall specify the maximum mileage tolls to be charged for passengers and for each class of the freight classification for all distances covered by the licensee.

(2) Every standard tariff and every amendment and supplement thereto shall require the approval of the Board before it becomes effective.

22. Special tariffs shall specify a toll or tolls lower than in the standard tariffs.

25 (1) Every licensee shall, according to his powers and within the limits of the capacity of the ships or aircraft specified in the licence, afford to all persons and companies all reasonable and proper facilities for the receiving, forwarding and delivering of traffic.

(2) No licensee shall,—

(*a*) make or give any undue or unreasonable preference or advantage to, or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever;

(*b*) by any unreasonable delay or otherwise howsoever, make any difference in treatment in the receiving, loading, forwarding, unloading or delivery of the goods of a similar character in favour of or against any particular person or company;

(*c*) subject any particular person or company, or any particular description of traffic, to any undue, or unreasonable prejudice or disadvantage, in any respect whatsoever.

Section 32 provides:

32. Notwithstanding anything in this Act contained a licensee engaged in transport by water or air may carry traffic free or at reduced rates to

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the same extent and subject to the same restrictions, limitations and control as are applied in the case of a railway company under the *Railway Act*.

I mention this section merely to set it aside as it does not make applicable section 348 of the *Railway Act*, R.S.C. 1927, c. 170, which provides that contracts, conditions, etc., limiting liability shall have no effect unless approved by the Board of Railway Commissioners for Canada (now, by section 3 of *The Transport Act*, the Board of Transport Commissioners for Canada).

Under the provisions of *The Transport Act* the Board issued its general order, 580. In a foreword to this order, it is pointed out that all initial tariffs or schedules filed will be deemed to comply with the law relative to filing, unless rejected by the Board. By the order itself, the title page of every tariff shall show *inter alia* whether the tariff is standard, special or competitive, and (clause 6 (*e*)) shall contain all rules and regulations which govern the tariff, stated in clear and explicit terms so as to leave no doubt as to their proper application. Clause 8 reads as follows:

> A separate tariff may be filed containing rules and regulations. Such rules and regulations may be made part of the rate tariff by the following reference therein:
>
> "Governed, except as otherwise provided, by rules and regulations published in C.T.C. No. * * * supplements thereto or re-issues thereof."

By amending Order 584 the Board added clause 6 (*g*) requiring that all tariffs shall contain:

> (*g*) Specific rules setting out the conditions under which service will be provided to each point to or from which a rate is published.

If the effect of *The Transport Act* and the Board's order is to make the respondent a common carrier of passengers at common law, the contract absolving the respondent from its liability for negligence is invalid. The distinction between common carriers of goods and common carriers of passengers is well known. The decision in the House of Lords in *Peek* v. *North Staffordshire Ry. Co.* (1) is a decision under the *Railway and Canal Traffic Act, 1854*. Blackburn J., in advising the House, discussed the position at common law but his discussion was confined to common carriers of goods and his remarks have no bearing upon the position of common carriers of passengers. The responsi-

(1) (1863) 10 H.L.C. 473.

bility of the former was much greater and that may be one of the reasons that, as pointed out by Blackburn J., the common law in England changed after 1832 and permitted common carriers of goods to impose conditions upon their liability. These conditions became so onerous that legislation was enacted in order to relieve the public from the hardship thus occasioned. No such change as had occurred in the common law as to common carriers of goods took place with reference to common carriers of passengers, and the latter never had the right, at common law, to limit their responsibility in the same way as the former. I agree with that part of the judgment of Lord Coleridge in the *West Ham* case (1) where he says, at page 868:

> It is settled law that a railway company—and for this purpose a tramway company seems to me to be in a similar position—may under certain circumstances limit their liability. They may, if they please, offer a free pass to a passenger, or permit him to travel under conditions which necessarily involve a greater risk to himself on payment of a lower fare or none, and call upon him to absolve them of their liability in whole or in part: *McCawley* v. *Furness Ry. Co.* (2); *Gallin* v. *London and North Western Ry. Co.* (3); *Hall* v. *North Eastern Ry. Co.* (4); but no case has been decided which permits a railway, canal, or tramway company, which has a duty to serve the public at large in the matter of carriage, to limit their liability without giving the passenger the option to travel at their risk.

Certainly no such case has been cited to us. The common law is sufficiently broad to prevent the respondent, which operates an aeroplane for passenger traffic, from limiting its liability without giving a passenger the option to travel at the respondent's risk.

In the *West Ham* case (1), Lord Justice Farwell, in the Court of Appeal, placed his decision upon the ground that the West Ham Corporation were common carriers of passengers at common law in the sense that they were bound to carry according to their profession. Lord Justice Kennedy placed his decision upon that ground and also upon the construction of certain statutes regulating the tramways. The Master of the Rolls placed his decision upon the latter ground. Both the Master of the Rolls and Lord Justice Kennedy were careful to make it plain that they did not consider that the railway legislation referred to by Lord Coleridge had any application to the case.

(1) [1909] 2 K.B. 858.
(2) (1872) L.R. 8 Q.B. 57.
(3) (1875) L.R. 10 Q.B. 212.
(4) (1875) L.R. 10 Q.B. 437.

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In the present case the respondent was compelled by its licence under the *Aeronautics Act* and Air Regulations to operate a tri-weekly service between Vancouver and Zeballos, subject to weather conditions, etc. (clause 19 of the licence). It was also licensed under *The Transport Act* to transport passengers. By subsection 1 of section 17 of that Act, it was under an obligation to file a standard tariff. So far as the evidence discloses, the only tariff filed is the one that fixes the fare between Vancouver and Zeballos at $25, and that must be taken to be the standard tariff required by the Act. The mere fact that the respondent designated it a "Special Passenger and Goods Tariff" can make no difference. In using the word "special", the respondent but copied the heading in a form attached as Appendix B to the Board's order 580. The numbering of this tariff and of certain regulations, to be mentioned shortly, also indicates that no prior tariff was filed, and the examination for discovery of Mr. Slesser, a past official of the respondent, put in at the trial, and the written argument of counsel for respondent, submitted to the trial judge, indicates that no tariffs and regulations except C.T.C. Nos. 1 and 2 were ever filed.

The so-called "Special Passenger and Goods Tariff" is numbered C.T.C. No. 2 and contains the following statement:

> All charges for passengers and goods and minimum charges for special trips between airports listed herein, governed, except as otherwise provided, by regulations for carriage issued by Ginger Coote Airways Ltd. C.T.C. No. 1, supplements thereto, or successive issues thereof.

The same day that this was issued, the respondent issued, as C.T.C. No. 1, "Regulations for carriage of passengers and goods carried on the licensed services of Ginger Coote Airways Ltd. under the provisions of *The Transport Act.*" Under Part 1 of these regulations, headed "Passengers", appears the following:

> 1. Liability. These rules and regulations cover transportation over the routes of Ginger Coote Airways Ltd. in accordance with the terms and conditions of the Company's passenger tickets. The Company is responsible for the transportation only over its own lines.

The contract upon which the respondent relies does not appear anywhere except on the back of its tickets. A form of ticket containing this contract is not shown by the evidence to have been filed with the Board. By clause 8 of the Board's general order 580, the respondent's rules and regu-

lations might be made part of the rate tariff by referring, in the latter, to rules and regulations published in another filed tariff. A mere reference in the respondent's regulations to "the terms and conditions of the Company's passenger tickets" is not a publication of a filed tariff within the meaning of clause 8; it is not in compliance with clause 6 (*e*) that all rules and regulations governing the tariff shall be stated in clear and unequivocal terms so as to leave no doubt as to their proper application; and it is not a specific rule setting out the conditions under which service will be provided, as required by clause 6 (*g*). What would be the effect of compliance with the Board's order need not be considered.

By clause 19 of the licence to the respondent under the *Aeronautics Act* and the Air Regulations, flights must take place according to the schedules stated in the licence, subject to weather conditions, etc. Being licensed to transport passengers under *The Transport Act,* the respondent, by section 25 thereof, was required to furnish all reasonable and proper facilities for the receiving, forwarding and delivering of traffic. Whether or not this section, taken in conjunction with other provisions of the Act and the relevant parts of the Board's order, constitutes the respondent a common carrier of passengers for hire, the evidence discloses that the respondent held itself out as being such. The fact that it would not have accepted the appellants or others as passengers unless they signed the contract on the back of the ticket does not alter its status. Nor does the circumstance that in the respondent's C.T.C. No. 1 appears the following:

> 3. Refusal of Passage — Ginger Coote Airways Ltd. reserves the right to refuse to carry, or to put off en route, any person whose status, age, physical or mental condition is such, in the Company's opinion, as to:
>
> (*a*) Render him incapable of caring for himself.
>
> (*b*) Make him objectionable to other passengers.
>
> (*c*) Involve hazard to himself, other persons or property, and the sole responsibility of the Company shall be to refund the unused portion of the fare.

A clause, not identical but in substance the same, appeared in the West Ham Corporation's by-laws.

As a common carrier of passengers, the respondent's duty was to take due care to carry its passengers safely. That being so, I think the law is correctly set forth in the judg-

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ments of Lord Justice Farwell and Lord Justice Kennedy in the *West Ham* case (1) and that the present respondent is not entitled, at common law, to rely upon a contract limiting its liability for negligence without having given the appellants the option of travelling at a higher fare without any such condition.

The same result follows if no such common law liability exists. By force of *The Transport Act,* the licences issued to it, and the Board's order, the respondent was under a statutory duty to carry at the only scheduled rate all passengers who presented themselves,—not being objectionable in the sense indicated in clause 3 of the respondent's regulations. A company empowered by statute to construct works for the use of the public and to take tolls from persons using its works is bound to take all reasonable care to have its works in a safe condition. *Parnaby* v. *Lancaster Canal Co.* (2); *Mersey Docks Trustees* v. *Gibbs* (3). The same principle should be applied to the present respondent and it cannot escape the performance of that duty by demanding a contract relieving it of its liability for negligence without some consideration other than the payment of the scheduled fare.

There remains for consideration the decision of the Privy Council in *Grand Trunk Ry. of Canada* v. *Robinson* (4). That was a case where the plaintiff, by an arrangement with the owner of a horse, travelled in charge of it upon the railway and (as it was held) upon the terms of a "Live stock special contract" in a form authorized by the Railway Commission. This contract had a condition relieving the appellants from liability for death or injury, even if caused by negligence, to a person permitted to travel with the horse at less than full fare. The decision was that where, under section 340 of the Dominion *Railway Act,* as it then stood, forms limiting liability had been approved by the Board, the companies were able to contract in such cases for complete freedom from liability for negligence. At page 744 Viscount Haldane states:

> Apart from statute, a carrier is liable in Canada, as in England, for injury arising from negligence in the execution of his contract to carry, unless he has effectively stipulated that he shall be free from such liability.

(1) [1909] 2 K.B. 858.
(2) (1839) 11 Ad. & E. 223.
(3) (1866) Q.R. 1 H.L. 93.
(4) [1915] A.C. 740.

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And at page 747:

If the law authorizes it (a special contract) such a contract cannot be pronounced to be unreasonable by a court of justice.

Viscount Haldane was not writing an essay in general on the common law liability of carriers of passengers; he does not, for instance, mention the case of an infant signing such a contract. Indeed, in the extract quoted, at page 744, he is careful to point out that the common law liability remains unless the carrier has "effectively" stipulated that he should be free from liability, and in the extract at page 747 he qualifies his statement by the proviso "if the law authorizes it". Effective stipulations and those that the law authorizes would be such as are discussed in the cases referred to by Lord Coleridge. In my view neither the decision in the *Robinson* case (1) nor anything in the remarks of Viscount Haldane are at variance with the conclusions expressed.

The appeal should be allowed and the judgment at the trial restored with costs throughout.

Appeal dismissed with costs.

Solicitor: for the appellant: *Paul D. Murphy.*

Solicitor for the respondent: *Charles W. Tysoe.*

IN THE MATTER OF A REFERENCE AS TO THE VALIDITY OF SECTION 16 OF THE SPECIAL WAR REVENUE ACT, AS AMENDED

1941

* Nov. 17, 18, 19.

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* Oct. 6.

Constitutional law—Section 16 of the Special War Revenue Act—Contracts of insurance with British or foreign companies or foreign exchanges—Tax imposed on insured on premiums payable by him—Whether section 16 ultra vires—Special War Revenue Act, 1932 (D.), c. 54, s. 1, and amendment, 1940-41 (D.), c. 27, s. 4—Canadian and British Insurance Companies Act (D.), 1932, 22-23 Geo. V, c. 46, s. 2 (b), and ss. 116, 117, 118, 142—The Foreign Insurance Companies Act, (D.) 1932, 22-23 Geo. V, c. 47, as amended by (D.) 1934, 24-25 Geo. V, c. 36.

Section 16 of the *Special War Revenue Act* enacted, in substance, that "every person resident in Canada who, after the 31st day of December, 1931, insures or has insured his property situate in Canada * * *

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

(1) [1915] A.C. 740.

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with any British or foreign company, or with any (foreign) exchange * * * which * * * is not authorized under the laws of the Dominion of Canada to transact the business of insurance, shall * * * in each year * * * pay to the Minister (of Finance) * * * a tax of ten per centum of the premiums paid or payable by such person."

Held that this section is *ultra vires* of the Parliament of Canada.

This section is, in point of law, so related to the insurance legislation affecting British and foreign companies and extra Canadian exchanges that, such insurance legislation being invalid, the section must fall with it. Assuming that the Dominion, in exercise of its control of trade and commerce under section 91 (2) B.N.A. Act, may regulate the business of insurance carried on by British companies as a branch of external trade and commerce, this does not give the Dominion authority to regulate their strictly provincial business; and sections 116, 117 and 118 of the *Canadian and British Insurance Companies Act,* if valid, do effect the regulation of such business. The principle of exclusive provincial control of the business of insurance within the province lies at the foundation of the judgment of the Privy Council *in re The Insurance Act of Canada* [1942] A.C. 41.

The corresponding enactments in the *Foreign Insurance Companies Act,* being also legislation in relation to the business of insurance within the province, are not *intra vires;* and the case of extra Canadian exchanges is not distinguishable.

REFERENCE by His Excellency the Governor General in Council, pursuant to the authority of s. 55 of the *Supreme Court Act* (R.S.C., 1927, c. 35), to the Supreme Court of Canada, for hearing and consideration, of certain questions which are cited in full at the beginning of the reasons for judgment of the Chief Justice of this Court.

F. P. Varcoe K.C. and *W. R. Jackett* for the Attorney-General for Canada.

G. D. Conant K.C., C. R. Majone K.C. and *H. D. McNairn K.C.* for the Attorney-General for Ontario.

Aimé Geoffrion K.C. for the Attorneys-General for Quebec and British Columbia.

J. A. Mann K.C. for the British Canadian Insurance Co. and others.

V. E. Gray K.C. for the Mutual Boiler Insurance Company of Boston.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—The interrogatory referred to us is in the following terms:—

Is section 16 of the Special War Revenue Act, as enacted by section 1 of chapter 54 of the Statutes of 1932 and amended by section 4 of chapter 27 of the Statutes of 1940-41 *ultra vires* of the Parliament of Canada either in whole or in part, and if so in what particular or particulars or to what extent?

The said section 16, as amended, reads as follows:—

16. (1) Every person resident in Canada who, after the thirty-first day of December, 1931, insures or has insured his property situate in Canada in which he has an insurable interest, other than that of an insurer of such property, or renews or has renewed any such insurance, against risks other than marine risks,

(*a*) with any British or foreign company; or

(*b*) with any exchange, the chief place of business of which exchange or of its principal attorney-in-fact is situate outside of Canada,

which, on or before the first day of July, 1932, or at the time such insurance is effected or renewed if after the last mentioned date, is not authorized under the laws of the Dominion of Canada to transact the business of insurance, shall, on or before the first day of March, 1933, and on or before the first day of March in each year thereafter, pay to the Minister, in addition to any other tax payable under any other existing law or statute, a tax of ten per centum of the net premiums paid or payable by such person in respect of such insurance for the next preceding calendar year.

(2) For the purpose of this section, every corporation carrying on business in Canada shall be deemed to be a person resident in Canada.

I have given to the arguments advanced in support of the validity of this enactment, as well as to those against it, the most prolonged and, I must admit, anxious consideration. Some of the arguments relied upon by the provinces seem to open up rather far reaching topics touching the powers of the Parliament of Canada concerning intercourse with other countries. I find it unnecessary to discuss such topics, because I think the question raised by the reference falls to be dealt with upon comparatively narrow ground.

I am unable to accept the argument that the enactment is *prima facie* valid as such and that the invalidity of the existing legislation relating to the transaction of the business of insurance is immaterial. In view of the decision in the Insurance Case of 1932 (*In re The Insurance Act of Canada*) (1), I see no escape from the proposition advanced by the provinces that section 16 of the *Special*

(1) [1932] A.C. 41.

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War Revenue Act, as amended by the statutes of 1940 to 1941, is, in point of law, so related to the insurance legislation affecting British and foreign companies and extra Canadian exchanges that if the insurance legislation is invalid section 16 must fall with it. In this respect I see no admissible distinction between the two cases.

The point of substance, therefore, is whether this insurance legislation is invalid as a whole, or in such degree as to strike section 16 with sterility.

It is convenient first to refer to the Act relating to British companies. By section 2 (*b*) a British company is thus defined:—

> "British company" means any corporation incorporated under the laws of the United Kingdom of Great Britain and Northern Ireland or any British Dominion or possession other than Canada or a province of Canada for the purpose of carrying on the business of insurance.

Sections 116 and 117 are in these words:—

> 116. There shall be established and maintained in the Department of Insurance a register in which shall be entered the names of all British companies registered under this Part and to which certificates of registry are granted.
>
> 117. No British company shall transact the business of insurance in Canada, save as hereinafter expressly provided, unless it is registered and holds a certificate of registry from the Minister.

Section 118 requires, *inter alia*, as a condition of registration, that a British company shall make a deposit with the Minister in any of the securities specified in section 55 of the Act in the following sums, namely:—

> (1) for a certificate of registry to transact the business of life insurance or fire insurance, the sum of one hundred thousand dollars, and
>
> (2) for a certificate of registry to transact any other class of insurance business, such sum as the Treasury Board may determine.

It appears then that by this legislation a British company is prohibited from making any contract of insurance in Canada, that is to say, in any province of Canada, and from performing in any such province any act of inducement to enter into any such contract or any act relating to the performance of any such contract, or rendering any service connected with any such contract in any such province, unless it is registered, and among the conditions of such registration is that just mentioned.

One must consider the effect of these enactments in practice. Prior to the passing of this statute a British

company has an agency in Toronto. It has complied with the provisions of the provincial law, whatever they may be, in respect of giving security for the benefit of its policy holders. The Dominion enactment comes into operation and the British company and its agents immediately come under the prohibition of section 117 and the company and its agents become subject to the penalties prescribed by section 142, which become exigible on the performance of any one or more of the acts constituting by definition the "business of insurance", unless and until it becomes registered under the Dominion statute.

I do not perceive any valid reason for holding that it would be beyond the powers of a province, in exercise of its authority to regulate the business of insurance in the province, to require the registration of insurers, and to exact as conditions of obtaining such registration the deposit of security of a character similar to that required by section 118.

Assuming that the Dominion, in exercise of its control of trade and commerce under the second clause of section 91, may regulate the business of insurance carried on by British companies as a branch of external trade and commerce, this does not give the Dominion authority to regulate their strictly provincial business; and it is my opinion that sections 116, 117 and 118, if valid, do effect the regulation of such business. The general principle is well-settled and well-known. (*The King* v. *Eastern Terminal Elevator Co.* (1); *Attorney-General for Canada* v. *Attorney-General for Ontario* (2)). The judgment of Lord Dunedin in the Insurance Case of 1932 (3) does not explicitly deal with the provisions of the statute then under review that correspond with sections 116, 117 and 118. Nevertheless, I think when that judgment is read as a whole its language points rather to the conclusion that, in the view of the great and lamented Judge who delivered it, these provisions stood in the same category as those relating to the forms of contracts and those governing transactions between an insurance company and its

(1) [1925] S.C.R. 434. (2) [1937] A.C. 326.
(3) [1932] A.C. 41.

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agents. It is not necessary, however, to consider whether this point is strictly ruled by Lord Dunedin's judgment in the sense that these particular provisions were passed upon. The principle of exclusive provincial control of the business of insurance within the province lies at the foundation of the judgment.

From this, it follows also that the corresponding enactments in the *Foreign Insurance Companies Act* are not *intra vires*. Those enactments, being legislation in relation to the business of insurance within the province, are not (it flows from the reasoning of that judgment) alien legislation in the sense contemplated by the judgment in *The Attorney-General for Canada* v. *Attorney-General for Alberta* (1). On this point I think the words of Lord Dunedin at p. 51 of the report (2) are conclusive:—

> What has got to be considered is whether this is in a true sense of the word alien legislation, and that is what Lord Haldane meant by "properly framed legislation." Their Lordships have no doubt that the Dominion Parliament might pass an Act forbidding aliens to enter Canada or forbidding them so to enter to engage in any business without a licence, and further they might furnish rules for their conduct while in Canada, requiring them, e.g., to report at stated intervals. But the sections here are not of that sort, they do not deal with the position of an alien as such; but under the guise of legislation as to aliens they seek to intermeddle with the conduct of insurance business, a business which by the first branch of the 1916 case has been declared to be exclusively subject to Provincial law. Their Lordships have, therefore, no hesitation declaring that this is not "properly framed" alien legislation.

The case of extra Canadian exchanges is not distinguished. It follows that section 16 is *ultra vires*.

It is perhaps unnecessary to add that nothing I have said is in any way inconsistent with the principle which precludes a province from impairing by legislation the status and powers of a Dominion company.

The interrogatory referred to us should be answered "Yes, in its entirety".

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(1) [1916] 1 A.C. 588. (2) [1932] A.C. 41.

C. KERR (PLAINTIFF)..... APPELLANT; 1942

*May 12, 13.
*Oct. 6.

AND

SUPERINTENDENT OF INCOME TAX AND ATTORNEY-GENERAL FOR ALBERTA (DEFENDANTS).... } RESPONDENTS.

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

Constitutional law—Taxation—Income tax—Provincial powers—Whether tax imposed on income or on person found in province—Income from sources outside province—Dividend cheques of foreign company—The Income Tax Act, 1932, c. 5 (Alberta).

The tax imposed by *The Income Tax Act* of Alberta, 1932, is not a tax on the income itself, but as a tax on the person receiving the income who is found within the province. Therefore, under the Act, the taxable income of such person includes also income derived from sources outside the province: *per* Rinfret and Hudson JJ.

On its proper construction, *The Income Tax Act* of Alberta, 1932, imposes a tax on a person found in the province with respect to his income, including that derived from sources outside the province, and is *intra vires* the Alberta legislature: *per* Kerwin and Taschereau JJ. and Gillanders J. *ad hoc*.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Ewing J. (2) and dismissing the appellant's action for declaratory judgment that dividends earned outside of province are not subject to tax under Alberta *Income Tax Act*.

Aimé Geoffrion K.C. for the appellant.

W. S. Gray K.C. for the respondent.

RINFRET J.—For the purposes of this case the parties have agreed upon the following statement of facts:

1. That Weyerhaeuser Timber Company, the corporation mentioned in the statement of claim herein, is incorporated under the laws of the state of Washington, and has its head office at the city of Tacoma, in the said state, and that it has no office in the province of Alberta, and does not carry on any part of its business in the said province.

2. That the plaintiff is now and has been for many years the owner of 600 shares in the capital of the said Weyerhaeuser Timber Company

*PRESENT:—Rinfret, Kerwin, Hudson and Taschereau JJ. and Gillanders J. *ad hoc*.

(1) [1938] 3 W.W.R. 740; [1939] 1 D.L.R. 149.

(2) [1938] 2 W.W.R. 144; [1938] 3 D.L.R. 23

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Rinfret J.

and that all of the said shares have at all times been registered on the books of the said company in the name of the plaintiff except that on one occasion 210 of the said shares were transferred and shortly thereafter replaced by another 210 shares, but that the plaintiff was at all times the beneficial owner of 600 shares.

3. That during the years 1933 to 1936, both inclusive, the said company declared the following dividends on the said 600 shares:

1933—September	$ 600.00
December	600.00
1934—June	600.00
September	600.00
November	1,800.00
1935—August	1,200.00
October	1,200.00
1936—June	1,200.00
September	1,200.00
December	2,100.00

and that all of the said dividends were declared and payable at Tacoma aforesaid, and the said company paid the said amounts by cheques issued by the said company payable at Tacoma, aforesaid, less, in some cases, small amounts retained on account of the United States Tax Regulations.

4. That the cheque for $1,200 in payment of the dividend declared in October, 1935, was deposited to the credit of the plaintiff in The Canadian Bank of Commerce (California) at Los Angeles in the state of California.

5. That the cheque for $1,228.50 in payment of part of the dividend declared in December, 1936, was deposited to the credit of the plaintiff in The Canadian Bank of Commerce (California) at Los Angeles, in the state of California.

6. That the cheque for $1,200 in payment of the dividend declared in June, 1936, was received by the plaintiff at said city of Calgary and was not cashed or deposited in Alberta, but was deposited to the credit of the plaintiff in the branch of The Canadian Bank of Commerce at Victoria, in the province of British Columbia.

7. That the cheque for $702 in payment of part of the dividend declared in September, 1936, was received by the plaintiff at said city of Calgary and was not cashed or deposited in Alberta but was deposited to the credit of the plaintiff in the branch of The Canadian Bank of Commerce at Victoria, in the province of British Columbia.

8. That payment of the remainder of the dividends declared in September and December, 1936, was received separately owing to the transfer and replacement of the said 210 shares. That the cheques in payment of all the said dividends set forth in paragraph 3 hereof excepting those mentioned in paragraphs 4, 5, 6 and 7 hereof, were deposited to the credit of the plaintiff in the Canadian Bank of Commerce, Calgary, in the province of Alberta.

9. That the dividends set out in paragraph 3 constituted "income" of the plaintiff for the respective years stated in the said paragraph within the meaning of that word as contained in section 3 of the *Income Tax Act*, being chapter 5 of the statutes of Alberta, 1932.

