1958

CANADA
LAW REPORTS

Supreme Court of Canada

Editors

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OTTAWA, 1959

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Honourable PATRICK KERWIN, P.C., *Chief Justice of Canada.*

The Honourable ROBERT TASCHEREAU.

The Honourable IVAN CLEVELAND RAND.

The Honourable ROY LINDSAY KELLOCK.

The Honourable CHARLES HOLLAND LOCKE.

The Honourable JOHN ROBERT CARTWRIGHT.

The Honourable GÉRALD FAUTEUX.

The Honourable DOUGLAS CHARLES ABBOTT, P.C.

The Honourable RONALD MARTLAND.

The Honourable WILFRED JUDSON.

ATTORNEY GENERAL OF CANADA

The Honourable EDMUND DAVIE FULTON, Q.C.

SOLICITOR GENERAL OF CANADA

The Honourable LÉON BALCER, Q.C.

MEMORANDUM

On the 15th day of January, 1958, the Honourable Roy Lindsay Kellock, Puisne Judge of the Supreme Court of Canada, resigned from the bench.

On the 15th day of January, 1958, Ronald Martland, one of Her Majesty's Counsel, learned in the law, was appointed a Puisne Judge of the Supreme Court of Canada.

On the 5th day of February, 1958, the Honourable Wilfred Judson, a judge of the Supreme Court of Ontario and a member of The High Court of Justice for Ontario, was appointed a Puisne Judge of the Supreme Court of Canada.

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ERRATA
in volume 1958

Page 193, fn. 1. Read "6 B. & C. 351".

Page 513, line 4 of Caption. Read "1953-54 (Can.)".

Page 597, line 2 of 1st Caption. Read "1948 (Can.), c. 52".

Page 597, line 4 of 2nd Caption. Read "1948 (Can.), c. 52".

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.

Outremont, City of v. *Montreal Tramways*, [1958] S.C.R. 82, petition for special leave to appeal refused with costs, October 20, 1958.

Wakefield Co. v. *Oil City Petroleums et al.*, [1958] S.C.R. 361, petition for special leave to appeal granted, October 20, 1958.

UNREPORTED JUDGMENTS OF THE SUPREME COURT OF CANADA

In addition to the judgments reported in this volume, the Supreme Court of Canada, between December 31, 1957 and December 31, 1958, delivered the following judgments which will not be reported in this publication:

Bailey v. *Peerless Electric Co.*, [1957] Que. Q.B. 609, appeal dismissed with costs, April 1, 1958.

Christensen v. *Kehna* (Ont.), appeal dismissed with costs, May 5, 1958.

Chutter v. *Minister of National Revenue*, [1956] Ex. C.R. 89, appeal dismissed with costs on motion for discontinuance, May 22, 1958.

Dawson v. *Helicopter Exploration Co. Ltd.*, 22 W.W.R. 207, 8 D.L.R. (2d) 97, appeal allowed with costs, January 28, 1958.

Deppiesse v. *Martin* (B.C.), appeal dismissed with costs, January 29, 1958.

Destrempes and Thompson v. *Perron et al.* (Que.), appeal dismissed with costs, January 28, 1958.

Frégeau v. *The Queen* (Exch.), appeal dismissed with costs, June 16, 1958.

Hall v. *Brown and Owen*, [1957] O.W.N. 15, appeal allowed with costs, Kerwin C.J. dissenting, March 3, 1958.

Harney and Lavoie v. *Francoeur*, [1958] Que. Q.B. *524*, appeal dismissed with costs, May 2, 1958.

Hooker v. *The Queen* (Ont.), appeal allowed, conviction quashed and acquittal directed on consent, May 26, 1958.

Massé v. *Duguay*, [1956] Que. Q.B. 439, appeal dismissed without costs, June 26, 1958.

Ottawa Valley Amusement Co. v. *Ewen and Warner*, 12 D.L.R. (2d) 348, appeal dismissed with costs, October 29, 1958.

Pelletier v. *Commission de Transport de Montréal* (Que.), appeal dismissed with costs, December 18, 1958.

Queen, The v. *Campbell* (B.C.), appeal quashed for want of jurisdiction, January 29, 1958.

Roberts v. *The Queen* (Que.), appeal dismissed, February 25, 1958.

Rolling v. *Langlais*, [1958] Que. Q.B. 207, appeal dismissed without costs, November 18, 1958.

Selkirk v. *Gotfrid et al.* (Ont.), appeal dismissed with costs of a motion to quash, December 9, 1958.

Soeurs de la Charité de Québec v. *Canadian Bank of Commerce*, [1957] Que. Q.B. 618, appeal allowed with costs, April 1, 1958.

Thibault v. *The Queen*, [1958] Que. Q.B. *273*, appeal dismissed, May 27, 1958.

Yared v. *Zigayer*, [1958] Que. Q.B. 198, appeal dismissed with costs, March 5, 1958.

MOTIONS

Brulé and Martel v. *The Queen*, [1958] Que. Q.B. *527*, leave to appeal refused, November 27, 1958.

Burton v. *The Queen* (N.S.), leave to appeal refused, October 9, 1958.

Campbell v. *The Queen* (Ont.), leave to appeal refused, January 28, 1958.

Chaisson v. *The Queen*, [1957] Que. Q.B. *791*, leave to appeal refused, January 28, 1958.

Crown Trust v. *Miles and Miles*, 14 D.L.R. (2d) 680, leave to appeal refused with costs, June 2, 1958.

Duncan v. *Ontario Teachers' Federation*, [1958] O.R. 691, leave to appeal refused with costs, December 18, 1958.

Elliot v. *Ewing* (Que.), leave to appeal refused without costs, October 15, 1958.

Federated Press v. *Dubé* (Que.), leave to appeal refused with costs, May 15, 1958.

Federated Press v. *Dubé* (Que.), motion to quash granted without costs, June 26, 1958.

Gagnon v. *Bar of Montreal*, [1954] Que. Q.B. 621, leave to appeal refused with costs if demanded, June 23, 1958.

Gagnon v. *Foundation Maritime Ltd.* (N.B.), leave to appeal refused with costs, December 15, 1958.

Grainger v. *The Queen*, 28 C.R. 84, 120 C.C.C. 321, leave to appeal refused, October 7, 1958.

Huffman v. *The Queen*, 28 C.R. 5, 120 C.C.C. 323, leave to appeal refused, April 23, 1958.

Hoyt v. *The Queen* (Ont.), leave to appeal refused, May 5, 1958.

Larochelle v. *Bienvenue* (Que.), leave to appeal refused with costs, May 27, 1958.

Lauzière v. *The Queen*, [1958] Que. Q.B. *182*, leave to appeal refused, March 17, 1958.

Lord v. *Lelièvre and Commissaires d'Ecoles de Sept-Iles* (Que.), leave to appeal refused with costs, April 1, 1958.

Maillé v. *City of Sherbrooke* (Que.), leave to appeal refused with costs, November 19, 1958.

Manitoba Power Commission v. *Boivin*, 12 D.L.R. (2d) 741, leave to appeal refused with costs, February 3, 1958.

O'Donnell v. *The Queen*, 27 C.R. 29, leave to appeal refused, March 3, 1958.

Perepolkin v. *Superintendent of Child Welfare for British Columbia*, 21 W.W.R. 625, 26 C.R. 97, 118 C.C.C. 263, leave to appeal refused without costs, February 24, 1958.

Prysniuk v. *The Queen* (Ont.), leave to appeal refused, April 23, 1958.

Railway Association of Canada, 76 C.R.T.C. 53, leave to appeal refused, March 17, 1958.

Sutherland v. *Director of Unemployment Insurance* (Que.), leave to appeal refused without costs, April 28, 1958.

Sutton v. *The Queen* (Que.), leave to appeal refused, November 19, 1958.

Yanovitch v. *The Queen*, [1958] Que. Q.B. *352*, 28 C.R. 220, leave to appeal refused, March 24, 1958.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA
ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

51476-0—1

ALISON BRUCE GRAY (sometimes known as Alison Bruce Kerslake) (*Defendant*) ..... APPELLANT;

1957

*June 11, 12
**Nov. 18

AND

MILDRED LOUISE KERSLAKE (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Annuities—Contract made in foreign country—Provision for payment to beneficiary if annuitant dies before commencement of payments—Whether contract one of life insurance governed by The Insurance Act, R.S.O. 1950, c. 183, Part V—Effect of ss. 1, 132, 134 of the Act.

Insurance—Life insurance—Change of beneficiary—Whether statutory provisions apply to contract made in foreign country and to be performed there—The Insurance Act, R.S.O. 1950, c. 183, ss. 1, 132, 134, 158(2), 164(1).

K, who lived in Toronto, made a contract with an association carrying on business in the State of New York (and not licensed to do business anywhere in Canada). The contract provided for monthly payments by the association to K after he became 60 years of age and for payments to the beneficiary named in the contract in the event that K died before payment of the annuity had begun. The contract expressly provided that it was to be performed in the State of New York and "governed as to its validity and effect by the laws there in force".

K designated his wife as beneficiary in the contract but reserved the right to change the beneficiary and, by a supplementary contract, this designation was changed and the appellant herein was substituted as beneficiary. K died before attaining the age of 60. It was contended that by the operation of *The Insurance Act* the change of beneficiary (being a change from a preferred to an ordinary beneficiary, without the consent of the former) was invalid, and that the association, on K's death, held the insurance moneys as trustee for his widow, as preferred beneficiary, under s. 164(1) of the Act.

Held: The appellant was entitled to be paid as beneficiary under the contract, notwithstanding that she was not a preferred beneficiary under s. 158(2) of *The Insurance Act*.

Per Kerwin C.J. and Locke and Cartwright JJ.: Even assuming that the policy was one of "life insurance" within the statutory definitions, Part V of the Act did not apply to it.

Per Kerwin C.J. and Cartwright J.: The word "deemed" in s. 134(1) of the Act (which provided, *inter alia,* that a contract was deemed to be made in Ontario if the insured was resident there) did not mean "conclusively deemed" but only "deemed until the contrary was proved". *Hickey v. Stalker* (1923), 53 O.L.R. 414 at 418-9, quoted with approval; statement to the contrary in *In re Duperreault,* [1940] 3 W.W.R. 385,

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Abbott and Nolan JJ.

**Nolan J. died before the delivery of judgment.

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disapproved. In this case the contrary was proved, and indeed admitted, and s. 134 therefore had no effect. Without applying s. 134, the contract could not be brought within any of the provisions of s. 132, defining the operation of Part V. Not only was it made and to be performed wholly in New York but it expressly provided that it was to be governed by the laws of that State.

Per Locke J.: Sections 132 and 134 of the Act could not apply to this contract since it was not made in Ontario and none of the rights arising out of it were situated there. To hold otherwise would be to say that the Legislature of Ontario might affect civil rights of which the *situs* was outside the Province. *Royal Bank of Canada et al. v. The King et al.*, [1913] A.C. 283 at 298, applied. The moneys payable under the contract were therefore not impressed with any trust in favour of the widow, and she had no claim to them.

Per Taschereau, Rand, Locke and Abbott JJ.: The contract was not one of "life insurance", and the proceeds were not "insurance moneys", either within the ordinary meaning of those terms or within the definitions in s. 1 of *The Insurance Act*.

Conflict of laws—Proof of foreign law—Presumption of similarity.

Per Kerwin C.J. and Cartwright J.: The presumption (in the absence of proof to the contrary) that foreign law is the same as that of the jurisdiction in which the action is tried relates only to the general law, and does not extend to the special provisions of particular statutes altering the common law; as to such provisions there is no presumption. *Purdom et al. v. A. E. Pavey & Co.* (1896), 26 S.C.R. 412 at 417, followed.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Wilson J.[2]. Appeal allowed.

Terence Sheard, Q.C., for the defendant, appellant.

F. A. Brewin, Q.C., and *J. F. McCallum*, for the plaintiff, respondent.

D. H. W. Henry, Q.C., for the Attorney General of Canada, intervenant.

The judgment of Kerwin C.J. and Cartwright J. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] allowing an appeal from a judgment of Wilson J.[2] and directing that judgment be entered for the respondent against the appellant for $6,147.85.

The facts are undisputed. On August 1, 1934, the late Everett George Kerslake, to whom I shall refer as "Dr. Kerslake", entered into a written contract, in which he was

[1] [1956] O.R. 899, [1956] I.L.R. 1-240, 6 D.L.R. (2d) 320.
[2] [1956] O.W.N. 594.

called "the annuitant", with Teachers Insurance and Annuity Association of America, hereinafter referred to as "the Association", whereby, in consideration of the payment of "regular monthly premiums" until he should attain the age of 60 years, the Association agreed to pay him a stated sum monthly, commencing on the first day of the calendar month next following the 60th anniversary of his birth and continuing thereafter throughout his life. At the date of this contract Dr. Kerslake was resident in Toronto. The contract was numbered A13169 and contained the following provisions:

9. Place of Contract. All premiums on this contract and all benefits herein provided, are payable at the Home Office of the Association in the City of New York. This contract is made and to be performed in the State of New York, and is to be governed as to its validity and effect by the laws there in force, with reference to which it is made. No person whosoever is authorized to represent or act for the Association in any manner outside of the State of New York.

* * *

12. Manner of Payment in Event of Death. In the event of the death of the Annuitant before payment of the annuity has begun as provided on the first page hereof, the Association will pay 120 equal monthly instalments of $9.83 per $1,000 of Accumulated Premiums to

MILDRED LOUISE KERSLAKE, WIFE

of the Annuitant, if living, as Beneficiary.

The right to change the Beneficiary is reserved by the Annuitant.

If the right to change the Beneficiary is reserved the Annuitant may from time to time change the Beneficiary by making written request to the Association, but such change shall take effect only upon the endorsement of the same hereon by the Association.

No oral testimony was given at the trial. The facts were stated by counsel and contract no. A13169 and contract no. S-1876, to which reference will be made later, were filed as exhibits by consent. The learned trial judge asked counsel whether he was correct in assuming "that the contract [A13169] was accepted in New York and issued from New York" and counsel replied in the affirmative. The Association was not at any time licensed to transact business in the Province of Ontario.

The respondent is the Mildred Louise Kerslake named in the paragraph quoted above from contract A13169. She was then the lawful wife and is now the lawful widow of Dr. Kerslake.

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On February 17, 1949, Dr. Kerslake executed an endorsement revoking the designation of the respondent and naming as beneficiary the appellant whom he described as "Alison B. Gray Friend".

On September 27, 1949, Dr. Kerslake obtained a decree of divorce from the respondent in the State of Idaho and on July 25, 1950, he went through a form of marriage with the appellant in the State of Connecticut. The domicile of Dr. Kerslake was at all relevant times in Ontario and it is conceded for the purposes of this action that, according to the law of Ontario, he was not validly married to the appellant.

On December 1, 1950, Dr. Kerslake executed a further endorsement naming the appellant as beneficiary and describing her as "Alison B. Kerslake (formerly Alison B. Gray) Wife".

Both of the above-mentioned endorsements were signed by Dr. Kerslake at Toronto. They were duly accepted and recorded by the Association and attached to the contract.

Dr. Kerslake died on July 22, 1953, before attaining the age of 60 years. He left a will in which he named the appellant as executrix and left all his estate to her. Probate was granted to the appellant on February 5, 1954 by the Surrogate Court of the County of York.

On August 1, 1953, the Association issued to the appellant a contract numbered S-1876 whereby it agreed to pay her an annuity certain consisting of 36 monthly payments of $179.46. This contract contained the following provisions:

> This supplementary contract is granted in consideration of the surrender to the Association of its original policy contract number A-13169, application of the proceeds thereof in the amount of $6,147.85 being in full satisfaction therefor and in accordance with the mode of settlement elected thereunder.
>
> * * *
>
> The consideration for this contract and all benefits herein provided are payable at the Home Office of the Association in the City of New York. This contract is made and to be performed in the State of New York, and is to be governed as to its validity and effect by the laws there in force, with reference to which it is made.

The respondent's claim was put as follows: (i) under the interpretation sections of *The Insurance Act,* R.S.O. 1950, c. 183, hereinafter referred to as "the Act", contract A13169 was a contract of life insurance; (ii) it must, by virtue of

s. 134 of the Act, be treated as having been made in Ontario; (iii) it was therefore subject to Part V of the Act; (iv) under s. 158(2) the respondent was a preferred beneficiary; (v) under s. 164(1), upon Dr. Kerslake designating her as beneficiary a trust was created in her favour; (vi) the designation of the appellant as beneficiary in her place was invalid and without effect; (vii) the appellant, having surrendered contract A13169 to obtain contract S-1876, holds the last-mentioned contract in trust for the respondent and is liable to account to her for the proceeds thereof.

To this it was answered: (i) that the respondent had no personal claim against the appellant and that if the respondent had any claim under contract A13169 (which was denied) it must be made against the Association and not against the appellant, and, alternatively, that if the respondent could have any right of action against the appellant this would arise only after she had exhausted her remedies against the Association; (ii) that the Ontario *Insurance Act* could not affect the rights of the parties under either contract A13169 or contract S-1876, both of which were made and to be wholly performed in the State of New York, and that to the extent that the provisions of the Act purport to affect those rights they are *ultra vires* of the provincial Legislature; (iii) that in any event the provisions of the Act were not applicable to contract A13169 as it was not a contract of life insurance.

The learned trial judge gave effect to the last-mentioned submission and dismissed the action.

The Court of Appeal[1] were of opinion that contract A13169 was a contract of life insurance as defined in the Act, that a trust was created in favour of the respondent when she was designated as beneficiary, that Dr. Kerslake could not deprive her of the benefits of the contract by transferring them to the appellant who was not a member of the class of preferred beneficiaries, that it was unnecessary to decide whether s. 134 of the Act was *ultra vires* of the Legislature as, in determining the rights of the parties, it should be assumed that the laws of the State of New York do not differ from those of Ontario, that the appellant had received from the Association money "which in law belonged

[1] [1956] O.R. 899, [1956] I.L.R. 1-240, 6 D.L.R. (2d) 320.