10. That the plaintiff is domiciled and resident at the city of Calgary, in the province of Alberta, and at all times maintains a residence here,

but that the plaintiff has lived during the winter months of each of the years above mentioned at either Los Angeles, in the state of California, or Victoria, in the province of British Columbia, and that the moneys deposited in the said accounts at Los Angeles and Victoria were used principally to pay her living expenses while residing at such places, and that the balance unexpended remains to her credit in the said accounts or one of them, and no part of the moneys so deposited in the said accounts at Los Angeles and Victoria has since such deposit been brought into the province of Alberta.

The appellant in the Alberta courts claimed a declaration that she was not liable for any tax with respect to the dividends in question under the *Income Tax Act 1932,* of Alberta, and that if any tax is payable by her with respect to those dividends under the Act, then the Act, in so far as it imposes such tax, is *ultra vires* of the provincial legislature and null and void.

It is admitted that those dividends constitute "income" of the appellant within the meaning of that word as contained in section 3 of the Act (c. 5 of the statutes of Alberta, 1932); but as such income is derived from sources outside of the province of Alberta, the question which arises is as to the validity of that portion of the statute which imposes a tax on income originating elsewhere than in the province (*Swift Canadian Co. Ltd.* v. *City of Edmonton*) (1).

The answer to that question will depend upon the identification of the subject matter of the tax; and, in turn, the identification of the subject matter of the tax must be found in the charging section of the statute, and it will only be in the case of some ambiguity in the terms of the charging section that recourse to the other sections is necessary.

This was the language of Lord Thankerton delivering the judgment of their Lordships of the Privy Council in *Provincial Treasurer of Alberta* v. *Kerr* (2), and the Earl of Halsbury, L.C., in *Gresham Life Society Limited* v. *Bishop* (3) expressed a similar view:

The question in this case seems to me to depend upon the actual words used by the Legislature, and I deprecate a construction which passes by the actual words and seeks to limit the words by what is supposed to be something equivalent to the language used by the Legislature.

(1) [1921] 3 W.W.R. 196. (2) [1933] A.C. 710, at 720, 721.
(3) [1902] A.C. 287, at 290, 291.

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In the statute under consideration (1932) the charging section read originally as follows:

8. (1) There shall be assessed, levied and paid upon the income during the preceding year of every person—

(*a*) residing or ordinarily resident in the Province of Alberta during such year; or

(*b*) who sojourns in Alberta for a period or periods amounting to one hundred and eighty-three days during such year; or

(*c*) who is employed in Alberta during such year; or

(*d*) who, not being resident in Alberta, is carrying on business in Alberta during such year; or

(*e*) who, not being resident in Alberta, derives income for services rendered in Alberta during such year, otherwise than in the course of regular or continuous employment, for any person resident or carrying on business in Alberta—

a tax at the rates applicable to persons other than corporations and joint stock companies set forth in the first schedule of this Act upon the amount of income in excess of the exemptions provided in this Act, and every person in respect of whose income any tax has been so assessed and levied shall pay the amount of the tax so assessed and levied together with an additional sum of three dollars:

In 1934, this section was amended (ch. 68 of the statutes of Alberta of 1934, s. 2) by striking out the words

and every person in respect of whose income any tax has been so assessed and levied shall pay the amount of the tax so assessed and levied together with an additional sum of $3.

Of course, general definitions or expressions of opinion relating to statutes framed differently or emanating from legislative bodies endowed with unlimited power and authority are not helpful in enabling the courts to determine the specific nature of the tax imposed by the particular statute under consideration.

The legislature of Alberta is that of a province which, under the Constitution (Head 92-2), can make laws in relation to: "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes".

In the present case, the material words in the clause just quoted are: "within the Province". They are words of limitation; and it cannot be useful, from the legal or constitutional point of view, to attempt to ascertain the validity of legislation adopted under such limited powers by making a comparison with legislation passed by a parliament enjoying sovereign powers such as, for example, the Imperial Parliament or the Dominion of Canada, whose authority to raise money may be exercised "by any mode or system of taxation" (B.N.A. Act, Head 91 (3)).

Speaking of the latter clause of the statutes, Lord Phillimore in *Caron* v. *The King* (1), on behalf of their Lordships of the Privy Council could say (p. 1006):

> They are statutes for imposing on all citizens contributions according to their annual means, regardless of, or it may be said, not having regard to the source from which their annual means are derived.

In the abstract, we may assume that a tax upon a man's entire income or entire property, intangible as well as tangible, is a personal tax (see Seligman, vol. 58, Annals of the American Academy of Political and Social Science). But the author of the article just referred to immediately adds:

> A tax upon a particular piece of property or upon a particular business which affords a revenue is a real tax or a specific tax or a tax on the thing apart from the person.

In the exercise of its powers under the Constitution of Canada "in order to the raising of a revenue" for provincial purposes, a province may no doubt directly tax a person in respect of his income. In that case, the income is used merely as a just standard or a yard-stick (to use the expression of counsel for the Attorney-General of Alberta) for computing the amount of the tax. In such a case the person is validly charged because he is a resident within the province; and it must be conceded that the legislature in such a case may use the foreign property together with the local property as the standard by which the person resident within the province is to be charged.

The legality of the tax, under those circumstances, results from the fact that the person is found within the province.

Assuming that some ambiguity is to be found in the charging section of the Alberta Act—and perhaps a little more so since the amendment of 1934 already referred to —I must come to the conclusion that, taking the statute as a whole and reading sec. 8 (1) in the light of the other sections and of the general tenor of the statute, the basis and subject-matter in respect to which the taxation here in question is imposed is the person who receives the income, and that it is not a specific tax upon the property, a tax on the thing apart from the person; and, therefore, it is a personal tax.

(1) [1924] A.C. 999.

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Although I may not agree with the argument that by its very nature an income tax is a personal tax and that its nature cannot be changed by the particular language of the statute imposing the tax, or that income tax cannot lose its character of being a personal tax by the wording of the statute, I have come to the conclusion that the effect of the Alberta Act, generally speaking, is to impose the tax, not on the income itself, but on the person receiving the income, for the following reasons:

1. The tax is to be paid in respect of the income earned during the preceding year; and it is based upon the aggregate amount of that income, irrespective of the source from which it was derived: income as such; income envisaged as a whole, as a mere figure representing the total revenue enjoyed by the ratepayer during the preceding year, without individualizing any of the moneys comprised in such revenue;

2. It is a tax imposed upon the income of the ratepayer, not upon the income derived from any specified property;

3. It is not a tax levied on property. In the words of McLennan J., in *Abbott* v. *City of St. John* (1),

> It is not a part of the income * * * No attempt is made to seize or appropriate the income itself.

The assessment entirely disregards the source of the annual means (*Caron* v. *The King* (2); it creates no lien on the moneys or on any particular part thereof. Indeed, when the tax is assessed and when it comes due, the moneys which went to make up the income might have completely disappeared. The person alone is called upon to make good the payment of the tax, which is recoverable by action against that person and, if not paid then, is levied by distress, not against the particular property from which the income was derived but against that person's property generally and indiscriminately.

The appeal should be dismissed with costs.

The judgment of Kerwin and Taschereau JJ. and of Gillanders J. *ad hoc* was delivered by

KERWIN J.—In this action the appellant seeks a declaration that he is not liable to income tax in the province of Alberta with respect to certain dividends received by him.

(1) [1908] 40 S.C.R. 597, at 616. (2) [1924] A.C. 999, at 1006.

The case came on for trial before Ewing J., in the Supreme Court of Alberta, on an agreed statement of facts. This statement is summarized by the learned trial judge in a succinct but comprehensive manner and I can do no better than quote his summary.

The plaintiff is the owner of 600 shares in the Weyerhaueser Timber Company, which corporation declared and paid the dividend in question. This company was incorporated under the laws of the state of Washington and has its head office at Tacoma in the said state. It has no office in the province of Alberta and does not carry on any part of its business in the said province. From time to time during the years 1933 to 1936 inclusive, this company declared and paid dividends in respect of the plaintiff's 600 shares, which dividends amounted during these years to about $11,100. The plaintiff is domiciled in Calgary but spent the winter months during the said years either at Los Angeles in California or at Victoria in British Columbia. The dividends in question were declared and were payable at Tacoma. Cheques were issued for the dividends, which cheques were payable at Tacoma.

Having regard to the use made by the plaintiff of her dividend cheques, these cheques fall into three classes, viz:

1. Those cheques which never came into Alberta but were deposited by the plaintiff in banks either in British Columbia or in California and no part of the moneys represented by these cheques was ever brought by the plaintiffs into Alberta.

2. Those cheques which were received by the plaintiff in Alberta and either cashed in Alberta or deposited in banks in Alberta.

3. Those cheques which were received by the plaintiff in Alberta and endorsed by her and then forwarded to British Columbia or California for deposit in banks there.

It is admitted that these dividends constitute "income" of the plaintiff for the said years within the meaning of that word as contained in section 3 of the *Income Tax Act*, being chapter 5 of the statutes of Alberta, 1932.

Mr. Justice Ewing continues:

As this section defines "income" as including "profit, gain or gratuity, whether derived from sources within Alberta or elsewhere," it is clear that in terms it includes the dividends in question and the only question arising in this action is the validity of that portion of the statute which imposes a tax on income originating elsewhere than in the province.

As to this last statement, it would appear that the first question must be the construction of the Act since the appellant's contention is that the statute imposes a tax on property only, while the respondent contends that, so far as this appeal is concerned, it imposes a tax on persons with respect to income.

Turning then to the Act, we find that section 3 provides in part:

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3. Without limiting the meaning of "income", for the purposes of this Act, "income" includes the annual net profit or gain or gratuity, whether ascertained and capable or 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 Alberta or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source.

The legislature here includes "net profit or gain * * * whether derived from sources in Alberta or elsewhere." By section 4, certain incomes are not liable to taxation, that is the incomes of named individuals, bodies corporate, etc. By section 5, "income" as defined in section 3 is subject to specified exemptions and deductions. By section 6,

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

certain enumerated matters. By subsection 1 of section 7 a deduction from the tax otherwise payable is allowed in certain cases for income tax paid elsewhere in respect of income derived from sources therein:

7.—(1) A taxpayer shall be entitled to deduct from the tax that would otherwise be payable by him under this Act the amount paid to any other province of Canada or to Great Britain or any of its self-governing dominions, colonies or dependencies other than the Dominion of Canada for income tax in respect of the income of the taxpayer derived from sources therein if such province or Great Britain or such self-governing dominion, colony or dependency imposing such tax allows a similar credit to persons in receipt of income derived from sources within Alberta.

Subsection 1 of section 8 provides:

8.—(1) There shall be assessed, levied and paid upon the income during the preceding year of every person—

(*a*) residing or ordinarily resident in the Province of Alberta during such year; or

(*b*) who sojourns in Alberta for a period or periods amounting to one hundred and eighty-three days during such year; or

(*c*) who is employed in Alberta during such year; or

(*d*) who, not being resident in Alberta, is carrying on business in Alberta during such year; or

(*e*) who, not being resident in Alberta, derives income for services rendered in Alberta during such year, otherwise than in the course of regular or continuous employment, for any person resident or carrying on business in Alberta—

a tax at the rates applicable to persons other than corporations and joint stock companies set forth in the first schedule of this Act upon the amount of income in excess of the exemptions provided in this Act, and every person in respect of whose income any tax has been so assessed and levied shall pay the amount of the tax so assessed and levied together with an additional sum of three dollars:

Provided that the said rates shall not apply to corporations and joint stock companies.

The words underlined were repealed but in my opinion, as indicated later, such repeal has no effect upon the proper construction of the enactment for the purposes of this appeal. Subsection 2 of section 8 provides that certain corporations and joint stock companies shall pay a tax. By subsection 3, every gas company shall be entitled to deduct certain amounts from the tax payable in any year by such company. By subsection 4, every electric light company and every power company shall be entitled to deduct specified amounts from the tax payable in any year by such company, and by subsection 5, in the case of a public utility corporation, no allowance is to be made by the Board of Public Utility Commissioners in fixing or regulating the company's charges for any tax payable by such corporation pursuant to the Act. It might here be interpolated that with reference to all these corporations and joint stock companies, the tax appears to be imposed upon them with respect to their income.

Sections 23 to 28 deal with non-residents. By section 32, every person liable to taxation must file a return of his total income during the last preceding year, and under section 47, every person liable to pay any tax under the Act shall send with the return of the income "the tax of three dollars and" not less than one-fourth of the amount of such tax. The words in quotation marks were repealed at the same time as the repeal of the words underlined in subsection 1 of section 8 and I take it that the reason for the repeal of the provision last mentioned is the same as that for the repeal of the words mentioned in section 47.

By section 48, if any person liable to pay any tax under the Act pays less than the Act requires at the required times, he is to pay interest. By section 68, all taxes, interest, penalties and costs assessed or imposed or ordered

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to be paid under the provisions of the Act shall be deemed to be a debt due to His Majesty and shall be recoverable as such in a court of competent jurisdiction.

While, therefore, subsection 1 of section 8 states that a tax shall be assessed, levied and paid upon income, it is to be noted that by the same subsection the tax is to be paid in one year upon the income earned during the preceding year. Taken in conjunction with the words used in clauses (*a*), (*b*) and (*c*) of the subsection,—"residing or ordinarily resident", "sojourn", "employed", the reference to income "whether derived from sources within Alberta or elsewhere", in section 3 and the other sections noted above, I am of opinion that the Act, taken as a whole, imposes a tax on a person such as the appellant who is found in the province with respect to his income, including that derived from sources outside the province.

There was for some time in Great Britain considerable divergence of opinion as to what was taxed by the Imperial Income Tax Acts but in *Colquhoun* v. *Brooks* (1), Lord Herschell stated that

> The income tax Acts * * * themselves imposed a territorial limit; either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there.

And in *Whitney* v. *Inland Revenue Commissioners* (2), Lord Wrenbury says:

> The policy of the Act is to tax the person resident in the United Kingdom upon all his income whencesoever derived and to tax the person not resident in the United Kingdom upon all income derived from property in the United Kingdom. The former is taxed because (whether he be a British subject or not) he enjoys the benefit of our laws for the protection of his person and his property. The latter is taxed because in respect of his property in the United Kingdom he enjoys the benefit of our laws for the protection of that property.

Lord Wrenbury then refers to the extract from *Colquhoun* v. *Brooks* (1) already set out as stating the matter in the same way.

It is true that in dealing with Imperial taxation Acts, the courts are not troubled with any constitutional difficulties and that no doubt accounts for the various expressions used to describe the tax. However, the quotations from the two judgments of the House of Lords are, I think, of assistance in coming to a conclusion in the present appeal.

(1) (1889) 14 A.C. 493. (2) [1926] A.C. 37, at 54.

In this connection the solution of the problem is not assisted by Lord Macnaghten's famous dictum in *London County Council* v. *Attorney-General* (1) that "income tax, if I may be pardoned for saying so, is a tax on income", because what Lord Macnaghten meant, as appears from what immediately follows, is that it is not, for example, a tax on capital. The Alberta Act is phrased differently from those considered in the two decisions referred to but, upon consideration, I have concluded that the former should, for the purposes of this appeal, be construed in the manner already indicated.

It is said, that this construction is precluded by the judgment of the Privy Council in *Provincial Treasurer of Alberta* v. *Kerr* (2). It is important to notice with what that case was concerned. The Alberta *Succession Duties Act* was there before the courts and one question was whether the tax imposed was a direct tax. The other question was not whether a tax was imposed on a person or a property but whether it was imposed on property or a transmission. It was with reference to that point that Lord Thankerton remarked at page 717:

> There can be no doubt that the Alberta *Succession Duties Act* purports to impose taxation on the basis (*inter alia*) of personal property situate outside the province

and it was on the basis of that construction that it was stated that

> identification of the subject matter of the tax is naturally to be found in the charging section of the statute,

and the conclusion was reached that the subject matter of the taxation was property and not the transmission of property. On the point as to whether the taxation was direct taxation, it was pointed out, at page 722, that the duties in question were imposed on the executors on their application for probate; so that in the same Act the tax was found as to property within the province to be a tax on persons but invalid because it was not direct taxation, and as to personal property outside the province, the Act was invalid both because the taxation was not direct and because it was not within the province. The decision affords no assistance in the determination of this appeal and the remarks of Lord Thankerton must be read with reference to the matters under consideration.

(1) [1901] A.C. 26, at 35. (2) [1933] A.C. 710.

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This being the proper construction of the statute, in my opinion the decision in *Bank of Toronto* v. *Lambe* (1) is authority that the Alberta legislature had the power to provide as it has. The question not being before us, it is strictly unnecessary to express any opinion as to whether the legislature also imposed a tax on the income within Alberta of non-residents and, if so, as to the constitutional validity thereof.

The appeal should be dismissed with costs.

HUDSON J.—The appellant, Mrs. Kerr, is domiciled in and a resident of Alberta. She has been assessed for income tax by the taxing authorities of the province in respect of her entire income, including sums received and spent by her while temporarily outside the province. She claims in this action a declaration that she is not liable to pay taxes in respect of sums received by her outside the province and that, if such tax is permitted by the provincial Act, such statute is to that extent *ultra vires* of the provincial legislature and null and void.

The respondent, on the other hand, contends that the assessment is within the Act and that the Act is within the legislative jurisdiction of the province, because the tax is imposed on a person and not on property.

Under section 92 (2) of the *British North America Act* the province has power over "direct taxation within the province in order to the raising of a revenue for provincial purposes".

Income tax is of course a direct tax and there would seem to be no doubt about the power of the legislature to measure the tax by reference to the value of property or assets of the taxpayer beyond, as well as within, the territorial limits of the province. The leading case of *Bank of Toronto* v. *Lambe* (1) is sufficient authority for this view. Lord Hobhouse said at page 584:

> The next question is whether the tax is taxation within the province. It is urged that the bank is a Toronto corporation, having its domicile there, and having its capital placed there; that the tax is on the capital of the bank; that it must therefore fall on a person or persons, or on property, not within Quebec. The answer to this argument is that class 2

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

of sect. 92 does not require that the persons to be taxed by Quebec are to be domiciled or even resident in Quebec. Any person found within the province may legally be taxed there if taxed directly.

* * *

The bank itself is directly ordered to pay a sum of money; but the legislature has not chosen to tax every bank, small or large, alike, nor to leave the amount of tax to be ascertained by variable accounts or any uncertain standard. It has adopted its own measure, either of that which it is just the banks should pay, or of that which they have means to pay, and these things it ascertains by reference to facts which can be verified without doubt or delay.

To the same effect are the succession duty cases, where taxes have been held to be validly imposed on beneficiaries domiciled or resident within the province on the value of property outside the province which they take by succession.

The charging section of the provincial Act, statutes of Alberta, 1932, chapter 5, is section 8 and reads as follows:

8. (1) There shall be assessed, levied and paid upon the income during the preceding year of every person—

(*a*) residing or ordinarily resident in the Province of Alberta during such year;

* * *

a tax at the rates applicable to persons other than corporations and joint stock companies set forth in the first schedule of this Act upon the amount of income in excess of the exemptions provided in this Act * * *

Section 3 defines income:

3. Without limiting the meaning of "income" for the purposes of this Act, "income" includes the annual net profit or gain or gratuity * * * 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 Alberta or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment * * *

The tax is imposed on the income of a person, not on the income of property. The section is indifferent as to the source or origin of the income, unless where exceptions are especially mentioned. It would appear then, on reading the section, that where the taxpayer is both domiciled and resident within the province the primary question for the assessor is how much did the taxpayer get, not where or how he did get it.

The language of the provincial Act is almost identical and apparently is taken from the provisions of the

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Dominion *Income Tax Act*. In the latter the charging section is section 9 and it is identical with section 8 of the provincial Act as above.

There are several cases where the provisions of the Dominion Act came before the courts for consideration.

Smith v. *Attorney-General of Canada* (1). Mr. Justice Audette held that profits arising from illicit liquor transactions are income within the meaning of the *Income War Tax Act* and taxable. At page 195 he says:

> * * * the appellant comes under section 4 of the Taxing Act, being a person residing in Canada, carrying on business therein and his income is thereunder subject to assessment. * * * It is not necessary to inquire into the source from which the revenue is derived, as the tax is a charge imposed by the legislature upon the person, and all his revenues—from whatever source derived—mingle with the rest of the income.

This decision of Mr. Justice Audette was reversed by this Court (2). But on further appeal to the Judicial Committee of the Privy Council, the decision of this court was reversed (3). Lord Haldane held that Parliament had power to impose this tax if they so chose. The words construed literally include these profits and there was not shown that it was intended to exclude them. The judgment of Mr. Justice Audette was restored.

In the case of *Waterous* v. *Minister of National Revenue* (4), a company declared a dividend payable in Dominion of Canada war loan bonds held by it, at the par value thereof. The bonds each provided that

> the obligation represented by this bond and the annexed interest coupons and all payments in discharge thereof are and shall be exempt from taxes, including any income, imposed in pursuance of any legislation enacted by the Parliament of Canada.

Appellant, a shareholder in the company, received a dividend in bonds as aforesaid, and was assessed upon the amount thereof under the *Income War Tax Act*. It was held by this court that the assessment was valid. In giving judgment of the Court, Mr. Justice Smith says at page 410:

> I think it is clear that this is not a taxation on the obligation represented by the bond or upon payments in discharge thereof, but merely taxation upon the appellant's income, which is in part measured by the amount of the bond which he received as divided, and which constitutes income.

(1) [1924] Ex. C.R. 193.
(2) [1925] S.C.R. 405.
(3) [1927] A.C. 193.
(4) [1933] S.C.R. 408.

Mr. Justice Smith further referred with approval to the decision in the case of *In re McLeod* v. *The Minister of Customs and Excise* (1), at page 464 where Mr. Justice Mignault made the following remark:

> All this is in accord with the general policy of the Act which imposes the income tax on the person and not on the property. In other words, it is the person who is assessed in respect of his income.

In *Abbott* v. *City of Saint John* (2), it was held by this Court that the city of Saint John had authority to assess the appellant, an official of the Dominion Government, on his income as such, he being a resident of the city of Saint John and the city being empowered under provincial legislation to impose an income tax. It was there said by Mr. Justice Maclennan at p. 616:

> From all this it is apparent that the tax to be levied in any year is not a part of the income, as such, of the inhabitant, but a sum of money to be measured by, or in proportion to the amount of his income during the preceding year. It is the inhabitant who is taxed for his fair and reasonable share of the expenses incurred by the municipality on his behalf, and on behalf of all the other inhabitants, and his income for the preceding year is referred to solely for the purpose of ascertaining what is just and reasonable that he should be required to pay. No attempt is made to seize or appropriate the income itself, or to anticipate its payment. He receives it, and applies it as he thinks fit.

This decision was approved of by the Judicial Committee of th ePrivy Council in the case of *Caron* v. *The King* (3). Lord Phillimore says at page 1006

> They are statutes for imposing on all citizens contributions according to their annual means, regardless of, or it may be said not having regard to, the source from which their annual means are derived.

These cases decided in effect that a tax imposed in similar language to that under consideration here was a tax on a person rather than on property or on a source of revenue. There the courts were not called on to decide whether or not the tax was imposed " within the province ". But if the tax is imposed on a person and that person is resident and domiciled in the province, it must, I think, follow that the tax is imposed within the province.

I cannot find that any of the other provisions of the Act conflict with this view, rather do they support it. Under section 32 (1) the taxpayer is bound to make a return in each year before the 31st of March of his income for the

(1) [1926] S.C.R. 457. (2) (1908) 40 S.C.R. 597.
(3) [1924] A.C. 999.

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preceding year. Meanwhile the taxpayer is free to spend his income as he pleases. There is no lien on any of the moneys received and the remedy for non-payment is first, by action under section 68 and, after failure to pay, a distress may be levied.

I think the appeal should be dismissed with costs.

Application dismissed with costs.

Solicitors for the appellant: *McLaws and Company.*

Solicitors for the respondent: *W. S. Gray.*

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* June 2.
* Oct. 6.

THE OWNERS OF THE STEAMSHIP *PANAGIOTIS TH. COUMANTAROS* (PLAINTIFFS) ..... APPELLANTS;

AND

NATIONAL HARBOURS BOARD (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, QUEBEC ADMIRALTY DISTRICT

Shipping—Vessel damaged by striking obstruction in harbour—Dredging operations under exclusive control of Department of Marine—Duty and extent of Board in assuring safety of harbour under its jurisdiction—Reasonable care in light of existing circumstances—Knowledge of danger to navigation and lack of warning to interested owners of vessels—Levy of tolls or rates by the Board.

Appellant's vessel, while clearing from the port of Montreal on the 19th of August, 1936, struck an under-water obstruction in the bed of the channel in the harbour and was damaged. During the years of 1935 and 1936, the Government of Canada had undertaken, under statutory authority, to deepen the channel from 30 to 35 feet. By a subsequent Order in Council, the administration, management, construction and execution of such improvement in the Montreal harbour was placed under the exclusive authority of the Department of Marine, and, by a second Order in Council, a contract for dredging was let to a firm of contractors. At the end of June, 1936, that part of the channel abreast of Victoria pier was swept by the respondent, and no dredging was done there up to the 19th of August. On the 12th of that month, some dredging was made above that pier. Dragging at that point by the contractor was observed by an official of this respondent between the 12th and 19th of August; but no sweeping had been done by either the Department of Marine or the respondent

* PRESENT:—Rinfret, Kerwin, Hudson and Taschereau J.J. and Bond J. *ad hoc.*

to test it. After the accident, a boulder of considerable size was found abreast Victoria pier; and it is admitted that that, or a similar one, was the obstruction the appellants' vessel had struck.

Held, Kerwin J. dissenting, that, on the facts disclosed by the evidence, no liability rests upon the respondent.—Although the harbour of Montreal is under the jurisdiction, control and management of the respondent, the execution in 1935 and 1936 of the work of improvement and deepening of the channel was exclusively under the authority of the Department of Marine, a third party over whom the respondent had no control and for whose conduct the respondent cannot be held responsible, respondent's control and administration, so far as such work was concerned, having been interfered with, or superseded by, superior authority.—The respondent's obligation to exercise reasonable care to see that the harbour was safe for navigation still existed; but that duty must be looked at in the light of the existing circumstances. Even assuming that the onus lies upon the respondent, the evidence establishes that reasonable care, under the circumstances, has been exercised by the respondent and that the latter has performed such duty *inter alia* by constant notices to those interested, during the progress of the work. But the respondent was not obliged to drag or sweep in order to ascertain that the work confided to the Department of Marine was being properly done. Only where the respondent knew, or should have known, that danger existed had steps to be taken by it to remove such danger, or suitable warning be given in respect of it.—The levy by the respondent of tolls or rates upon ships using the harbour does not make any difference in principle in respect of its liability of exercising reasonable care.