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to" the respondent, and that as the appellant resided within the jurisdiction of the Courts of Ontario the respondent was entitled to maintain an action against her to enforce payment of the sum of money "belonging to" the respondent which the appellant "wrongfully received and used for her own benefit". The argument that the respondent must first pursue her rights against the Association was rejected, but without discussion of the cases on which it was founded.

It is obvious, from what has been said above, that the respondent's claim depends upon her being able to maintain that the rights of the parties were governed by Part V of the Act, particularly s. 164(1).

The cases cited by Mr. Sheard indicate that, apart from the definitions contained in the Act, contract A13169 could not properly be described as one of life insurance, while the learned justices of appeal have concluded that it falls within the statutory definition of a contract of life insurance. I do not find it necessary to decide these points because, even on the assumption that the contract is one of life insurance, it is my opinion that Part V of the Act does not apply to it.

Not only was the contract made and to be performed wholly in the State of New York but its terms provided that it was made with reference to and was to be governed as to its validity and effect by the laws of that State. It was in fact fully performed according to its terms in the State of New York by the issue to the appellant of contract S-1876.

Section 132 of the Act reads in part as follows:

132.—(1) Notwithstanding any agreement, condition or stipulation to the contrary, this Part shall apply to every contract of life insurance made in the Province after the 1st day of January, 1925, and any term in any such contract inconsistent with this Part shall be null and void.

(2) This Part shall apply to every contract of life insurance made in the Province before the 1st day of January, 1925, where the maturity of the contract had not occurred before that date.

(3) This Part shall apply to every other contract of life insurance made after the 1st day of January, 1925, where the contract provides that this Part shall apply or that the contract shall be construed or governed by the law of the Province.

It is obvious that contract A13169 does not fall within the wording of any of these subsections read by themselves, but the respondent relies on s. 134(1) of the Act which provides:

134.—(1) A contract is deemed to be made in the Province,

(*a*) if the place of residence of the insured is stated in the application or the policy to be in the Province; or

(*b*) if neither the application nor the policy contains a statement as to the place of residence of the insured, but the actual place of residence of the insured is within the Province at the time of the making of the contract.

The question of the meaning to be given to the word "deemed" when used in a statute has been considered in many decisions, a number of which are collected and discussed in the judgments delivered in the Appellate Division in *Hickey v. Stalker*[1], a case dealing with an Ontario statute different from the one with which we are concerned. As is pointed out by Meredith C.J.C.P., at p. 416, the word may mean "deemed conclusively" or "deemed until the contrary is proved".

At pp. 418-9 Middleton J., as he then was, after referring to the treatment of the word in the dictionaries, continued:

> Far more important are two decisions of the Supreme Court of Nova Scotia. In *Regina v. Freeman* (1890), 22 N.S.R. 506, Townshend, J., speaking for the full Court, says (p. 513): "The word 'deemed' has acquired no technical or peculiar signification when used in legislation, but, like other words, must be interpreted with reference to the whole Act of which it forms a part."
>
> In the second case, *Rex v. Fraser* (1911), 45 N.S.R. 218, the statute provided that an act which in itself might be lawful or might be unlawful "shall be deemed" to have been unlawful; it was argued that this meant "held conclusively" or "adjudged and determined." The same learned Judge, then Sir Charles Townshend, C.J., says (p. 220): "I should be sorry to believe that our Legislature was capable of enacting such an unreasonable law, and I am quite confident the Legislature never contemplated anything so contrary to natural justice:" and so he concludes that the true meaning to be given to the word "deemed", as here used, is that it shall be treated as *"prima facie* evidence," "held until the contrary is proved." Graham, J., prefers this result to thinking that the Legislature had declared "white to be black;" Drysdale and Lawrence, JJ., also concurred; but Russell, J., did not agree.
>
> I think this modified meaning should be given to the word as found in our statute, for it will not only save the legislation from being unjust but also from being absurd. That it is the duty of the Court, in seeking the true legislative intention of an Act, which undoubtedly is the sole duty of the Court, to regard the possible consequences of alternative constructions of ambiguous expressions, has been determined in many cases.

In the case at bar, and in many cases which can easily be imagined, to construe the word "deemed" in s. 134(1) as "held conclusively" would be to impute to the Legislature the intention (i) of requiring the Court to hold to be the fact something directly contrary to the true fact, and (ii) of

[1] 53 O.L.R. 414, [1924] 1 D.L.R. 440.

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asserting the power to alter the terms of a contract made and to be wholly performed and in fact wholly performed in a foreign state. This result can, and in my opinion should, be avoided by construing the word to mean "deemed until the contrary is proved". In the case at bar the contrary has been proved and indeed admitted.

I have not overlooked the fact that in *In re Duperreault*[1], Bigelow J. held that the words "is deemed" in s. 156 of *The Saskatchewan Insurance Act,* R.S.S. 1930, c. 101, the wording of which was identical with that of s. 134 of the Ontario Act, meant not "is *prima facie* considered" but "must be considered and held"; but, with the greatest respect for the opinion of that learned judge, the practical and constitutional objections to that construction appear to me to be insurmountable.

It is contended that the Court of Appeal were right in presuming that the law of the State of New York was the same as that of Ontario, but the presumption relates to the general law and does not extend to the special provisions of particular statutes altering the common law. It will be sufficient to refer to one of the several authorities on this point relied upon by Mr. Sheard. In *Purdom et al. v. A. E. Pavey & Co.*[2], an appeal from the Court of Appeal for Ontario, Strong C.J.C., delivering the unanimous judgment of the Court, said, at p. 417: "Then we cannot presume that the law of Oregon corresponds with the present state of our own statutory law."

For the above reasons I am of opinion that Part V of the Act does not apply to contract A13169 and that the appeal succeeds; it therefore becomes unnecessary for me to consider the submissions of counsel for the appellant other than those with which I have dealt above.

I would allow the appeal and restore the judgment of the learned trial judge with costs throughout. No costs should be awarded to or against the intervenant.

TASCHEREAU J.:—With the exception that I do not find it necessary to express any opinion as to the validity of s. 134 of *The Insurance Act,* R.S.O. 1950, c. 183, I agree with my brother Locke that for the reasons stated by him this

[1] [1940] 3 W.W.R. 385, 7 I.L.R. 347, [1941] 1 D.L.R. 38.
[2] (1896), 26 S.C.R. 412.

appeal should be allowed with costs throughout, and that there should be no order as to costs to or against the intervenant.

The judgment of Rand and Abbott JJ. was delivered by

RAND J.:—This appeal deals with an annuity contract entered into between the husband of the respondent and the Teachers Insurance and Annuity Association of America. Payment of the annuity was to begin when the annuitant reached the age of 60 years; should he die before that time the Association was to pay 120 monthly instalments of such an amount as at the rate of 3½ per cent. would return the premiums paid. The contract was made in the State of New York and according to its terms was to be subject to the law of that State. The annuitant was then residing in Ontario. The original beneficiary was the annuitant's wife. By an express provision the annuitant could change the beneficiary and in 1946 he substituted the appellant for his wife. In 1953 he died. The Association entered into a new arangement with the appellant providing for 36 monthly instalments of $179.46. The widow brought this action against the beneficiary. At trial it was dismissed but on appeal judgment was directed for the total amount of the premiums, $6,147.85, from which the beneficiary brings the case here.

The cause of action is argued to be supported by several sections of *The Insurance Act*, R.S.O. 1950, c. 183. By s. 132 it is declared that every contract of life insurance made in Ontario after January 1, 1925, shall be subject to Part V of that Act, within which the sections hereafter mentioned are included. By s. 134 a contract is deemed to be made in the Province if, at the time, the insured is resident in Ontario. Section 158(2) provides for preferred beneficiaries, of whom the wife is one, and s. 164 prohibits any change to an ordinary beneficiary in such circumstances as are present here. As these provisions are confined to life insurance the initial question is whether the policy is one of that class.

The expression "Life Insurance" is defined by s. 1(36):

"life insurance" means insurance whereby the insurer undertakes to pay insurance money on death, or on the happening of any contingency dependent on human life, or whereby the insurer undertakes to pay insurance money subject to the payment of premiums for a term depending on human life, but, except to the extent of double indemnity insurance, does not include insurance payable in the event of death by accident only.

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"Insurance" is also defined, s. 1(31):

"insurance" means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event;

It is seen from these definitions that the latter is considerably broader than the former, but both are used in the Court of Appeal in reaching the conclusion that the contract was one of life insurance. It seems to me to be clear, however, that the specific definition of "life insurance" is exclusive and it would be misleading to extend it by an interpretation given in the light of that wider definition.

Life insurance in its characteristic forms involves, as its essence, a risk in a specified payment of money absolute from the moment the contract takes effect. That constitutes the security sought by the insured, the premiums for which in turn furnish the consideration to the insurer. There is nothing of that in this case. The repayment when death is before the age of 60 years is simply the return of the premiums to that moment paid. The only risk assumed by the Association in relation to death lies in the preservation or investment of the premiums. But that is not a life insurance risk; there is in fact no risk in the true sense whatever and the Association will retain the benefit derived over the years from the use of the premiums received.

Laidlaw J.A.[1] quotes from the general definition the following: "to pay a sum of money . . . upon the happening of a certain event"; but in the specific definition it is not the payment of "money", it is the payment of "insurance money", on "death or on the happening of any contingency dependent on human life"; that means the payment on the risk assumed by the insurer to be liable for the amount of insurance from the beginning.

On the reasoning of the Court of Appeal every pension scheme with provision for repayment of the whole or part of the premiums in the event of death, would satisfy the definition of "insurance" and thereupon to be treated as a life policy. I can find nothing in the Act dealing with life insurance to give support to that intention or applicability. Pension schemes are as familiar now as insurance and are approaching an almost universal item in industrial business and other economic activities. Pensions may be looked upon

[1] [1956] O.R. at pp. 904-5.

as the payment of postponed wages, and their amount depends, certainly in most schemes, on the length of service, the contributions made and the wages from time to time received; they are not, in the general understanding and in a true sense, looked upon as insurance. If the Legislature had any intention that the definition should extend to such contracts it would, I think, have declared so in clear terms, and I am unable to read the specific definition as embracing them. Legislation for such schemes would call for consideration of matters not relevant to insurance. The provision for the return of premiums paid is a resulting contingent incident and does not change the essential character of the contract. Nothing in the Act gives any indication of attention having been given to these different features and aspects; there is nothing referring to annuities except those which are modes of paying insurance moneys upon death.

This conclusion dispenses with the examination of the other questions raised, the validity of s. 134 and the right of suit against the appellant in the absence of pursuing a claim against the Association, and no view is intended to be expressed for or against either of them.

I would allow the appeal and restore the judgment at trial with costs in the Court of Appeal and in this Court.

LOCKE J.:—The agreement made by the Teachers Insurance and Annuity Association of America with the late E. G. Kerslake, dated August 1, 1934, obligated it to pay an annuity of such amount as the accumulated premiums at the date of the first annuity payment would purchase, in accordance with the interest rates and mortality tables designated, on the 60th anniversary of the birth of the annuitant. It further provided that, in the event of Kerslake's death before completion of the annuity payments provided for, the Association would pay 120 equal monthly instalments "of such amounts as to be equivalent in value on a $3\frac{1}{2}\%$ interest basis to the accumulated premiums at the date of death", to the named beneficiary. A term of the agreement declared that its purpose was to furnish an old age annuity benefit and that it had no cash surrender value.

Clause 9 of the general provisions forming part of the Agreement read:

Place of Contract. All premiums on this contract and all benefits herein provided, are payable at the Home Office of the Association in the City of New York. This contract is made and to be performed in the

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State of New York, and is to be governed as to its validity and effect by the laws there in force, with reference to which it is made. No person whosoever is authorized to represent or act for the Association in any manner outside of the State of New York.

Clause 12 read:

Manner of Payment in Event of Death. In the event of the death of the Annuitant before payment of the annuity has begun as provided on the first page hereof, the Association will pay 120 equal monthly instalments of $9.83 per $1,000 of accumulated premiums to

MILDRED LOUISE KERSLAKE, WIFE

of the Annuitant, if living, as Beneficiary.

The right to change the Beneficiary is reserved by the Annuitant.

Thereafter Kerslake assumed to change the named beneficiary to the appellant Alison Bruce Gray, describing her as a friend, and at a later date directed that the beneficiary be described as Alison B. Kerslake, describing her as his wife. This description was inaccurate as the contract of marriage with the respondent had not been dissolved.

By the statement of claim it was alleged that the Teachers Insurance and Annuity Association had paid or agreed to pay "the proceeds of the said policy of insurance" to the appellant.

The defence, as amended, denied that the Association had paid the amount alleged to the defendant but said that it had issued to her a new contract in settlement of her claim against the company under the laws of the State of New York.

By way of reply the respondent alleged that if this had been done

the new contract with the Insurance Company, numbered S. 1876 having been secured with the proceeds of a policy of insurance held in trust for the Plaintiff, is subject to the said trust and the defendant is liable to account therefor as claimed in the Statement of Claim.

At the trial, an agreement was put in evidence dated August 1, 1953, whereby the Teachers Insurance and Annuity Association of America agreed, in consideration of the surrender of her rights under the contract of August 1, 1934, to pay to the appellant an annuity consisting of 36 monthly payments of $179.46 each, the first to be paid on the 1st day of each month thereafter and, in the event of her death, to be commuted and paid in one sum to persons designated by the annuitant as beneficiaries. This agreement was made at the city of New York.

Subsection 31 of s. 1 of *The Insurance Act,* R.S.O. 1950, c. 183, declares the meaning to be assigned to the word "insurance" in the Act. The expression "insurance money" is also defined and subs. 36 defines the words "life insurance" as meaning

> insurance whereby the insurer undertakes to pay insurance money on death, or on the happening of any contingency dependent on human life, or whereby the insurer undertakes to pay insurance money subject to the payment of premiums for a term depending on human life, but, except to the extent of double indemnity insurance, does not include insurance payable in the event of death by accident only.

Part V of the Act includes ss. 131 to 191, both inclusive. Of these the following require consideration: s. 132 which declares that, notwithstanding any agreement to the contrary, Part V applies to every contract of life insurance made in the Province after January 1, 1925, and to every contract of life insurance made in the Province before that date where the maturity of the contract has not occurred before that date, and to every other contract of insurance made after January 1, 1925, where the contract provides that it shall apply or that the contract shall be construed or governed by the law of the Province.

Section 134(1) reads:

> A contract is deemed to be made in the Province,
> (*a*) if the place of residence of the insured is stated in the application or the policy to be in the Province; or
> (*b*) if neither the application nor the policy contains a statement as to the place of residence of the insured, but the actual place of residence of the insured is within the Province at the time of the making of the contract.

Section 158(2) defines "preferred beneficiaries" and s. 161 provides that the insured may designate the beneficiary by the contract or by a declaration, subject, *inter alia,* to the provisions of the Act relating to preferred beneficiaries. Section 165 provides that, notwithstanding the designation of a preferred beneficiary, the insured may subsequently exercise the powers conferred by s. 161 so as to transfer the benefits of the contract to any one or more of the class of preferred beneficiaries, to the exclusion of any or all others of the class.

Section 164(1) reads:

> Where the insured, in pursuance of the provisions of section 161, designates as beneficiary or beneficiaries, a member or members of the class of preferred beneficiaries, a trust is created in favour of the designated beneficiary or beneficiaries, and the insurance money, or such part thereof

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as is or has been apportioned to a preferred beneficiary, shall not, except as otherwise provided in this Act, be subject to the control of the insured, or of his creditors, or form part of the estate of the insured.

It is on the footing that the annuity contract was subject to these provisions of *The Insurance Act* of Ontario that the respondent advances the claim against the appellant.

The claim of the respondent must be sustained, if at all, on the basis that the moneys payable by the Association under the annuity contract of August 1, 1934, were, at the time of the death of Kerslake, held in trust by the Association for the respondent as a preferred beneficiary and that the moneys received by the appellant under the annuity contract of August 1, 1953, were impressed with a trust in the respondent's favour. It is stating the obvious to say that any claim that the respondent may assert against the appellant cannot be placed upon any higher ground than such claim as she might advance against the Association. If the quoted sections of *The Insurance Act* applied, Kerslake's attempt to change the beneficiary from the preferred beneficiary, his wife, to one who did not fall within that class, would be ineffective and, accordingly, the respondent's right against the Association might be asserted either in contract under the terms of the agreement of August 1, 1934, or in damages for breach of trust in paying to the appellant moneys held in trust for the respondent. It is only on the basis that the latter claim might be sustained that the respondent's claim can be upheld. The limit of the claim would be that portion of the accumulated moneys which had not been exhausted by the annuity payments made to Kerslake between the time when he became 60 years of age and the date of his death.

The appellant contends that the annuity contract dated August 1, 1934, was not a contract of life insurance and that, accordingly, Part V of *The Insurance Act* does not apply to it or alter or affect the obligations of the Association. A further contention is that ss. 132 and 134 of the Act do not apply in respect of the said contract, since it was not made in Ontario and none of the rights arising out of it are situated in Ontario.

It appears from the reasons for judgment delivered in the Court of Appeal[1] that the second of these points was raised in that Court as a contention that s. 134 was *ultra vires* of

[1] [1956] O.R. 899, [1956] I.L.R. 1-240, 6 D.L.R. (2d) 320.

the Province. The Attorney General of Canada did not appear in that Court but obtained leave to intervene in this Court and we have heard counsel on his behalf. The position now taken both by counsel for the appellant and for the Attorney General is as it is stated in the next preceding paragraph.

The judgment of the Court of Appeal found against the appellant on the first point and rejected the contention that the sections were, as the respondent asserted, *ultra vires*.

While if the first point is decided against the respondent it is decisive of the action, I think the second point should be decided in this Court.

The finding of the Court of Appeal is made upon the basis that the annuity contract was a contract of life insurance to which Part V of *The Insurance Act* applies. The home office of the Association is in the city of New York and, while it was not proven, it may properly be presumed that it was incorporated in the United States. The contract itself was made in the State of New York and, by its terms, the obligations of the Association were to be performed there and were to be such as were imposed upon it under the laws of that State. The Association was not licensed to carry on business in Ontario at any time. The effect of the judgment is to declare that the Legislature of Ontario may, despite the existence of such facts, alter the terms of a contract of life insurance made by such an association by declaring that the person insured may not, contrary to its terms, change the beneficiary to any one other than a preferred beneficiary as defined by the Legislature, say that the liability of the Association for the insurance moneys payable on the death of the policyholder is that of a trustee for the person to whom the Act of the Legislature permits the money to be paid, and prohibit the insuring company from carrying out the obligations imposed upon it by the laws of the state where the contract was made and to be performed, in this case the State of New York.

The situs of the cause of action which would arise on the death of the policyholder or annuitant was clearly in the State of New York. The validity of the finding of the Court of Appeal may perhaps be tested in this manner: Should the respondent bring an action against the Association in the State of New York, where the moneys were payable,

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would it be an answer to the claim for the Association to say that, in accordance with the terms of the contract, it had paid the moneys to the person entitled under the laws of the State of New York, or could the respondent in such case say that these terms had been changed by an Act of the Legislature of Ontario and that the Association's liability was to be determined under the laws of that Province? It seems to me that to ask the question is to answer it.

I agree with the contention of the appellant and the Attorney General that, even if it be assumed that the contract was one of life insurance, s. 134 and s. 132 of *The Insurance Act*, to the extent that it would make s. 134 applicable, do not apply. To hold otherwise would be to say that the Legislature of the Province might affect civil rights the situs of which was outside the Province. This is the argument which failed in *Royal Bank of Canada et al. v. The King et al.*[1], where Lord Haldane, delivering the judgment of the Judicial Committee, referring to the rights of the non-resident bondholders outside the Province of Alberta which were enforceable, said at p. 298:

> Their right was a civil right outside the province, and the Legislature of the province could not legislate validly in derogation of that right.

It accordingly follows that, as the moneys payable under the annuity contract were not impressed with a trust in favour of the respondent, the contention that the appellant has received moneys impressed with a trust in her favour should fail.

Counsel for the Attorney General did not contend that the sections were *ultra vires* since, clearly, they do apply to contracts made within the Province and to civil rights the situs of which is within the Province. In my opinion, this aspect of the matter should be decided on that basis.

I am further of the opinion that the annuity contract was not a contract of life insurance within the meaning of *The Insurance Act* and that Part V does not apply to it.

"Insurance money" is defined in s. 1(33) as meaning the amount payable by an insurer under a contract and includes all benefits, surplus, profits, dividends, bonuses and annuities payable under the contract. This expression appears as part of the definition of "life insurance" in subs. 36 of s. 1,

[1] [1913] A.C. 283, 9 D.L.R. 337, 3 W.W.R. 994.

and the contract there referred to is a contract of life insurance. It is true that under the annuity contract in question, as in the case of the annuities which may be purchased under the *Government Annuities Act,* R.S.C. 1952, c. 132, where the annuity provides for payments for a defined number of years, if the annuitant dies before the annuity commences or before the full amount has been paid, the part of the accumulated moneys which have thus been unexpended are paid to the personal representatives of the annuitant or to his nominees. There is express provision for this in s. 12 of the *Government Annuities Act,* as there is in the contract in question, and like annuity contracts are issued by great numbers of life insurance companies and annuity companies in this country. The fact, however, that part of the money may thus be repayable on death cannot transform what is simply an arrangement for the payment of annuities into a life insurance contract or the annuities into insurance money.

Annuities of the kind provided by the contract in question and by the *Government Annuities Act* have, in my opinion, nothing in common with contracts of life insurance. Their usual purpose is simply to provide, by the deposit either of a lump sum or of payments over a period of years, a sum of money sufficient, with accumulated interest, to provide an annuity to commence in one's later years, either for the life of the annuitant or for a fixed term of years. The sum repayable on death if the annuitant dies before he has reached the age when the annuity has commenced or before the stipulated number of annual payments have been made is nothing more than a refunding of moneys deposited for a defined purpose, when that purpose has wholly or partially failed owing to the death of the annuitant. It is common practice for testators to direct that moneys forming part of their estates shall be used to purchase annuities for their dependants, either for their life or for a specified term of years, and I am quite unable to understand how annuity contracts purchased for such a purpose could be classified as contracts of life insurance.

It may be noted in passing that by s. 26 of the Act insurers licensed for the transaction of life insurance in the Province may issue annuities but nothing in Part V refers to such contracts or the moneys payable thereunder.

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I would allow this appeal with costs throughout and restore the judgment at the trial. I would not award costs to or against the intervenant.

Appeal allowed with costs throughout.

Solicitor for the defendant, appellant: V. Maclean Howard, Toronto.

Solicitors for the plaintiff, respondent: Cameron, Weldon, Brewin & McCallum, Toronto.

Solicitor for the Attorney General of Canada, intervenant: W. R. Jackett, Ottawa.

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*Mar. 21
Nov. 18

DAME GABRIELLE ROBERT (*Petitioner*) APPELLANT;

AND

GERALD MARQUIS (*Plaintiff*) .....RESPONDENT;

AND

ANTONIO LUSSIER .....MIS-EN-CAUSE.

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

Parties—Death of party—Appeal taken in name of deceased party—Whether absolute or relative nullity—Whether petition in continuance of suit receivable—Code of Civil Procedure, arts. 266, 270, 1193, 1209, 1226, 1237.

The taking of an appeal in the name of a deceased person is not an absolute nullity but only a relative one which can be remedied by amendment. *Price v. Fraser* (1901), 31 S.C.R. 505, applied.

The appellant's husband was sued in damages and the action was contested on his behalf and in his name by the attorney for the insurance company by which he was insured. He died after the trial but before judgment condemning him was delivered. Neither the insurance company nor the attorney knew that he was dead, and, on the instructions of the insurance company, the attorney filed an appeal in the name of the deceased. After the delays for appeal had expired, the appellant (the widow and universal legatee of the deceased) filed a petition in continuance of suit. The plaintiff contested the petition and also moved to quash the appeal. The Court of Appeal granted the motion to quash and dismissed the petition in continuance. Appeals were taken from these two judgments.

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*PRESENT: Kerwin C.J. and Taschereau, Cartwright, Fauteux and Abbott JJ.

Held (Taschereau and Fauteux JJ. dissenting): The appeals should be allowed and the case should be remitted to the Court of Queen's Bench, Appeal Side, for decision upon the merits.

Per Kerwin C.J. and Cartwright and Abbott JJ.: The decision in *Price v. Fraser, supra,* was not distinguishable and, in such a case as this, this Court was bound by its own previous decision.

Per Cartwright and Abbott JJ.: The principle laid down by this Court in *Price v. Fraser, supra,* was applicable to the issue in the present case. There was no difference in principle between the two cases. In both of them the appeal was taken in the name of a deceased litigant in error, which is defined as "something incorrectly done through ignorance or inadvertence". The taking of such an appeal being a relative nullity only, the reason for which it was taken erroneously in the name of the deceased person could not make the nullity an absolute one, incapable of being remedied by amendment. The proceeding should have been designated as a motion to amend the inscription in appeal, but as this was a matter of form and not of substance, the Court below was entitled *proprio motu* to deal with it as such a motion.

Per Taschereau J., *dissenting*: There is no need for continuance of suit when a cause is ready for judgment, but, pursuant to art. 270 C.C.P., a suit can be continued by the heirs or representatives of a deceased person who was originally a party to it. The appeal to the Court of Queen's Bench is a new *instance,* and there can, therefore, be no continuance if it has been brought in the name of a person who was already dead. Article 1209 C.C.P. implies necessarily that an appeal cannot be brought in the name of a deceased person. The French authors are unanimous in their opinion that the purpose of a continuance of suit is to replace the deceased party and to continue proceedings already started; that the deceased party must have been engaged in an *instance*; that there has been an interruption in the proceedings, and that every summons in the name of a deceased person is null. It is a question of absolute nullity, of something non-existent, and therefore the factors of discretion or of prejudice cannot be taken into account.

Price v. Fraser, supra, was distinguishable on the facts and the proceedings. There, the majority judgment did not decide that a deceased person could start an *instance,* but merely that an error, made by inadvertence, in the name of the party, could be remedied by amendment. Nothing could justify extending the scope of that decision so as to make it say that an *instance* which in law has never existed could be continued.

Per Fauteux J., *dissenting*: The present case was clearly distinguishable as to the facts, the proceedings and the question of law from *Price v. Fraser, supra,* as well as from the cases therein cited. What this Court decided in the *Price* case was (1) that the Court of Revision could, by amendment, correct an inscription made by inadvertence in the name of a deceased person whereas it was intended to have been made, according to the mandate received, in the name of the testamentary executors, and (2) that there had been no abuse of discretion and no prejudice. The *ratio decidendi* of point (1) consisted merely in the approval, expressed with some hesitation, of a jurisprudence, the application of which was, however, specifically limited to cases similar to the ones that gave rise to that jurisprudence. The declaration at p. 513 of the *Price* case, that an inscription in review may validly be taken in the name of a dead person, was a mere *obiter dictum,* since

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it went beyond what was necessary to the decision in that case. *Charles R. Davidson & Co. v. M'Robb or Officer,* [1918] A.C. 304 at 322; *Quinn v. Leathem,* [1901] A.C. 495 at 506, applied.

An appeal being a new *instance,* it was metaphysically impossible for a deceased person to satisfy the provisions of public order governing the right *ester en justice,* and the inobservance of those provisions imported nullity. If ignorance of the minority of a party to an *instance* did not modify the absolute character of the nullity resulting therefrom, ignorance of the death of an appellant should not have a different result. *Levine v. Serling,* [1914] A.C. 659, referred to. What was sought here was much more than the correction of an error, caused by mere inadvertence, in the inscription in appeal, since the vice in the proceedings here resulted from ignorance of the fact of the defendant's death.

APPEALS from the Court of Queen's Bench, Appeal Side, Province of Quebec[1], dismissing a petition in continuance of suit. Appeals allowed, Taschereau and Fauteux JJ. dissenting.

A. Laurendeau, Q.C., for the petitioner, appellant.

André Nadeau, for the plaintiff, respondent.

THE CHIEF JUSTICE:—By an order of this Court leave was granted Dame Gabrielle Robert to appeal from two judgments of the Court of Queen's Bench (Appeal Side) of the Province of Quebec[1], pronounced September 20, 1956. One of these judgments dismissed with costs an appeal to that Court of the deceased, Leopold Patenaude; the other dismissed with costs a petition *en reprise d'instance* of the present appellant, the widow and universal legatee of Patenaude.

The point is determined so far as this Court is concerned, by its decision in *Price v. Fraser*[2], where it was held that the taking of an appeal in the name of a deceased person is not an absolute nullity but is a relative one which can be remedied by amendment. That decision is not distinguishable and, in such a case as this, the Court is bound by its own previous decision. This has never been doubted. It was so held in *The Grand Trunk Railway Company of Canada v. Miller*[3]. There Chief Justice Taschereau at p. 59 states: "We were bound, I need hardly say, by that decision.", referring to *The Queen v. Grenier*[4]. At p. 63

[1] *Sub nom. Patenaude v. Marquis,* [1956] Que. Q.B. *808.*
[2] (1901), 31 S.C.R. 505.
[3] (1903), 34 S.C.R. 45.
[4] (1899), 30 S.C.R. 42.

Girouard J. and at p. 66 Davies J. and at p. 70 Killam J. made statements to the same effect. The fact that the judgment of this Court in the *Miller* case was reversed by the Judicial Committee[1], has no relevancy to the matter under discussion.

In *Daoust, Lalonde & Cie. Ltée. v. Ferland*[2], Chief Justice Anglin states:

> Although impressed by the views of Mr. Justice Howard in the Court of King's Bench, I find it impossible to follow him to his conclusions. To give effect to them here, I think, would be to exhibit a vacillation in the opinion expressed by this court on the subject of the scope and application of Art. 1301 C.C., which could not fail to be disastrous. We might as well at once forego any idea that the doctrine of *stare decisis* (*Stuart v. Bank of Montreal* (1909) 41 Can. S.C.R. 516) forms part of our jurisprudence.

In the reasons for judgment of Duff and Rinfret JJ., delivered by the former, it is pointed out that "It is settled by several decisions of this court that the ambit of article 1301 is not restricted to personal obligations". In *La Corporation du Village de la Malbaie v. Boulianne*[3], Chief Justice Anglin in a dissenting judgment had this to say:

> While I fully recognize the force of the contention of the respondents that the jurisprudence of Quebec has ben very largely to the contrary of the view above expressed, and the value and significance of the judgments of the Privy Council in such cases as *Webb v. Outrim* [1907] A.C. 81, (and am fully prepared to stand by what I said in *Gagnon v. Lemay* (1918) 56 Can. S.C.R. 365, at 374 as to the wisdom and importance of this branch of the doctrine of *stare decisis*), we must also be careful never to forget that we are not bound by the decisions of provincial courts and that it is our business to correct the errors of those courts when it is clear to us that such errors have, in fact, existed (*Bourne v. Keane* [1919] A.C. 815, at 859-860).

The appeals should therefore be allowed with costs here and in the Court of Queen's Bench (Appeal Side) and the case remitted to that Court so that the appeal to it may be adjudicated upon the merits.

TASCHEREAU J. (*dissenting*):—Le 2 mai 1956, par jugement de la Cour Supérieure, rendu dans le district de Bedford, Léopold Patenaude et Antonio Lussier ont été condamnés conjointement et solidairement, à payer à l'intimé Gérald Marquis la somme de $8,217.18 comme résultat d'un accident d'automobile. L'un des défendeurs, Léopold

[1] [1906] A.C. 187, 75 L.J.P.C. 45, 94 L.T. 231, 22 T.L.R. 297.
[2] [1932] S.C.R. 343 at 345, 2 D.L.R. 642.
[3] [1932] S.C.R. 374 at 379.

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Patenaude, était détenteur d'une police d'assurance émise par la Canadian Mercantile Assurance Company, contre la responsabilité publique.

Après que le jugement de la Cour Supérieure fut rendu, MM. Phaneuf, Turgeon et Noël qui agissaient comme procureurs pour la Compagnie d'Assurance et, par conséquent, indirectement pour Léopold Patenaude, reçurent instructions de leur cliente la compagnie d'assurance de porter la cause en appel quant à Patenaude et, en conséquence, le 30 mai 1956, c'est-à-dire dans le délai prévu par le *Code de procédure civile,* une inscription en appel fut logée au greffe de la Cour du Banc de la Reine à Montréal. L'autre défendeur Antonio Lussier a aussi porté sa cause en appel, mais ce dernier appel est étranger au présent litige.

Quand les procureurs de la compagnie d'assurance ont produit et signifié leur inscription en appel *au nom de Léopold Patenaude,* ce dernier était décédé depuis le 8 avril précédent, ce que la compagnie d'assurance ignorait. Ce n'est que le 4 juin 1956, après que les délais légaux pour inscrire en appel furent expirés, que Mtre Phaneuf, qui avait reçu instructions de porter la cause en appel, a été informé du décès de Patenaude.

Au moment de son décès, Patenaude était marié à la présente appelante, Dame Gabrielle Robert, et cette dernière était la légataire universelle de la succession du défunt. Le 3 juillet de la même année, l'appelante produisit devant la Cour du Banc de la Reine *une demande en reprise d'instance,* en vertu des dispositions des arts. 266 et 1237 du *Code de procédure civile,* et demanda dans ses conclusions de continuer l'instance devant la Cour du Banc de la Reine vu le décès de son époux. Cette requête a été combattue par l'intimé Marquis pour le motif que l'inscription en appel au nom de Patenaude était invalide. A peu près à la même période, Marquis a produit devant la Cour du Banc de la Reine une motion pour faire rejeter l'appel pour la même raison. La Cour du Banc de la Reine a rendu jugement et a rejeté l'appel pour la raison suivante[1]:

> CONSIDÉRANT qu'aucune instance n'a jamais commencé ni s'est jamais formée devant cette Court au motif que l'inscription faite au nom de l'appelant décédé dès avant le jugement de la Cour Supérieure était radicalement nulle.

[1] *Sub nom. Patenaude v. Marquis,* [1956] Que. Q.B. *808.*

Elle a aussi rejeté la requête en reprise d'instance pour le motif suivant:

CONSIDÉRANT que les héritiers de cet appelant inexistant ne peuvent continuer ou reprendre une instance qui n'a jamais pris naissance et qui a été mise à néant par l'arrêt précité de cette Cour.

Une permission spéciale a été accordée d'appeler de ces deux jugements de la Cour du Banc de la Reine.

La preuve révèle que Patenaude en effet est décédé le 8 avril 1956, lorsque la cause était en état devant la Cour Supérieure, et que le juge au procès a rendu son jugement le 2 mai de la même année. Il appert aussi au dossier que l'inscription en appel au nom de Patenaude a été produite le 30 mai 1956, soit dans les délais prévus au *Code de procédure civile,* mais à cette date, il y avait déjà près de deux mois que Patenaude était décédé. Il n'est pas contesté que Patenaude était porteur d'une police d'assurance émise par la Canadian Mercantile Assurance Company qui, en fait, le représentait dans cette cause, et qui elle-même avait donné des instructions à ses avocats, et qu'à cette date du 30 mai, la compagnie d'assurance, pas plus que Mtre Phaneuf, n'était au courant du décès de Patenaude. Les avocats de l'intimé Marquis savaient que Patenaude était décédé. A part les deux jugements formels rendus par la Cour du Banc de la Reine, les juges de cette Cour n'ont produit aucune raison écrite au dossier.

En vertu des dispositions du Code de procédure de la province de Québec, il n'y a pas lieu à reprise d'instance lorsque la cause est en état, c'est-à-dire lorsque l'instruction est terminée et que la cause a été prise en délibéré (arts. 266 *et seq.* C.P.C.). Cependant, l'instance peut être reprise en vertu des dispositions de l'art. 270 C.P.C. par les héritiers ou ayants cause de la partie décédée. Il faut donc que la personne décédée *ait été partie à l'instance* originairement pour que cette dernière puisse être reprise dans le cas de décès. Or l'on sait, et c'est une jurisprudence constante, que l'appel logé devant la Cour du Banc de la Reine constitue *une nouvelle instance.* Ce n'est pas un simple acte de procédure dans une instance pendante, et pour cette raison, les représentants d'un défunt n'ont pas à reprendre l'instance pour initier un appel. Une inscription en appel est l'équivalent d'une nouvelle action. Même sans la

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formalité d'une substitution de procureurs, un procureur autre que celui qui occupait en première instance peut instituer un appel.