Per Kerwin J. (dissenting).—The mere fact that the Crown has let a contract for the dredging of the channel has not absolved the Harbour Commissioners, predecessors of the respondent, of all responsibility. Their duty in general is suitably expressed in the words of Lord Phillimore in *Pacific Steam Navigation Co.* v. *Mersey Docks and Harbour Board* (22 Ll. L.R. 383 at 389); and the principles set forth in *The Moorcock* (14 P.D. 64) and in *The Bearn* ([1906] p. 48) should be applied to this case. The Commissioners knew that the dredging operations would throw up obstructions, but, instead of making any examination or warning the appellants of the danger, they did nothing but rely on the sweeping and dragging operations performed by the contractor, which their officers saw proceeding in connection with the dredging. The evidence establishes that, if these operations had been properly performed, the obstruction which caused the damage would have been discovered. In any event, the Commissioners knew of the danger to navigation resulting from probable obstructions and they did nothing to give warning of the danger to the appellants. As a consequence of that breach of duty, the Commissioners, and hence the respondents, are responsible.

Judgment of the Exchequer Court of Canada, Quebec Admiralty District ([1941] Ex. C.R. 188) affirmed, Kerwin J. dissenting.

APPEAL from the judgment of the Exchequer Court of Canada, Quebec Admiralty District, Cannon L.J. (1) dis-

(1) [1941] Ex. C.R. 188.

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missing the appellant's action to recover from the respondent damages sustained by their vessel allegedly due to negligence of the respondent.

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

Bernard Bourdon K.C. for the respondent.

The judgment of the majority of the Court, Rinfret, Hudson and Taschereau JJ. and of Bond J. *ad hoc* was delivered by

BOND J. *ad hoc*.—This is an appeal from a judgment rendered on the 25th June, 1941, by the Hon. Mr. Justice Cannon, District Judge in Admiralty for Quebec, which dismissed the plaintiffs' action, with costs.

The action was one to recover damages sustained by the plaintiffs' steamship *Panagiotis Th. Coumantaros,* through striking an under-water obstruction in the upper part of the Harbour of Montreal, on the 19th August, 1936. The ship in question was a steel screw steamship of Greek registry, 424·4 feet in length, 53 feet beam, 5,839 tons gross, and 3,699 tons net register.

She arrived in the harbour of Montreal on August 13th, 1936, in ballast and, under instructions from the Harbour Commissioners, berthed at the Marine Tower Jetty, to reach which, as also when later she proceeded to sea, she had to pass through the part of the main ship channel of the St. Lawrence river abreast of the Victoria pier in the harbour of Montreal. The ship took on a grain cargo, and paid to the Harbour Commissioners charges against the ship and her cargo totalling $2,787.98. On the 19th August, having completed loading, she was granted a clearance and permission by the harbour master to leave her berth at 2.15 p.m., for the purpose of proceeding on her voyage. She was drawing 26 feet 7½ inches, which was less than the maximum draft of 26 feet 9 inches permitted for that day. The water gauge, showing the depth of water available on that date, registered 29 feet 3 inches, and the clearance exacted by the authorities was 2½ feet for ships under 10,000 tons.

Having backed away from the jetty with the assistance of tugs, and turned her head down the river in about the centre of the channel, or a little to the south of it, she

proceeded down the river, in charge of a qualified pilot, and very shortly after, when abreast of the dividing line between sheds 18 and 19 on Victoria pier, the ship struck an under-water obstruction of a hard nature. She vibrated and slowed down but did not stop, and the obstruction, according to the testimony of the pilot, seemed to roll a little under her as she passed over it. The ship commenced to leak and, by the time Quebec was reached, she was considerably down by the head. Part of the cargo was discharged, and the vessel dry-docked, when an indentation or groove was found in the bottom extending for 190 feet, 14 plates being affected, which damage was, according to the Salvage Association Surveyor, evidently caused by a round or smooth boulder or rock. The cost of the repairs alone amounted to $17,700, besides the loss of earnings, expenses in discharging and reloading the cargo, and other items.

During the year 1935-36, the Government of Canada had undertaken to deepen the channel from 30 to 35 feet under the authority of an Act 25-26 Geo. V, c. 34; (*The Supplementary Public Works Construction Act, 1935*), which Act authorized the Governor in Council to execute and complete the works mentioned in the schedule, and to place the administration, management and execution of such works under such Minister or Department of the Crown as was considered most advisable in the public interest. In pursuance thereof two Orders in Council were passed, the first of which provided that the administration, management, construction and execution of the Montreal Harbour improvement and deepening be placed under the Minister of Marine, subject to the control of the Governor in Council, while the second declared that it was imperative that certain dredging operations be commenced forthwith in the harbour of Montreal, in order to provide for a greater depth of water, and that, as the chief engineer of the river St. Lawrence ship channel reported in favour of the tender of General Dredging Contractors, Limited, authorized the Minister to enter into a contract with that company accordingly, which contract was executed on the 14th August, 1935. The specification attached to this contract provides that the engineer in charge shall be the "Chief Engineer, River St. Lawrence Ship Channel, Department of Marine".

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This specification also includes the following paragraphs:

Navigation.—The contractor must not, under any circumstances, obstruct, inconvenience or delay navigation.

The contractor is hereby warned against the intensive traffic in the port of Montreal, more especially in the upper part of said port. The contractor shall be equipped with drags or other suitable plant to locate and remove immediately all lips or other obstructions caused by dredging or blasting, and shall effect the location and removal of such lips or obstructions prior to the passing of all deep-draft vessels over the area affected by the dredging or blasting, and by the removal of such lips or obstructions, the contractor shall ensure a depth of water in the said area equal to that of the current harbour datum or such depth as indicated by the engineer.

Liability.—The Department will not be responsible for the safety of the contractor's employees, plant or material, nor for any damage which may be sustained by him from any source or cause. The contractor will be responsible for damage done to piers, shipping, or to other property or persons by himself, his agents or servants, as the Department will assume no responsibility in this connection.

In general the contractor is warned that dredging conditions in Montreal harbour present considerable difficulties in the way of very heavy currents, as well as heavy traffic which must be carried at all times.

* * *

The contract itself required the contractor

to perform, complete and finish in every respect * * * all the works required to deepen, dredge out and clear wholly and entirely of all obstructions and materials whatsoever

a 35 feet deep channel in area "A" of the Montreal harbour (which included the deep ship channel abreast the Victoria pier, then 30 feet deep).

The dredging under this contract was started in 1935, and continued in 1936. The work was supervised on behalf of the Department of Marine by Mr. F. S. Jones, presently chief engineer of the St. Lawrence ship channel, but then an assistant engineer, and he had as an assistant Mr. McEwan. They had at their disposal a sounding scow, and the S.S. *Berthier,* to enable them to test the work of the contractors.

From the end of June, 1936, until August 19th, there was no dredging done in the channel abreast of Victoria pier, closer than about 400 feet from the pier. After the June dredging had been completed, that part of the harbour was carefully swept. Mr. Jones testified that, from July 31st to August 7th, these "berms" were constantly being dragged; that it was part of the job, and while the

Department did not do it themselves, they knew it was being done, and had every reason to believe that it was carefully done.

On the 12th August, 1936 (to come down to the approximate time of the occurrence now in question), one of the contractor's dredges started above Victoria pier, on the south bank of the channel, a cut to deepen the channel to 35 feet, and, proceeding downstream, finished that cut on the 19th August, well below the pier. On that day there was an open channel abreast Victoria pier, at least 630 feet wide.

It was well known that dredging was likely to turn up "berm" or ridges, as well as boulders along the edge and at the ends of the cuts. Dragging by the contractor was observed by Mr. Jones between the 12th and 19th of August at this point, but no sweeping had been done by the Department to test it.

The master of the steamship *Panagiotis* advised the agents of the owners of the occurrence on the evening of the 19th by marconigram, and the harbour authorities and Mr. Jones, of the Department of Marine, were also duly advised.

On the following day—the 20th—Mr. Jones swept the berm of the cut in the vicinity of Victoria pier, and found some touches or high spots.

On the 21st August, about 10 a.m., the master of the dredge, working on a second cut abreast Victoria pier, found a boulder lying alongside the cut at about 20 to 25 feet from the dredge. Mr. Jones says it was 430 feet out from Victoria pier. The boulder was one of considerable size, namely, 18 feet long, 10 feet wide and 6 feet high, and weighed about 60 tons. It left a clearance of only 26½ feet. The harbour master was notified, and two Cunard ships about to leave were detained for a couple of hours. The boulder was marked by anchoring the launch belonging to the Department over it, and no further boulders were discovered.

The contractors, under the supervision of the Department, worked at the boulder and, on the evening of the 21st, it was removed or pushed into a depression in the river bed.

There can be little doubt, if indeed any, from the evidence, of which the above is a brief summary, that the

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appellants' ship struck a boulder turned up by the dredging operations in the immediate vicinity, and the learned trial judge so found as a fact.

It is probable that it was another boulder which the vessel rolled along until it also reached a depression in the river bed, leaving ample clearance.

The real question that calls for decision is whether, on the facts disclosed in evidence, any liability rests upon the respondent.

The appellants seek to hold the respondent liable on three principal grounds, namely:

First: The duty and responsibility of the harbour authorities.

Second: The jurisdiction and powers of the Harbour Commissioners of Montreal, and the rates levied.

Third: The failure of the Harbour Commissioners to exercise care.

It will be more convenient to deal with the second ground at the outset.

The *Montreal Harbour Commissioners' Act,* (1894) 57-58 Vic., c. 48, consolidated the earlier Acts on the subject, and defined the boundaries of the harbour, which boundaries, by later amendments, have been varied but it is not disputed that the accident occurred within the boundaries of the harbour.

Section 19 of the Act as replaced by 8-9 Ed. VII, c. 24, provides:

> The harbour of Montreal shall be vested in the corporation, and shall be under its jurisdiction, control and management for the purposes of this Act.

By an amendment (8-9 Ed. VII, c. 24), it was provided as follows:

> Within the limits of the said harbour, the corporation shall have no right in or jurisdiction over the main ship channel of the river St. Lawrence. * * *

But in 1913, by a further amendemnt (3-4 Geo. V, c. 32), the reference to the exclusion of the main ship channel was omitted. Thus it appears that the whole of the harbour, including where the *Panagiotis* struck the boulder, was under the jurisdiction, control and management of the Harbour Commissioners, including the right to control navigation, impose rates for the use of harbour facilities, the whole in virtue of an Act of Parliament.

But, in 1935, as already pointed out, the Parliament of Canada passed the *Supplementary Public Works Construction Act,* the object of which included the improvement and deepening of the harbour of Montreal, and, by Orders-in-Council, under the express authority of that Act, placed the administration, construction and execution of such work specifically under the authority of the Minister of Marine and his Department. The contract with the dredging contractor was signed on behalf of the King by the Acting Minister of Marine, and the official named in the contract and specifications as the engineer in charge of the undertaking was the chief engineer of the river St. Lawrence ship channel, Department of Marine. In other words, for this particular work, the Harbour Commissioners were superseded by superior authority, and their control and administration, so far as concerns this work, was transferred to the Department of Marine and its officials. The respondent could no longer direct how the work was to be performed, but had to adapt itself to these changed conditions.

The respondent was kept advised by the contractors, or the Department, of the progress and location of the work, and the harbour master issued regularly to the shipping interests, pilots and others concerned appropriate notices, and kept them advised.

The contract between the King and the contractor expressly provided that the contractor must not obstruct, inconvenience or delay navigation, and, indeed, about 6,000 vessels entered the harbour in each of the years 1935 and 1936, without any mishap.

But the under-water operations were exclusively controlled by the Department of Marine, a third party over whom the respondent had no control, and for whose conduct, in the execution of the work confided to it, the respondent cannot be held responsible, on this second ground of appeal alone, for the work was done over its head.

The first and third grounds may be considered together. The appellants contend that harbour authorities who invite vessels to use the harbour or harbour facilities for reward, are obliged to exercise reasonable care to see that the harbour is safe for navigation, and if it is not safe, or they have not taken such reasonable care, they are obliged to give warning.

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The appellants also contend that the onus is on the respondent to show that the required care was exercised, and also that the harbour authorities warrant that the harbour under their jurisdiction, management and control is safe for ships invited to use it.

But, as already pointed out, the harbour of Montreal had been placed, for the purposes of this work, under the control of the Department of Marine, and the control by the respondent in this respect was interfered with or superseded. No doubt the respondent was obliged to exercise reasonable care to see that the harbour was safe for navigation, and that duty was performed by constant notices to those interested as to the progress of the work, and the location of the dredges from time to time, as also provision for the removal of such dredges when there was interference with navigation. But the respondent was not obliged to drag or sweep in order to ascertain that the work confided to the Department of Marine was being properly done by the Department's employees. That would be placing the duty of the harbour authorities too high. Where the respondent knew, or should have known that danger existed then, no doubt, steps had to be taken to remove such danger, or to give suitable warning in respect to it. *The Moorcock* (1).

But, in the present instance, there was no reasonable ground for apprehension by the respondent in view of the precautions taken by way of dragging and sweeping by those in charge of the operations. The deputy harbour master, Capt. Perchard, observed the dragging and testing by the contractors being carried out the very morning of the 19th August.

The cases cited on behalf of the appellants establish clearly a duty upon the harbour authorities to take reasonable care that those who choose to navigate the harbour may do so without danger to their lives or property. (*Per* Lord Cranworth, L.C. in *Mersey Docks & Harbour Board Trustees* v. *Gibbs* (2).

But that duty must be looked at in the light of the existing circumstances, as in the present case, where the control of the harbour has been interfered with by a superior authority; and the evidence establishes that

(1) (1889) 6 Asp. M.C. 373. (2) (1864) L.R. 1 E. & I. App. 93, at 122.

reasonable care, under the circumstances, was exercised by the respondent, and this, even assuming that the onus lies upon the respondent. (*The Sound Fisher* (1).)

In the case of *The Orita: Pacific Steam Navigation Co.* v. *Mersey Docks & Harbour Board* (2), in the House of Lords, Lord Phillimore said, at p. 389:

> The duty of the Mersey Docks & Harbour Board to vessels travelling the channel leading to the Mersey has been expressed with accuracy by Bankes, L.J. in his judgment in the Court of Appeal. It is to take reasonable steps to discover from time to time the existence of any wreck or other obstruction in the channel, to remove any such obstruction with reasonable promptitude, and meanwhile to mark it by a buoy or otherwise, so that those in charge of vessels may avoid it. The Harbour Board does not warrant that the channel shall always be free from such an obstruction. But it must provide for frequent inspection so that if any such obstruction should occur it should be promptly discovered, and that the consequential steps should be promptly taken.

The respondent, in the present case, *a fortiori,* cannot be held to a warranty against the work of a third party duly authorized to perform such work.

The fact further relied upon by appellants that the respondent levied tolls or rates upon the ship using the harbour, seems to have little additional bearing upon the matter. The revenue derived by the respondent was not for its own profit, but as a trustee for the benefit of the public. The *Harbour Commissioner's Act* provides explicitly how such revenue shall be applied. But, as Lord Cranworth pointed out, this does not make any difference in principle in respect to the liability (*Mersey Docks & Harbour Board Trustees* v. *Gibbs* (3).) That liability, as already pointed out, is to exercise reasonable care under the circumstances existing at the time, and so far as any control in this respect remained in the respondent over the ship channel in the harbour then being deepened by the Department of Marine, such reasonable care is established.

The present respondent was created by the Act 1 Ed. VIII, c. 42, and succeeded to all the rights and obligations of the former body known as "The Harbour Commissioners of Montreal" prior to the institution of the present action, though at the time of the accident the former body was in existence.

The appeal should be dismissed, with costs.

(1) (1937) 59 Ll. L.R. 123. (2) (1925) 22 Ll. L.R. 383.
(3) (1864) L.R. 1 E. & I. App. 93, at 122.

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KERWIN J. (dissenting).—The appellants are the owners of the steamship *Panagiotis Th. Coumentaros* and the respondents are National Harbours Board. While proceeding to sea from Montreal, the ship struck a hidden obstruction on the bottom of the main ship channel in the St. Lawrence river in the harbour of Montreal. Action was brought by the appellants for a declaration that they were entitled to damages for the injury caused the ship and for a reference to ascertain the amount of such damages. The trial judge found that the obstruction was a boulder which had been turned up in the course and on account of the dredging operations which had been carried on in the vicinity, and that no blame was attributable to the ship. These findings were not seriously challenged before us by the respondents. The trial judge, however, dismissed the action because he considered that, under the circumstances, the predecessors of the National Harbours Board had used reasonable care to insure that the harbour of Montreal, which was under their control at the time of the occurrence, was reasonably safe for the vessels which they had invited to use it.

The predecessors of the respondents were the Montreal Harbour Commissioners and by the *National Harbours Act, 1936,* chapter 42, the present respondents became liable for all lawful claims against and obligations of the Commissioners. The earlier Acts relating to the Commissioners and to the harbour of Montreal were consolidated by *The Montreal Harbour Commissioners Act, 1894* (57-58 Vic., c. 58), which Act defined the boundaries of the harbour and constituted the Commissioners a corporation. It may be assumed, as no question was raised regarding it, that the main ship channel where the accident occurred was part of the harbour of Montreal at Confederation and, therefore, became the property of the Crown in right of the Dominion. In 1909 a new subsection 2 of section 6 of the principal Act was enacted providing that "within the limits of the said harbour the corporation shall have no right in or jurisdiction over the main ship channel of the river St. Lawrence", and subsection 3 stated:

> The Governor in Council may for the purposes of this section define the extent and limits of the main ship channel.

The 1909 Act also repealed section 19 of the 1894 statute and enacted in lieu thereof:

> The harbour of Montreal shall be vested in the corporation and shall be under its jurisdiction, control and management for the purposes of this Act.

In 1913, by 3-4 George 5, chapter 32, subsection 2 of section 6 as enacted in 1909 was repealed in such a way that the exclusion of the Commissioners' jurisdiction over the main ship channel of the river was omitted, and subsection 3 of section 6, which gave the Governor in Council power to define the extent and limits of the ship channel, was also repealed. In 1914, by 4-5 George V, chapter 42, it was provided that notwithstanding anything contained in any of the earlier Acts respecting the harbour, it and all wharves, warehouses, etc., should, subject to the jurisdiction and powers of management and control by law vested in the corporation, be vested in His Majesty in right of His Majesty's Government of Canada and should be deemed to have always been so vested since the first of July, 1867. The corporation was empowered to surrender, transfer and convey to His Majesty the harbour, together with the wharves, warehouses, etc.,

> provided that such surrender, transfer or conveyance shall not be deemed to affect the jurisdiction or powers of control and management of the corporation.

In 1932, by chapter 50, this section was repealed and a new one enacted but so far as this appeal is concerned it is sufficient to note that by it the harbour and all wharves, warehouses, etc., were vested in His Majesty subject to the jurisdiction or powers of control and management of the corporation.

In 1935, by 25-26 George V, chapter 34, entitled *The Supplementary Public Works Construction Act, 1935*, Parliament, for the purpose of stimulating employment, provided that the Governor in Council might authorize the execution and completion of the several public works and undertakings mentioned in schedule A, and for such purposes might authorize the performance of such acts and the execution of such contracts as might be deemed necessary and expedient. By section 5, the Governor in Council might place the administration, management, construction and execution of any of the works under such

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Minister or Department as might be considered most advisable in the public interest. In the schedule, as item 3, appears:

3. Montreal Harbour Improvement and Deepening $3,500,000.

By an Order in Council, the administration, construction and execution of this work was placed under the authority of the Minister of Marine and his department. By a subsequent Order in Council, the tender of General Dredging Contractors Limited for the deepening of the ship channel was accepted and the Minister was authorized to enter into a contract for the purpose, which contract was subsequently executed and operations commenced. By the contract, the engineer in charge of the undertaking was the chief engineer of the St. Lawrence ship channel.

At the time of the accident, therefore, the position appears to be that the Crown in right of the Dominion owned the bed of the channel; that by the Act of 1894 and amendments the management and control of the harbour, which included the bed of the channel at the point where the ship struck the obstruction, rested with the Commissioners; but that, pursuant to the Act of 1935, the Crown as owner undertook to deepen the channel.

No point was made before us that the appellants could not have sued the Commissioners or could not sue the present respondents, and nothing therefore is said with reference to the matter. The question is whether under the circumstances the Commissioners owed any duty to the appellants. The appellants' ship loaded a quantity of wheat from the Commissioners' elevators in the harbour, for which, in accordance with the powers of the Commissioners, the latter levied rates amounting in all to over $1,200. In addition wharfage rates to the extent of more than $500 were also paid by the appellants to the Commissioners. The ship's draft was less than the draft permitted for vessels navigating the harbour and the vessel was granted a clearance certificate. She was in charge of a qualified pilot and she was proceeding in a proper manner when, without any warning and without any knowledge on the part of the pilot or the officers of the appellants, she struck the obstruction.

Does the mere fact that the Crown had let a contract for the dredging of the channel absolve the Commissioners

of all responsibility? Their duty generally could not be better expressed than in the words of Lord Phillimore with reference to the Mersey Docks and Harbour Board in the action brought against it by Pacific Steam Navigation Company (1):

> The duty of the Mersey Docks & Harbour Board to vessels travelling the channel leading to the Mersey has been expressed with accuracy by Bankes L.J., in his judgment in the Court of Appeal. It is to take reasonable steps to discover from time to time the existence of any wreck or other obstruction in the channel, to remove any such obstruction with reasonable promptitude, and meanwhile to mark it by a buoy or otherwise, so that those in charge of vessels may avoid it. The Harbour Board does not warrant that the channel shall always be free from such an obstruction. But it must provide for frequent inspection so that if any such obstruction should occur it should be promptly discovered, and that the consequential steps should be promptly taken.

In *The Moorcock* (2), wharfingers were held liable to the owners of the ship which had grounded after having berthed at the defendants' jetty. The bed of the Thames river adjoining the jetty was vested in the conservators and the defendants had no control over it. They were held liable when the vessel on grounding at low water sustained damage from the uneven condition of the bed of the river, on the ground that they must be deemed to have implicitly represented that they had taken reasonable care to ascertain that the bottom of the river adjoining the jetty was in such a condition as not to cause injury to the vessel.

This decision was followed in *The Bearn* (3), where a railway company, owners of a wharf, were held liable to the owners of a steamship which had been berthed alongside the wharf because, as owners thereof, they had invited the plaintiffs' vessel alongside for profit to themselves and could not rely upon pilots performing a duty cast upon them by their co-defendants, the Shoreham Harbour Trustees, for, in their capacity as wharf owners the railway company had the opportunity of ascertaining the condition of the berth and should, therefore, have either satisfied themselves that it was reasonably fit or warned those in charge of the vessel that they had not done so.

The principles set forth in these two cases should be applied to the present appeal. The Commissioners knew that the dredging operations would throw up obstructions

(1) (1925) 22 Ll. L.R. 383, at 389.
(2) (1889) 14 P.D. 64.
(3) [1906] P.D. 48.

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but, instead of making any examination or warning the appellants of the danger, they did nothing but rely on the sweeping and dragging operations which their officers saw proceeding in connection with the dredging. The evidence dealing with the precautions that were taken by the contractors and the chief engineer of the St. Lawrence ship channel or his assistants indicates that if these operations had been properly performed, the obstruction which caused the damage would have been discovered. In any event the Commissioners knew of the danger to navigation in the channel from obstructions which would undoubtedly be cast up by the dredging and they did nothing to give warning of this danger to any one connected with the appellants either by verbal or written notice or by buoying the limits of the channel within which navigation would be safe. For the consequences for this breach of duty, the Commissioners, and hence the respondents, are responsible.

The appeal should be allowed, the judgment *a quo* set aside and in lieu thereof there should be the declaration and order for reference sought by the appellants. The appellants are entitled to their costs of the action and of this appeal.

Appeal dismissed with costs.

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

Solicitor for the respondent: *Bernard Bourdon.*

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* June 23.
* Oct. 6.

MARIE E. RACETTE (SUPPLIANT).....APPELLANT;

AND

HIS MAJESTY THE KING (DEFENDANT). RESPONDENT.

AND

THE ROYAL BANK OF CANADA

(THIRD PARTY).

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—War loan bond—Transfer by owner—Made in form approved by Minister of Finance—Signature of registered owner guaranteed by bank—Owner denying having executed transfer—Liability of the Crown.

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

Transfer of war loan bonds of the Dominion of Canada had been made on a form required by regulations passed by order in council under the provisions of section 15 of c. 178, R.S.C., 1927. At the foot of such form, it was specified that the "signature of the registered owner, if not known at the office of transfer, must be guaranteed by a bank * * *".

Held that the liability of the Crown can only be discharged by evidence that the registered owner of the bond has, in fact, duly executed a written instrument of transfer on a form approved by the Minister of Finance.—The mere reception by the Crown, of such form purporting to be signed by the owner and containing the warranty of a bank as to the signature of the registered owner, is not sufficient in itself to liberate the Crown from the payment of the bond.

APPEAL from the judgment of the Exchequer Court of Canada, Angers J., dismissing the appellant's action against the Crown for the recovery of the amount of war loan bonds.

J. P. Charbonneau K.C. for the appellant.

Roger Ouimet for the respondent.

Hazen Hansard for the third party.

The judgment of the Court was delivered by

RINFRET J.—Nous n'arrivons pas à donner aux règlements adoptés par le gouverneur en conseil, sous l'empire de la section 15 du chapitre 178 des Statuts Revisés du Canada, 1927, l'interprétation que leur a attribuée l'honorable juge de la Cour d'Echiquier du Canada.

Le transfert des obligations qui appartenaient à la pétitionnaire paraît bien avoir été fait sur la formule requise par ces règlements; cette formule, au bas, contient bien la mention:

signature of the registered owner, if not known at the office of transfer, must be guaranteed by a bank or other financial institution acceptable by the Department;

et, au-dessous de cette mention, apparaît bien la déclaration suivante:

For the Royal Bank of Canada,
St. Catherine & Bleury streets,
Montreal.

(signed) H. A. Caswell, manager.

mais les règlements invoqués par l'intimé n'ont pas l'effet qu'il prétend et que leur a accordé le jugement porté en

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Rinfret J.

appel. Ils ne prescrivent pas que si le Ministre des Finances reçoit une formule ainsi libellée, il sera "justifié d'effectuer le transfert", ainsi que le dit le jugement, et, que le Gouvernement sera validement libéré, comme le décide ce jugement.

Il est probable que le fait d'exiger la garantie par une banque est de réserver au Gouvernement un recours contre la banque qui certifie l'authenticité de la signature du cédant; mais le règlement ne déclare pas que cette garantie ou ce certificat sera tenu pour décisif et indiscutable à l'encontre du véritable propriétaire des obligations qui font l'objet du transfert.

Au contraire, le règlement précise:

> In order to effect the transfer of a Dominion of Canada War or Victory Bond, there must be presented * * * a written instrument of transfer in form approved by the Minister duly executed by the registered holder.

Or la pétitionnaire était la propriétaire enregistrée des obligations dont elle réclame le paiement; et ce qu'elle allègue, c'est que précisément elle n'en a jamais effectué ("duly executed") le transfert.

L'unique motif du jugement de première instance ne saurait donc être accepté; et il faut trouver ailleurs la solution de cette cause.

* * *

The judgment then proceeds in giving the reasons why, in the opinion of the Court, there should be a new trial, mainly on the ground that the facts and circumstances of the case have not been sufficiently disclosed by the evidence and that the trial judge, having decided the case solely on the question of construction mentioned in the head-note, has thus made no findings as to the facts of the case and the credibility of the witnesses.

Appeal allowed with costs; new trial ordered.

Solicitors for the appellant: *Charbonneau, Charbonneau & Charlebois.*

Solicitor for the respondent: *Roger Ouimet.*

Solicitors for the third party: *Montgomery, McMichael, Common & Howard.*

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* May 18, 19.
* Oct. 6.

W. W. SALES LIMITED (DEFENDANT)....APPELLANT;

AND

THE CITY OF EDMONTON (PLAINTIFF) ..... RESPONDENT.

W. W. SALES LIMITED (DEFENDANT)....APPELLANT;

AND

ARMSTRONG - COSANS LIMITED (PLAINTIFF) ..... RESPONDENT.

W. W. SALES LIMITED (DEFENDANT)....APPELLANT;

AND

B. SHELDON'S LIMITED (PLAINTIFF) ..... RESPONDENT.

W. W. SALES LIMITED (DEFENDANT)....APPELLANT;

AND

ROBERT ARKINSTALL (PLAINTIFF) ....RESPONDENT.

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

Master and servant—Negligence—Servant instructed to clean premises—Burning of debris by servant without specific instructions—Fire causing damages—Liability of employer—Whether servant's act within scope of employment—Breach of city by-law—Commission of alleged illegal act by servant.

Respondents sued for damages to their properties from a fire which they alleged was caused by the negligence of servants of the appellant company. The latter's manager ordered two of its servants to clean out the basement of its store and place the rubbish in an ash can outside the premises. The employees did this and then, without any special instructions in that regard, tried to burn the rubbish. The fire spread out of control and damaged the property of the respondents. The trial judge held that the evidence, as to the actions of one of the servants and as to the instructions given him and the other servant, showed that the former had ignited the fire in the can, that in doing so he was negligent, and that he was at the time acting within the scope of his employment. The judgment of the trial judge was affirmed by the appellate court.

Held, affirming the judgment appealed from ([1942] 1 W.W.R. 375), that the appellant company was liable for the damage caused by the fire.—

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The findings of fact by the trial judge have been accepted by the appellate court, and the evidence does not disclose anything which would justify a reversal of these judgments by this Court.—The servants were "not on a frolic of their own"; but they were in fact doing work, which was intended to be of service to their master and was in fact closely connected with acts which they were specifically instructed to do. The burning of the debris was, therefore, as a matter of fact, within the course of the servant's employment. *Lockhart* v. *Canadian Pacific Railway Co.* ([1941] S.C.R. 270) followed.—Also, in view of the finding of the trial judge, the appellant cannot succeed on the ground raised by it, that the act of lighting a fire at the place and under the circumstances in which it was lit was an illegal act, being in breach of certain city by-law and that, there being no express order given by the appellant to the servant to light the fire, no authority to light could be implied. *Dyer* v. *Munday* ([1895] 1 Q.B.D. 742) ref.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of the trial judge, Howson J. (2) and maintaining the respondents' actions to recover damages for loss occasioned to them, through appellant's servants' alleged negligence, by reason of a fire which damaged their buildings and their contents.

George Steer K.C. for the appellant.

H. H. Parlee K.C. for the respondents.

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

HUDSON J.—Buildings belonging to the several plaintiffs were damaged by fire and it was claimed in these actions that the fire originated through the negligence of the defendant's servants while in the course of their employment.

The action was tried before Mr. Justice Howson, who held the defendants liable, and this decision was unanimously affirmed in the court of appeal.

The facts are set out in the judgment of Mr. Justice Clarke in the court of appeal as follows:

The Powell Block, owned by the city, occupied the easterly half of the block. The plaintiff Armstrong-Cosans Limited occupied the eastern part as a printing and publishing office, and the plaintiff Arkinstall occupied the westerly part as a motor car exchange, and the Sheldon block occupied the westerly half of the block, there being a lane between the two blocks. The defendant carried on a general merchandising business

(1) [1942] 1 W.W.R. 375; [1942] 1 D.L.R. 516.

(2) [1941] 2 W.W.R. 329; [1941] 3 D.L.R. 737.

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Hudson J.

on the northeast corner of the intersection of 97th street and 101st avenue about two city blocks from the Sheldon block, and had the south half of the basement of the Sheldon block rented for the storage of its surplus merchandise. The basement is entered from the lane at the east end thereof.

About three o'clock on the afternoon of January 13th, 1940, S. P. Wilson, who was president and manager of the defendant company, ordered Roy A. Eckstrom, one of the defendant's employees, to take with him another employee, William Fleming, and to go to the basement of the Sheldon block, and there clean up these premises rented by the defendant. Eckstrom is 22 or 23 years old, is a mail order clerk, and had been in the defendant's employment for four or five years. Fleming is a general utility man, about 17 years old, and had been employed by the defendant only a few months.

Across the lane from the rear entrance to the basement of the Sheldon block, and within two feet of the rear wall of the Powell building, stood a fifty-gallon steel oil drum which was used as an ash can by the tenants of the Powell building. Eckstrom and Fleming, as ordered, went to the basement of the Sheldon block and swept up the debris on the floor, which consisted of paper, straw, dust and pieces of wooden boxes. They carried this debris into the lane and piled it in the said ash can. About four o'clock p.m., a fire occurred which consumed a considerable portion of the Powell building. Shortly before four o'clock the contents of this oil drum were burning, and the blaze reached three or four feet above the top of the drum. A strong wind was blowing. At about the same time or slightly later, the Powell building was seen to be afire in the vicinity of this ash can.

The trial judge found that the fire which ignited the building originated in the steel drum or ash can. He also found that Fleming ignited the material which he had brought from the defendant's rented premises and put into the can, in the belief that he was fully carrying out the instructions he had received. He also found that Fleming was negligent and that he was acting within the scope of his employment.

Mr. Justice Clarke, speaking on behalf of the court of appeal, agreed with these findings, which thus became concurrent findings of fact.

The arguments for the appellant before this Court were first, that the defendant's servants in depositing the refuse in the drum and igniting it were doing something which they had no authority to do and which had, in fact, been expressly forbidden by their employer. In support of this argument, reliance was placed on the evidence of Mr. Wilson, president and general manager of the defendant company. The trial judge on this point makes the following statement:

> Wilson testified that behind the store on the northeast corner of the intersection of 97th street and 101st avenue, an incinerator is constructed

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for the destruction of the debris from that store, and that there are standing orders to all employees to collect in cartons all waste material to be destroyed, and that the same should be burned only by the shipper or his assistant. It is quite evident that the complete cleaning-up process at that store consists in sweeping up, carrying out, depositing in cartons, and burning. Behind the Sheldon block there was no incinerator or other receptacle for either the destruction or accumulation of the debris from the defendant's premises there. Wilson swore that the above standing orders applied also to the Sheldon block premises. I do not accept that statement. There is nothing to indicate that the shipper or assistant shipper ever were at the Sheldon block. On the other hand, Eckstrom had done this cleaning-up on several previous occasions. I am satisfied that general orders "to go to the Sheldon block and clean up these premises" were given. It was left open to the employees to interpret those orders just as widely as Wilson left it to the plaintiffs' counsel to interpret what was meant when, as he says in answer to question 111: "What does your wife do when she cleans up?" It was left to Eckstrom and Fleming to carry out the complete process of cleaning-up—that is, to sweep up, carry out, pile up and burn. It was not a case of being ordered to do a specific act, but rather these employees received general instructions to clean up the premises, which involved a discretion in the method as well as unlimited judgment as to the extent of the operation. I find that Fleming was acting within the scope of his employment, and that the defendant is liable to the plaintiffs for such damages as may be proven. The plaintiffs will have their costs, including examinations, on the columns applicable to their respective ascertained losses.

The findings of fact were accepted by the court of appeal and perusal of the evidence does not disclose anything which would now justify a reversal by this Court.

The courts below relied on what was said by this Court in *Lockhart* v. *Canadian Pacific Railway Co.* (1). An appeal was taken from that decision to the Judicial Committee of the Privy Council and judgment recently has been given confirming same. In his judgment Lord Thankerton quotes with approval an extract from Salmond on Torts, 9th ed., p. 95:

> It is clear that the master is responsible for acts actually authorized by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes—although improper modes—of doing them. In other words, a master is responsible not merely for what he authorizes his servant to do, but also for the way in which he does it * * * 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.

(1) [1941] S.C.R. 270.

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I think that this statement has a close application to the present case. Here the servants were "not on a frolic of their own." They were in fact doing work which was intended to be of service to their master and was in fact closely connected with acts which they were specifically instructed to do.

The second point pressed before us is that the act of lighting a fire at the place and under the circumstances in which it was lit was an illegal act and, there being no express order given by the defendant to Fleming to light the fire, no authority to light could be implied. This point is not dealt with by the trial judge, but is discussed by Mr. Justice Clarke in the court of appeal and dismissed.

In the case of *Dyer* v. *Munday* (1), the question of the responsibility of a master for the commission of criminal offences by a servant in the course of his employment was discussed and Lord Esher at page 746 states the position thus:

> Then it is suggested that if the excess complained of amounts to the commission of a criminal offence, that would take the case out of the rule which makes the master liable for the acts of his servant. But if we look at *Bayley* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (2) and *Seymour* v. *Greenwood* (3) it appears that the acts complained of in both those cases were criminal acts. In neither case was the ground taken that because part of the excess was criminal the master was exempt from liability, and in view of that fact the proposition put before us will not hold good. I do not at all say that the criminal act may not be of such a character as to induce the jury to say that it could not have been done in furtherance of the master's business, or at all in the interests of the master. It may well be that the question whether the offence is a criminal one may be a material fact for the jury to consider from that point of view, but the mere fact that it is a criminal offence is not sufficient to take the case out of the general rule. The liability of the master does not rest merely on the question of authority, because the authority given is generally to do the master's business rightly; but the law says that if, in course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable. There was evidence in this case on which the jury might be properly asked to give their opinion.

In view of the finding of the trial judge in the present case, the second argument is adequately answered.

I would dismiss the appeal with costs.

(1) [1895] 1 Q.B.D. 742. (2) L.R. 8 C.P. 148.
(3) (1861) 30 L.J. Ex. 189, at 327.

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GILLANDERS J. *ad hoc*—These four actions were brought by the plaintiffs to recover damages caused by fire to their buildings and contents. The defendant was found liable at the trial, and an appeal to the Appellate Division of the Supreme Court of Alberta was dismissed by that Court. The defendants appeal to this Court.

The material facts may be conveniently taken from the judgment of Mr. Justice Clarke in the Appellate Division. (See *supra* p. 469.)

Mr. Justice Clarke also continued:

> The trial judge also found that Fleming ignited the material which he had brought from the Sheldon block and put into the can, in the belief that he was fully carrying out the instructions that he had received, and he also found that Fleming was negligent.

On the argument of this appeal appellant's counsel conceded that Fleming placed the debris in and ignited the fire in the ash can, and did so in the belief that he was carrying out the instructions he had received, but it was ably argued that the defendant was not liable because (1) what Fleming did was beyond the scope of his employment, and (2) he (Fleming) had no express authority to ignite or burn the rubbish, and, under the circumstances, that authority could not be implied because it was an illegal act.

The question involves the responsibility of a master for the negligence of his servant. The principles to be kept in mind are authoritatively discussed in the recent case of *Lockhart* v. *Canadian Pacific Railway Co.* (1), in which judgment was delivered (not yet reported) on August 5th, 1942, in the Privy Council. In that case I thought, in the Court of Appeal, that the defendant was not liable, and the error of that conclusion is made clear in the unanimous judgment of this Court and of the Privy Council. Lord Thankerton, who delivered the opinion of the Lords of the Judicial Committee, says in part:—

> The general principles ruling a case of this type are well known, but, ultimately, each case will depend for decision on its own facts. As regards the principles their Lordships agree with the statement in Salmond on Torts (9th ed.), p. 95, viz.:—
>
> "It is clear that the master is responsible for acts actually authorized by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is

(1) [1941] S.C.R. 278.

liable even for acts which he has not authorized, provided they are so connected with acts that he has authorized that they may rightly be regarded as modes—although improper modes—of doing them. In other words, a master is responsible not merely for what he authorizes his servant to do, but also for the way in which he does it * * * 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."

The well known dictum of Lord Dunedin in *Plumb* v. *Cobden Flour Mills Company Limited* (1), that "there are prohibitions which limit the sphere of employment, and prohibitions which only deal with conduct within the sphere of employment," may be referred to. Their Lordships may also quote passages from the judgment of this Board in *Goh Choon Seng* v. *Lee Kim Soo* (2), which was delivered by Lord Phillimore: "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 regards all the cases which were brought to their Lordships' notice in the course of the argument this observation may be made. They fall under one 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; then the master is not responsible. Cases which fall under this head are easy to discover upon analysis. There is more difficulty in separating cases under heads (2) and (3). Under head (2) are to be ranged the 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. Again, the master is not responsible for any mischief which he may do to a third party. 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."

In *Goh Choon Seng's* case (2) the appellant's servants had been employed by him to burn vegetable rubbish collected on his land, and they burnt some of it by lighting fires on Crown land left waste and uncultivated, which was wedged in between the appellant's land and that of the respondent, with the result that the fires spread to the respondent's land and caused damage to his property. The appellant was held liable to the respondent.

The Chief Justice of this Court in the *Lockhart* case (3) refers to passages from Story adopted by Lord Macnaghten in *Lloyd* v. *Grace, Smith & Co.* (4), and one of these passages is in part as follows:—

The passage in the judgment of Blackburn J. as reported in *McGowan & Co.* v. *Dyer* (5) is as follows: "In Story on Agency, the learned author

(1) [1914] A.C. 62, at 67.
(2) [1925] A.C. 550, at 554.
(3) [1941] S.C.R. 278.
(4) [1912] A.C. 716.
(5) (1937) L.R. 8 Q.B. 141.

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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, negligence, and other malfeasance or misfeasances, and omissions of duty on 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."

The instructions given to Eckstrom and Fleming were to go to the basement of the Sheldon block and "clean up" the premises. It is urged that these instructions, while they might be authority to sweep up the debris in the basement, consisting of paper, straw, dust and pieces of wooden boxes, and to remove and pile it, did not, and should not be interpreted to, include the burning of it, and that any burning was, under the circumstances, outside the course of employment. The trial judge says in part:

> * * * behind the store on the northeast corner of the intersection of 97th street and 101st avenue, an incinerator is constructed for the destruction of the debris from that store, and that there are standing orders to all employees to collect in cartons all waste material to be destroyed, and that the same should be burned only by the shipper or his assistant. It is quite evident that the complete cleaning-up process at that store consists in sweeping up, carrying out, depositing in cartons, and burning. Behind the Sheldon block there was no incinerator or other receptacle for either the destruction or accumulation of the debris from the defendant's premises there. Wilson swore that the above standing orders applied also to the Sheldon block premises. I do not accept that statement. There is nothing to indicate that the shipper or assistant shipper ever were at the Sheldon block. On the other hand, Eckstrom had done this cleaning-up on several previous occasions. I am satisfied that general orders "to go to the Sheldon block and clean up those premises" were given.

Whether or not one accepts Wilson's statement which the trial judge rejected, it must, I think, be concluded that the burning of the debris was within the course of the servant's employment. By putting debris in the ash can and burning it he did not divest himself of the character of the servant and become in law a stranger to his employer. Even, although one concedes that had his employer known of the steps proposed to be taken he would not have approved of this method of "cleaning-up",

under all the circumstances the burning was not so divorced from the cleaning-up that it could be said to be done other than in Fleming's character as a servant.

Having concluded that the burning of the debris was, as a matter of fact, in the course of the servant's employment, it is, I think, immaterial whether the burning was or was not in breach of a city by-law. It was urged that it was in breach of certain city by-laws, was therefore illegal, and that authority could not be implied. We are referred to certain provisions in by-laws of the city of Edmonton providing, in short, that inflammable trade refuse may be destroyed in a properly constructed incinerator of approved design; that it is unlawful to collect or dispose of refuse except under the provisions of the by-law, and prohibiting the lighting of any fire of any kind in the open air without a written permit from the fire chief, and without keeping a competent person in charge of it till extinguished. In the circumstances here, even though if it might, on the record, be concluded that the burning was in breach of a by-law, this would not avail as a defence. This is not a case where the defendant had no authority to "clean up" its premises, or to burn the refuse. The fact that the mode of doing it adopted by the servant may have been an improper mode, cannot avail the defendant since what the servant did was in the course of his employment. If the wrongful act had been so divorced from the servant's employment to be, not a method, though improper, of carrying it out, but an independent act lying beyond the course of employment, the absence of express authority would be of importance.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Friedman, Liberman & Newson.*

Solicitors for the respondents City of Edmonton and B. Sheldon's Limited: *Parlee, Smith & Parlee.*

Solicitors for the respondents Armstrong-Cosans Ltd. and Robert Arkinstall: *Wood, Buchanan, Macdonald & Campbell.*

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*May 8, 11, 12.
*Nov. 3.

FIRESTONE TIRE AND RUBBER COMPANY OF CANADA, LIMITED (APPELLANT) ..... APPELLANT;

AND

COMMISSIONER OF INCOME TAX (RESPONDENT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Taxation—Income tax (provincial)—Extra-provincial company manufacturing goods—Distribution of same goods by provincial company—Whether profits from such sales are income of extra-provincial company "earned within the province"—Interpretation of contract—Whether contract of agency or sale—Taxation Act, R.S.B.C., 1924, c. 254—Income Tax Act, R.S.B.C., 1936, c. 280.

The appellant company is a Dominion company having its head office at the city of Hamilton, in the province of Ontario, having no office or any employees in the province of British Columbia; it manufactures automobile tires, accessories and repair equipment at its plant at the same city. The appellant company had a contract called "Distributor's Warehouse Contract," with M., W. & D. Ltd., a British Columbia company doing business entirely within that province as wholesale dealer in tires, automobile accessories, radios and electric supplies, Firestone products being about 25% of its business. The detailed conditions of the contract are given in the judgments of this Court. The appellant company, on April 8th, 1938, was assessed in respect of income in connection with sales of its products in British Columbia by M., W. & D. Ltd. The assessments were confirmed by the Provincial Minister of Finance; but they were set aside by the Supreme Court of British Columbia, Murphy J. Upon a further appeal to the Court of Appeal for British Columbia, the decision of the Minister of Finance was restored by a majority of that Court.

Held, reversing the judgment of the Appellate Division ([1941] 3 W.W.R. 635), Kerwin and Hudson JJ. dissenting, that the contract between the parties was one of agency, with the result that M., W. & D. Ltd. would only be the agent of the appellant company and, as a consequence, the sales made by M., W. & D. Ltd. in British Columbia would be in reality sales made there by the appellant company itself. The contract must be construed as an agreement of sale made in the province of Ontario. Neither upon that contract as a matter of construction nor constitutionally the profits accruing to the appellant company from these sales may be deemed to be income earned in British Columbia. Therefore, these profits did not come within the charge of the *Income Tax Act* of that province. *John Deere Plow Company* v. *Agnew* (48 Can. S.C.R. 208) applied.

Per Kerwin and Hudson JJ., dissenting.—The effect of the agreement between the parties in this case is to make the distributor, M., W. & D.

*PRESENT:—Rinfret, Kerwin, Hudson and Taschereau JJ. and Gillanders J. *ad hoc*.

Ltd., merely an agent of the appellant company for the sale of its goods in the province of British Columbia.—The manufacture, in the province of Ontario, of the appellant company's goods, however necessary to the existence of its business, does not earn income. The goods are manufactured for the purpose of sale and the income is earned when the goods are sold and all the income, therefore, was earned within the province of British Columbia.—The agreement in the *John Deere Plow* case (*supra*) is entirely dissimilar to the one in the present case.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Murphy J. (2), the latter having allowed an appeal from the confirmation by the Minister of Finance of the province of British Columbia of the income tax assessments levied against the appellant company by the respondent, the Commissioner of Income Tax for that province.

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

J. W. de B. Farris K.C. and *E. B. Bull* for the appellant.

R. L. Maitland K.C. and *H. Alan Maclean* for the respondent.

The judgment of Rinfret and Taschereau JJ. and of Gillanders J. *ad hoc* was delivered by

RINFRET J.—The appeal concerns the income tax assessments levied against the appellant by the Commissioner of Income Tax for the province of British Columbia. The appellant Firestone Tire and Rubber Company of Canada Limited is a Dominion company having its head office at the city of Hamilton, in the province of Ontario. This company manufactures pneumatic passenger and truck type casings and tubes, solid tires, tire accessories, repair material and repair equipment at its plant at Hamilton. It has no office or any employees in British Columbia, save one, whose sole duty is to make adjustments on faulty products of the Firestone Company.

At all material times the appellant had a contract with MacKenzie, White & Dunsmuir Limited, a British Colum-

(1) [1941] 3 W.W.R. 635; [1941] 3 D.L.R. 256.
(2) 56 B.C.R. 45; [1941] 1 W.W.R. 257; [1941] 3 D.L.R. 257.

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Rinfret J.

bia company doing business entirely within the province and which is a wholesale dealer in tires, automobile accessories, radios and electric supplies.

The decision of the case turns upon the construction of the contract in question.

It is called a "Distributor's Warehouse Contract".

By the first paragraph thereof (entitled "Sales"), the Firestone Company grants to MacKenzie, White & Dunsmuir Limited (called the distributor)

> the right to sell Firestone pneumatic passenger and truck type casings and tubes, solid tires, all types, tire accessories, repair materials and repair equipment,

referred to in the contract as "Firestone Products", in the territory of the Island of Vancouver and the province of British Columbia east to and including Revelstoke and Nelson.

In consideration,

> the distributor agrees to receive from the Company and to warehouse in accordance with the terms and conditions herein contained and maintain a sufficient stock of Firestone products to meet the requirements of his territory, to vigorously push the sale and distribution of Firestone products within the said territory; to sell to all commercial accounts, to persons, firms or corporations known as national accounts (a list of which will be furnished to the distributor by the Company) who qualify for and are entitled to special prices under the Company's regulations from time to time made; to sell or upon the order of the Company to deliver to the Dominion Government departments or their servants holding certificates, provincial government departments, and in special cases to automobile and truck manufacturers, and their agents, Firestone products under the terms and conditions and at the prices set forth and provided for in the Company's regulations from time to time made and furnished to the distributor.

It may at once be noted that no question arises concerning the tire accessories, repair materials and repair equipment, as it is conceded that they are purchased outright by MacKenzie & Company and that, accordingly, these sales are only made outside the province, to wit: in Hamilton, and that no tax is payable on profits resulting from these sales. Anything stated in the present judgment should not therefore be taken to have any reference to tire accessories, repair materials or repair equipment.

As for the sales to national accounts, including the Dominion and provincial governments and the automobile and truck manufacturers, they are admittedly in a class by themselves and they are not to be taken into account to ascertain the true nature of the general contract between the appellant and the distributor.

Bearing in mind the remarks just made, we may now proceed further with the analysis of the contract.

Paragraph 4 (entitled "Lien") provides that

> the right, title, ownership and property of, in and to all Firestone products * * * ordered by the distributor from the Company or shipped by the Company to the distributor shall be and remain in the Company notwithstanding delivery, either actual or constructive, of the said Firestone products or any part thereof to the distributor so long as the same or any part thereof shall remain in the said warehoused stock and shall not have been *bona fide* sold or otherwise disposed of to dealers or consumers in accordance with the terms and provisions hereof.

The distributor may, subject to the terms, provisos, conditions and agreement

> resell in the usual and ordinary course of his business, but not otherwise, any of the Firestone products delivered or to be delivered by the Company provided, however, that no article shall be sold by the distributor at a price less than the list price established from time to time by the Company * * * less such discounts as may be authorized from time to time in connection with the prices so fixed or to be fixed by the Company. The mailing by the Company to the distributor of such price lists from time to time shall be conclusive evidence of the establishment of such prices.

Promptly on the twenty-third day of each month the distributor must mail to the Company a stock movement report made up as of the twentieth of that month and on the following basis:—

> Inventory of the twentieth of the previous month plus all receipts in detail, (less deductions for returned goods and so forth). "New inventory as of the twentieth to be deducted from this total to give the amount to be charged to the distributor."

Any increase in the value of any portion of the stock of Firestone products which shall not have been resold by the distributor, and occasioned by a rise in price or otherwise, shall inure solely to the benefit of the Company.