Suivant les dispositions de l'art. 1209, l'appel doit être interjeté dans les trente jours du jugement, et ce délai, nous dit l'article, *est de rigueur,* même contre les mineurs, les femmes sous puissance de mari, les insensés ou interdits, et les personnes absentes de la Province, lorsque ceux qui les représentent ou doivent les assister, ont été dûment mis en cause. De plus, si la partie décède avant d'appeler, le délai ne court contre ses héritiers ou représentants légaux que du jour de son décès, ce qui implique nécessairement l'idée que l'appel ne peut être logé au nom du défunt. Sur cette question, la jurisprudence de la province de Québec n'est pas très riche. Le plus ancien jugement est celui de *Kerby v. Ross*[1] en date de 1874. Le sommaire se lit ainsi:

> That an appeal instituted in the name of a party who has died while the case was *en délibéré* in the Court below *is null and void.*
>
> That a petition by the alleged legal representative of such deceased party, to take up the *instance, cannot be allowed.*

Dans cette cause, M. le Juge Loranger parlant pour les juges Ramsay et Sanborn, dit ce qui suit:

> The principle of law is that no judicial or extra judicial proceeding can be conducted *in the name of a person who is dead.*

Et plus loin:

> Now it is admitted by the learned president of the Court that an appeal is an *instance nouvelle.* That being the case, it is plain that this new proceeding cannot be taken out in the name of *one who is dead.*

Dans un autre jugement rendu la même année, soit en septembre 1874, *Haggarty v. Morris and Haggarty et al.*[2], il a été décidé ce qui suit:

> That after the *instance* has been taken up in the place of a dead appellant, it is not competent to the respondent to move to quash the writ of appeal, on the ground that it issued in the name of a person who was dead previously to the issue of the writ.

Apparemment dans cette cause, où le banc était composé de trois des juges qui avaient siégé dans la cause ci-dessus citée, la Cour en est venue à la conclusion que parce qu'une requête en reprise d'instance avait été faite et maintenue avant la motion pour rejet d'appel, il y avait eu acquiescement.

[1] (1874), 18 L.C. Jur. 148.

[2] (1874), 19 L.C. Jur. 103.

Ce jugement évidemment ne peut nous aider dans la détermination de la présente cause, et il ne peut être opposé au jugement rendu dans *Kerby v. Ross.* C'est d'ailleurs la conclusion à laquelle en est venue la Cour du Banc de la Reine dans la cause de *Fraser v. Price*[1], où Sir Alexandre Lacoste dit ce qui suit, en référant sans doute à la cause de *Haggarty v. Morris*:

> Nous ne croyons pas pouvoir faire autrement que d'appliquer la règle qui paraît être pour ainsi dire universellement admise en France où le droit est semblable au nôtre. Nous avons bien dans notre jurisprudence un précédent de notre cour qui a refusé le rejet de l'appel après une reprise d'instance par les représentants légaux, mais c'était parce qu'il y avait eu acquiescement. La demande de rejet avait été faite après une reprise d'instance acceptée par l'intimée.

Cependant, le jugement de la Cour d'Appel dans cette cause de *Price v. Fraser* a été infirmé par cette Cour[2]. Sir Henry Strong, Juge en chef, et le Juge Elzéar Taschereau étaient dissidents. Dans cette cause, il ne s'agissait pas d'une reprise d'instance, mais bien d'un amendement, et j'en discuterai ultérieurement les divers aspects.

Les auteurs français sont unanimes dans l'opinion que le but de la reprise d'instance est de remplacer la partie décédée et de continuer les *procédures déjà commencées.*

Comme le dit Bioche, Dictionnaire de Procédure, vol. 5, 5e éd. 1867, à la page 805:

> La reprise d'instance est l'acte par lequel l'ayant cause d'une partie reprend volontairement ou est forcé de reprendre l'instance dans laquelle cette partie est *engagée*; . . .

Employant à peu près les mêmes termes, Carré et Chauveau, Procédure Civile et Commerciale, vol. 3, 5e éd. 1880, à la page 220 disent:

> On peut définir la reprise d'instance l'acte par lequel ceux qui succèdent aux droits et obligations *d'une partie,* ou qui ont, à tout autre titre, droit et qualité pour la représenter, *reprennent* volontairement, ou sont forcés de reprendre l'instance dans laquelle *cette partie était engagée.*

Pour qu'une instance soit reprise, il faut qu'elle soit *interrompue,* il faut qu'il y ait un lien qui ait été rompu. Ceci suppose donc qu'il faut que l'instance ait été commencée, Glasson et Tissier "Précis de Procédure Civile" vol. 2, 3e éd. 1926, page 580.

[1] (1901), 10 Que. K.B. 511 at 524. [2] (1901), 31 S.C.R. 505.

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Jur. Cl. Proc. Civ., arts. 342 et 343, nos 10 et 11, rapporte ce qui suit:

> Pour qu'il y ait lieu à reprise d'instance, il faut qu'il y ait une *instance en cours*; par suite, il n'en saurait être question si, au moment où se produit l'événement susceptible de produire l'interruption, *l'instance n'est pas encore engagée,* ou si elle a pris fin.

Et aussi:

> Ainsi, si la partie était décédée au jour de l'assignation introductive d'instance, *l'assignation était nulle* et il n'y a pas lieu à reprise d'instance; ...

On voit donc qu'il faut de toute nécessité qu'une partie ait été *engagée* dans une instance pour que celle-ci puisse être reprise, qu'il faut une *interruption* dans une procédure déjà *commencée,* et que toute assignation faite au nom d'une personne décédée est nulle.

L'argument que cette permission de reprendre l'instance ne constitue pas un abus de discrétion si personne ne subit de préjudice, est à mon sens sans valeur. Il s'agit d'une *nullité absolue, de quelque chose d'inexistant,* et dans ce cas, ni la discrétion ni le préjudice ne sont des facteurs dont les tribunaux sont justifiés de tenir compte. Si comme c'est le cas, les parties ne peuvent pas consentir à prolonger les délais de 30 jours pour inscrire un appel, à plus forte raison est-il interdit de consentir à ce qu'un défunt forme une demande en justice, même s'il y a ratification. L'incapacité vient du tribunal.

Dans la cause de *Price v. Fraser*[1], que j'ai mentionnée précédemment, il s'agissait d'une action pour revendiquer certains terrains, et aussi en réclamation de dommages. L'action fut maintenue en partie par la Cour Supérieure, et les défendeurs logèrent un appel devant la Cour de Revision. M. Price, le défendeur, était cependant décédé durant le délibéré en Cour Supérieure, mais l'appel fut logé en son nom, et non pas au nom des exécuteurs testamentaires. La cause fut placée sur le rôle de la Cour de Revision deux mois plus tard; les intimés présentèrent une motion pour rejet d'inscription, et cette motion fut suivie, le lendemain, d'une autre motion, *pour amender* afin de substituer comme appelants, les noms des exécuteurs testamentaires à celui de M. Price.

Les deux motions furent entendues en même temps par la Cour de Revision, et la motion pour amender fut accordée sans frais, et la motion pour rejet d'inscription en revision

[1] (1901), 31 S.C.R. 505.

fut accordée pour les frais seulement. Subséquemment, la Cour de Revision entendit la cause au mérite et rejeta l'action. Il y eut un appel de logé des trois jugements devant la Cour du Banc de la Reine, qui décida que la Cour de Revision n'avait pas juridiction pour amender l'inscription en revision, et que tous les jugements de cette dernière Cour étaient invalides. La Cour Suprême maintint l'appel et remit le dossier à la Cour du Banc de la Reine, afin qu'elle puisse adjuger sur le mérite.

Je crois que cette décision de la Cour Suprême, sur laquelle se sont particulièrement basés les procureurs de l'appelant, peut être distinguée de la présente cause. Il s'agissait en effet d'une motion *pour amender,* et comme le signale M. le Juge Girouard dans le jugment de la majorité, en vertu du nouveau Code de procédure, le pouvoir d'une cour pour accorder un amendement a été substantiellement élargi; c'est d'ailleurs ce qu'indiquent les arts. 513 et 523. M. le Juge Girouard continue en disant que ces articles sont conformes au principe que les codificateurs expliquent dans leur rapport, et que seul l'art. 522 du Code de procédure signale une exception au pouvoir d'amender, c'est-à-dire que la nature de l'action ne doit pas être changée. Il continue à dire que personne n'a subi de préjudice, que les adversaires n'ont pas été pris par surprise, que des affidavits ont été produits à l'effet que l'avocat des appelants, c'est-à-dire des exécuteurs testamentaires de Price, savait que M. Price était décédé, qu'il avait reçu instructions d'inscrire au nom des exécuteurs, qu'il avait reçu l'argent pour faire le dépôt nécessaire, et que c'est par inadvertance seulement de sa part, que l'inscription n'avait pas été faite telle qu'elle aurait dû l'être. L'avocat avait véritablement mandat et l'intention d'inscrire au nom des exécuteurs testamentaires, mais à cause de sa propre erreur, ce n'est malheureusement pas ce qui a été fait.

Dans le cas qui nous occupe, la situation est entièrement différente. Il ne s'agit pas *d'un amendement,* mais bien d'une *reprise d'instance,* et les textes du *Code de procédure civile* sont entièrement différents, car l'on sait qu'en vertu de l'art. 270 que j'ai signalé déjà, l'instance ne peut être reprise que par les héritiers ou ayants cause de *la partie décédée.* Pour reprendre cette nouvelle instance en Cour

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d'Appel, il eut fallu que Patenaude, avant son décès, fût partie devant la Cour du Banc de la Reine, et qu'il fût décédé après l'inscription en appel, logée par lui-même.

Il ne s'agit nullement d'un cas d'inadvertance ou d'erreur, comme dans la cause de *Price v. Fraser*. Dans cette dernière, l'avocat savait que Price était décédé, avait l'intention d'inscrire au nom des exécuteurs testamentaires, et ce n'est que par une erreur cléricale que cela n'a pas été fait. Dans la présente cause, M. Phaneuf ignorait la mort de son client et avait donc, en conséquence, l'idée d'inscrire au nom du défunt. Il n'y a aucun élément d'inadvertance ni d'erreur.

La question de savoir si l'avocat du défunt était au courant de la mort de son client ou ne l'était pas, est d'une suprême importance. S'il le savait, comme dans la cause de *Price v. Fraser,* l'avocat a reçu évidemment instructions d'appeler de la part des exécuteurs testamentaires. D'un autre côté, s'il l'ignorait, le défunt ne peut pas lui avoir donné de pareilles instructions, évidemment encore moins les exécuteurs testamentaires, qu'il ne devait pas connaître. Or, comme le dit le Juge Elzéar Taschereau, dissident dans cette cause de *Price v. Fraser,* "il ne peut y avoir de mandat d'outre tombe, de mandataire sans mandat".

On voit donc que dans *Price v. Fraser* la majorité de cette Cour n'a pas décidé qu'un défunt peut commencer une instance, mais elle a décidé que quand, par inadvertance, il y avait erreur de nom, l'amendement était permis. Elle n'a pas été au delà de cela, et rien ne me justifie d'étendre la portée de ce jugement, et de lui faire dire qu'on peut reprendre une instance qui en droit n'a jamais existé. Je suis clairement d'opinion qu'un tel principe est contraire et répugne à l'économie de la procédure, à la jurisprudence établie et à l'enseignement des auteurs.

Pour toutes ces raisons, je suis d'avis de rejeter ces deux appels avec dépens.

CARTWRIGHT J.:—I agree with the reasons of the Chief Justice and those of my brother Abbott and would accordingly dispose of these appeals as proposed by the Chief Justice.

FAUTEUX J. (*dissenting*):—Les faits et procédures donnant lieu à la question de droit soulevée en cet appel, logé à l'encontre d'un jugement unanime de la Cour du Banc de la Reine[1], sont relatés en détail aux raisons de jugement de mon collègue M. le Juge Taschereau.

Comme ce dernier, et en toute déférence pour ceux qui entretiennent l'opinion contraire, je ne crois pas que ce point de droit soit, comme l'a soumis le savant procureur de l'appelant, déjà déterminé, en tant que la Cour Suprême est concernée, par la décision majoritaire de cette Cour dans *Price v. Fraser*[2].

Différant la considération des conséquences juridiques en résultant, on notera immédiatement que les faits et procédures dans *Price v. Fraser,* ainsi que l'observent MM. les Juges Taschereau et Abbott dans leurs raisons de jugement, sont manifestement distincts de ceux qui se présentent dans la cause actuelle. Dans *Price v. Fraser,* cette Cour—le Juge en chef Sir Henry Strong et le Juge Sir Elzéar Taschereau étant dissidents—affirma, contrairement aux vues exprimées en Cour d'Appel par la majorité, mais d'accord avec l'opinion minoritaire de M. le Juge Bossé, le bien-fondé d'un jugement de la Cour de Revision autorisant par voie d'amendement, la correction de l'inscription en appel. Cette inscription, par suite d'une inadvertance résultant d'un concours de circonstances, avait été logée, par les procureurs agissant comme agents des procureurs réguliers des exécuteurs testamentaires de Price, au nom du défunt, au lieu de l'être au nom de ces derniers, tel que voulu par eux et leurs procureurs réguliers. Dans l'espèce, on ne cherche pas à corriger le fait d'une inadvertance et il ne s'agit pas non plus d'un amendement. En fait, aucune inadvertance n'existe puisque les procureurs, comme les assureurs de Patenaude d'ailleurs, ignorant le fait du décès de ce dernier, au moment où l'appel était logé, l'ont délibérément inscrit en son nom. Et c'est la nullité—absolue ou relative—, il en est discuté plus loin—de cette inscription faite au nom d'un défunt qu'on a cherché à corriger, et ce par voie de reprise d'instance, le tout au moment où le délai, pour légalement constituer cette instance en appel, était expiré et où la nullité de l'inscription était invoquée.

[1] *Sub nom. Patenaude v. Marquis,* [1956] Que. Q.B. *808.*
[2] (1901), 31 S.C.R. 505.

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Notons de plus que les faits ou les procédures de cette cause sont également distincts de ceux qui furent considérés dans les trois décisions de la Cour d'Appel de Québec citées, en premier lieu, par M. le Juge Girouard au jugement majoritaire de cette Cour dans *Price v. Fraser*.

Dans la première de ces décisions, celle de *Haggerty v. Morris and Haggerty et al.*[1], il s'agissait bien d'une motion pour faire casser une inscription en appel logée au nom d'un défunt, mais ceci dans des circonstances que nous ignorons totalement et dont la similarité à celles de la présente cause plutôt qu'à celles de *Price v. Fraser* ne peut aucunement être affirmée. En droit, cette motion fut rejetée, parce que des procédures en reprise d'instance avaient été prises et admises avant que ne fut faite cette motion. La Cour d'Appel considéra que le défaut affectant l'inscription avait été couvert par ces procédures et qu'il n'était plus loisible de s'en prévaloir. Ainsi que le signale Sir Elzéar Taschereau dans *Price v. Fraser,* à la page 508, cette décision de *Haggerty* n'indique pas si ces procédures en reprise d'instance avaient été contestées ou non. Enfin, et comme l'affirmèrent, en Cour d'Appel, les procureurs des appelants dans *Fraser v. Price*[2], les requérants dans la cause de *Haggerty* "n'apparaissent pas avoir été hors des délais de l'appel pour reprendre l'instance" et, ont-ils ajouté, "nous devons supposer qu'ils ont fait leurs procédures en temps utile". Si telle était la situation, et rien ne permet d'en douter, cet acquiescement, retenu comme *ratio decidendi* de la décision dans *Haggerty,* avait comme objet la procédure faite pour l'exercice d'un droit d'appel non périmé, et non comme objet le droit d'appel lui-même lequel, étant de rigueur et attributif de juridiction, ne peut, après extinction, revivre par l'accord des parties.

Les deux autres décisions citées par M. le Juge Girouard dans *Price v. Fraser, supra,* soit *Clément v. Francis*[3] et *Laforce v. La Ville de Sorel*[4], peuvent être examinées simultanément en raison de la similitude du point décidé lequel, à mon avis, n'a aucune analogie avec celui soulevé dans l'instance qui nous occupe. Dans la première, il s'agissait d'une motion pour rejeter l'appel logé par un curateur à un interdit sans avoir obtenu préalablement, et conformément aux exigences des arts. 306 et 343 C.C., l'autorisation du

[1] (1874), L.C. Jur. 103.
[2] (1901), 10 Que. K.B. 511 at 515.
[3] (1883), 6 Legal News 325.
[4] (1889), M.L.R. 6 Q.B. 109.

juge ou du protonotaire sur l'avis du conseil de famille. On décida que ce défaut pouvait être corrigé par l'obtention subséquente de cette autorisation. Dans la seconde, la motion pour rejet d'appel reposait sur l'absence d'autorisation préalable du tuteur pour loger l'appel, ainsi que l'exigeaient les dispositions de l'art. 306 C.C. Se basant sur le précédent de *Clément v. Francis, supra,* on adopta la même conclusion et les procédures en appel furent suspendues pour permettre l'obtention et la production de cette autorisation. Dans les deux cas, on considéra évidemment que l'inscription n'était pas de nullité absolue *ab initio*. Dans ces deux décisions, cependant, il ne s'agissait pas d'un appel logé, par inadvertance, au nom d'une personne dépourvue de toute entité juridique, de toute existence, d'un défunt, mais bien d'un tuteur et d'un curateur dont le droit d'appel était conditionné par l'observance de certaines formalités. Ajoutons que le bien-fondé de ces décisions de la Cour d'Appel dans *Clément v. Francis, supra,* et *Laforce v. La Ville de Sorel, supra,* est demeuré, aux vues de cette même Cour, l'objet d'un doute sérieux. On en trouve l'expression dans l'opinion de M. le Juge Rivard dans *Morin ès-qualité v. Labrecque*[1]. Dans *Hamer v. Chevalier*[2], on a suivi ces deux décisions en s'appuyant d'abord sur la longévité de cette jurisprudence et surtout parce qu'on considéra que les dispositions de l'art. 306 C.C., requérant l'autorisation, avaient été adoptées dans l'intérêt et pour la protection du mineur et non dans l'intérêt des tiers, et que la nullité résultant du défaut de l'obtenir préalablement à l'inscription en appel était relative et non absolue.

La présente cause se distingue donc clairement, quant aux faits et procédures aussi bien qu'au point de droit en résultant, d'avec celle de *Price v. Fraser* et de ces trois causes citées, en premier lieu, aux raisons de cette décision majoritaire.

L'examen des quatre autres causes citées, mais non commentées, aux raisons de M. le Juge Girouard, à la page 513, suggère les observations suivantes. Dans *Le Curé et les Marguilliers de l'Œuvre et Fabrique de Sainte-Anne de Varennes v. Choquet*[3], il s'agissait également d'un défaut d'autorisation pour appeler. Dans *Sawyer v. The County of Missisquoi*[4], on décida que, sur un appel à la Cour de

[1] (1938), 66 Que. K.B. 430 at 435.
[2] [1944] Que. K.B. 149.
[3] (1885), M.L.R. 1 Q.B. 333.
[4] (1892), 1 Que. S.C. 217.

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Circuit d'une décision d'un conseil de comté, où les parties avaient été appelées en cause par ordre de la Cour, ces dernières ne pouvaient obtenir le rejet de l'appel sur le motif que copie de l'assignation ne leur avait pas été signifiée, tel que requis par l'art. 1067 du *Code Municipal*. Dans *Varin v. Guérin*[1], on jugea que le représentant de la partie décédée peut s'inscrire en revision sans au préalable reprendre l'instance. La Cour était présidée par MM. les Juges Jetté, Davidson et Pagnuelo. Il convient de retenir le considérant suivant pris à la page 33:

> Considérant que la qualité de la dite Dame Elmire Varin se trouve de fait admise, que l'appel ou la revision est une instance nouvelle *qui se prend au nom des représentants de la partie décédée,* qu'il n'était pas nécessaire d'une reprise d'instance de sa part pour porter la cause en revision et que sa procédure est régulière et valable.

Enfin, dans *Barrette v. Lallier*[2], on jugea que la Cour Supérieure siégeant en revision n'était pas une Cour d'Appel dans le sens de l'art. 306 C.C. et qu'en conséquence, le tuteur n'était pas tenu d'obtenir l'autorisation y mentionnée pour inscrire en revision.

En toute déférence, je dois dire qu'à mon avis, aucune des décisions de ce dernier groupe, sauf celle de *Varin v. Guérin,* ne peut avoir de portée sur le point qui nous occupe. Et on observera que dans cette dernière cause, on affirma précisément que l'appel, ou la revision, doit être porté au nom des représentants de la partie décédée, et que Dame Varin, l'exécutrice testamentaire du défunt, ayant logé l'appel en son nom et en sa qualité, n'avait pas, tel qu'on le prétendait, à reprendre l'instance.

En somme, ce que la Cour Suprême a décidé dans *Price v. Fraser,* c'est que: (i) la Cour de Revision avait juridiction pour permettre un amendement aux fins de corriger l'inscription qui, par inadvertance, avait été faite au nom du défunt au lieu d'être faite, suivant le mandat reçu, au nom des exécuteurs testamentaires; (ii) il n'y avait pas eu d'abus dans l'exercice de ce pouvoir discrétionnaire et (iii) aucune partie n'en subissait de préjudice. La *ratio decidendi* du premier point (i) de la décision, qui est le point de substance, ne consiste vraiment que dans l'approbation, plutôt timidement exprimée, de la jurisprudence examinée, juris-

[1] (1893), 3 Que. S.C. 30. [2] (1893), 3 Que. S.C. 489.

prudence dont on a, cependant, limité l'application à des cas similaires à ceux y ayant donné lieu, ainsi qu'il ressort des deux extraits suivants[1]:

The opinion finally prevailed, and the jurisprudence seems to be well settled, for nearly thirty years, by numerous decisions quoted above, that a defective appeal, *such as in the above cases,* is not so absolutely null and void that it cannot be remedied by subsequent proceedings or conduct, and especially by an amendment.

* * *

I am inclined to regard the jurisprudence of Quebec as not only just and reasonable but also sound in law.

Je crois avoir suffisamment indiqué les distinctions entre les faits ou les procédures donnant lieu à cette jurisprudence aussi bien qu'à la décision dans *Price v. Fraser,* d'une part, et ceux donnant lieu au point de droit soulevé en la présente cause. Au jugement majoritaire de cette Cour, on trouve également une référence à l'art. 1193 C.P.C., dispositions applicables à un pourvoi devant la Cour de Revision mais dont le texte a été reproduit à l'art. 1226 quant au pourvoi devant la Cour d'Appel. Quoique référant à cet article, M. le Juge Girouard n'affirme rien de définitif quant à son interprétation. Et la déclaration, suivant immédiatement cette référence, à l'effet qu'une inscription en revision peut validement être faite au nom d'une personne décédée, constitue un *dictum* débordant, en raison de sa généralité, ce qu'il était nécessaire de statuer en droit, pour la détermination des faits de la cause et qui, pour cette raison particulièrement, ne lie pas. A la vérité, tout ce qu'il était nécessaire de décider en droit dans cette cause de *Price v. Fraser,* c'est qu'une inscription en revision logée au nom d'un défunt, par suite d'une simple inadvertance et non par suite de l'ignorance du fait du décès, n'était pas entachée de nullité absolue, mais d'une nullité relative susceptible d'être corrigée par voie d'amendement. Dans *Charles R. Davidson and Company v. M'Robb or Officer*[2], Lord Dunedin dit:

My Lords, I apprehend that the dicta of noble Lords in this House, while always of great weight, are not of binding authority and to be accepted against one's own individual opinion, unless they can be shown to express a legal proposition which is a necessary step to the judgment which the House pronounces in the case.

[1] (1901), 31 S.C.R. 505 at 512, 513. [2] [1918] A.C. 304 at 322.

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Cette déclaration générale de M. le Juge Girouard est, de plus, manifestement en conflit avec le principe de droit affirmé au considérant précité de la cause de *Varin v. Guérin*, citée dans ses raisons de jugement. Aussi bien ce serait, je crois, dépasser l'intention véritable du savant juge que de donner plein effet à cette déclaration générale en écartant celui résultant de la cause qu'il cite à l'appui de l'approbation restrictive qu'il donne à la jurisprudence rapportée.

De plus, l'application de la maxime *Ubi jus est aut vagum aut incertum, ibi maxima servitus praevalebit* ou de la doctrine du *stare decisis* demeure toujours assujettie aux observations classiques faites à la Chambre des Lords par l'Earl d'Halsbury L.C., dans *Quinn v. Leathem*[1]:

> Now, before discussing the case of *Allen v. Flood* ([1898] A.C. 1) and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it.

Au mérite de la question soulevée dans la présente cause, je suis d'accord avec les raisons et la conclusion de mon collègue M. le Juge Taschereau, auxquelles je voudrais ajouter les considérations suivantes.

L'appel constitue une nouvelle instance et il est de règle, dans notre droit: que, pour former une demande en justice, il faut avoir un intérêt; que personne ne peut plaider au nom d'autrui; que, pour ester en justice, en demandant ou en défendant, sous quelque forme que ce soit, il faut avoir, sauf le cas de dispositions spéciales, le libre exercice de ses droits, et que ceux qui ne l'ont pas doivent être représentés, autorisés ou assistés de la manière que règle leur état ou leur capacité relative. On n'a pas à signaler l'impossibilité métaphysique pour un défunt de satisfaire à aucune de ces dispositions d'ordre public, dispositions dont l'inobservance emporte la nullité. Particulièrement, et en décédant, comme le remarque M. le Juge Rivard en commentant l'art. 1226 C.P.C., dans Manuel de la Cour d'Appel, p. 280, n° 650, la partie "a laissé le droit d'appeler dans sa succession et ce droit peut être exercé par ses représentants légaux, exécu-

[1] [1901] A.C. 495 at 506.

teurs, légataires ou héritiers, selon le cas. Ils sont censés avoir été partie au procès dans la personne de leur auteur." Dans *Levine v. Serling*[1], décision postérieure à *Price v. Fraser,* et dans laquelle il s'agissait d'une action dirigée contre un mineur alors que, suivant la loi, elle aurait dû être contre le tuteur, le Comité Judiciaire du Conseil Privé jugea, contrairement à ce qui avait été décidé par cette Cour[2], que la nullité en résultant était absolue et que, dès qu'apparaît la preuve du fait de la minorité, l'instance commencée doit être considérée comme n'ayant jamais eu d'existence. Il convient de citer les extraits suivants du jugement[3]:

> They [Their Lordships] do not agree with the statement that the incapacity of minors is relative and not absolute; in their opinion, the incapacity to sue and be sued is absolute, subject only to certain expressed exceptions.
>
> * * *
>
> But when it has once been established, as in this case, that the so-called defendant is an infant, then he ceases ab initio to be a defendant and cannot be treated by summons or order as if he were: this is not a mere question of procedure but of legal right, and is therefore not a matter of judicial discretion but of determination on the facts. The proceedings after the infant attained his majority in this case are open to the further objection that there was then no longer any action in existence.

Au jugement de cette Cour dans *Levine v. Serling,* on avait, comme on le fait en la présente instance, traité le point comme étant une question de pure procédure, ne causant aucun préjudice, et soumis qu'aucun texte de loi n'affirmait que la nullité était absolue. Ces arguments, également invoqués par cette Cour dans *Price v. Fraser,* n'ont pas prévalu devant le Comité Judiciaire dans cette cause de *Levine v. Serling.* A mon avis, ces vues du Comité Judiciaire sur le caractère de la nullité s'appliquent *a fortiori* dans le cas d'une instance initiale ou d'une instance en appel dirigée contre une partie décédée, ou logée en son nom. L'ignorance du fait de la minorité n'a pas la vertu de modifier le caractère absolu de la nullité; et je ne vois pas, dans le cas qui nous occupe, que l'ignorance du fait du décès puisse produire un résultat différent. Qu'on puisse être admis à corriger le vice d'une inscription résultant d'une

[1] [1914] A.C. 659, 83 L.J.P.C. 295, 111 L.T. 355, 29 W.L.R. 87; 19 D.L.R. 111.

[2] (1912), 47 S.C.R. 103, 7 D.L.R. 266. [3] [1914] A.C. 659 at 663, 664.

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inadvertance, comme c'est le cas dans *Price v. Fraser,* ou d'une faute d'inattention commise aux procédures où, par exemple, le chiffre 17 au lieu du chiffre 27 serait donné pour désigner l'âge de l'une des parties à la cause, ce sont là des situations bien différentes de celle se présentant en l'espèce où le fait viciant la procédure ne résulte pas de l'inadvertance mais de l'ignorance du fait du décès. Appliquer la décision de *Price v. Fraser* aux faits de cette cause serait non seulement en étendre la portée à une situation qui n'entre pas dans le cadre de celles auxquelles cette Cour en a clairement limité la portée et ainsi indiqué que la proposition de droit y affirmée n'avait pas le caractère absolu qu'on veut lui donner, mais serait créer une exception nouvelle aux dispositions d'ordre public plus haut mentionnées.

Pour ces raisons, je rejetterais les deux appels avec dépens.

ABBOTT J.:—I am of the opinion that these appeals should be allowed.

In my view the matter is determined by the decision of this Court in *Price v. Fraser*[1], in which a majority of the Court held that in the Province of Quebec the taking of an appeal in the name of a deceased person is not an absolute nullity but is a relative one which can be remedied by an amendment.

The husband of the appelant, one Leopold Patenaude, since deceased, was sued jointly with the *mis-en-cause* Lussier for damages resulting from an automobile accident. The said Leopold Patenaude was insured with the Canadian Mercantile Assurance Company against public liability, and the insurance company instructed its attorney to contest the action on his behalf.

On May 2, 1956, judgment was rendered condemning the two defendants jointly and severally to pay to the respondent Marquis the sum of $8,217.18 with interest and costs. In the meantime, after the case had been heard on the merits but before judgment was rendered, the said Leopold Patenaude had died on April 8, 1956, a fact however which was unknown to the insurance company and to its counsel. Within the delay allowed for appeal, the insurance company instructed its counsel to appeal from the said judgment and, on May 30, 1956, after notice to the attorneys

[1] (1901), 31 S.C.R. 505.

for the respondent and the *mis-en-cause*, an inscription in appeal was filed in the name of the said Leopold Patenaude and the insurance company furnished security that it would satisfy the condemnation and pay all costs adjudged in case the judgment appealed from was confirmed.

Although the attorney for respondent knew of the death of Patenaude he made no objection at that time to the filing of the inscription in appeal or to the security furnished. It was only after the delays to appeal had expired that the attorney for the insurance company learned of Patenaude's death, and on July 3, 1956, a petition in continuance of suit was taken asking that appellant (who is the universal legatee of her husband the late Leopold Patenaude) be authorized to continue the appeal. The respondent Marquis contested the petition in continuance and also moved to quash the appeal, and on September 20, 1956, the Court of Queen's Bench rendered two judgments[1], one granting the motion to quash and dismissing the appeal with costs and the other dismissing the petition in continuance with costs. The present appeals by special leave are from those two judgments.

It is clear from the foregoing summary of the facts that as between the late Leopold Patenaude and the Canadian Mercantile Assurance Company, it was the latter which had the ultimate interest in the outcome of the litigation.

I think moreover it may properly be inferred in the circumstances that Patenaude had authorized his insurers to conduct the litigation in such manner as they saw fit, including the taking of an appeal from the judgment in the Court of first instance if it were deemed advisable to do so.

As I have said, I consider that the principle laid down by this Court in *Price v. Fraser* is applicable to the issue in this appeal and that appellant was entitled to ask that the inscription in appeal be amended by substituting her name as appellant in place of that of her deceased husband.

It is true that in *Price v. Fraser* by inadvertence, appeal was entered in the name of the late Senator Price although his death was in fact known to the attorneys who had been instructed to take such appeal by his legal representatives. An application to amend was allowed in order to substitute the names of the testamentary executors for that of the

[1] *Sub nom. Patenaude v. Marquis,* [1956] Que. Q.B. *808.*

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deceased. In my opinion, the enunciation of the legal proposition that the taking of an appeal in the name of a deceased person is a relative and not an absolute nullity was a necessary step to the judgment of the majority in that case. In the present case the appeal was not taken in the name of the deceased by inadvertence. At the time the inscription was filed, the attorney for the insurance company was ignorant of the fact that Patenaude was dead. I am unable to see any difference in principle between the two cases. In both of them appeal was taken in the name of a deceased litigant in error and error is defined in the Shorter Oxford English Dictionary as "something incorrectly done through ignorance or inadvertence". The taking of an appeal in the name of a deceased person being a relative nullity, the *reason* for which such appeal has been taken erroneously in the name of the deceased person cannot change the character of the nullity to that of an absolute nullity incapable of being remedied by amendment.

It is also true that in the present case the proceeding taken to correct the error was entitled a petition *en reprise d'instance* whereas a motion to amend the inscription in appeal would have been a more appropriate designation. This, however, is a matter of form and not one of substance, and in my opinion the Court was entitled *proprio motu* to deal with the petition as an application to amend the inscription in appeal.

I adopt as my own the language of Girouard J. in *Price v. Fraser*, when, speaking for himself, Gwynne and Davies JJ., he said:

> Under the new Code of Procedure, which governs this case, the power of a court to amend has been greatly enlarged; it is almost unlimited. See articles 513 and 523. The commissioners, charged with its confection, observe that all the provisions contained in the above articles are in conformity with the new principle they lay down in relation to exceptions to the form, namely, that formal defects do not entail nullity unless they are not remedied. They express the opinion that article 522 furnishes the only exception upon the power to amend, viz., the nature of the action cannot be changed. I find, however, another wise limitation in article 520, viz., the opposite party must not be led into error. With these two exceptions, the power to amend is much larger than in France; it is practically as liberal as in England, the State of New York and the Province of Ontario. The commissioners have even indicated the Codes and Judicature Acts in force in these states as the source of several articles of our new code. The cardinal rule seems to prevail in the courts of these countries that in pass-

[1] (1901), 31 S.C.R. 505 at 513.

ing upon applications to amend, the ends of justice should never be sacrificed to mere form or by too rigid an adherence to technical rules of practice.

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The appeals should therefore be allowed with costs here and in the Court of Queen's Bench (Appeal Side) and the case remitted to that Court so that the appeal to it may be adjudicated upon the merits.

Appeals allowed with costs, TASCHEREAU *and* FAUTEUX JJ. *dissenting.*

Attorneys for the petitioner, appellant: Phaneuf & Turgeon, Montreal.

Attorney for the plaintiff, respondent: J. Goyette, Granby.

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*Dec. 9

IN THE MATTER OF LEWIS DUNCAN, Esquire, one of Her Majesty's Counsel, of the City of Toronto, in the Province of Ontario.

Contempt of Court—Committed in the face of the Court—What amounts to contempt—"Scandalizing the Court or a judge"—Jurisdiction of Supreme Court—The Supreme Court Act, R.S.C. 1952, c. 259, as amended.

The Supreme Court of Canada which, by the *Supreme Court Act,* is a common law and equity Court of record, has undoubted power to cite a barrister and to find him guilty of contempt of Court for words uttered in its presence.

There is no doubt that a counsel owes a duty to his client but he also has an obligation to conduct himself properly before any Court in Canada. This is particularly true of one who has been practising for many years and has had extensive experience in the Courts. Judges and Courts are, alike, open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court can or will treat that as contempt; but any act calculated to bring a Court into contempt or to lower its authority is a contempt and punishable as such. *Regina v. Gray,* [1900] 2 Q.B. 36 at 40, applied.