The distributor shall accord to the duly accredited representative of the Company full opportunity at all times to inspect the distributor's books of account, vouchers, sales notes or slips and all other documents and papers of the distributor relating to the distributor's business or the conduct thereof and to take extracts and make summaries thereof and to inspect and check all goods in the possession of or belonging to the distributor.

Paragraph 10 reads as follows:—

> 10. Price and discount. The distributor shall account to the Company for Firestone products at the prices and shall be entitled to the discounts on Firestone products set forth and contained in the schedule of covenants and conditions hereinafter referred to.

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In the case of a decline in the Company's dealer list price or in the Company's solid tire net price list, the Company agrees to compensate the distributor by merchandise credit in respect of any rebates which he shall have made to a dealer.

The Company agrees to prepay the freight charges on carload shipments and to refund the charges in respect of shipments less than carload lots.

The agreement is for a term of five years, with liberty to each party of terminating it upon giving to the other one year's written notice.

The terms, covenants and conditions upon which the agreement is made are set forth in detail in a schedule attached to it and are declared to have the same force and effect as if they were contained in the body of the agreement.

Among the terms and conditions in the schedule are the following:—

> The distributor shall pay to the company for Firestone products purchased from the Company, the following prices, namely: For pneumatic passenger and truck type casings and tubes * * * the Company's list price in force at the time the order is received and accepted. Provided that such list prices are subject to change without notice.
>
> 2. Terms: Payment due on or before the 20th day of the calendar month following date of shipment * * * ; 2% cash discount to be allowed if payment is made on or before the due date. Net thereafter. The Company may at its discretion decline to make deliveries except for cash whenever it deems such action necessary.

If the Company should decide as a matter of policy that a graduated bonus for volume of sales should be allowed to dealers, the distributor will credit the dealer with such bonus when earned and the Company will, upon proof to its satisfaction, allow the distributor at the end of the Company's fiscal year, the amount of such bonus in the form of a merchandise credit.

The Company shall not be bound by or charged with any claim or adjustment made by the distributor, unless special adjustment privileges have been granted to the distributor by the Company; and there are elaborate provisions dealing with such adjustment privileges.

Paragraph 10 of the schedule reads as follows:—

> The distributor has the exclusive right to sell Firestone products to dealers in the territory specified, but this contract is not to be construed as constituting the distributor the agent of the Company for any purpose.

The only other material provision in the schedule (paragraph 14) is to the effect that the stock of Firestone products in the distributor's warehouse shall be at the sole risk of the distributor and the distributor agrees at all times to carry in the name of the Company, with loss payable to the Company, but at the expense of the distributor, insurance on the said stock.

This provision was later modified by a letter dated March 1st, 1934, whereby MacKenzie & Company were "relieved of all responsibility whatsoever as to fire insurance." But it was explained that the new arrangement was made because MacKenzie & Company felt that they would save money on the premiums, in view of the fact that the Firestone Company was able to make a Dominion-wide contract and that, in such a way, the saving on the premiums would accrue to MacKenzie & Company. The latter, however, continued to pay the premiums, although at the more advantageous rates secured by the Firestone Company.

The Commissioner of Income Tax contends that, as a result of the agreement above outlined, the distributor is an agent for making sales of the Firestone products on behalf of the appellant in British Columbia, and that, as a consequence, the Firestone Company must pay income tax on the profits it makes on the sales of these products in the province.

Pursuant to the *Income Tax Act* (Revised Statutes of British Columbia, 1936, c. 280) the appellant, on April 8th, 1938, was assessed in respect of income for the fiscal years from October 31st, 1927, to October 31st, 1931, inclusive, and from October 31st, 1932, to October 31st, 1937, inclusive, to the amounts of $3,255.14 and $6,322.77 respectively.

Under section 41 of the *Income Tax Act,* these assessments were placed before the Minister of Finance by the Commissioner of Income Tax and, after considering the submission contained in the appeal submitted on behalf of the Firestone Company and the information and documents on file in the office of the Commissioner, the assessments were confirmed by the Minister.

Upon appeal to a judge of the Supreme Court of British Columbia from the decision of the Minister of Finance, the appeal was allowed; but upon a further appeal to the Court of Appeal for British Columbia, the

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decision of the Minister was restored with costs, except as to the amount of tax, if any, levied on income of the Firestone Company earned on the sale of accessories, repair materials and repair equipment; otherwise the assessments were confirmed. The Chief Justice of British Columbia and D. A. MacDonald J.A. however dissented from that judgment and stated that they had reached the same conclusion as the learned trial judge.

It must be admitted that the wording of the contract under discussion makes the case a difficult one, for, to borrow the words of Viscount Haldane in *Michelin Tyre Company Limited* v. *MacFarlane (Glasgow) Limited* (1):

> The decision must turn on the right reading of agreements which have aimed at putting into writing the methods of men whose concern has been with practical results in business, rather than with exactitude in legal definition.

But, as stated by Pollock M.R. in *The Commissioners of Inland Revenue* v. *The Eccentric Club Limited* (2):

> It is a well-established principle that, in revenue cases, regard must be had to the substance of the transactions relied on to bring the subject within the charge to a duty, and that the form may be disregarded.

And in order to get at the substance of the transactions between the appellant and the MacKenzie Company it will undoubtedly be helpful to examine the "methods" followed by them in the carrying out of the contract, as they have been explained in the course of the evidence given at the trial. "There is no better way of seeing what the parties intended than seeing what they did under the agreement" (*Chapman* v. *Bluck* (3); *Pearson* v. *Ries* (4).

MacKenzie, White & Dunsmuir Limited do a large volume of business. They keep a stock commensurate with the amount of business they are doing and, in order to meet the requirements of their clients, they place orders (which they call specifications) with the factory of the appellant, upon receipt of which orders the latter ships the goods usually in carload lots.

The appellant has no right to tell the MacKenzie Company how much stock they shall carry. As a matter of

(1) (1916) 55 Sc. L.R. 35, at 39.
(2) (1923) 12 Tax C. 657, at 690.
(3) (1838) 4 Bing. N.C. 187, at 193.
(4) (1832) 8 Bing. 178, at 181.

fact, no order for tires placed by the MacKenzie Company has ever been refused, nor has any complaint ever been made on that score.

The specification or order for goods merely states the number and the kind of tires that are required. It is sent to the appellant at Hamilton and, upon it being accepted (and we are told that none has ever been rejected), a memorandum invoice or a record of the shipment is sent by the appellant from Hamilton to the MacKenzie Company in Vancouver, freight prepaid.

On this memorandum invoice, as it is called, the number, the size and the description of the tires ordered are repeated in the same way as appears in the specifications sent by the MacKenzie Company, but the prices are not extended, the reason for it being that the MacKenzie Company does not pay upon this specific invoice. It pays, in accordance with the terms of the contract as we have already seen them, only for the removals from the stock in the course of the period extending between the twentieth day of the previous month and the twentieth day of the month on which the report is mailed by the MacKenzie Company to the Firestone Company, as provided for in clause 6 of the contract.

On the 23rd of each month the monthly inventory and sales report is sent showing these removals from stock. The report indicates the inventory of the goods as of the 20th of the previous month, the receipts of goods in the course of the month just expired and the inventory on the 20th of the month on which the report is made. By deducting the new inventory from the total shown by the inventory of the previous month, plus all receipts in the meantime, the parties arrive at the total removal to be charged to the MacKenzie Company; and, the quantity of removals of each particular description having thus been ascertained, a new invoice is sent from Hamilton by the Firestone Company to the MacKenzie Company, on which the prices are extended and showing the amount which the latter will have to pay on or before the 20th of the month following the mailing of their report. That is done every month.

The prices charged to the MacKenzie Company, according to the contract, are those "in force at the time the order is received and accepted". Those prices are fixed by all the rubber companies and are stabilized across Canada.

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Those are the prices that the MacKenzie Company is called upon and obliged to pay to the appellant and not, as stated in the judgments of the majority of the Court of Appeal, "the proceeds of the sales, made by the distributor in Vancouver". This is very important as it has necessarily a particular bearing on the question of the relationship of the parties.

Thus the MacKenzie Company is charged with the goods removed from stock in the course of the previous month and it is not called upon to account for the proceeds of these goods, it is only obliged to pay for them at the price prevailing "at the time the order is received and accepted". There may have been a change of price in the meantime to which the MacKenzie Company may be subject under certain circumstances provided for in the contract, but this does not affect the essential provision that what they are charged with by the appellant and what they pay is the price stipulated by the terms of the contract and not the proceeds of the sales made to the dealers in Vancouver or the specific purchaser.

Now, the MacKenzie Company is charged with and pays for all the goods removed from stock as shown in the inventory report, and we agree with the learned trial judge and it is established by the evidence that, under the contract, goods removed from stock would include not only those that have actually been sold, but also any other goods that might have disappeared through fire, theft or other occurrences.

The only concern of the Firestone Company is with regard to the quantity of goods of the specified description which have been removed from the stock warehoused and to the amount that they are to receive from the MacKenzie Company for the goods so removed, at the price fixed under the terms of the contract.

The appellant has no control over the sales or the removals made in Vancouver; it has no authority to give instructions as to whom the goods shall be sold. It employs no salesmen of its own; it has no employees in British Columbia, except the man already referred to whose only duty is to approve the adjustments on claims made upon the MacKenzie Company by its purchasers. The MacKenzie Company run its own business, of which the

sale of Firestone products is only a small part (evidence shows 25% of the whole business); they employ their own servants, with whom the appellant has nothing to do whatever; they make their sales as they please, in their own name, and they give title directly to the purchasers. As a matter of fact, they can do absolutely what they like with the goods in the warehouse and they deal with them as owners.

The Firestone Company is not bound by or not to be charged with any claim or adjustment made by the MacKenzie Company, except as a result of special privileges granted to the debtor by the appellant under the provisions of the contract. As for the MacKenzie Company itself, it becomes liable for the payment of the goods as soon as they have disappeared from the inventory; and if the purchasers do not pay, the loss is the MacKenzie Company's loss; the appellant "takes absolutely no loss whatever".

Upon an examination of the terms of the agreement, of the "methods" adopted by the parties to carry it out and of the course of dealings between them, I find myself in agreement with the learned trial judge and the two dissenting judges in the Court of Appeal that the contract between the parties is not that of agency, but is that of sale.

Here we have, first, a case of offer and acceptance. Under no circumstances contemplated in the contract does the Firestone Company ship goods without an order or specification.

Then we have the promise to pay for the goods made by the MacKenzie Company. It is not an obligation to pay which arises only upon the MacKenzie Company having received the amount paid by a customer as a result of a sale. The MacKenzie Company becomes liable for the payment as soon as the goods are removed from the warehouse or disappear from the inventory. Immediately upon such occurrence they are obliged to pay the price fixed under the contract, irrespective of the amount paid by the customer and whether the customer pays or not. The agreement calls for no act done within British Columbia in order to complete the sale. The removal of the goods from inventory does not make the title of the MacKenzie Com-

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pany to the goods any more complete than it was upon its order or specification being accepted in Hamilton. The occurrence of the removal has only the effect of fixing the date of the payment of the price of sale, which is irrevocably established by the specific terms and conditions of the contract. The due date of the payment is the 20th of the month following the removal or disappearance of the goods from the warehouse. That is the only object of referring to the disappearance or removal of the goods. It has nothing to do with the completion of the sale as between the appellant and the MacKenzie Company; it is there mentioned only for the purpose of fixing the date of the payment.

It is true that, as a result of the terms so agreed upon by the appellant, the due date of the payment might never occur—although, in practice, that would no doubt be an exceptional case—but that would flow only from the terms upon which the parties have agreed. It is essentially a matter for the vendor's concern and I do not see how it can alter the nature of the contract.

Such, in my view and with respect, is the substance of the agreement which the respondent asks the Court to bring within the charge of the *Income Tax Act* of British Columbia. I do not understand it to be disputed that if that contract is to be construed as an agreement of sale, made in Hamilton, Ontario, the profits accruing to the appellant are not income earned in British Columbia and coming within the charge of the *Income Tax Act* of that province. The ground upon which the Commissioner of Income Tax claims that these profits are subject to the charge is that the contract under discussion is one of agency, that the MacKenzie Company is only the agent of the appellant and that consequently the sales made to the purchasers in British Columbia are in reality made by the appellant.

In my view, the relationship between the Firestone Company and the MacKenzie Company is one of vendor and purchaser; whatever profits are derived from it by the Firestone Company result from a contract of sale made in Hamilton, Ontario; and, accordingly, neither upon that contract as a matter of construction nor constitutionally, may the respondent Commissioner of Income Tax legally and validly assess the appellant's profits as claimed in the present case.

No doubt some of the clauses of the agreement may be held consistent with agency relationship, but none of them are inconsistent with the notion of an outright sale.

Primarily we have the declared intention of the parties in clause 10 of the schedule that

> this contract is not to be construed as constituting the distributor the agent of the Company for any purpose.

There is no suggestion, anywhere in the case, of bad faith or of colourable phraseology used by the parties for the purpose of defeating the British Columbia legislation. The contract has now been in force for at least twenty years. There can be no doubt that under that stipulation in clause 10, between the parties themselves at all events, such a clause would have to be given its full effect.

Then we have the situation that the MacKenzie Company gets all the profits on the sales to the purchasers in British Columbia and that it bears all the losses. We have the further fact that the MacKenzie Company pays the appellant as a debtor and not as an accountant. It must pay on the date fixed by the contract the price stipulated therein, without any reference to the price which it gets from its customers and even in the case where it does not collect from them any amount whatever.

Of course there is clause 4 of the contract, by force of which the right, title, ownership and property of the Firestone products ordered by the MacKenzie Company and shipped by the appellant remain in the latter, notwithstanding delivery either actual or constructive, so long as the same remains in the warehoused stock and has not been *bona fide* sold or otherwise disposed of in accordance with the terms of the contract. But that clause is styled "Lien". It is consistent with the idea that the legal title will remain in one while the beneficial title becomes vested in the other. To a situation such as this the words of the present Chief Justice of this Court in *John Deere Plow Company* v. *Agnew* (1) may well be applied:—

> It is, in my judgment, an agreement relating to the sale and purchasing of goods embodying elaborate provisions for the protection of the sellers. Until the sellers have been paid in full the property remains vested in them and all moneys received on sale by the respondent are to be treated as theirs; but the rights thus reserved to them are only for

(1) (1913) 48 Can. S.C.R. 208, at 231.

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securing the payment of the purchased money; and on payment they would disappear at once. Subject to the rights so held by the sellers as security the purchaser is the beneficial owner of the goods.

The clause subjecting to certain conditions the "resale" by the MacKenzie Company to its customers is readily explained by the fact that the appellant gives to the MacKenzie Company the exclusive right to sell their products in the defined territory. The same may be said of the clauses relating to advertising and bonus. They are according to usual practice and merely intended for promoting the sales.

The provision that the goods are to be paid upon being removed is, as we have seen, merely a term of credit.

The learned trial judge relied on the decision of this Court in *John Deere Plow Company* v. *Agnew* (1), and I think he was perfectly justified in doing so. Many of the circumstances in that case are also present here. There also the question of the retention of title and property, the obligation to insure in the name of the vendor, the compulsion upon the purchaser to sell at a fixed price were stipulated in the contract; and yet the agreement was held not to be an agency contract.

A strikingly similar situation was examined by the House of Lords in the case of *Michelin Tyre Company Limited* v. *MacFarlane (Glasgow) Limited* (2) and their Lordships held that the relationship created between the parties by such a contract was one of sale and return.

Moreover, in the latter case, the vendors had the right to recall the goods and, in the agreement under discussion, there is no provision to that effect.

The result is that the contract between the appellant and the MacKenzie Company is a contract of sale made in Hamilton, Ontario, and that the profits accruing to the appellant under such a contract are not income earned in the province of British Columbia. Therefore, they do not come within the *Income Tax Act* of that province, indeed constitutionally they could not come under it (*Rex* v. *Lovitt* (3); *Provincial Treasurer of Alberta* v. *Kerr* (4)).

The conclusion thus reached makes it unnecessary to discuss the point whether, at all events, the assessments having been made indiscriminately both on the manufac-

(1) (1913) 48 Can. S.C.R. 208.
(2) (1916) 55 Sc. L.R. 35.
(3) [1912] A.C. 212.
(4) [1933] A.C. 710.

turing profits in Hamilton and the selling profits in British Columbia, they might not have been held unconstitutional and be equally set aside on that ground. (See Duff, C.J., in *International Harvester Company* v. *The Provincial Tax Commission and the Attorney-General for Saskatchewan* (1)).

The appeal should therefore be allowed with costs here and the Court of Appeal and the judgment at the trial should be restored.

The judgment of Kerwin and Hudson JJ. (dissenting) was delivered by

KERWIN J.—Firestone Tire and Rubber Company of Canada, Limited, is a Dominion company having its head office at Hamilton, Ontario, where it manufactures tires and casings, automobile accessories and repair material and equipment. Under the provisions of successive British Columbia taxation Acts, the Commissioner of Income Tax for that province had assessed the Company to income tax. The assessments were confirmed by the Provincial Minister of Finance but were set aside by Murphy, J., of the Supreme Court of British Columbia. From that decision an appeal was taken to the Court of Appeal by the present respondent, the Commissioner of Income Tax. The Commissioner did not claim in either court that the Company was subject to income tax on the profits derived from the sales in British Columbia of accessories, repair material and repair equipment. He did, however, contend that all other Firestone products were merely warehoused by a distributor in Vancouver, which was in reality the agent of the Company, and that the Company was therefore liable for income tax with respect to the income from the sale in British Columbia of those products. The Court of Appeal agreed with this contention, the Chief Justice of British Columbia and Mr. Justice D. A. Macdonald dissenting.

Section 3 of the *Income Tax Act*, R.S.B.C., 1936, chapter 280, provides:—

> 3. (1) To the extent and in the manner provided in the Act and for the raising of a revenue for Provincial purposes:
>
> (*a*) all income of every person resident in the Province and the income earned within the Province of persons not resident within the Province shall be liable to taxation.

(1) [1941] S.C.R. 325, at 331.

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The earlier applicable legislation contains a similar provision.

Bearing in mind that we are not concerned with accessories, repair material and repair equipment, the result of this appeal depends, first of all, upon the proper construction of a certain agreement between the Company and the distributor referred to above, MacKenzie, White and Dunsmuir Limited. By clause 1 of the agreement:—

1. Sales. The Company hereby grants to the distributor upon the terms and conditions hereinafter set forth, the right to sell Firestone pneumatic passenger and truck type casings and tubes, solid tires, all types, tire accessories, repair materials and repair equipment, hereinafter referred to as "Firestone Products", in the following territory:

It will be noted that the Company does not agree to sell any of its products to the distributor. Clause 2 merely provides for the territory to be covered. By clause 3:—

3. Consideration. In consideration whereof the distributor agrees to receive from the Company and to warehouse in accordance with the terms and conditions herein contained and maintain a sufficient stock of Firestone products to meet the requirements of his territory; to vigorously push the sale and distribution of Firestone products within the said territory; to sell to all commercial accounts, to persons, firms or corporations known as national accounts (a list of which will be furnished to the distributor by the Company) who qualify for and are entitled to special prices under the Company's regulations from time to time made; to sell or upon the order of the Company to deliver to the Dominion Government departments or their servants holding certificates, Provincial Government departments, and in special cases to automobile and truck manufacturers, and their agents, Firestone products under the terms and conditions and at the prices set forth and provided for in the Company's regulations from time to time made and furnished to the distributor.

It will be noted that by this clause the distributor does not agree to buy any of the Company's products. By clause 4:—

4. Lien. The right, title, ownership and property of in and to all Firestone products which have been heretofore or may hereafter be ordered by the distributor from the Company or shipped by the Company to the distributor shall be and remain in the Company notwithstanding delivery either actual or constructive of the said Firestone products or any part thereof to the distributor so long as the same or any part thereof shall remain in the said warehoused stock and shall not have been *bona fide* sold or otherwise disposed of to dealers or consumers in accordance with the terms and provisions hereof.

Clause 5 provides for a list price to be established by the Company, below which the distributor may not sell but, as considerable weight is attached to the word "resell", the clause is reproduced:—

5. Resale. The distributor may, subject to the terms, provisos, conditions and agreement herein contained resell in the usual and ordinary course of his business but not otherwise any of the Firestone products delivered or to be delivered by the Company provided, however, that no article shall be sold by the distributor at a price less than the list price established hereafter from time to time to be established by the Company as the list price for the sale thereof by the distributor less such discounts as may be authorized from time to time in connection with the prices so fixed or to be fixed by the Company. The mailing by the Company to the distributor of such price lists from time to time shall be conclusive evidence of the establishment from time to time of such prices.

It may at once be stated that, in my view, the word "resell" does not merit the importance it has received, in view of such words in clause 5 as "deliver", "sold", and "sale", and also in view of subsequent clauses in the agreement. By them a report is to be made on the 23rd day of each month, made up as of the 20th of that month, on the followng basis: to the inventory of the 20th of the previous month is to be added all goods received, and the new inventory as of the 20th of the current month is to be deducted from the total, to give the items to be charged to the distributor. Provision is made whereby any increase in value of any portion of the stock shall inure solely for the benefit of the Company, while in the event of a price decline the Company agrees to compensate the distributor by a merchandise credit. The word "resold" appears in clause 7 dealing with price increase but, for the reasons already advanced, it does not affect the construction to be placed upon the document when read in its entirety. The agreement is for five years with provision for an earlier termination and I agree with O'Halloran, J., that in the event of such termination the Firestone products warehoused with the distributor would belong to the Company.

Further carrying out the idea that the distributor is not a purchaser, the agreement provides that it shall account to the Company for the goods in question as set forth in the schedule of covenants and conditions attached to, and forming part of, the agreement. Paragraph 1 of this schedule states:—

The distributor shall pay to the Company for Firestone products purchased from the Company, the following prices, namely: For pneumatic passenger and truck type casings and tubes, accessories, repair materials and repair equipment, the Company's list price in force at the time the order is received and accepted. Provided that such list prices are subject to change without notice.

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The word "purchased" as here used refers to the purchase by a purchaser from the Company through the distributor. Because of the significance attached to paragraph 10 by Murphy, J. (with whom the two dissenting judges in the Court of Appeal agreed), it is reproduced:—

> 10. The distributor has the exclusive right to sell Firestone products to dealers in the territory specified but this contract is not to be construed as constituting the distributor the agent of the Company for any purpose.

The contention of the latter part of this paragraph is merely to insure, so far as possible, that the distributor should not undertake on behalf of the Company to make terms and conditions when selling that would be binding upon the Company. Paragraph 14 providing that the products in the distributor's warehouse or in his possession should be at the sole risk of the distributor, who has to carry insurance thereon in the name of the Company, was varied by a letter of March 1st, 1934, whereby the distributor was relieved of all responsibility as to fire insurance.

What is the effect of this agreement? It has been urged that the agreement is similar to the one considered in *John Deere Plow Company* v. *Agnew* (1). In my view the two agreements are entirely dissimilar and the judgment of O'Halloran, J., deals with the difference in such a satisfactory manner that I am content to adopt his remarks on that point. After consideration of all the arguments to the contrary, I have concluded that the effect of this agreement is to make the distributor merely an agent of the Company for the sale of the goods that are in issue in this appeal. It is perhaps unnecessary to state that the distributor does not take orders for Firestone products to be sent to the head office of the Company in Ontario, but sells the goods direct and receives the purchase price therefor in British Columbia. The system of monthly inventories provides the method of calculating the remuneration of the distributor as agent, for its services. In this connection there remains but to add that the carrying out of the agreement strengthens the above conclusion, particularly the fact that in the general financial balance of the Company the goods warehoused with the distributor are included on the asset side under the heading of "inventories".

(1) (1912) 48 Can. S.C.R. 208.

No question was raised as to the constitutional validity of the provision in subsection 1 of section 3 of the Act that

> the income earned within the Province of persons not resident within the Province shall be liable to taxation

but it was argued that, assuming that the Company earned income in British Columbia, the assessments were invalid because they were made indiscriminately on income earned in the Province and that earned outside. This question is not the same as that which arose in *Commissioners of Taxation* v. *Kirk* (1). By section 15 of the New South Wales Act there under review, an income tax was to be paid at a rate to be fixed on all incomes exceeding £200 per annum:—

> (1) Arising or accruing to any person wheresoever residing from any profession, trade, employment or vocation carried on in New South Wales, whether the same be carried on by such person or on his behalf wholly or in part by any other person.
>
> (3) Derived from lands of the Crown held under lease or licence issued by or on behalf of the Crown.
>
> (4) Arising or accruing to any person wheresoever residing from any kind of property except from land subject to land tax as hereinafter specifically excepted, or from any other source whatsoever in New South Wales not included in the preceding subsections.

By subsection 3 of section 27:—

> No tax shall be payable in respect of income earned outside the Colony of New South Wales.

Two companies had made profits from their business operations, which Lord Davey, speaking for the Judicial Committee, divided into four processes:—

> (1) the extraction of the ore from the soil; (2) the conversion of the crude ore into a merchantable product, which is a manufacturing process; (3) the sale of the merchantable product; (4) the receipt of the moneys arising from the sale.

As to the first, it was held that it came within the income derived from lands of the Crown under subsection 3 of section 15, and that the second, or manufacturing process, if not under subsection 1, at least fell within the words "any other source" in subsection 4.

As Lord Davey pointed out at page 592:—

> The real question, therefore, seems to be whether any part of these profits were earned or (to use another word also used in the Act) produced in the Colony.

(1) [1900] A.C. 588.

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In determining that question their Lordships treated the word "derived" as synonymous with "arising or accruing", and a decision that some income was earned in New South Wales, where it arose or accrued from a trade carried on therein or was derived from lands of the Crown, or arose or accrued from any other source, can, in my view, have no application to the consideration of a statute which imposes a tax upon "the income earned within the province." In fact, the entire scope of the British Columbia Act is quite different from that of the New South Wales Act and also from that of the Saskatchewan Act in *International Harvester Company of Canada, Limited* v. *The Provincial Tax Commission* (1). In that case, with respect to a person residing outside of Saskatchewan but carrying on business there, the Saskatchewan Act imposed a tax on

"the net profit or gain arising from the business of such person in Saskatchewan."