To say to the Court that the administration of justice will not be served if a particular member of the Court sits on an appeal that is about to be argued, without giving any reasonable explanation of the statement, constitutes a punishable contempt of the Court.

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*PRESENT: Kerwin C.J. and Taschereau, Rand, Kellock, Cartwright, Fauteux and Abbott JJ.

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RE DUNCAN

APPEARANCE in answer to an order of the Court calling on a barrister to show cause why he should not be adjudged in contempt.

The judgment of the Court was delivered by

THE CHIEF JUSTICE (orally):—In pursuance of an order of December 2, 1957, the above-named Lewis Duncan appeared to show cause why he should not be adjudged in contempt of this Court for a certain statement attributed to him on November 18, 1957. On that date Mr. Duncan appeared as counsel for the appellant in an appeal before this Court of *Lahay v. Brown* and when the appeal was called for hearing Mr. Duncan said:

> In my opinion, the administration of justice would not be served by Mr. Justice Locke sitting on this appeal. It is in the interest of my client and in my personal interest that Mr. Justice Locke should withdraw.

To-day Mr. Duncan did not admit that he used those words, but there is no doubt in the minds of those members of the Court who were then present (leaving aside Mr. Justice Locke), and it is made quite clear by the evidence given before us to-day by Mr. W. K. Campbell and Mr. W. Boss, that he did use them. In any event, in our opinion the words which Mr. Duncan to-day asserted that he had used on the previous occasion* do not differ in substance from those set out above.

On November 18, upon that statement having been made, Mr. Justice Locke said: "Why, for what reason?", and Mr. Duncan declined to give any reason. The Chief Justice asked Mr. Duncan: "Is that all you have to say?", to which the reply was "Yes". There was then no suggestion that Mr. Justice Locke was or had been at any time concerned in the appeal of *Lahay v. Brown,* or that he knew either of the parties or any of the witnesses, or that there was any feeling of animosity by him against Mr. Duncan personally.

*These words were as follows:

"With great respect to all members of the Court I object to the proceedings before this panel while Mr. Justice Locke is a member.

"As I understand it, the administration of justice requires that justice be administered in fact, but also that it be so administered that it is patent to all that it is being administered.

"And thirdly, so long as Mr. Justice Locke remains a member of this panel I will not be satisfied nor will my client that justice is being administered."

Upon reconvening after a recess on November 18, the Chief Justice announced:

The Court has considered the unprecedented situation which has arisen. None of us knows of any reason for the remarkable statement earlier this morning and no reason has been advanced. The Court, therefore, proposes to continue.

Mr. Justice Locke then said:

I have something to say, however. I do not know you, Mr. Duncan. I have never had anything to do with you in my life. I have no feeling of any kind towards you. I know nothing about the case we are about to hear, but, since you have chosen to take this stand, I decline to sit in this case. I withdraw.

The Court deemed it advisable that the parties to the appeal should not suffer in any way by reason of what had occurred and, accordingly, the hearing of the appeal was commenced and completed with another member of the Court replacing Mr. Justice Locke.

The objection taken by Mr. Duncan to our jurisdiction to cite him for contempt has no foundation. By the provisions of the *Supreme Court Act,* R.S.C. 1952, c. 259, this Court is a common law and equity Court of record and its power to cite and, in proper circumstances, find a barrister guilty of contempt of Court for words uttered in its presence is beyond question. That power has been exercised for many years and it is not necessary that steps be taken immediately.

Although, as has been pointed out, Mr. Duncan made no such suggestions on November 18, to-day he avers that over 30 years ago he was concerned in a certain matter; that another member of the bar took umbrage at a certain action taken by him; that later that member of the bar became a partner of Mr. Locke, as he then was, and that he, Mr. Duncan, felt that the latter, as a result of his association with the other member, had an "antipathy" to him, to use his own words, that he was of opinion that that antipathy was exhibited by Mr. Justice Locke in an appeal of *Lacarte v. Board of Education of Toronto* in 1955[1]. It is to be observed that in that case the five members of the panel including Mr. Justice Locke were unanimous in dismissing the appeal of the appellant, for whom Mr. Duncan appeared. While he did not mention it, it should also be pointed out that in an earlier appeal, *Maynard v. Maynard* in 1951[2], in which Mr. Duncan appeared for the appellant,

[1] [1955] 5 D.L.R. 369. [2] [1951] S.C.R. 346, [1951] 1 D.L.R. 241.

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the Court, of which Mr. Justice Locke was a member, was unanimous in dismissing that appeal. We consider the suggestions made by Mr. Duncan this morning too preposterous to require elaboration.

Mr. Duncan says finally that in *Kennedy v. The Queen,* which was a motion for leave to appeal to this Court, and on which Mr. Justice Locke was one of a panel of three, he, Mr. Duncan, through an agent had failed to secure leave to appeal. He therefore considered, he said, that this was a confirmation of the feeling he had that Mr. Justice Locke was biased as regards himself. We are all of opinion that this suggestion is too trivial to require further consideration.

There is no doubt that a counsel owes a duty to his client, but he also has an obligation to conduct himself properly before any Court in Canada. That applies particularly to one who, like Mr. Duncan, has been practising for many years and who has had an extensive experience in the Courts of Ontario and in this Court. It has been stated by Lord Russell of Killowen C.J. in *Regina v. Gray*[1], that judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. However, Lord Russell had already pointed out that any act done calculated to bring a Court into contempt or to lower its authority is a contempt of Court and belongs to that category which Lord Chancellor Hardwicke had as early as 1742 characterized as "scandalising a Court or a judge"[2]. The matter is put succintly in the 3rd edition of Halsbury, vol. 8 (1954), at p. 5:

> The power to fine and imprison for a contempt committed in the face of the court is a necessary incident to every court of justice. It is a contempt of any court of justice to disturb and obstruct the court by insulting it in its presence and at a time when it is actually sitting . . . It is not from any exaggerated notion of the dignity of individuals that insults to judges are not allowed, but because there is imposed upon the court the duty of preventing *brevi manu* any attempt to interfere with the administration of justice.

[1] [1900] 2 Q.B. 36 at 40.

[2] *Re Read and Huggonson (The St. James's Evening Post Case)* (1742), 2 Atk. 469, 26 E.R. 683.

We have considered the cases cited by Mr. Duncan but we think it necessary to refer only to *Cottle v. Cottle*[1]. It was there held that it was not necessary to show that a justice of the peace was in fact biased, and there was sufficient evidence upon which the husband there in question might reasonably have formed the impression that that justice could not give the case an unbiased hearing. The case was, therefore, remitted for a new trial before a bench of which that justice was not a member. There, however, it might be pointed out that the husband took a specific objection to Mr. Browning sitting as chairman of the Bath justices. Here there was no suggestion at the time of any specific objection and it was only to-day that the matters referred to above were brought forward by Mr. Duncan and, as to these, we have already expressed our opinion that not only is there no substance to them, but the bringing forward of them at this time is a continuation and an aggravation of the contempt of Court of which we now unanimously find Mr. Duncan guilty.

The members of the Court now available, omitting Mr. Justice Locke, have no doubt that what was said by Mr. Duncan on November 18, 1957, was deliberate and that there is no basis in fact or law for his statements. It was calculated to bring the Court and a member thereof into contempt and to lower its authority and we so find. We, therefore, fine Mr. Duncan the sum of $2,000, to be paid to the Registrar of this Court on or before Friday, December 13, 1957. In default of payment he is to be imprisoned by the Sheriff of the County of Carleton in the common gaol of the said county, to be there confined for a period of 60 days unless the fine be sooner paid. Furthermore, unless and until he personally apologizes unreservedly in open Court for the statements made by him on November 18 of this year he is prohibited from appearing in this Court or in chambers.

Judgment accordingly.

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[1] [1939] 2 All E.R. 535.

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*Oct. 31, Nov. 1 Dec. 19

J. & R. WEIR, LIMITED (*Defendant*) ....APPELLANT;

AND

LUNHAM & MOORE SHIPPING LIMITED (*Plaintiff*) ..... } RESPONDENT.

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

Negligence—Sufficiency of evidence—Outbreak of fire in ship undergoing repairs—Knowledge of presence of inflammable cleaning fluid.

The defendant company was engaged by the plaintiff company to effect general repairs to a ship. While the repairs were under way, a fire broke out, caused by the use of an acetylene torch by the defendant's employees in close proximity to a highly inflammable cleansing fluid. This cleansing fluid had been bought by the plaintiff and left lying on the top of a tank near which the defendant's employees were working, and the defendant's officers and employees had been specially engaged to pump out this fluid but had left a quantity of it lying on the top of the tank.

Held: The defendant alone was responsible for the fire and the consequent damage. The evidence revealed that it was negligent in not taking the elementary precautions that a prudent man would have taken in similar circumstances. Having a wide experience in the repairing and cleansing of ships, the defendant knew or should have known that this particular fluid was inflammable. It was not the plaintiff which undertook to flush out the fluid and the ordering of this fluid for use on the ship did not constitute fault or a direct cause of the fire, particularly in view of the fact that it was to be handled and used by people who represented themselves as experts. *Grobstein v. Leonard,* [1943] Que. K.B. 731 at 735; *Gibson & Co. et al. v. Grangemouth Dockyard Company, Ltd.* (1927), 27 Lloyd, L.R. 338 at 340, 344, quoted with approval.

APPEALS from two judgments of the Court of Queen's Bench, Appeal Side, Province of Quebec[1] on appeal from a judgment of Smith J. Appeals dismissed.

The action was for damages resulting from a fire that originated in a manner described in the reasons for judgment. The trial judge found both parties equally at fault and awarded the plaintiff one-half of the damages assessed. Both parties appealed and the Court of Queen's Bench, holding the defendant entirely at fault, allowed the plaintiff's appeal, awarding it the full amount of the damages, and dismissed the defendant's appeal. The defendant appealed from both judgments.

*PRESENT: Taschereau, Locke, Cartwright, Fauteux and Abbott JJ.

[1] [1957] Que. Q.B. *514.*

A. M. Watt, Q.C., and *Lucien Tremblay, Q.C.*, for the defendant, appellant.

R. C. Holden, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—The respondent company, as assignee of Melan Shipping Company Limited, claims from the defendant-appellant a sum of $10,516.37. It is alleged in the declaration that on June 2, 1952, a fire occurred in the engine-room of the ship "Anguslake", on which the appellant company was effecting general repairs. As a result of the damages caused by the fire, the ship was detained and unable to operate for a period of 16½ days, and the loss sustained was established at $10,516.37. This amount is not challenged. It is the contention of the plaintiff that the damage was caused by the fault, negligence, imprudence and want of care and of skill of the defendant company and its employees, in the performance of the work for which they were employed.

Mr. Justice Smith of the Superior Court, sitting at Montreal, reached the conclusion that the responsibility must be shared equally by both parties, and gave judgment in plaintiff's favour for $5,158.93. Both parties appealed, and the Court of Queen's Bench allowed the appeal of the present respondent, awarded the full amount claimed and dismissed the cross-appeal of J. & R. Weir, Limited. We have to deal here with the two appeals.

Before this Court, two points were raised. It was first argued that the ship belonged to an English firm, the Melan Shipping Company Limited, a parent company, having its head office in London, England, and that there was no relationship giving rise to an action between the two parties. But it has been shown that the English firm has been paid in full by the present respondent, which is now the assignee of all the rights of the owner of the ship. (*Civil Code*, arts. 1570-1582). During the argument, the Court disposed of this contention and informed Mr. Holden, counsel for respondent, that it was not necessary to hear him on this point.

It was also argued that the respondent did not discharge the burden of proving the negligence alleged in the declaration, that the cause of the fire was due to an inflammable degreasing fluid, purchased by the respondent, and dumped on to the tank tops by its own officers, who should have

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J. & R. WEIR, LTD. v. LUNHAM & MOORE SHIPPING LTD.

Taschereau J.

known that it was inflammable and who did know that appellant's employees would be burning there the next day. And it was further argued that the appellant in the circumstances took all reasonable precautions for the safe performance of its work.

The facts may be summarized as follows. While the "Anguslake" was laid up for general overhaul and repairs, it was decided by the respondent that the condenser and some other equipment in the engine-room should be degreased and cleaned. For that purpose, J. S. Porteous, respondent's engineer superintendent, requested the services of Magnus Chemicals Limited, which used a special degreaser called "magnusol". One week before the fire, Magnus Chemicals started the work, using one part of magnusol mixed with six parts of kerosene, which is an inflammable liquid. Three hundred gallons of the mixture were put into the condenser, where it was circulated for some days, and then pumped over into the feed filter tank, or hot well, where water was added by hose. The mixture was then pumped and circulated between the hot well and the feed filter, and on Sunday, June 1, it was drained out onto the tank top.

The defendant-appellant specially pleads that on or about Saturday, May 31, it was engaged by the plaintiff-respondent "to drain the cleaning fluid out of the condenser and hot well into the sump in the tank top forming the bottom of the ship, *whence the said fluid was to be pumped overside*". (The italics are mine.) The appellant also adds in its plea that this work was carried out on Sunday, June 1, by some of its own employees under the supervision of engineer superintendent Mr. Porteous. One of appellant's employees, Buchan, who was in charge, under Benson, of the work appellants were doing on the "Anguslake", said that they were there *on Sunday specially to circulate the mixture and get rid of it.*

It is in evidence that the mixture was not all pumped out on Sunday, and Benson, one of the vice-presidents of the appellant and in charge of the repairs, testified as follows:

Q. How much did you leave in? A. *Lying on the tank top would be 3 or 4 inches covering the full area down to nothing just astern of the boilers.*

(The italics are mine.)

Saturday before the fire, one of the appellant's employees, Jourdain, had been burning out bolts near the tank top with an acetylene torch in the engine room, in order to remove a light steel screen bulkhead. He returned on Monday morning to continue his work. He was lying on the floor-plates which had been pushed back, leaving a space of about 8 to 10 inches between the engine-room floor and the bulk-head, and he was operating from there, his torch burning down near the tank top.

There can be no doubt, and it is the conclusion of the lower Courts, that it is while in the process of this operation, that the torch ignited the residue of the magnusol which was on the tank top, and which had not been completely removed the previous day.

I do not think that appellant can escape liability. The evidence reveals that it was negligent in not taking the elementary necessary precautions that a prudent man should have taken in similar circumstances. It was indeed negligence, entailing liability, for the appellant *which had been specially engaged to remove the magnusol and to pump it overside,* to leave, Sunday night, lying on the tank top over the whole area, a substantial quantity of this inflammable liquid, and to allow its employee, Jourdain, Monday morning, to burn bolts with his acetylene torch in the very near vicinity. Knowing through its employees, of the presence of the fluid, the appellant should have seen that this liquid was completely removed before the burning operations were resumed.

Having a wide experience in the repairing and cleaning of ships, the appellant knew, or should have known, that magnusol mixed with kerosene is an inflammable liquid, exhaling an odour which Benson, the appellant's employee, detected and which naturally would arouse one's suspicions as to the dangerous nature of the material employed.

The learned trial judge reached the conclusion that both parties were at fault and apportioned the damages that resulted from the fire. He reached the conclusion that the defendant-appellant knew or should have known of the presence and nature of this inflammable mixture, and should not have operated the acetylene torch where it was operated without first having taken all reasonable precautions to avoid the possibility of fire. He thought, however, that the

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plaintiff, which selected the said degreasing compound, "was also guilty of negligence for having failed to diligently and thoroughly clean the said tank top of the mixture, or at least warn the defendant of its presence there".

I entirely agree with the statement of the learned trial judge when he says that the appellant is at fault because its servants failed to take all reasonable precautions against fire, by permitting its employee to operate the acetylene torch at a place and in the manner he did without having taken all reasonable precautions. However, with respect, I do not agree with his conclusion that the plaintiff-respondent also contributed to the accident. It was not the respondent which undertook to flush off the material from the tank top, but it was the employees of the appellant who performed that work, for which they were specially engaged on the Sunday previous to the fire. If Porteous, the respondent's representative who was present at the cleaning operation, knew that some material had been left on the tank top, it was unnecessary for him to tell Benson, who was in charge of the operation, and who said that on Sunday night he left on the tank top between 3 and 4 inches of this inflammable mixture.

In cases of contributory negligence, the existence of a fault attributable to the victim must be examined and determined according to the same principles applied in establishing the fault of the author of a delict or of a quasi-delict. One of the main elements to be considered is a link between the fault and the resulting damage. It is imperative that the damage sustained be the direct consequence of the fault which has been committed. I see this necessary link in the conduct of the appellant's employees, but I fail to see that the fact that the respondent had ordered the magnusol on board its ship, was a direct cause of the fire, particularly in view of the fact that this mixture was to be handled and used by people representing themselves as experts in the matter. As to the alleged negligence in that the appellant was not warned of the presence of this mixture, I do not see that it is founded in law. I know of no law that compels a person to tell a third party a fact of which he is already aware, and which holds him liable in case of damages, if he fails to do so.

I entirely concur in the views expressed by Mr. Justice E. M. McDougall in the case of *Grobstein v. Leonard*[1], where he says:

A skilled artisan who lights a fire in premises upon which he is working must be bound to know the conditions prevailing. He must assure himself of all the prerequisites to the successful and safe accomplishment of what he sets out to do. Here, admittedly, he took no precautions whatever, closed his eyes to obvious risks, and proceeded to do something to which he was not directly bound. Does it lie in his mouth to disclaim negligence merely on the statement that he did not know?

In *Gibson & Co. et al. v. Grangemouth Dockyard Company, Ltd.*[2], Lord Fleming, at pp. 340, 344, expresses identical views:

The first question to be considered is whether the pursuers have proved that the fire was caused by sparks or particles of molten metal from the oxy-acetylene machine . . .

In this case the machine was used for the purpose of removing metal and not for the purpose of welding. When used for the purpose of removing or cutting away material, there are two well-recognized stages in the process. The blow-pipe of the machine has a nozzle with two orifices, an annular one and a central one within the annular. Through the annular orifice a mixture of acetylene and oxygen at a comparatively low pressure passes, which, when lighted, gives a flame with a high temperature of about 2500 deg. Fahr. This flame is applied to the metal to be removed and gives it the necessary heat. When the operator judges that this stage has been reached, he then opens the central orifice through which a supply of pure oxygen at high pressure flows. The supply of pure oxygen raises the flame to a very high temperature and causes the metal to combust and blows it away in glowing sparks . . .