The reasoning in *Lovell* v. *Commissioner of Taxes* (2) is illuminating although I am not unmindful of the difference in the matters there under consideration from those at bar. At page 52, it was stated:—

The decisions do not seem to furnish authority for going further back for the purpose of taxation than the business from which profits are directly derived and the contracts which form the essence of that business.

Referring to this statement and to a statement in *Grainger* v. *Gough* (3), Isaacs J. in *Commissioner of Taxation* v. *Meeks* (4) remarks:—

Now, in my opinion, what is meant by those observations is this: where a business is carried on of which contracts are "the essence", then you look to the place where those contracts are made. And, if antecedent operations, whether manufacture, or purchase, or requests, are not part of "the essence" of the business carried on, but preparatory only, then, however necessary they may be to the very existence of the business, they are not part of it, in the sense at all events required for income tax purposes. In applying the principles enunciated in *Lovell's* case (2), the judgment proceeds: "In the present case their Lordships are of opinion that the business which yields the profit is the business of selling goods on commission in London." And it is pointed out that the earlier arrangements entered into in New Zealand were "transactions the object and effect of which is to bring goods from New Zealand within the net of the business which is to yield a profit."

I adapt, if I may, that statement to the facts in this case. The manufacture in Ontario of the appellants' goods,

(1) [1941] S.C.R. 325.
(2) [1908] A.C. 46.
(3) [1896] A.C. 325.
(4) (1915) 19 C.L.R. 568 at 588.

however necessary to the existence of its business, does not earn income. The goods are manufactured for the purpose of sale and the income is earned when the goods are sold and all the income, therefore, was earned within British Columbia.

The appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *C. L. McAlpine.*

Solicitor for the respondent: *H. Alan Maclean.*

KEYSTONE TRANSPORTS LIMITED (DEFENDANT) ..... APPELLANT;

AND

DOMINION STEEL & COAL CORPORATION, LIMITED (PLAINTIFF). RESPONDENT.

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* May 29, June 1.
* Nov. 3.

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

Shipping—Damage to cargo—Goods damaged by contact with water coming through hold—Loosening of tarpaulins covering hatches—Weather conditions—Meaning of "perils of the sea"—Prima facie case—Proof of negligence—Water Carriage of Goods Act, 1936, 1 Edw. VII, c. 49.

In an action by the owner of a cargo for damage suffered through the goods coming into contact with water which came through one hold of the ship as the result of the loosening of the tarpaulins covering the hatches,

Held, reversing the judgment appealed from, Bond J. *ad hoc* dissenting, that, according to the facts and circumstances of the case, the appellant has established, and the trial judge so found, that, in view of the weather conditions existing at the time of the accident, the damage was due to a peril of the sea and that, therefore, the vessel and her owners were relieved of any responsibility.—There being more than a mere "*prima facie* case", it was upon the respondent to disprove it by proving negligence causing the loss, and, in this, it has totally failed.

A "peril of the sea" is not defined in the *Water Carriage of Goods Act, 1936,* and it would indeed be very difficult to give in a law a definition which would cover all the possible cases which may arise.

* PRESENT:—Rinfret, Kerwin, Hudson and Taschereau JJ. and Bond J. *ad hoc.*

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"Each case must be considered with reference to its own circumstances": *per* Lord MacNaghten in *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (12 A.C. 484).

"Perils of the sea" do not mean to cover only accidents peculiar to navigation that are of extraordinary or catastrophic nature, or arise from irresistible force: *Canada Rice Mills Ltd.* v. *Union Marine and General Insurance Co.* (67 Ll. L.R. 549).

An accident of navigation, in order to constitute a peril of the sea need not be as above described; it is sufficient that it be the cause of damage to goods at sea by the violent action of the wind and waves when such damage cannot be attributed to someone's negligence. The officers and members of the crew are not bound to take all the precautions that would inevitably prevent the accident and make its occurrence impossible; they are required to exercise the care that reasonably prudent men would exercise in similar circumstances. *Pandorf & Co.* v. *Hamilton, Fraser & Co.* (16 Q.B.D. 629; 6 Asp. 44), *The Vincent McNally* ([1929] 1 A.M.C. 161), *The Light No. 176* ([1929] 1 A.M.C. 554), and *Canada Rice Mills Ltd.* v. *Union Marine and General Insurance Co. (supra).*

Per Bond J. *ad hoc* (dissenting)—Under the circumstances of this case, the damage cannot be attributed to a peril of the sea. "The term 'peril of the sea' refers only to fortuitous accidents or casualties of the sea. It does not include the ordinary action of the winds and waves." (Scrutton, on Charter-parties and bills of lading, p. 268). Where a *prima facie* case of loss by perils of the sea is made, it is for the goods' owner to disprove it by proving negligence causing the loss. (Scrutton, p. 261). But, in this case, such a *prima facie* case has not been established. On the contrary, it was disclosed by the evidence that there had been negligence in the inspection of the wedges, notwithstanding the fact that the danger of their becoming loosened was a known and anticipated risk.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the trial judge, Boyer J., and maintaining an action instituted by the respondent claiming $2,842.75 as damage to a shipment of kegs of nails, staples and wire on board the appellant's steamer *Keynor.*

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

Lucien Beauregard K.C. for the appellant.

C. Russell Mackenzie K.C. for the respondent.

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

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TASCHEREAU J.—The respondent, plaintiff in the Superior Court, claims from the appellant the sum of $2,842.76. It alleges in its declaration that at all material times it was the owner of a cargo of nails, staples and wire shipped on board the defendant's steamer *Keynor* at Sydney, N.S., on or about August the 11th, 1937, and bound for Fort William, Ontario. The goods which were received for carriage by the defendant in good condition, were found to be seriously damaged by water when they arrived at Fort William. The amount of $2,842.76 claimed by the plaintiff represents the difference between the sound value of part of this cargo and its salvage value.

It is not contested that the goods suffered damage by contact with water which came through hold no. 3, as the result of the loosening of the tarpaulins which covered the hatches.

The defendant, in its plea, alleges that the *Keynor* was tight, staunch and strong, that her hatches were well and sufficiently covered and protected, that she was sufficiently manned, and in every way fit to perform a voyage safely and that the cargo was in every respect properly arranged and stowed. It further alleges that it was a condition of the bill of lading, which was the contract between the parties, that the parties agreed to be bound by all its stipulations, exemptions and conditions, and that the said bill of lading was subject to the terms and provisions of and all the exemptions from liability contained in the *Water Carriage of Goods Act,* and it invoked all the provisions of the said *Water Carriage of Goods Act* of 1936 and, amongst other provisions, subsection (*c*) of section 2 of article 4 of the said Act which reads as follows:—

> 2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:
>
> * * *
>
> (*c*) perils, danger and accidents of the sea or other navigable waters.

The defendant also alleges that during the voyage, the *Keynor* encountered in the Gulf of St. Lawrence, heavy and rough weather and that while covering the distance from Sydney to Cape Gaspé, she was labouring, pitching and rolling very heavily, her decks being continuously under water, and that if the cargo was damaged during

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the voyage, the damage was due to perils of the sea for which the defendant could not be held responsible in fact or in law.

In the Superior Court, Mr. Justice Boyer came to the conclusion that the weather encountered between Bird Rocks and Cape Gaspé was such as to constitute a "peril of the sea" relieving the vessel and her owners of responsibility for any damage to the cargo, and dismissed the action with costs.

The Court of King's Bench, Mr. Justice Galipeault dissenting, allowed the appeal.

The only question for consideration for this Court is whether the Court of King's Bench was right in holding that the appellant had not proved that the damage to the respondent's cargo was due to a peril of the sea. The respondent particularly stressed the points that there was no peril of the sea, and that if there were any, the damage to the cargo happened before any peril of the sea was encountered. There was no *causa causans* or causal connection between the alleged peril of the sea and the damage to the cargo.

The bill of lading contained, amongst others, the following condition:—

> This bill of lading shall have effect subject to the provisions of the *Water Carriage of Goods Act,* 1936, enacted by the Parliament of the Dominion of Canada, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act.

The *Water Carriage of Goods Act,* of 1936 (1 Edward VIII, ch. 49, article 3, of the rules relating to bills of lading) provides for the responsibilities and liabilities of the carrier and states:—

> The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to,
>
> (*a*) make the ship seaworthy;
>
> (*b*) properly man, equip, and supply the ship.
>
> (*c*) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

Section 2 of article 3 then provides that:—

> Subject to the provisions of article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

Article 4 then deals with the rights and immunities of the carrier and, after stating that

> neither the carrier nor the ship shall be liable for loss or damage arising or resulting from seaworthiness, unless caused by want of due diligence on the part of the carrier,

section 2 of the said article provides that:—

> Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,
>
> (*a*) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;
>
> (*b*) fire, unless caused by the actual fault or privity of the carrier;
>
> (*c*) perils, danger, and accidents of the sea or other navigable waters.

and then there are thirteen other causes enumerated for which the carrier shall not be responsible and, finally, there is the Omnibus Clause (*q*), which reads as follows:—

> (*q*) Any other cause arising without the actual fault and privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

There is no dispute that the ship was seaworthy, that she was properly manned and equipped and that the carrier has properly loaded, stowed and kept the good carried.

The ship left Sydney on August the 11th at 7.30 o'clock in the morning. At that time, the weather was fair, and at Cape North a light wind was encountered. From Cape North to Bird Rocks, the voyage proceeded without incident of any kind and this last place, according to the evidence and entries in the log book, was reached that same night at 11.30 o'clock. The maximum speed of the *Keynor* is approximately 7·3 miles per hour, and she covered the distance of 108 miles from Sydney to Bird Rocks in 16 hours, travelling therefore at an average speed of 6 miles and three-quarters per hour. At that point the weather was clear but the southwest wind which was then blowing was becoming stronger. The *Keynor* which was following NxW course towards Cape Gaspé was not heading into the sea which was becoming to be rough, but was being struck by the waves on her left beam.

The ship encountered very bad weather from Bird Rocks to Cape Gaspé, this is from 11.30 o'clock the night of the 11th of August, and this is how the witnesses describe the weather and the effect it had on the vessel.

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S. G. Williamson, master of the *Keynor*, says:—

A. We really did not get much bad weather till we got to Bird Rocks, and that was 11.45 p.m. Our bad weather was from Bird Rocks, to Cape Gaspé. That was covering the 12th.

Q. Will you describe the weather you encountered during this period?

A. After rounding Bird Rocks we struck this strong southwest wind with a very, very heavy sea, and periodically through the next 36 hours I used to head the ship in the sea, head her southwest in the sea for the mates to go around and inspect the decks, to see if everything was seaworthy.

Q. Why did you have to head her to the sea?

A. Because there was too much water coming over, otherwise it was too dangerous to put men on deck under the course we were steering.

Q. Why?

A. There was too much sea coming over.

Q. Would you describe what would be the action of the sea on the vessel?

A. Well, with a ship working—that is why we have those inspections, the working of the ship in the sea will cause those hatches wedges to loosen.

And further:—

Q. When you say shipping water, do you refer to the spray of the water over the deck?

A. We were not taking spray on that trip. We were taking seas, heavy water. Sometimes we had our deck covered with as much as six to eight feet of water, solid water and she would roll down in the trough of the sea.

Q. Do you mean to say her whole deck would be covered by sea?

A. Completely covered, until the sea would wash off and she would raise.

Robert Brash declared:—

Q. How did this weather compare to other voyages?

A. I have not seen any that was worse. That seemed to be a pretty bad trip to me.

And J. A. MacLean, who took pictures, says:—

Q. In your seven or eight years' experience of the sea, did you not have any opportunity to take pictures of that character?

A. No, not like that.

Q. What do you mean by not like that?

A. I never saw it bad enough to get a good picture like that, with the sea coming over.

And Raymond Savard says:—

Q. What would be the height of the waves that would be striking on the ship?

A. The water used to come up to our boom. That would be about seven or eight feet.

Q. When you say the water, would that be the spray or would it be the water in volume?

A. That would be the full force of the water. It would be all water. the full force of the water.

Q. Where was that force of water breaking on your ship?
A. On the hatch coamings.

J. M. Beak, the chief engineer on board the *Keynor*, says that from Bird Rocks to Cape Gaspé they went through very "dirty" weather and in his evidence he says:—

Q. Where did you get the gale of wind?
A. From Bird Rocks.
Q. I mean, was this gale of wind judged by yourself?
A. Oh, yes, by my own self. It was just what I would call a gale of wind for that class of ship. It would be smooth water for a big ship, but for this class of ship it was dirty weather, I mean, being low and loaded in the water.

Moreover, MacLean, who was an engineer on board the *Keynor* for seven years, took some pictures of the huge waves breaking on the deck of the ship. He does not remember exactly the position of the *Keynor* when these pictures were taken, but he says that it was approximately at half past eleven in the morning. This is obviously on the 12th of August, twelve hours after the ship had passed Bird Rocks, because, on the 11th, at that time, the ship had just left Sydney where the sea was calm, and on the 13th, at 11.30 a.m., she had reached a point beyond Cape Gaspé, and the storm had then subsided. These pictures, which have been produced as exhibits, show clearly huge waves breaking on the ship, covering the deck, and they corroborate the description made by the numerous witnesses who were on board.

It is also interesting to note that the engines of the *Keynor* were running at full speed, but the sea was so heavy that at certain moments, she was not doing better than two miles an hour. Furthermore, from the moment the ship left Bird Rocks to approximately the time when the pictures were taken, and when the log indicated a prevailing S.W. strong wind, at 12.45 p.m. on the 12th of August, the ship covered only 54 miles in 13 hours, or an average of a little over 4 miles per hour, instead of 7·3 which is the maximum speed, or 6 and three-quarters miles per hour, as she had covered from Sydney to Bird Rocks. There can be no doubt in my mind, that the ship from Bird Rocks to Gaspé encountered very heavy seas, and that the water covered completely her decks. I agree with the finding of the trial judge who says:—

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On its course between Bird Rocks and Gaspé, the boat encountered a strong wind blowing on its quarter and heavy seas which rolled over its deck constantly, thus preventing any one from crossing from one turret to the other without risk of life, except when the boat was deflected from its course and headed against the wind.

It was while the ship was labouring under such adverse and violent elements, that it was discovered that the tarpaulins covering hatch on hold no. 3 had loosened, thus permitting the infiltration of salt water in the ship. It was Robert Brash, the mate of the *Keynor*, who noticed it first. He does not remember exactly the date and the hour, but the evidence of Williamson and Savard reveals that it was at noon, on the 12th of August, a little after the time when MacLean took the pictures that leave no room for doubt as to the prevailing conditions of the elements. The sea was so rough when this discovery was made, that the members of the crew could not walk on the deck to tighten them, and the course of the ship had to be altered in order to facilitate their task.

Do these conditions constitute a peril of the sea? The respondent submits that they do not, because there was nothing unusual or of an unexpected nature in the weather which can bring the appellant within the exception of the law. It is true that some witnesses have stated that this kind of weather had already been encountered in the Gulf and that strong wind has to be anticipated in that vicinity, but I do not think that this is the true test.

A peril of the sea is not defined in the Act, and it would indeed be very difficult to give in a law a definition which could cover all the possible cases which may arise.

As Lord MacNaghten said in the case of *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1):—

> Your Lordships were asked to draw the line and to give an exact and authoritative definition of the meaning of the expression "perils of the seas" in connection with the general words. For my part I decline to attempt any such task. I do not think it is possible to frame a definition which would include every case proper to be included, and no other. I think that each case must be considered with reference to its own circumstances, and that the circumstances of each case must be looked at in a broad common sense view and not by the light of strained analogies and fanciful resemblances.

(1) (1887) 12 App. Cas. 484, at 502.

And from the following authorities it can be seen that the submission of the respondent cannot be accepted as being the true interpretation of the law.

It was held in *Pandorf & Co.* v. *Hamilton, Fraser & Co.* (1):—

In a seaworthy ship, damaged goods caused by the action of the sea during transit, not attributable to the fault of anybody, is a damage from peril of the sea.

In the same case, in the Court of Appeal (2), Lord Isher says:—

Therefore, perils of the sea are those perils which are peculiar to carrying on business on the sea; they obviously, therefore, include the violence of the sea itself; they include the danger which is caused by being on the sea by reason of the action of other elements acting upon the sea.

In *Vincent McNally* (3) it was held:—

The theory that to constitute a peril of the sea a storm must be of such intensity as not to be anticipated, is one that finds no support in law. Damage is caused by a peril of the sea within a contract of affreightment when the cause of the entrance of the water is not unseaworthiness or negligence or ordinary wear and tear, but the unusual stress of water or the violent action of the elements. Where a recently overhauled barge encountered in October, 1929, in the Chespeake, a storm so severe that tarpaulin hatch covers and strongbacks were carried away, so that the cargo was met with sea water, such damage was caused by a peril of the sea.

In *Lighter No. 176* (4):—

A peril of the sea need not be something of a catastrophic nature, but is something arising from the violent action of the elements rather than from weakness within the vessel.

At page 558, one of the judges said:—

But this, it has been held, does not mean that the peril must be extraordinary in the sense of arising from causes which are uncommon and could not be reasonably anticipated. It means rather that the peril must result from the violent action of the elements as distinguished from their normal influence upon the fabric of the vessel. Casualties which may and not consequences which must.

The latest pronouncement of the Judicial Committee of the Privy Council settles definitely the question, and sets aside many old contentions to the effect that the words "perils of the sea" were meant to cover only accidents peculiar to navigation that are of extraordinary or catastrophic nature, or arise from irresistible force.

(1) (1885) 16 Q.B.D. 629.
(2) (1886) 6 Asp. 44, at 45.
(3) [1929] 1 A.M. Cas. 161.
(4) [1929] 1 A.M. Cas. 554.

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In the case of *Canada Rice Mills Ltd.* v. *Union Marine and General Insurance Co. Ltd.* (1) it was held that:—

It must be predicated that where damage is caused by a storm, even though its incidence or force is not exceptional, a finding of loss by perils of the sea may not be justified.

Lord Wright said at pages 556 and 557:—

The view of Sloan J.A. seems to be that there was no peril of the sea because in his opinion the weather encountered was normal and such as to be normally expected on a voyage of that character, and that there was no weather bad enough to endanger the safety of the ship if the ventilators had not been closed. But these are not the true tests. In the House of Lords in the *Xantho* (2), which was a bill of lading case but has always been cited as an authority on the meaning of the same words in policies of marine insurance (see *per* Lord Bramwell in *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (3) Lord Herschell said at page 509:—

"The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that these losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities or by common understanding."

* * *

In *Thames & Mersey Marine Insurance Company Limited* v. *Hamilton, Fraser & Co.* (4), Lord MacNaghten said that it was impossibe to frame a definition of the words. In *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (3) where a rat gnawed a hole in a pipe, whereby sea water entered and damaged the cargo, there was no suggestion that the ship was endangered, but the damage to the cargo of rice was held to be due to a peril of the sea. There are many contingencies which might let the water into the ship besides a storm and in the opinion of Lord Halsbury in the case last cited any accident that should do damage by letting in sea water into the vessel should be one of the risks contemplated.

* * *

The accident may consist in some negligent act, such as the improper opening of a valve, or a hole made in a pipe by mischance, or it may be that sea water is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea, or, even without stress of weather, by the vessel heeling over owing to some accident or by the breaking of hatches or other coverings. These are merely a few among many possible instances in which there may be fortuitous incursion of sea water. It is the fortuitous entry of the sea water which is the peril of the sea in such cases. Whether in any particular case there is such a loss is a question of fact for the jury.

* * *

On any voyage a ship though she need not necessarily encounter a storm, and a storm is a normal incident on such a passage as the *Segundo* was making, but if in consequence of the storm cargo is damaged by the

(1) (1940) 67 Ll. L.R. 549.
(2) (1887) 12 App. Cas. 503.
(3) (1887) 12 App. Cas. 518 at 527.
(4) (1887) 12 App. Cas. 484, at 502.

incursion of the sea, it would be for the jury to say whether the damage was or was not due to a peril of the sea. They are entitled to take a broad common sense view of the whole position.

How slight a degree of the accidental or unexpected will justify a finding of loss by perils of the sea is illustrated by *Mountain* v. *Whittle* (1), where a houseboat, the seams of which above the water-line had become defective, was towed in fine weather and in closed water in order to be repaired. A powerful tug was employed and this caused a bow wave so high as to force water up into the defective seams. There was no warranty of seaworthiness. "Sinking by such a wave," said Lord Sumner, at page 630, "seems to me a fortuitous casualty; whether formed by passing steamers or between tug and tow, it was beyond the ordinary action of wind and wave, or the ordinary incidents of such towage."

In the same way, storms at sea may be frequent, in some cases seasonal, like typhoons in the China Seas; a ship may escape them, and they are outside the ordinary accidents of wind and sea. They may happen on the voyage, but it cannot be said that they must happen.

From these authorities it is clear that to constitute a peril of the sea the accident need not be of an extraordinary nature or arise from irresistible force. It is sufficient that it be the cause of damage to goods at sea by the violent action of the wind and waves, when such damage cannot be attributed to someone's negligence.

The respondent has stressed the point that in the log book the expressions "fresh wind" and "strong wind" are employed. These flexible words used by the officer in charge of the log to describe the weather at 12.00 noon and 12.45 p.m. on the 12th of August, convey only an indefinite and vague idea of the existing conditions. Although the terms used may not be adequate, they do not contradict the rest of the evidence adduced to the effect that the waves were sufficiently high to cover the bridge. And, moreover, a peril of the sea, as we have seen by the authorities cited *supra,* may arise as the consequence of a wind, the violence of which does not amount to more than the description found in the log book, even if accepted in its most restricted meaning.

I believe that the appellant has succeeded, and the trial judge has so found, in establishing that there has been a peril of the sea. There is even more than a mere "*prima facie* case". It was then upon the respondent to disprove it, by proving negligence causing the loss—in this, it has totally failed.

Before leaving the port of Sydney, the usual inspection was made; the hatches were covered with tarpaulins

(1) [1921] 1 A.C. 615.

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fastened in the usual proper way. The wedges were driven in tight, and everything on deck was in good condition and seaworthy. After the ship had left Sydney, frequent inspections were made, as often as twice every watch, and when the wedges were found loose on account of the action of the sea, they were tapped with a hammer and driven in further. When the sea was too heavy, and it became impossible for the crew to go on the bridge to do this particular work, the course would be altered to head the ship into the waves, and thus allow the men to fasten the loosened tarpaulins.

Under these circumstances, no negligence can be imputed to the officers and crew who were watchful and alert, and they cannot, therefore, be held liable, if by no breach of their duty vigilantly performed, there was an infiltration of water in hold no. 3. They were not bound to take all the precautions that would inevitably prevent the accident and make its occurrence impossible. They were required to exercise the care that reasonably prudent men would exercise in similar circumstances.

It has been argued that the crew did not discover immediately the damaged condition of the tarpaulins. The failure to make such an immediate discovery does not amount to negligence under the prevailing conditions of the weather, and even if it did, there is no evidence, and the burden was upon the respondent, that there was any undue delay.

But the respondent further submits, that even if a peril of the sea has been established, the damage to the goods was caused before such peril was encountered.

I fail to appreciate this argument; on the contrary, I see a *causa causans* between the peril of the sea and the damage caused to the goods.

It was at noon on the 12th of August that it was noticed that the tarpaulins were loose. At that time the weather was bad, and the waves were battering the ship persistently since many hours; although there had been frequent inspections on the morning of the 12th of August, (two every watch) it was only at that time that it was found that some wedges were gone. It seems to me that there can be no other inference to be drawn except that there is a clear relation between the peril of the sea and the damage caused.

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

BOND J. *ad hoc* (dissenting)—This is an appeal from a judgment of the Court of King's Bench, appeal side, for the province of Quebec, dated 30th April, 1941, reversing by a majority, a judgment of the Superior Court, and maintaining an action instituted by the respondents, claiming $2,842.75 as damage to a shipment of kegs of nails, staples and wire on board the appellant's steamer *Keynor*, on a voyage from Sydney, N.S., to Fort William, Ont., during the month of August, 1937.

The cargo was delivered in a damaged condition as a result of the incursion of sea water into no. 3 hold, where the cargo was stowed.

In support of its action, the respondent company set up the contract of carriage evidenced by bills of lading, the value of the shipment, the damaged condition on arrival at destination, the consequent loss arising, and prayed for judgment accordingly.

The appellant, by its plea, denied liability, invoking the *Water Carriage of Goods Act, 1936,* and alleging that it had fulfilled all its obligations under that Act; that the ship, in a seaworthy condition, left Sydney on the 11th August, 1937, at about 7.30 a.m., and all went well until August 12th at 12 a.m., when the vessel encountered a strong southwest wind and heavy seas, until arrival at Cape Gaspé on August 13th about 5 a.m.; that the vessel rolled heavily, taking in heavy bodies of water; that, in order to enable the officers and crew to go on deck and look at the hatches to see whether the battens holding the tarpaulins on the hatches were secured, and the wooden wedges holding the battens were tight, and to tighten them if necessary, the ship's course was altered, and the ship headed into the sea on several occasions during that period; that, at approximately noon on August 12th, the officer on watch noticed that the tarpaulins on no. 3 hatch had become loose, and, upon inspection, it was found that several wedges on the forward end of the hatch had gone, and that the tarpaulins were loosened, allowing water to enter the hold, and also that the "booby hatch" had been sprung by heavy seas; that the tarpaulins were immediately refastened, and new wedges inserted. The appellant contends that the damage to the cargo was the result of a peril of the sea, and invokes the terms of the *Water Carriage of Goods Act,* exempting it from liability in such cases.

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By its answer to plea, the respondent joined issue generally, but alleged specifically that the ship was not seaworthy as alleged, nor as required by law.

The fact of the damage to the cargo, and the amount of such damage not now being in dispute, the substantial question that calls for discussion is whether the appellant has established that the loss is to be attributed to a peril of the sea, without fault being attributable to the officers or crew; in other words, the loss being established as a result of the incursion of sea water, has the appellant brought itself within the exceptions mentioned in the Act as relieving it from responsibility?

The Act provides (I Edw. VIII, ch. 49, schedule, rules relating to bills of lading, art. III, 2):

> Subject to the provisions of Art. IV the Carrier shall properly load, handle, stow, carry, keep, care for and discharge the goods carried.

Article IV enumerates the exemptions from liability that the carrier may invoke. Those relied upon in the present case appear to be:—

> Article IV (2). Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:
>
> (*a*) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship.

This ground is not now apparently relied upon and, indeed, probably could not be successfully invoked in view of the decision of the House of Lords in *Gosse Millerd, Ltd.* v. *Canadian Government Merchant Marine, Ltd.* (1).

In that case, the Lord Chancellor (Lord Hailsham) said at p. 234:—

> But even if it can be assumed that the negligence in dealing with the tarpaulins was by members of the crew, such negligence was not negligence in the management of the ship, and, therefore, is not negligence with regard to which art. IV, rule 2 (*a*) affords any protection.

The real ground relied upon by the appellant is to be found in subsection (*c*) of section 2, of art. IV, namely:

> 2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:—
>
> (*c*) perils, danger and accidents of the sea or other navigable waters.

Subsection (*q*) should also be referred to, namely:

> (*q*) any other cause arising without the fault or neglect of the servants of the carrier, but the burden of proof shall be on the person claiming the

(1) [1929] A.C. 223.

benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

It is clear from the evidence, and, indeed, admitted, that some of the wedges holding the batten bars in place were forced out by the action of the waves sweeping over the deck and, as a consequence, the tarpaulins covering the hatch of no. 3 hold, and which were kept in place by these battens, became loose, thus permitting the water to enter the hold. This was a contingency that evidently could be foreseen. It was something that was quite likely to occur unless precautions were adopted. The precautions were to inspect these wedges from time to time and keep them tight by blows with a hammer, when required. Such inspection was made according to the "protest", about every six hours. The mate (Brash) testifies that the hatches were inspected twice every watch, but later on he said, in answer to the question:

Was there anything that you could do to prevent these wedges from loosening up? Answer. No. We did as much as we could, which was to inspect them once in a while, and tap them with a sledge hammer, and drive them in further.

The master, (Williamson), testified as follows:—

Q. Before I proceed further: from the time you left Sydney was there anything to be done to make sure that the hatches were properly battened down and that the wedges were tight and kept tight?

A. You mean leaving port?

Q. After you left port proceeding on the voyage?

A. Just the usual mate's inspection, unless the weather warrants that we have to send him along the deck and inspect more often.

Q. What does that inspection consist of?

A. Checking all the wedges to see if they are tight and that everything is sea-worthy on deck.

And, again, the master said:

* * * it is all up to the man on duty; if he thinks that he has gone long enough without inspection, he simply hauls her to.

These periodic inspections were evidently of vital importance to guard against an incursion of water, but, from the above extracts from the evidence, these inspections were somewhat of a routine or perfunctory character. In order to carry them out in rough weather, it was necessary to take the ship off her course and head her into the sea. The master testified on this point as follows:—

Q. How long would it take before these tarpaulins could be fixed and the hatch made tight again?

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A. Oh, a matter of ten minutes, but for an inspection, for the men to go along like that, I think almost every time we had, during the weather like that, I was heading—about half an hour, would take them that length of time to go around the hatches.

The SS. *Keynor* was a reinforced canal boat (Dolphin canal type), and though duly licensed for the coasting trade, would roll more than a salt water boat. There was nothing to protect the main deck from the sea in the shape of bulwarks; (*per* Savard, the second mate); and the water would go right across the entire deck when the ship rolled.

The discovery that these tarpaulins had worked loose was made at noon on the 12th August, according to the ship's protest, and also according to the testimony of the master. The ship left Sydney on the morning of the 11th, and, consequently, the perils of the sea invoked on behalf of the appellant must have occurred prior to noon on the 12th August, that is, the day following her departure. On this point, the master testified as follows:—

> We really did not get much bad weather till we got to Bird Rocks, and that was 11.45 p.m. Our bad weather was from Bird Rocks to Gaspé. That was covering the 12th. After rounding Bird Rocks, we struck this strong heavy west wind with a very, very heavy sea.

The ship reached Bird Rocks at 11.30 p.m., on the 11th, and Brion Island at 4 a.m. on the 12th. It was at noon on that day that Brash, the mate, when passing along the deck to go to a meal, noticed that some of the wedges had worked loose, and one of the booby hatches had sprung.

The master (Williamson) gave his evidence on the 26th May, 1939, that is, a year and nine months after the event. He emphasized the heavy weather encountered after leaving Bird Rocks till off Cape Gaspé. But the ship reached Bird Rocks at 11.30 p.m., on the 11th, and Brion Island at 4 a.m. on the 12th, and the entry in the ship's log describes the wind as merely "fresh". The first entry of the wind as "strong" is at 12.45 p.m. on the 12th, after the discovery.

The engines were kept at full speed all the time, and her speed not appreciably affected. If, as claimed, the decks were constantly awash, as might be expected in boats of this type, extra precaution was called for, and more frequent inspections made. Between 4 a.m. and noon on the 12th, it was daylight, yet the discovery of the loose

tarpaulins was made quite casually by the mate while on his way to his mid-day meal. It was apparently not observed from the bridge.

Under such circumstances, can the damage be attributed to a peril of the sea?

The term "perils of the sea" (*c*), whether in policies of insurance, charterparties, or bills of lading, has the same meaning (*d*), and includes:—

> Any damage to the goods carried caused by sea-water, storms, collision, stranding, or other perils peculiar to the sea or to a ship at sea, which could not be foreseen and guarded against by the shipowner or his servants as necessary or probable incidents of the adventure (*d*). If a *prima facie* case of loss by perils of the sea is made, it is for the goods owner to disprove it by proving negligence causing the loss (*e*).
>
> (Scrutton on Charterparties and Bills of Lading. 14th ed., page 267).

The foregoing definition was adopted in the case of *Canadian National Steamships* v. *Baylis* (1).

The difficulty in framing an exhaustive definition of the term was referred to in *The Thames and Mersey Marine Insurance Company Ltd.* v. *Hamilton, Fraser & Co.* (2), but Lord Bramwell said:—

> I think the definition of Lopes, L.J., in *Pandorf* v. *Hamilton* (3) very good: "In a seaworthy ship, damage to goods caused by the action of the sea during transit, not attributable to the fault of anybody".

As pointed out in Carver's "Carriage by Sea" (s. 87, p. 139):—

> Upon this, it must be remarked that the losses need not be extraordinary, in the sense of arising from causes which are uncommon. Rough seas, which are characteristically sea perils, are common incidents of a voyage. But damage arising from them, whether by their beating into the ship, or driving her on the rocks, is within the exception, if there has been no want of reasonable care and skill in fitting out the ship and in managing her.

Again in *Canada Rice Mills, Limited* v. *Union Marine & General Insurance Company* (4), Lord Wright said:—

> In the same way, storms at sea may be frequent, in some cases seasonal, like typhoons in the China Seas; a ship may escape them, and they are outside the ordinary accidents of wind and sea. They may happen on the voyage, but it cannot be said that they must happen. In their Lordships' judgment, it cannot be predicated that where damage is caused by a storm, even though its incidence or force is not exceptional, a finding of loss by perils of the sea may not be justified.

(1) [1937] S.C.R. 261, at 263.
(2) (1887) 12 App. Cas. 484.
(3) (1885) 16 Q.B.D. 629.
(4) (1940) 67 Ll. L.R. 549, at 557.

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That case, it should be noted, was an action on a policy of insurance and, while the definition of the term "perils of the sea" therein used, is the same as in a bill of lading, the consequences or results are not necessarily identical, for the peril may, in a bill of lading case, be due to negligence which is immaterial in a contract of insurance (*per* Lord Wright in *Canada Rice Mills* v. *Union Marine & General Insurance Company* (1).

It has been pointed out that each case must be decided upon the facts disclosed by the evidence, and thus the case of *Donaldson Line Co. Limited* v. *Russell and Sons Ltd.* (2) can readily be distinguished. In that case, a wave of unusual character boarded the ship during a gale in an unusual manner at a peculiar position, sweeping out suddenly the wedges, and at the same time causing considerable damage to other parts of the ship in the immediate vicinity.

In the case now under consideration there was merely a "fresh" wind, and a gradual loosening of the wedges which could have been discovered by more frequent or regular inspection.

> The term "peril of the seas" refers only to fortuitous accidents or casualties of the sea. It does not include the ordinary action of the winds and waves. (Scrutton, p. 268).

In the case of *Canadian National Steamships* v. *Baylis* (3), it was said:—

> * * * it was incumbent upon the appellants (ship-owners) to acquit themselves of the onus of showing that the weather encountered was the cause of the damage, and that it was of such a nature that the danger of damage to the cargo, arising from it, could not have been foreseen or guarded against as one of the probable incidents of the voyage.

Where a *prima facie* case of loss by perils of the sea is made, it is for the goods' owner to disprove it by proving negligence causing the loss. (Scrutton, p. 261). In the present instance, such a *prima facie* case has not been established within the definition

> damage to goods caused by the action of the sea during transit, not attributable to the fault of anybody.

(1) (1940) 67 Ll. L.R. 549, at 557. (2) (1939) Q.R. 68 K.B. 135.
(3) [1937] S.C.R. 261, at 263.

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On the contrary, there appears to have been negligence in the inspection of these wedges, notwithstanding the fact that the danger of them becoming loosened was a known and anticipated risk.

The appeal should be dismissed.

Appeal allowed with costs.

Solicitors for the appellant: *Beauregard, Laurence & Brisset.*

Solicitors for the respondent: *Montgomery, McMichael, Common & Howard.*

IN THE ESTATE OF ELMER SHAW, DECEASED

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* Nov. 2.
* Nov. 12.

EMILY JANE SHAW (APPLICANT).....APPELLANT;

AND

THE TORONTO GENERAL TRUSTS CORPORATION, THE ATTORNEY-GENERAL OF SASKATCHEWAN, AND THE CITY OF REGINA.....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Wills—Administration of estates—Application by widow of testator for relief under The Dependants' Relief Act, R.S.S., 1940, c. 111—S. 8 (1) (2)—Construction of the Act—Condition precedent to Court making order for relief.

On an application by the widow of a testator for relief under *The Dependants' Relief Act,* R.S.S., 1940, c. 111, the onus is on the applicant to satisfy the court that her husband's will has not made reasonable provision for her maintenance; and this is a condition precedent to the court making an order for relief.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1) setting aside the order of Bigelow J. in chambers in the Court of King's Bench (2) made in favour of the present appellant, and dismissing the latter's motion for relief under *The Dependants' Relief Act,* R.S.S., 1940, c. 111.

(1) [1942] 1 W.W.R. 818; [1942] 2 D.L.R. 439.
(2) [1942] 1 W.W.R. 613.

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

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The appellant, widow of Elmer Shaw, late of Abernethy, in the Province of Saskatchewan, deceased, moved in the Court of King's Bench of Saskatchewan, before Bigelow J. in chambers, under the provisions of said Act, for relief upon the ground that by the terms of the will of said deceased the appellant received less than if the deceased had died intestate leaving a widow and children, or for such further or other order as to the court might seem proper.

Bigelow J. held that the intention of the Act is to provide that anything less than what the widow would have received if the husband had died intestate leaving a widow and children, viz., one-third of the estate, is not a reasonable provision for the maintenance of the widow; and made an order that the present appellant was entitled to a one-third share of the estate.

The Court of Appeal for Saskatchewan set aside the order of Bigelow J. and dismissed the present appellant's motion. It was held that s. 8 (1) of the Act sets out a condition as a basis for the jurisdiction which enables the court to intervene and that condition requires the court to be of the opinion that reasonable provision has not been made in the will for the dependant to whom the application relates; if the condition fails, the provisions for relief do not come into operation; if the court decides that an order should be made, it is then (if the application is made by or on behalf of a widow) that s. 8 (2) (as to amount of allowance to be made to the testator's wife) operates; and from all the facts before the court in the present case the court could not form the opinion that the deceased had by his will so disposed of his real or personal property that reasonable provision had not been made for the maintenance of his widow; and accordingly the condition laid down in s. 8 (1) had not been complied with and the court had no jurisdiction to put in motion the machinery provided by the Act.

According to a memorandum in the record before this Court (set out in the reasons for judgment now reported), the present appellant had, on the hearing before the Court of Appeal, asked for leave to file a further affidavit, and the Court of Appeal made no disposition of that application.

The judgment in the Court of Appeal ordered that the costs of all parties in that Court and in the Court of King's Bench as between solicitor and client, as the same might be taxed, be payable out of the estate of said deceased. The appellant, in her notice of appeal to this Court, stated that she did not complain of such disposition of costs.

There was a motion by the respondents that the appeal be quashed for want of jurisdiction, which motion was heard at the same time as the hearing of the appeal.

E. C. Leslie K.C. for the appellant.

G. W. Forbes K.C. for the respondents The Toronto General Trusts Corporation (executor and trustee under the will of the deceased) and The City of Regina (as owner and operator of the Regina General Hospital, a beneficiary under the will).

Duncan A. McIlraith K.C. for the respondent The Attorney-General of Saskatchewan.

THE COURT—We agree with Chief Justice Martin as to the construction of *The Dependants' Relief Act* and that, on the evidence before the Court, it cannot be said that the deceased has by his will so disposed of his real or personal property that reasonable provision has not been made for the maintenance of his widow, the appellant. The formal order of the Court of Appeal sets aside the judgment below and directs judgment to be entered dismissing the application made by the appellant under the Act. Counsel for the appellant and for the respondents, the executors and the City of Regina, have filed a memorandum in respect of the hearing before the Court of Appeal reading as follows:—

> Counsel for the Respondent asked for leave to file a further Affidavit setting out the expense to which the Respondent would be put in maintaining the standard of living to which she had been accustomed, to maintain the home, the automobile, etc. The filing of such material was opposed by the Appellants and no disposition was made by the Court of the application.

The respondent and appellants mentioned in this memorandum are the respondent and appellants as they appeared in the Court of Appeal but, of course, in this Court their

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roles were reversed. The filing of the material referred to was opposed before us by counsel for the named respondents. We are of opinion, however, that leave should be given to the appellant, if so advised, to file in the Court of King's Bench within sixty days such material and also material relating to anything relevant to be considered by the Court in determining whether the appellant is entitled to any relief under the terms of the statute. The respondents may, of course, file such relevant material in answer as they may be advised.

The proper order would therefore appear to be to declare that the onus is placed upon the appellant to satisfy the court that the will of her husband has not made reasonable provision for her maintenance and that this is a condition precedent to the court making an order for relief; to allow the appeal to the extent that the existing application of the appellant for relief is not dismissed but is kept alive for the purposes mentioned; and to remit the matter to the Court of King's Bench.

The motion to quash fails but the costs of that motion will be costs in the cause. The costs of all parties to this appeal will be paid out of the estate, those of the executors as between solicitor and client. If the appellant proceeds, the court before whom the matter comes will deal with the question of any further costs.

Judgment accordingly.

Solicitors for the appellant: *MacPherson, Milliken, Leslie & Tyerman.*

Solicitors for the respondents The Toronto General Trusts Corporation and the City of Regina: *Cross, Jonah, Hugg & Forbes.*

Solicitor for the respondent The Attorney-General of Saskatchewan: *Alex. Blackwood.*

HIS MAJESTY THE KING .....APPELLANT;

AND

ROBERT HUGHES, JOHN PETRYK, WILLIAM G. BILLAMY, FLOYD BERRIGAN .....RESPONDENTS.

1942

* Oct. 6, 7, 8.
* Nov. 12.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Murder—Shooting during attempted robbery—Four accused engaged in the robbery—Victim shot by one of the four—Struggle between the latter and the victim—Jury instructed that accused guilty of murder or nothing—Whether verdict of manslaughter should have been left open to jury—Definition of murder—Ss. 252 (2), 259 (d) and 260 Cr. C.

The respondent H., with two companions, entered a shop kept by the father of the victim for the purpose of robbery. The family of the victim and the victim were sitting in a room, in the rear of the shop, separated by a half door with curtains. The mother, hearing the store bell, entered the shop, saw H. carrying a revolver and gave a warning to the family that a hold up was in progress. H. fired a first shot through the wooden partition of the side of the doorway and a second one through the curtains. The first of the shots wounded the victim in the hand and the second in the arm. The victim immediately came into the shop and grappled with H. in an effort to disarm him. The accounts of the actual shooting by the mother and a brother of the victim did not agree. The mother testified that, during the struggle, the victim was attempting to take the pistol from H. "but could not reach because he was quite high" and that she heard then only one shot, her son falling down; while the brother stated that H. broke away from the victim, was leaving the shop and, just as he was opening the door, turned and fired at the victim a third shot which killed him; but the brother agreed with his mother that the victim "had H.'s wrist raising it up in the air" during the struggle. A witness for the Crown testified that H., on the evening of the date of the crime, had made a statement to him "that the gun accidentally went off". The trial judge charged the jury that H. was guilty of murder or of nothing. All four respondents were convicted of murder, H. for having effected the act of shooting and the three others as conspirators with H. and, as such, responsible for the crime. A majority of the Court of Appeal ordered a new trial, holding that the trial judge erred in not instructing the jury that they could have returned a verdict of manslaughter, if they believed some of the evidence that the revolver was accidentally discharged.

Held that the judgment appealed from (78 Can. Cr. C. 1) should be affirmed. The trial judge properly instructed the jury that it was their duty to find H. guilty of murder, if they accepted the evidence of the brother of the victim; and that they could render a similar verdict, if they accepted the mother's testimony, as they could properly infer that the shot which occurred during the struggle,

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

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following at once the two shots fired into the sitting room, was intentionally fired by him in a state of mind evincing disregard of the consequences of his shooting and with the knowledge that his conduct was endangering the lives of the people whose premises he was invading. But the trial judge did not deal with the third hypothesis, the possibility that they might find the pistol was discharged by accident in the sense that it was not discharged by any act of H. done with the intention of discharging it. The trial judge ought to have told the jury that they might and ought to find a verdict of manslaughter if they thought the pistol was not discharged by the voluntary act of H. and that H. did not anticipate and ought not to have anticipated that his conduct might bring about a struggle in which somebody's death might be caused.—Also the trial judge proceeded rightly in instructing the jury that, in the circumstances of the case, the law to be applied was to be found in the Criminal Code (S. 252 (2) Cr. C.) *Graves* v. *The King* (47 Can. S.C.R. 568) applied.

APPEAL by the Crown from the judgment of the Court of Appeal for British Columbia (1), allowing an appeal by the four respondents in this case, quashing their conviction for murder on a joint trial before Sidney Smith J. and a jury and ordering a new trial.

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

R. L. Maitland K.C. and *Alfred Bull K.C.* for the appellant.

A. Branca for the respondent Hughes.

W. A. Schultz for the respondent Petryk.

J. S. Burton for the respondent Billamy.

T. F. Hurley for the respondent Berrigan.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—The respondents were convicted of the murder of Yoshyuki Uno in Vancouver on the 16th of January, 1942. The act of shooting by which it is alleged the murder was effected was, it is charged, the act of the respondent Hughes; the other respondents were charged and found guilty as conspirators with Hughes and, as such, responsible for the crime.

I shall deal first with the case of Hughes. The evidence shows that on the date mentioned Hughes with two companions entered the shop kept by the father of the victim

(1) (1942) 78 Can. Cr. C. 1; [1941] 3 W.W.R. 1; [1942] 3 D.L.R. 391.

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at 305 West 4th Ave., Vancouver, for the purpose of robbery. The family, his wife, the mother of the victim, a daughter, the victim and another son, lived with him in the rear of the shop which was separated from a sitting room, or living room, by what is called a half door with curtains on the store side extending to the floor. There is a bell which rings in the sitting room when the street door of the store opens.

On the occasion with which we are concerned Mr. and Mrs. Uno were sitting in the sitting room with the deceased son and the other son and daughter. The store bell having rung, the father left the room for some reason and the mother entered the shop. She says Hughes was carrying a revolver and she uttered some expression which gave a warning to the family in the sitting room that a hold-up was in progress. They had formerly gone through the same experience and this expression was understood. Mrs. Uno says that Hughes went immediately toward the curtains of the door leading into the sitting room and, as he approached, he fired a shot which passed through the wooden partition at the side of the doorway. When he got to the curtains he fired another shot through the curtains. The first of these shots wounded Yoshyuki Uno in the hand and the second in the arm. Yoshyuki immediately came into the store and grappled with Hughes in an effort to disarm him. The brother and the mother were in the store at this time together and the brother agrees with the mother that this struggle took place. Their accounts, however, of the actual shooting of the victim do not agree. The brother says that Hughes broke away from Yoshyuki and left the shop and, just as he was opening the door turned and fired at Yoshyuki a third shot which took effect in his head and killed him. The mother says that in the struggle Yoshyuki was attempting to take the pistol from Hughes "but could not reach because he was quite high". She adds:—

* * * Hughes was holding gun, and my son grabbed his wrist.

Q. Does she mean that Hughes was holding the gun in his hand?

A. Yes, and my son was doing his best, and trying to bring it down, but he was quite weakened because he sustained injury already.

She says that while they were struggling she heard a shot and afterwards did not hear another, that after the

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shot her son fell down and Hughes made off. She distinctly remembers one shot fired during the struggle but heard no later shot. It ought to be observed perhaps that the brother's evidence, while generally agreeing with his mother's statement that there was a struggle, is to the effect that Yoshyuki "had Hughes' wrist raising it up in the air". If the jury accepted the brother's account of the shooting they had before them, of course, a plain case of murder. The controversy turns entirely upon the alternative hypothesis that the third shot occurred during the struggle, as the mother says.

The majority of the Court of Appeal have held that it was open to the jury, if they took a certain view of the evidence, to find that the pistol went off by accident in the sense that it was not discharged by any act of Hughes done with the intention of discharging it, and that if they so found they might properly have brought in a verdict of manslaughter and that the learned trial judge erred in not leaving that issue to them.

The Crown appeals.

The jury would view the acts of Hughes from the moment Mrs. Uno entered the shop as swiftly succeeding phases of a single outrage and without doubt as evincing a reckless disregard of the consequences of his shooting, and they would be quite justified in ascribing to him a knowledge that his conduct was endangering the lives of the people whose premises he was invading. They might not improperly infer that the shot which occurred during the struggle (if they accepted the mother's story), following at once upon the two shots fired into the sitting room, was intentionally fired by him in that state of mind. If that was their conclusion, it would be their duty to find him guilty of murder under section 259 (*d*) of the Criminal Code. I think the learned trial judge in effect instructed them in this sense. He also properly instructed them that they might find the same verdict if they accepted the evidence of the brother.

Unfortunately, he did not deal with the third hypothesis, the possibility that they might find the pistol was discharged by accident in the sense mentioned.

The Crown adduced in evidence against the accused the testimony of one Ciminelli, who deposed to an account of

the shooting given to him by Hughes in a conversation on the evening of the date of the crime, the 16th of January, 1942. In examination in chief Ciminelli said that Hughes told him on that occasion that

> the Jap came for him and struggled with him and then * * * and the gun went off.

On cross-examination Ciminelli said that on the preliminary hearing he had given this version of the conversation:—

> Q. What was the conversation? A. He told me that he was in a jam.
> Q. What kind of a jam? A. He told me he took some store, and the guy came for him, and struggled with him, and the gun accidentally went off.
> Q. Do you remember giving that evidence? A. That is right.
> Q. Your recollection was clearer then than it is to-day, I take it? A. That is right.

As Parke J. said in *Rex* v. *Higgins* (1):—

> Now, what a prisoner says is not evidence, unless the prosecutor chooses to make it so, by using it as a part of his case against the prisoner; however, if the prosecutor makes the prisoner's declaration evidence, it then becomes evidence for the prisoner, as well as against him; but still, like all evidence given in any case, it is for you to say whether you believe it.

If the jury accepted Ciminelli's version of Hughes' statement given at the preliminary hearing ("that the gun accidentally went off") as a true account of that statement, then that statement in its complete form was evidence in favour of the accused. It was, of course, for the jury to consider whether this statement, having regard to all the other evidence before them, satisfied them that the pistol in fact went off by accident and not by the voluntary act of Hughes, or that it was only of sufficient weight to leave their minds in a state of doubt on the point. If the jury thought the pistol did not go off by the voluntary act of Hughes, or were in serious doubt about it, then another question might arise; and here emerges the real point for decision on this appeal.

Before stating that point, I quote subsection (2) of section 252 and subsection (*d*) of section 259 of the Criminal Code:—

> Section 252 (2): Homicide is culpable when it consists in the killing of any person * * * by causing a person, by threats or fear of violence, or by deception, to do an act which causes that person's death * * *

(1) (1829) 3 C. & P. 603, at 604, also cited by the Chief Justice in *Eberts* v. *The King* (1912) 47 Can. S.C.R. 1, at 31.

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Section 259: Culpable homicide is murder.

* * *

(*d*) If the offender, for an unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

I think I ought to say now, in the clearest terms, that, in my opinion, even if the jury thought the pistol went off by accident (or were not satisfied that it did not go off in that manner) they might still have properly found a verdict of murder under these sections if they were satisfied that the conduct of the accused was such that he ought to have known it to be likely to induce such a struggle as that which actually occurred, and that somebody's death was likely to be caused thereby and that such was the actual effect of his conduct and of the struggle.

At p. 583 of his judgment, delivered on behalf of the majority of the Court, in *Graves* v. *The King* (1), Anglin J. (as he then was) says:—

> For the purposes of this appeal I assume that under this provision it was not necessary, in order to bring the charge of culpable homicide within it, that the jury should have found that the acts of the defendants were such as they knew or should have known were likely to cause the very acts to be done or the precise situation to arise which in fact resulted in the homicide, or to cause the death of the person who was killed, but that it would suffice if the jury had found that the accused did an act which they knew or should have known would be likely to induce the doing of anything or to bring about any situation likely to cause the death of some person—the person killed or any other person.

I think this passage ought to be accepted as stating the law as it is, not merely as it is assumed to be. To repeat, I think the act of Yoshyuki in attempting to disarm Hughes and the ensuing struggle were so clearly the natural and ordinary consequences of Hughes' conduct that the jury might well, as reasonable men, have inferred that Hughes ought to have anticipated some such occurrence and the probable involuntary discharge of the pistol as a natural incident of the occurrence; it would then be for them to say whether the conditions of clause (*d*) of section 259, when read with subsection (2) of section 252, were fulfilled. The learned trial judge did not put this to the jury explicitly, but possibly it is within the scope of his language.