The defenders, however, contend that the pursuers, and in particular the shipowners, are debarred from recovering damages because they contributed by their own negligence to the happening of the fire. It was suggested that there was a duty on the shipowners to inform the defenders of the nature of the cargo that was being loaded in No. 2 hold and also to take precautions for the safety of the cargo.

I think, however, that on the contrary it was the duty of the defenders, before they used a machine which gave off sparks, to ascertain whether there was any cargo in the vicinity of their operations which was likely to be damaged by it and to take the necessary precautions to protect it. Further, in point of fact, the man in charge of the squad and the operator knew that jute was being loaded in No. 2 hold for at least an hour or so before the fire actually took place.

* * *

I shall accordingly pronounce a finding that the defenders are liable for the loss and damage sustained by the pursuers in consequence of the fire which took place on the steamship Grangemouth on Apr. 24, 1925.

[1] [1943] Que. K.B. 731 at 735. [2] (1927), 27 Lloyd, L.R. 338.

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I cannot escape the conclusion that the appellant is the only party responsible for this accident, and I would therefore dismiss both appeals with costs throughout.

Appeals dismissed with costs.

Taschereau J.

Attorneys for the defendant, appellant: Foster, Hannen, Watt, Leggat & Colby, Montreal.

Attorneys for the plaintiff, respondent: Heward, Holden, Hutchison, Cliff, McMaster & Meighen, Montreal.

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*Nov. 28, 29
Dec. 19

IN THE MATTER OF an application by Helen May Agar for a Writ of Habeas Corpus;
AND IN THE MATTER OF Donald Cletus Agar, an infant.

RAYMOND SAMUEL McNEILLY AND DORA LOUISA McNEILLY (*Respondents*) ..... } APPELLANTS;

AND

HELEN MAY AGAR (*Applicant*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Infants—Custody—Right of natural parents—Withdrawal of consent to adoption—Illegitimate child.

The mother of an illegitimate child, who is of good character and is able and willing to support it in satisfactory surroundings, is entitled to the custody of that child notwithstanding that other persons who wish to do so could provide more advantageously for its upbringing and future. This is true notwithstanding the fact that the mother has signed a consent to the adoption of the infant if, at the time she seeks the custody, the adoption has not yet been completed. *Re Baby Duffell; Martin and Martin v. Duffell,* [1950] S.C.R. 737; *Hepton et al. v. Maat et al.,* [1957] S.C.R. 606, applied.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Wilson J.[2]. Appeal dismissed.

J. D. Pickup, Q.C., for the respondents, appellants.

P. B. C. Pepper and *H. W. Rowan,* for the applicant, respondent.

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

[1] [1957] O.R. 359, 8 D.L.R. (2d) 353.

[2] [1957] O.W.N. 49, 7 D.L.R. (2d) 502.

THE CHIEF JUSTICE:—There is no question but that the appellants are fit and proper persons to have the custody of the child and that they would bring it up in a proper and becoming manner, giving it advantages that the child's mother may not be able to afford and continuing to extend to it that love and affection which they have shown to it up to the present time.

I have read the entire record and have considered everything advanced by counsel on behalf of the appellants. After anxious consideration, I agree with the reasons for judgment of a unanimous Court of Appeal, to which I have nothing to add, except to mention the argument that that Court was not justified in interfering with the trial judge's discretion. Reference was made to the judgment of the Judicial Committee in *McKee v. McKee*[1], where it is stated at p. 360:

> Further, it was not, and could not be, disputed that the question of custody of an infant is a matter which peculiarly lies within the discretion of the judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances, and that his decision should not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence.

The general rule there set forth is well known and understood, but difficulties may arise in applying it, as is evidenced by the conflict of judicial opinion in the *McKee* case in the Ontario Courts and in this Court. Bearing in mind this rule, I have come to the conclusion that the Court of Appeal was justified, for the reasons given by it, in allowing the appeal to it.

I would dismiss the appeal and, in accordance with the agreement of counsel, without costs.

TASCHEREAU J.:—I fully agree with the reasons of Mr. Justice Roach who delivered the unanimous opinion of the Court of Appeal[2].

Although I am convinced that the appellants are proper and fit persons to care for the child, no grounds for the disqualification of the mother to his custody have been shown to my satisfaction.

[1] [1951] A.C. 352, [1951] 1 All E.R. 942, [1951] 2 D.L.R. 657.
[2] [1957] O.R. 359, 8 D.L.R. (2d) 353.

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Having regard to the welfare of this child, and being convinced of the ability of the mother to educate and support him in proper surroundings, I do not think that her wishes should be disregarded.

I would dismiss the appeal without costs.

RAND J.:—I agree with the reasoning and conclusion of my brother Cartwright and have only a paragraph to add.

Here, as in the case of *Hepton et al v. Maat et al.*[1], there is the disturbing circumstance of a concealment of the child's whereabouts notwithstanding that, within a month and a half of its being handed over to the foster parents, the welfare agency, and within six months, those parents, knew the mother was seeking its return. It must, I think, be recognized that for the period of at least one year the transferred custody is provisional; until an order of adoption is made there is no obligation on the foster parents to keep the child nor on the part of the parent or parents to acquiesce in the new relationship. The consent of the latter to adoption may, by an order of the Court, be dispensed with, but until that is done there is always the possibility of the child's return. In that situation an aggravation of the conditions that would surround that possibility is to be highly deprecated. If the provisional character of the period is fully appreciated then the breaking of any ties between the child and the persons seeking adoption will cause them much less distress. More important, however, is the possible temporary effect upon the child. It would seem to me to be obvious good sense that once the issue is raised it should be disposed of as quickly as possible. If the welfare of the child is in reality the object of the social organizations and the parties desiring to adopt, under the existing statutory provisions there will be no delay in facilitating that determination.

LOCKE J.:—In *Re Baby Duffell; Martin and Martin v. Duffell*[2], it was decided by this Court that the consent of an unmarried mother to the adoption of her child may be revoked by her at any time prior to the making of an adoption order under the provisions of *The Adoption Act*, R.S.O. 1937, c. 218, and that the consent referred to in s. 3

[1] [1957] S.C.R. 606, 10 D.L.R. (2d) 1.

[2] [1950] S.C.R. 737, [1950] 4 D.L.R. 1.

is one which is effective as of the date of the application. In that case, our brother Cartwright stated the law in the following terms (p. 746):

> In the present state of the law as I understand it, giving full effect to the existing legislation, the mother of an illegitimate child, who has not abandoned it, who is of good character and is able and willing to support it in satisfactory surroundings, is not to be deprived of her child merely because on a nice balancing of material and social advantages the Court is of opinion that others, who wish to do so, could provide more advantageously for its upbringing and future. The wishes of the mother must, I think, be given effect unless "very serious and important" reasons require that, having regard to the child's welfare, they must be disregarded.

In *Hepton et al. v. Maat et al.*[1], a case relating to a child born in wedlock, Cartwright J. stated the law in similar terms.

In the interval between the disposition of these two cases, the case of *McKee v. McKee*[2], was decided by the Judicial Committee on an appeal taken from a judgment of this Court[3]. In that case Lord Simonds said in part (p. 365):

> It is the law of Ontario (as it is the law of England) that the welfare and happiness of the infant is the paramount consideration in questions of custody; . . . To this paramount consideration all others yield.

This, in my opinion, states the rule in more positive terms than it was stated in the judgment of Viscount Cave in *Ward v. Laverty et al.*[4].

It must be taken that this passage from the judgment of the Judicial Committee in *McKee's Case* was considered by the majority of the Court in *Hepton's Case* and that they were of the opinion that it did not represent any change in what had been decided to be the law in *Duffell's Case.*

In the present matter the rights of the parties are, in my opinion, to be tested as of the time in February 1956 when the writ of *habeas corpus* was issued at the instance of the respondent. At that time the infant child was 14 months old. I have examined with care the evidence given in this case and, while of the opinion that the child would be more likely to have a successful and happy life if left in the custody of the appellants, I have come, with regret, to the con-

[1] [1957] S.C.R. 606, 10 D.L.R. (2d) 1.
[2] [1951] A.C. 352, [1951] 1 All E.R. 942, [1951] 2 D.L.R. 657.
[3] [1950] S.C.R. 700, [1950] 3 D.L.R. 577.
[4] [1925] A.C. 101 at 108.

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clusion that, applying the rule as stated in the decisions of this Court in the cases of *Duffell* and *Hepton*, it has not been shown that the mother should be refused custody.

I would, accordingly, dismiss this appeal. I would make no order as to costs.

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Wilson J.[2] and directing that the appellants deliver the infant Donald Cletus Agar into the custody of the respondent at the city of Toronto.

Counsel for the appellants in the course of a full and able argument put forward everything that could be said in support of the appeal. Since the hearing I have had an opportunity of considering the entire record and having done so I find myself so fully in accord with the reasons of Roach J.A., who delivered the unanimous judgment of the Court of Appeal[1], that I simply express my agreement with his reasons and conclusion.

Counsel stated that, whatever the result of the appeal, the parties did not ask for costs. I would therefore dismiss the appeal without costs.

Appeal dismissed without costs.

Solicitors for the appellants: Fasken, Robertson, Aitchison, Pickup & Calvin, Toronto.

Solicitors for the respondent: McMillan, Binch, Stuart, Berry, Dunn, Corrigan & Howland, Toronto.

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*Dec. 2, 3

Dec. 19

DOUGLAS JUNKIN AND YETTA JUNKIN (*Defendants*) ..... RESPONDENTS.

AND

JOHN H. BEDARD AND AMELIA BEDARD (*Plaintiffs*) ..... APPELLANTS;

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Fraud and misrepresentation—Pleading—Necessity for precision—Immaterial variation between pleading and facts established in evidence.

*PRESENT: Kerwin C.J. and Rand, Cartwright, Fauteux and Abbott JJ.

[1] [1957] O.R. 359, 8 D.L.R. (2d) 353.

[2] [1957] O.W.N. 49, 7 D.L.R. (2d) 502.

Although it is well established by the authorities that a party relying upon allegations of fraud must plead them with precision, the rule does not go so far as to require that a plaintiff's action be dismissed if the misrepresentation on which he relies is pleaded as an oral one while the evidence at the trial proves that misrepresentation, but made in writing. If every fact necessary to make up the cause of action for deceit is pleaded, and the variance between the pleading and proof cannot have resulted in the defendant failing to call evidence that he would otherwise have adduced, or prejudiced him in any way in the conduct of his defence, the plaintiff is entitled to succeed.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Barlow J. Appeal dismissed.

J. J. Robinette, Q.C., for the defendants, appellants.

E. G. Black, Q.C., for the plaintiffs, respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1], setting aside a judgment of Barlow J. and directing judgment to be entered in favour of the respondents for damages to be assessed by the Master. Counsel agree that the amount in controversy in the appeal exceeds $2,000.

The action is for damages for deceit.

On March 18, 1954, the respondents signed an offer in writing to exchange certain properties owned by them for a summer hotel property owned by the appellants at a valuation of $35,000. The offer was accepted on March 30, 1954. The contract was carried out in due course and the respondents took possession of the hotel property on May 1, 1954. They carried on the hotel business from that date until the commencement of their action on November 14, 1954.

The misrepresentation relied on by the respondents was pleaded in para. 3 of the statement of claim as follows:

3. Prior to the making of the said offer by the plaintiffs, the defendants each represented to the plaintiffs, orally, that the business done by them in the year 1953 in the Rice Lake House at Gore's Landing amounted to $16,000. This representation was made by the defendants for the purpose of inducing the plaintiffs to make an offer, was false to the knowledge of the defendants, and was relied upon by the plaintiffs and was one of the principal reasons that the plaintiffs made the said offer.

Laidlaw J.A. delivered the unanimous judgment of the Court of Appeal. After a careful review of the evidence and giving full weight to the opinion of the learned trial judge

[1] [1956] O.W.N. 287.

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as to the credibility of certain witnesses, he made findings of fact which in my opinion are correct. These may be summarized as follows:

The appellants employed one Anderson as their agent to find a purchaser for the hotel property. The appellant Mrs. Junkin, acting for her husband, the other appellant, as well as for herself, told Anderson that the gross revenue from the hotel business was approximately $16,000 and the net profit after paying expenses approximately $9,700. Mrs. Junkin intended that this information should be given by Anderson to prospective purchasers as an inducement to make an offer. The information was false, and Mrs. Junkin knew it was false. Anderson gave this information to the respondents in writing on March 7, 1954. The respondents relied upon it and were induced by it to make their offer to purchase. The respondents suffered damages in that the value of the hotel and equipment was less than the price which the respondents were induced by the false representation to agree to pay. It should be mentioned that there is no suggestion that Anderson knew of the falsity of the representation or was in any way a party to the fraud practised upon the respondents.

Accepting, as I do, the findings of fact made by the Court of Appeal briefly summarized above, it would appear that the appeal must fail unless the point taken by Mr. Robinette as to the form of the pleadings is fatal to the respondents' case.

While all the findings of fact set out above were supported by the evidence, the respondents both testified that they were induced to make their offer by oral representations made to them by the appellants personally on March 14, 1954, which were identical with those made in writing by Anderson. The learned trial judge found that the respondents were mistaken in this evidence and that the oral representations, if made, were made not on March 14 but on March 28, after the offer had been made.

Mr. Robinette referred to several decisions in which it has been held that a party relying upon allegations of fraud must plead them with precision. In *Bell v. Macklin*[1], Strong C.J. said at pp. 583-4:

> In pleading fraud parties are still, notwithstanding the laxity in pleading which seems now to some extent to be countenanced by the Judicature Act, bound to more than ordinary exactitude, (see observations of Fry J. in *Redgrave v. Hurd,* 20 Ch.D.1.) and if there were not more substantial grounds for maintaining the judgment under appeal it might be worth while to inquire whether a plaintiff could be entitled to relief in a case charging fraud, when his own statement on oath varies so materially from his pleading as we find it does here.

The observation of Fry J. to which the learned Chief Justice referred appears at 20 Ch.D. pp. 5-6. That was an action for specific performance of a contract to purchase a house. The defence was that the defendant had been induced to sign the contract by misrepresentation and there was a counterclaim for damages. Counsel for the plaintiff said in argument:

> The defence is that the contract was induced by misrepresentation. The misrepresentations relied upon ought to be specifically stated in the pleadings . . . The *Judicature Act* has made no difference in this respect.

and Fry J. observed:

> I do not think the *Judicature Act* affects such a question as this, because it is only fair play between man and man that the Plaintiff should know what is charged against him.

In *Graham Sanson & Co. v. Ramsay*[2], Masten J., as he then was, speaking for the majority of the Appellate Division, said at p. 79:

> By our Rules (see 141 and 143) fraud is not to be alleged generally, but the particular matters constituting the fraud must be specifically alleged. These Rules should be taken to apply to every misrepresentation, whether innocent or fraudulent.

In *Washburn v. Wright*[3], Riddell J., as he then was, delivering the unanimous judgment of the Appellate Division, said at p. 144:

> The learned Judge has found fraud, in my opinion wrongly. No fraud is charged; the itemised statement is set up by the statement of defence as a defence, and this is not met by a plea of fraud. We have recently said: "It is not too much to require any one who intends to charge another with fraud . . . to take the responsibility of making that charge in plain terms" . . . and the person making the charge is confined to the particular fraud charged.

[1] (1887), 15 S.C.R. 576. [2] (1922), 22 O.W.N. 78.
[3] (1914), 31 O.L.R. 138, 19 D.L.R. 412.

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Cartwright J.

At p. 145 the learned judge added:

> Nothing further is said about fraud during the trial, and it is obvious, I think, that the question of fraud was not gone into at all.
>
> Notwithstanding all this, if the facts proved established fraud, we might now allow an amendment, and, if all the facts were before the Court, permit the finding of fraud to stand, or, if all the facts were not or might not be before the Court, direct a new trial.

I have no wish to suggest any doubt as to the accuracy of any of these statements but, in my opinion, they are not applicable to the circumstances of the case at bar. The weight of the charge made by the respondents against the appellants in the case before us is that the latter tricked the former into offering $35,000 for the hotel property by the representation, false to the knowledge of the appellants, that the business done by them in the year 1953 in the hotel amounted to $16,000. Every fact necessary to make up the cause of action for deceit was pleaded and I have already indicated my agreement with the finding of Laidlaw J.A. that every such fact was proved. What is urged for the appellants is that while the respondents proved the making of the very representation pleaded their action cannot be maintained because in their pleading they stated it was made orally but by their evidence they proved it was made in writing.

If it appeared that this variance between the pleading and the proof could have resulted in the appellants failing to call evidence which they would otherwise have adduced, or that it prejudiced them in any way in the conduct of their defence, it might well be that the judgment could not stand and that the question whether a new trial should be ordered would arise; but, in my opinion, in the particular circumstances of this case the variance was immaterial and caused no prejudice to the defence.

In his reasons the learned trial judge does not refer to this question of pleading but does deal with the representation made by Anderson. He says in part:

> The plaintiffs allege that one Anderson, whom they allege was the agent of the defendants, on the 7th March 1954 gave them a statement showing gross earnings of the hotel during 1953 of $16,000, and a net profit of about $9,700.

His reasons for rejecting the respondents' claim, so far as it was based on this allegation, proceed not on the form of the pleadings but on his view that the evidence did not satisfy

him, (i) that the representation was false, or (ii) that Anderson was the agent of the appellants. Laidlaw J.A. took a different view of the effect of the evidence on these two points and, as already stated, I agree with his findings. The learned justice of appeal makes no mention in his reasons of the point of pleading and it is a reasonable inference that either it was not raised or he regarded it as immaterial. In my opinion, no amendment of the pleadings is now necessary.

It was argued that the respondents failed to prove damage but I agree with the Court of Appeal that damage was shown and that in the circumstances of this case the proper course was to direct a reference. The reasons of Laidlaw J.A. state correctly the principles to be applied in assessing the damages.