(1) (1913) 47 Can. S.C.R. 568.

The learned judge, however, gave the jury to understand that the accused must be acquitted if they did not find them guilty of murder. I am forced to the conclusion that this was misdirection.

The argument on behalf of the Crown was based upon two decisions, *Director of Public Prosecutions* v. *Beard* (1), and *Rex* v. *Elnick* (2).

The rule laid down in the House of Lords in *Beard's* case (1) is that homicide arising from an act of violence in furtherance or in the course of the crime of rape constitutes murder. In *Beard's* case (1) it was proved that there was a violent struggle in which the accused overpowered the child and stifled her cries by putting his hand over her mouth and pressing his thumb upon her throat, the acts which, in her weakened state resulting from the struggle, killed her. This, the House of Lords held, was murder, although the accused had no intention of causing death.

I cannot agree that you can bring within this rule the accidental discharge of the pistol admitted by Hughes. If the pistol went off accidentally, in the sense mentioned above, it could hardly be said as matter of law to be an act of violence done by the accused "in furtherance of or in the course of" the crime of robbery in the sense of the Lord Chancellor's judgment.

No question of accident in the relevant sense arose in *Beard's* case (1). There was no question that the act which caused the suffocation, the act of the prisoner in placing his hand on the mouth of the victim, was his voluntary act. In the report of the case in the Criminal Appeal Reports (3), there appears this passage in the judgment of the Lord Chief Justice:—

> During a discussion on the law applicable to the case the learned judge said that he should tell the jury that if a man is engaged in violating the honour of a woman and she does her best to defend herself and struggles, and the man does something which kills her, to prevent her from screaming or struggling, it is murder. In summing up he directed that "if a man is assaulting a woman or girl, and the woman or girl, in order to resist him screams and struggles, and the man, in order to effect his purpose, puts his hand upon her mouth and suffocates her, he is guilty of murder, and it is no use at all to say, 'I only intended to stop her screaming. I did not intend to kill her.' That is no defence, in my judgment."

(1) [1920] A.C. 479.
(2) (1920) 30 Man. R. 415; 33 C.C.C. 174; [1920] 2 W.W.R. 606.
(3) (1919) 14 C.A.R. 110, at 114.

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And at page 116:—

> It was proved that there was a struggle of a horrible description between this man, seeking to consummate his desire, and this 13 years old girl. No questions were put in cross-examination by Mr. Artemus Jones for the defence, to minimize the effect of the testimony about the struggle that must have taken place. The child was straining every nerve and muscle to escape him, and in order to overpower her and to stop her struggles and screams he eventually did the act which resulted in her death. By the law of England that is murder: it is an act of violence done in the course or in furtherance of a felony involving violence, and beyond all question and beyond the range of any controversy that is murder.

Again the judgment of the Lord Chancellor makes it quite clear that the defence founded upon drunkenness was not that Beard was so drunk as to be incapable of forming the intent to commit rape, but that he was incapable of measuring or foreseeing the consequences of his violent act, or that at the time of placing his hand on the child's mouth he was incapable of knowing that what he was doing was dangerous. At p. 307 he says:—

> There was certainly no evidence that he was too drunk to form the intent of committing rape. Under these circumstances, it was proved that death was caused by an act of violence done in furtherance of the felony of rape. Such a killing is by the law of England murder.

In this country a charge arising out of circumstances such as those considered in *Beard's* case (1) would be disposed of under the law laid down in section 260 of the Criminal Code.

As regards *Rex* v. *Elnick* (2), Mr. Justice Cameron says at p. 431:—

> The jury should have been told that on the undisputed and admitted facts the killing of De Forge was caused by an act of violence done by Elnick in furtherance of a crime of violence, that the killing was therefore murder and that it was their duty to return a verdict of guilty.

That is really the basis of the decision in that case. Such a direction could not properly have been given in this case, in view of the evidence set forth above as to accidental discharge.

The learned trial judge ought to have told the jury that they might and ought to find a verdict of manslaughter if they thought the pistol was not discharged by the voluntary act of Hughes, and that Hughes did not anticipate

(1) [1920] A.C. 479. (2) (1920) 30 Man. R. 415.

and ought not to have anticipated that his conduct might bring about a struggle in which somebody's death might be caused.

Mr. Justice Fisher thinks that on the evidence no reasonable jury could find that the discharge of the pistol was accidental, or that there was sufficient evidence to raise a doubt upon that point. There is much, very much, to be said for that view; I am not satisfied, however, that if the issue of manslaughter had been left to the jury, they must necessarily have found the verdict they did.

I think the learned trial judge proceeded rightly in instructing the jury that in the circumstances of this particular case the law to be applied is to be found in the Criminal Code. He might well have called the attention of the jury to the second subsection of section 252 and to the judgment of Anglin J. in *Graves* v. *The King* (1). As this Court thought in *Graves* v. *The King* (1), I am quite satisfied that the law to be applied to the circumstances of this case is to be found in the Code and that we need not pass upon the question whether the definitions in sections 252, 259 and 260 Cr. C. are exhaustive.

The appeal, therefore, from the judgment of the Court of Appeal, as it affects the conviction of Hughes, should be dismissed; and it follows necessarily that the appeal in respect of the other respondents must also be dismissed.

Appeal dismissed.

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(1) (1913) 47 Can. S.C.R. 568.

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ADMINISTRATION OF ESTATES — *Payment by executors of succession duties —Will giving bequests of specific sums and residuary bequest—Depreciation in value of estate owing to severe slump in stock market shortly after testator's death, causing insufficiency to pay bequests in full or anything on residuary bequest—Rates at which duties should be calculated—Duties paid based on net value of estate as at date of testator's death and at the rates appropriate to the different classes of beneficiaries, including the residuary legatee, as named in the will—Question whether payments made on wrong basis of computation under the circumstances and whether executors chargeable for overpayment.*]—The question on the appeal was whether the executors of a deceased's will, who had paid amounts claimed by certain provinces of Canada for succession duties, were justified in having paid those amounts, or whether the duties had been paid according to a wrong basis of computation under the circumstances and consequently there had been overpayment for which the executors were chargeable. The deceased, residing in the province of Nova Scotia, died on August 25, 1929, leaving a large estate consisting almost entirely of listed stocks and shares. His will made bequests of specific sums, directed a certain fund to be set aside for certain life interests and afterwards to revert to his estate, and bequeathed the whole of the residue to a university in the province of New Brunswick. The will provided that no bequests (except income from said fund) be paid for three years after deceased's death, the expressed purpose being to allow the executors time to dispose of securities to the best advantage and not in a depressed market. The will contained no express instructions with regard to payment of succession duties. Shortly after the executors entered upon their duties and before they had realized any portion of the estate the stock market took an unprecedented and severe slump and the value of securities constituting the estate fell very much below the inventory values, with the result that the estate has ever since been insufficient to pay the legacies in full; all the general legacies had to abate and there was no residue. Between 1930 and 1936 the executors paid (from time to time as funds were available or were rendered available by sale of assets or by borrowings) to the Provinces of Nova Scotia, Ontario, Quebec and British Columbia the succes-

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sion duties claimed to be payable in respect of all property passing under deceased's will. The payments were made on the footing that the amounts thereof constituted a charge upon the assets of the estate and that the executors were legally bound to pay them. The duties were paid on the basis of the net value of the estate as at the time of deceased's death and at the rates appropriate to the different classes of beneficiaries, including the residuary legatee, as named in the will. The Supreme Court of Nova Scotia *in banco* held (15 M.P.R. 477) that the executors were not entitled to pay succession duties as so claimed; that they were entitled to pay succession duties based upon the rates applicable to the persons who receive property or beneficial interest in property from the estate and not at rates applicable to persons by whom no property or beneficial interest in property is received although such latter persons may have been named in the will. The sole surviving executor appealed to this Court. *Held* (*per* the Chief Justice and Hudson and Taschereau J.; Crocket and Kerwin JJ. dissenting): The appeal should be allowed. The executors were justified in having paid out of the assets of the estate the claims as made for succession duties. The material statutory provisions considered were in the Nova Scotia *Succession Duty Act* (R.S.N.S., 1923, c. 18), the material statutory provisions in other provinces to whom duty was paid being substantially the same. *Per* Hudson and Taschereau JJ.: The tax is primarily a property tax and is intended to be a direct burden on that property, varying in amount according to the ralationship of the successor to the testator. The tax is intended to be determined by the state of things existing at the date of the deceased's death. Agreement expressed with the following holding by Hall J., dissenting, in the Court below: It is the purpose and intention of the Act that the two factors necessary to determine the duty—valuation and rates—shall be constant. Irrespective of market fluctuations, duty shall be levied upon the fair market value (less deductions) at the date of death. The rate is determined by the relationship or nature of the person for whose benefit property passed on the death. Computation is made by applying the appropriate rate to property passing to each person beneficially on the testator's

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avoid the policy, except under certain specified circumstances. In 1921, the insured, exercising his right to do so and complying with the necessary formalities, appointed his wife, the present respondent, beneficiary of the insurance policy; and the change was duly accepted by the appellant Assurance Society. In 1930, i.e., over ten years after the issue of the policy, the respondent asked for and received from the appellant a cash advance of $17,000, of which $2,645.50 was applied in payment of the annual premium then due. The amount of the cheque given to the respondent by the appellant was for $15,244.21, the surplus representing the accrued dividends. The respondent then endorsed the cheque in favour of her husband and the latter deposited it in his own bank account. In connection with the advance so made, the respondent signed a document, called "special contract", wherein it was stated that the appellant had made to the respondent a cash advance, receipt being thereby acknowledged, upon the security of the value of the policy which was duly assigned to the appellant by the respondent. The respondent also therein agreed with the appellant as to the condition upon which such advance and any future additional advances would be made, these conditions *inter alia* dealing with the payment of interest and providing that unpaid interest would be added to the existing loan; it was also agreed that, upon default in payment of any premium, "the total of all advances and any interest shall not be repayable in cash but shall be deducted by the Society from any sum * * * otherwise applicable to the purchase of paid-up or extended term insurance"; though it was also stipulated that the appellant "Society may exercise all powers necessary to effect repayment of all advances and any interest thereon". Appended to that document was a declaration signed by the insured that "I hereby consent to the execution by my wife of the foregoing agreement and to the advance or advances made or to be made thereunder": and, at the same time, the insured signed a "special assignment" of the policy to the appellant Society. In 1932 and 1933, the respondent applied to the appellant Society and obtained two further advances, providing mostly for payment of premiums due, thus bringing the total advances up to $21,977. Default was made in payment of annual premiums in December, 1933, and the last of several extensions of time for payment terminated in August, 1934. Thereupon, the total of the advances, with accrued interest, became deductible by the appellant Society from any sum or amount under the policy which would otherwise have been applicable to the purchase of paid-up or extended term insurance; and, as the advances and interest due were in excess of such sum or amount, the policy, as contended by the appellant Society, became null and void and was not in force at the death of the insured in December, 1936. The respondent, after her request for the payment of the amount of the policy had been refused, brought the present action against the appellant Society, alleging that the money advances were absolutely and radically null and void and of no effect, that, consequently, the policy should be held to have been still legally in force at the death of the insured and that the appellant Society should be condemned to pay the full amount of the policy. The grounds, upon which the action was based, were that, although admittedly the cheque for the money advanced was made to her order, the respondent had immediately endorsed it over to her husband, who had deposited it in his own bank account; that she had not received any of the money thus advanced; and that it followed that the whole transaction was: 1st, contrary to articles 1265 C.C., as being in some manner a benefit *inter vivos* conferred by the consorts upon each other and not in conformity with the provisions of the law under which a husband may insure his life for his wife; 2nd, a transaction whereby the wife had bound herself with or for her husband, contrary to the provisions of article 1301 C.C.; and 3rd, a transaction not in conformity with the provisions of the *Husbands' and Parents' Life Insurance Act* whereunder, exclusively, the consorts were authorized by the Civil Code to confer benefits *inter vivos* upon each other. The trial judge, holding that the cash advance to the respondent was void, maintained the respondent's action to the extent of $46,042.88, deducting part of the advances used for the purpose of the payment of the premiums due at the time of the advances. That judgment was affirmed by the appellate court "sans admettre toutes les raisons données par la cour inférieure". *Held,* reversing the judgment appealed from, (Q.R. 71 K.B. 279) that the respondent's action against the appellant Assurance Society should have been dismissed. The appeal to this Court was allowed. The money advances to the respondent were not made contrary to the provisions of article 1265 C.C.—The transfer of the policy by the insured to his wife was not a benefit *inter vivos* conferred in contravention of that article, as, by its very terms, a husband may, subject to certain conditions and restrictions, insure his life for his wife "in conformity with the provisions of the law", and, more particularly, with those contained in the *Husbands' and Parents' Insurance Act.*—Also, the endorsement by

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the respondent, in favour of her husband, of the cheque issued by the appellant Society was not of the Society's concern. The prohibition contained in that article is a prohibition addressed to the consorts themselves: they may not alter the covenants contained in their marriage contract and they cannot in any other manner confer benefits *inter vivos* upon each other; but that prohibition does not affect the appellant Assurance Society, except possibly in so far as the latter may have acted as an accomplice to the contravention of that article by the consorts themselves. Assuming, without formally deciding it, that the provisions of article 1265 C.C. would forbid a husband from insuring his life for the benefit of his wife unless he does so within the terms of the *Husbands' and Parents' Insurance Act* (the wording of the exception "in conformity with the provisions of the law" does not clearly exclude any provisions of the law found to be applicable and not expressed in the Act), the insurance policy in this case does not detract from the conditions enacted in that statute and, therefore, cannot be held to have been forbidden by, and to be contrary to, the provisions of article 1265 C.C.—As long as an insurance policy does not infringe any of the "conditions and restrictions" essentially required under that statute, the latter must be construed as authorizing the insertion of such accessory clauses as admittedly are usually to be found in ordinary insurance policies. Also, section 3 of the Act authorizes a husband to "insure his life or appropriate any policy of insurance held by himself on his life for the benefit of his wife"; and the word "any" connotes the idea of an ordinary insurance policy containing the usual and customary clauses. Moreover, the condition of the policy, upon which the respondent relies for contending that the policy was still in force at the death of her husband, is not to be found in the above statute and the necessary consequence of the respondent's argument would be that such a condition should not be read into the policy, thereby entailing a fatal result for the respondent's claim. Finally, if the conditions, which the respondent contended should be disregarded, are in conflict with the above statute, or, as an indirect consequence, in conflict with article 1265 C.C., they should be held to be contrary to public order, and therefore, such conditions would render void the appropriation itself made under the statute; then the insured himself would have remained entitled to the benefits of the policy and the respondent would have no ground of action. The cash advance made upon the strength of the policy by the appellant Society to the respondent was not a loan whereby the respondent

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bound herself (*s'est obligée*) either with or for her husband, contrary to the provisions of article 1301 C.C. and the obligation contracted by her was accordingly valid (although the respondent might be taken to have made to her husband an illegal gift *inter vivos* of the sums so advanced). Emphasis must be put on the word "bound" as that is the mischief, and the only mischief, which article 1301 C.C. is intended to prevent.—It was a term and condition of the policy that, at each of the periods mentioned in the "Table of loan and surrender values", the appellant Society obliged itself to advance a certain sum stated in the Table. This was one of the benefits and advantages conferred by the policy; it was, therefore, one of the benefits and advantages appropriated by the insured to his wife and conferred upon her at the date of her acceptance of the appropriation of the policy to her: she was at liberty to claim that benefit and advantage, at least after the expiration of ten years of the life of the policy. There was no new obligation assumed by either the husband or the wife in the "special contract": the respondent did not, by that document, or on that date, or in respect of the advance payment made to her, bind herself to anything to which she was not already subject by having accepted the appropriation of the policy.—The appellant Society, when making the cash advance, was merely carrying out the contract which it had made long before with the insured and with the beneficiary. The appellant Society was bound to carry it out and could have been compelled to carry it out at the suit of the beneficiary: it was only paying its debt to the respondent beneficiary and it was none of its concern what the respondent would do with the money. *Hamel* v. *Panet* (2 App. Cas. 121; 3 Q.L.R. 173), *Trust & Loan Co. of Canada* v. *Gauthier* ([1904] A.C. 94), *Laframboise* v. *Vallières* ([1927] S.C.R. 193), *Rodrigue* v. *Dostie* ([1927] S.C.R. 563), *Banque Canadienne Nationale* v. *Carette* ([1931] S.C.R. 33), *Banque Canadienne Nationale* v. *Audet* ([1931] S.C.R. 293), *Daoust, Lalonde & Cie* v. *Ferland & New York Life Insurance Co.* ([1932] S.C.R. 343), *Lebel* v. *Bradin* (19 R.L.n.s. 16), *Joubert & Turcotte* v. *Kieffer* (Q.R. 51 S.C. 152) and *Lacoste-Tessier* v. *The Bank of Montreal* (Q.R. K.B. 148) distinguished. In none of the cases which have come before the courts, and in particular in none of the cases referred to in the reasons for judgment of the appellate court in this case, did the question arise of the effect of advances made by an insurance company upon a policy similar to the one now before this Court. In every one of those cases a loan had been made by a third party, generally a bank, on the security of the

3.——*Set-off judgments—Defendant seeking to set off, against plaintiff's execution on judgment in action in Supreme Court of Ontario for damages for trespass, judgments obtained by Workmen's Compensation Board in District Court through certificates filed under s. 108 of Workmen's Compensation Act, R.S.O., 1937, c. 204, and assigned to defendant—Whether mutual debts—Judicature Act, R.S.O., 1937, c. 100, ss. 123, 124—Propriety of the procedure taken — Appeal to Supreme Court of Canada on question of practice in Ontario.*]—In an action commenced on June 4, 1931, in the Supreme Court of Ontario, plaintiff, on July 7, 1939, recovered judgment against defendant for damages for trespass, and issued execution. The Workmen's Compensation Board of Ontario had issued five certificates against plaintiff, at various times in the years 1927 to 1934, pursuant to the provisions of what is now s. 108 of *The Workmen's Compensation Act*, R.S.O., 1937, c. 204. The certificates were duly filed with the clerk of a district court and, under said s. 108, when so filed, they would become orders, and be enforceable as judgments, of that court. Executions were issued thereon and kept renewed and were, on the dates hereinafter mentioned, in full force and effect. The Board on December 6, 1934, assigned all its rights, title and interest in said certificates and orders of the court, and all moneys recoverable thereunder, to one who, on February 3, 1936, assigned the same to defendant. Defendant, on August 2, 1939, paid a sum to the sheriff on plaintiff's execution against him, and claimed to set off the balance as being the amount owing by plaintiff in respect of the five judgments of the Board (obtained through said certificates filed), acquired by defendant as aforesaid. Plaintiff disputed (*inter alia*) defendant's right of set-off. The trial of an issue was directed to determine whether defendant was entitled to set off against the amount of plaintiff's judgment the amount of the Board's judgments acquired by defendant; and whether plaintiff's execution had been satisfied or how much was owing thereunder. On this issue, Greene J. held that defendant was entitled to such a set-off, subject to the amount thereof being determined by a reference; any amounts embodied in the Board's judgments in the nature of penalties not to be included in computing the total amount due under them. The Court of Appeal for Ontario ([1941] O.W.N. 472; [1942] 2 D.L.R. 120) reversed that decision and held that the claims indicated by the cross judgments were not in their nature mutual debts and there was no right, therefore, to set them off; and moreover, that defendant had not proceeded, on his claim for relief, in the proper way. Defendant appealed to this Court. *Held:* The appeal should be dismissed, without prejudice to any application that defendant might be entitled to make to the Ontario courts to give effect to his equity to set off the judgments secured against plaintiff by said Board and assigned to defendant. *Per* the Chief Justice, and Kerwin, Hudson and Taschereau JJ.: This Court should not interfere with the order of the Court of Appeal in this case on the question of practice in Ontario. But (disagreeing with the Court of Appeal), in plaintiff's said action, judgments against plaintiff in another court, which had been assigned to defendant, could be set off, under ss. 123 and 124 of *The Judicature Act* (R.S.O., 1937, c. 100); all that is required by these sections is that there should be a mutual debt; the debts here sought to be set off are mutual debts; the operation of the statute is not limited to cases of debts arising out of or connected with the same transaction. *Bennett* v. *White*, [1910] 2 K.B. 643; *Edwards* v. *Hope*, 14 Q.B.D. 922, at 927; *Kohen* v. *Culley Breay & Dover Ltd.*, 57 O.L.R. 533, at 535, referred to. If above conclusion that the debts are mutual debts is right, it may be possible for defendant, by apt proceedings, to secure a pronouncement giving effect thereto; whether that be so or not is a question that should be dealt with by the Ontario courts. Disagreement expressed with plaintiff's contention that there was no power in the Workmen's Compensation Board to assign its judgments. *Per* Davis J.: Before issue of plaintiff's execution, there were proceedings or applications which defendant might have taken for the purpose of his relief now claimed. *Quaere*, whether there was any authority to make the order directing trial of the issue, after judgment and issue of execution. The issue of a writ of *fi. fa.* is an order of the court to make the money—the sheriff's authority comes from the court, not from the plaintiff (*Mahaffy* v. *Bastedo*, 38 O.L.R. 192). S. 21 of *The Execution Act* and s. 5 of *The Creditors' Relief Act* (R.S.O., 1937, chs. 125, 126) referred to. There must be an inherent jurisdiction in the court over its own process, but there would seem to be no authority for dealing with an execution after it has been placed in the sheriff's hands in the manner in which the proceedings in question were taken and continued. One can quite understand under special circumstances the court invoking an equitable jurisdiction to prevent a levy under execution where the execution debtor has a plain claim of a definite and fixed amount against the

Admiralty for the province of Quebec, L. Cannon J., holding that the *New York News* was responsible for the collision, maintained the action brought by the *Fort Willdoc* against the respondent here and dismissed the counter-claim. The Exchequer Court of Canada, Maclean J., reversed that judgment and held that both vessels were equally at fault in bringing about the collision. *Held,* Duff C.J. and Crocket J. dissenting, that the *New York News* was the only party to blame and therefore responsible for the collision and that the judgment of the local judge in Admiralty should be restored. *Held,* also, as to the ground raised by the respondent that before the accident the *Fort Willdoc* was proceeding at an excessive rate of speed and thus contributed to the accident, that, assuming it to be so, this would have happened before 5.15 a.m. when the first blasts of the whistles were heard; and, in view of what occurred afterwards, that there is no possible relation between this previous speed and the collision and that such speed could not have any bearing whatever upon the issue of liability in the present case. *The Pemaquid* (255 Federal Rep. 709) foll.—Duff C.J. and Crocket J. dissenting. *Per* Rinfret, Hudson and Taschereau JJ.—The duties of each steamer approaching each other head to head or on the starboard of each other are indicated in rules 22 and 25 of the "Rules of the Road for the Great Lakes." In this case, both ships were not coming head to head, but were slightly on the starboard side of each other. The one-blast signal of the *Fort Willdoc* and the two-blast signal of the *New York News* were not cross-signals, as they were given almost simultaneously, and the captain of the latter so understood them. If at that moment, there has been any confusion, it was for a very short time, because immediately after the two-blast signal of the *Fort Willdoc,* her captain ordered her twenty-two degrees to port in order to meet starboard to starboard. The captain of the *New York News* admitted having heard this last signal; if it had been otherwise, it was his duty to give immediately the danger signal, which he did not give. There was perfect understanding by both ships as to how they would meet and if such understanding had been followed, there would have been no collision. The sole and determining cause of the accident was the failure of the *New York News* to follow the course agreed upon, and to proceed, without giving the necessary signals, in a direction unknown to the *Fort Willdoc* and which she had no reason to forsee. *Per* Duff C.J. and Crocket J. (dissenting) —Both ships were to blame in proceeding at full speed in a dense fog contrary to rule 19 and both violated the same rule in

not immediately reducing speed to bare steerage way on hearing fog signals, and not navigating with caution until they had passed each other; it is no defence for one ship to say that the fog signals of the other appeared to be far away.—Upon the facts, the *Fort Willdoc* was greatly in fault and such fault was a contributing factor in bringing about the collision—The average speed of the *Fort Willdoc,* more than nine miles an hour, in a dense fog, the visibility being limited to between two and three hundred feet, did not come within the category of "moderate speed", as explicitly required by rule 19 and as every consideration of good seamanship would dictate; the speed of a vessel shall not be so great as to render it impossible to stop within the "limits of observation."—Both ships in the circumstances here erred in not giving a danger signal promptly under rules 21 and 22.—Prompt action from both ships, i.e., instant action, was demanded under the circumstances. If the *Fort Willdoc* had instantly signified her compliance with the course declared by the *New York News,* the disaster might have been avoided.—A delay of over half a minute before giving a signal, in the conditions of the moment, was not a prompt answer within the meaning of the rules.—The evidence does not show anything in the nature of an agreement between the two ships, resulting from the exchange of signals, that they were to follow a course starboard to starboard; and the final manoeuvre of the *New York News* was justified under rule 37. Judgment of the Exchequer Court of Canada ([1941] Ex. C.R. 145) reversed, Duff C.J. and Crocket J. dissenting. Paterson Steamships Ltd. *v.* The Ship "New York News". Paterson Steamships Ltd. *v.* Quebec and Ontario Transportation Co. Ltd.... **19**

2.——*Insurance — Insurance of cargo of wheat—Wheat, while in winter storage on berthed vessel, damaged by vessel sinking—Insurer paying insurance, taking over the damaged wheat, partially salvaging it, and, as endorsee of bills of lading, suing carrier for damages — Whether right of action—Bills of Lading Act, R.S.C., 1927, c. 17, s. 2—Counterclaim by carrier for contribution in general average.*]—There was insured with appellant certain wheat shipped on respondent's upper lakes steamer *Mathewston* for carriage to Montreal via Port Colborne. The bills of lading were deposited with a bank, through which the shipper's purchase of the wheat had been financed, and which was named in the bills of lading as consignee. When wheat from the upper lakes is destined for Montreal, the practice is to discharge it from the upper lakes vessel into the government elevator at Port Colborne and then load it into canal sized