For the reasons given by Laidlaw J.A. and those set out above, I would dismiss the appeal with costs, with the usual provisions as to a married woman in the case of the appellant Yetta Junkin.

Appeal dismissed with costs.

Solicitor for the defendants, appellants: H. M. Swartz, Toronto.

Solicitor for the plaintiffs, respondents: E. G. Black, Toronto.

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*Dec. 9
Dec. 19

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LIMITED (*Plaintiff*) ..... APPELLANT;

AND

SIEGEL DISTRIBUTING COMPANY LIMITED ET AL. (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Appeals—Right of appeal—Amount in dispute—Effect of pleadings—The Exchequer Court Act, R.S.C. 1952, c. 98, s. 82.

*PRESENT: Kerwin C.J. and Rand, Cartwright, Fauteux and Abbott JJ.

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C.A.P.A.C. v. SIEGEL DIST. CO. LTD. et al.

The mere fact that the plaintiff in an action in the Exchequer Court for infringement of copyright claims more than $500 in damages is not sufficient to give a right of appeal to the Supreme Court. Such a pleading does not of itself establish that "the actual amount in controversy" in the appeal exceeds $500 within the meaning of s. 82 of the *Exchequer Court Act*. *McNea and McNea v. The Township of Saltfleet*, [1955] S.C.R. 827, applied.

MOTION by the respondents to quash an appeal from a judgment of the Exchequer Court of Canada[1]. Appeal quashed.

The action was for infringement of copyright through the use of a reproducing machine in a tea-room in Toronto. The defendant company furnished and serviced the reproducing equipment and the individual defendants were the proprietors of the tea-room in question.

The plaintiff claimed declarations, injunctions and "the sum of $525.00 damages, or such further sum as this Court may see fit to allow". The trial judge dismissed the action with costs, and the plaintiff appealed.

In support of the motion to quash, the respondents filed an affidavit, parts of which are summarized in the reasons for judgment. The appellant filed an affidavit of W. S. Low, General Manager of the appellant company, containing the following paragraphs:

2. The Plaintiff claims in this action the sum of $525 damages. No evidence was tendered at the trial in respect of the quantum of damages for the reason that in more than 120 actions for damages for infringement of copyright brought by the Appellant in the Exchequer Court of Canada, a minority of which have come to trial, damages have not been assessed at trial or on motion for judgment, but have been the subject of a reference to the Registrar or Deputy Registrar of the said Court.

3. The Defendants in this action have continuously since the filing of the statement of claim infringed the Appellant's copyrights by continuing to perform in public music the sole right to perform which in public in Canada is the property of the Appellant, and the Defendant Company is engaged in activities similar to those carried on at the premises in question in this action in numerous locations in the City of Toronto and elsewhere, and at such locations has in a similar manner continued to infringe the Appellant's copyrights.

* * *

6. The Appellant, as a result of observations made by its staff and applications for licence made to it, believes that devices similar to those in question in this appeal are used for public performance of music the sole right to perform which in public in Canada is the property of the

[1] (1957), 16 Fox Pat. C. 194, 27 C.P.R. 141.

Appellant by persons in Canada who would be liable to the Appellant for fees, according to the scale approved by the Copyright Appeal Board, in sums aggregating more than $125,000 per year.

Paragraph 4 of the affidavit gave particulars of an action brought by the appellant against other defendants where "punitive damages" of $1,200 were awarded in respect of "infringements much less numerous than" those established in this action.

G. W. Ford, Q.C., for the defendants (respondents), applicants.

M. B. K. Gordon, Q.C., for the plaintiff (appellant), *contra.*

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is a motion by the defendants to quash for want of jurisdiction an appeal lodged by the plaintiff against the judgment of the Exchequer Court[1] dismissing its action. The application is supported by the affidavit of Carlton F. McInnis showing the course of the trial and stating that the evidence offered by the plaintiff indicated that from March 11, 1955 to May 3, 1956, there were ten instances of recordings being played in the Superior Tea Room of the four musical works referred to in the statement of claim. The deponent believes that as between the plaintiff and the defendants the value of the amount in dispute is far less than $500.

An examination of the transcript of the proceedings before the Exchequer Court shows that on the argument before Mr. Justice Cameron counsel for the plaintiff drew the Court's attention to the fact that the statement of claim asked for $525 damages, "or such further sum as this Court may see fit to allow", and later said:

> . . . we are asking for $525 damages, which award would give the Defendants the right to go, as a matter of course, to the Supreme Court of Canada, . . . [this] is a fair and very modest request. We have no evidence to show how much of a profit was made out of this installation.

In *McNea and McNea v. The Township of Saltfleet*[2], we said:

> Very often the allegations of fact set forth in a statement of claim and the amount claimed may be sufficient to show that the amount or value of the matter in controversy in an appeal exceeds $2,000 within the meaning of s. 36 of the *Supreme Court Act.*

[1] (1957), 16 Fox Pat. C. 194. 27 C.P.R. 141. [2] [1955] S.C.R. 827.

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Kerwin C.J.

It was there decided that, in the circumstances of that case as they were explained, the amount of damages asked for in the statement of claim could not be said to be any indication that the amount or value of the matter in controversy exceeded the stated sum.

Similarly in the present case, and notwithstanding the affidavit of Mr. Low, it cannot be said that the mere claim by the plaintiff for $525 damages, or a larger sum, is sufficient to show that the actual amount in controversy in the appeal exceeds $500 within the meaning of s. 82 of the *Exchequer Court Act*, R.S.C. 1952, c. 98. No opinion is expressed as to the damages that might be allowed if the plaintiff had succeeded.

The motion is, therefore, granted with costs.

Appeal quashed.

Solicitors for the plaintiff, appellant (respondent on the motion): Manning, Mortimer, Mundell & Bruce, Toronto.

Solicitors for the defendants, respondents (applicants): Rogers & Rowland, Toronto.

THE CITY OF WESTMOUNT (*Plaintiff*) APPELLANT; 1957

AND *Mar. 11, 12, 13 Dec. 19

MONTREAL TRANSPORTATION COMMISSION (*Defendant*) ..... } RESPONDENT.

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

Contracts—Franchise to operate street-cars—Clause as to sharing cost of snow removal—Effect of special legislation—Whether contract terminated by special legislation—An Act to amend the Charter of the City of Montreal, 1918 (Que.), c. 84—An Act concerning the City of Montreal, 1950 (Que.), c. 79, as amended by the Act respecting the Montreal Transportation Commission, 1951 (Que.), c. 124.

By a contract made in 1893, the plaintiff, then the Town of Côte St. Antoine, granted to the Montreal Street Railway Company an exclusive franchise to operate street-cars in the municipality for 30 years. Subsequently, Montreal Tramways Company took over all the undertaking and rights of the Montreal Street Railway Company. By cl. 33 of the contract, it was provided that the company would pay one-half of the costs of ice and snow removal from the streets occupied by the tramway tracks; and by cl. 37, the Town had the right to expropriate the company's undertaking within its limits at the end of the 30 years, or of any subsequent 5-year period. The contract was amended in 1904 to extend the term of the franchise to 1934.

In 1918, a contract between the company and the City of Montreal was ratified by statute (8 Geo. V, c. 84), the company's franchise in the city of Montreal was replaced, and its term extended to 1953, but the franchise in the plaintiff municipality was not annulled. However, the right of the latter municipality to expropriate the undertaking was abrogated and given exclusively to the City of Montreal.

Under a statute of 1950, amended in 1951, the defendant Commission was established "to organize, own, develop and administer a general system of public transportation for the benefit of the population of the City and of the Metropolitan District", and the property and assets of the Montreal Tramways Company were vested in it.

In its action, the plaintiff municipality sought to recover one-half of the cost of snow removal for the period June 1951 to July 1952. The action was dismissed by the Superior Court and by the Court of Appeal.

Held (Rand and Cartwright JJ. dissenting): The appeal must be dismissed. The defendant was not bound by any conditions or obligations arising out of contracts previously in existence between the plaintiff and the Montreal Tramways Company. The statute creating the defendant Commission conferred upon it the right to operate in perpetuity a publicly-owned transportation system in the Montreal area, and that

*PRESENT: Taschereau, Rand, Cartwright, Fauteux and Abbott JJ.

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right was not made dependent upon any contractual rights theretofore existing between the Montreal Tramways Company and the various municipalities in the metropolitan area. The provisions of the preamble to the 1951 Act must be read into the City's by-law creating the Commission, even if they were not expressly enacted in it.

Per Rand and Cartwright JJ., *dissenting*: The appeal should be allowed for the reasons stated by Rand J. in *City of Outremont v. Montreal Transportation Commission, infra*, p. 75.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming the judgment of Salvas J. Appeal dismissed, Rand and Cartwright JJ. dissenting.

J. L. O'Brien, Q.C., A. Weldon and *E. E. Saunders,* for the plaintiff, appellant.

Gustave Monette, Q.C., and *Edouard Asselin, Q.C.,* for the defendant, respondent.

TASCHEREAU J.:—Mon collègue M. le Juge Abbott a fait un sommaire complet de tous les faits qui ont donné naissance à ce litige. Pour les raisons qu'il donne, je suis d'opinion que le présent appel doit être rejeté avec dépens.

Je désire seulement ajouter que la principale raison qui me porte à arriver à cette conclusion est que, même si le contrat entre l'appelante et la Montreal Street Railway Company, devenue plus tard la Montreal Tramways Company, n'a pas été éteint et n'est pas devenu sans effet le 16 mai 1934, la loi autorisant la création de la Commission intimée y a mis fin. L'obligation de payer le coût de la moitié de l'enlèvement de la neige dans la cité de Westmount, n'a pas été assumée par l'intimée, et depuis le 16 juin 1951, quand tous les droits de la Montreal Tramways Company ont été acquis par l'intimée, en vertu du statut 14 Geo. VI, c. 79, tel qu'amendé par 14-15 Geo. VI, c. 124, l'entente pré-existante a été purgée, quant à l'intimée.

La Cité de Montréal, en vertu du statut de 1918, avait le droit d'exproprier le réseau de la compagnie de tramways dans les limites de la cité de Westmount, et ce droit était nié à toute autre municipalité y compris Westmount. Quand la Commission de Transport de Montréal a été formée, en vertu du statut ci-dessus mentionné, et que tout l'actif de la Montreal Tramways Company a été transporté à l'intimée, il s'agissait également d'une expropriation, par

[1] [1955] Que. Q.B. 754.

l'opération de la loi, et je ne puis pas en arriver à la conclusion que l'intimée a plus d'obligation de payer la moitié du coût de l'enlèvement de la neige, que n'en aurait eu la Cité de Montréal, si elle avait décidé de procéder à l'expropriation de la compagnie. Un nouvel état de choses a été créé en vertu duquel l'intimée n'a que les obligations que lui impose le statut.

The judgment of Rand and Cartwright JJ. was delivered by

RAND J. (*dissenting*):—The dispute in this appeal arises out of a by-law and contract granting a franchise to the predecessor in title of the respondent in terms almost identical with those considered in the appeals of the City of Outremont[1], judgments in which are being delivered simultaneously with this.

As in the case of Outremont the grant, by s. 2 of the by-law, was of an exclusive franchise from August 1, 1892; and by s. 37 it was agreed that

> . . . the present arrangement or contract . . . shall extend over a period of 30 years from the 1st of August, 1892. At the expiration of the said term of 30 years, and at the expiration of every term of 5 years thereafter the Town shall have the right after notice

to expropriate the property.

Section 33 provided:

> The Company shall, under instructions from the Town keep their track free from ice and snow and the Town may at its option remove the whole or such part of ice and snow from curb to curb, as it may see fit, from any street or part of street in which cars are running, including the snow from the roofs of houses, thrown or falling into the streets, and that removed from the sidewalks into the streets with the consent of the Town, and the Company shall be held to pay one half of the cost thereof.

It is under this section that the City claims against the respondent for one-half the cost of snow removal for the period June 16, 1951, to July 10, 1952; and the question is whether that claim can be maintained.

As in the appeals of Outremont, I construe the franchise to be indefinite in time but marked by certain terms at the end of which the City was entitled to assume ownership of the undertaking. Throughout this entire period the provisions of the by-law and the contract embodying them apply unless their force has been destroyed by subsequent legislation or they have expired according to their intent

[1] [1958] S.C.R. 75, 82.

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and meaning; that s. 33 by its own terms continues indefinitely with the franchise cannot be disputed. The Act 8 Geo. V., c. 84, has been examined in the Outremont appeals and, apart from the fact that the provision of the contract contained in schedule A was repealed by the legislation of 1951, there is no suggestion that it affects the question here.

There remain 14 Geo. VI., c. 79, and 14-15 Geo. VI., c. 124. For the reasons given in the appeal of Outremont against the respondent[1], that legislation has not the effect of impliedly nullifying the by-law and agreement here and the same result follows that the claim under s. 33 is well founded.

I would, therefore, allow the appeal and direct judgment declaring the appellant to be entitled to recover from the respondent the amount claimed with costs throughout.

The judgment of Fauteux and Abbott JJ. was delivered by

ABBOTT J.:—For some sixty years prior to June 1951 the tramway system in the city of Montreal and the surrounding area was operated by the Montreal Tramways Company and its predecessor company, the Montreal Street Railway Company. These companies operated under various franchises granted by the City of Montreal and by certain other municipalities which included the former Town of Côte St. Antoine, now the City of Westmount. On June 16, 1951, all the property undertaking and rights of the Montreal Tramways Company were acquired by respondent under the authority of the statute 14 Geo. VI, c. 79, as amended by 14-15 Geo. VI, c. 124, and respondent has operated its tramway system in appellant's territory since the said date.

Appellant's claim is for $20,475.55, representing one-half the cost of snow removal on certain streets in appellant's territory during the winter of 1951-52. Appellant claimed this amount under a specific provision of the franchise granted by the former Town of Côte St. Antoine under the authority of which it contends respondent is operating its tramways in the city of Westmount.

[1] [1958] S.C.R. 75.

The claim was submitted to the Superior Court in a stated case in accordance with the terms of art. 509 of the *Code of Civil Procedure* of the Province of Quebec. The present appeal is from a judgment of the Court of Queen's Bench[1] confirming the judgment of the learned trial judge, the Honourable Mr. Justice Elie Salvas, which declared that respondent was not indebted to appellant in the amount claimed.

The terms and conditions of the franchise granted by the Town of Côte St. Antoine were set out in by-law 33 of the said Town, adopted August 7, 1893, and in a contract in almost identical terms between the Town and the Montreal Street Railway Company. The Town granted to the company the exclusive right, subject to specified conditions, to establish and operate lines of electric railway in particular streets in the municipality and the company undertook to establish and operate the lines of railway subject to the same conditions. The conditions to which the franchise was made subject were set out in the by-law, which contained forty-one sections, two of which, namely, s. 33 providing for payment by the company of one-half of the cost of removing ice and snow from the streets occupied by tramway tracks, and s. 37 providing for the term of the franchise, read as follows:

SECTION 33. The Company shall, under instructions from the Town keep their track free from ice and snow and the Town may at its option remove the whole or such part of ice and snow from curb to curb, as it may see fit, from any street or part of street in which cars are running, including the snow from the roofs of houses, thrown or falling into the streets, and that removed from the sidewalks into the streets with the consent of the Town, and the Company shall be held to pay one half of the cost thereof.

SECTION 37. It is agreed between the Town and said Company that the present arrangement or contract for the establishment and operation of the said electric railway shall extend over a period of thirty (30) years from the first of August, eighteen hundred and ninety-two (1892). At the expiration of the said term of thirty years, and at the expiration of every term of five years thereafter, the Town shall have the right after a notice of six months to the Company, to be given within the twelve months preceding the expiration of the said thirty years, and also after a like notice of six months at the end of every subsequent five years, to assume the ownership of the said railway and all its real estate, appurtenances, plant and vehicles belonging to the Company, situate in Côte St. Antoine, and necessary for the operation of its line on payment of their value to be determined by arbtirators, together with an additional ten per cent

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thereon, said arbitrators, to be appointed as follows. Viz: One by the Company, one by the Town, and third by a Judge of the Superior Court, sitting in and for the District of Montreal.

The franchise was amended and extended by by-law 144 of the Town of Westmount and by a contract between the Town and the company dated May 17, 1904. Aside from certain changes in the conditions of the original contract, which are not relevant in the present appeal, the new by-law and contract extended the term of the franchise until May 17, 1934, but maintained in force the conditions set out in ss. 33 and 37 above quoted. Both by-law 33 and by-law 144, with the contracts implementing them, were ratified by the Quebec Legislature.

Until the passing of certain legislation in 1918, to which I shall refer in a moment, I am satisfied that under the provisions of s. 37 of the contract above quoted, in the event of the City of Westmount failing to exercise its right of expropriation on May 17, 1934, the respective rights and obligations of the parties under the contract were to continue for an indefinite period after that date, subject to termination by either party at its option in the following manner:

(a) By the City of Westmount exercising its right of expropriation at the end of each five-year period subsequent to May 17, 1934, upon giving the notice called for in the contract;

(b) By the tramways company, at the end of each such five-year period, failing expropriation by the City.

This position was changed, however, in 1918.

On January 28, 1918, the Montreal Tramways Company and the City of Montreal entered into a contract which was ratified by the statute 8 Geo. V, c. 84. The contract appears as Schedule A to the said Act. The company's franchise in the city of Montreal was expressly annulled and replaced, but the company's franchise in the city of Westmount was not annulled. Its conditions were modified in certain respects which are not relevant to the issue in this appeal but in addition the right of the City of Westmount to expropriate the company's undertaking within its limits was abrogated.

The relevant sections of the 1918 statute (para. 8 of art. 92 and art. 95 of Schedule A) read as follows:

Article 92.

Paragraph 8. Expropriation.

On March twenty-fourth (24th) nineteen hundred and fifty-three (1953), and at the expiration of every subsequent five-years period, the City shall have the right, after six months notice given to the Company within the twelve months immediately preceding March twenty-fourth (24th) nineteen hundred and fifty-three (1953), and also after a similar notice of six months and on the same conditions at the end of each subsequent five-years period, to appropriate for itself the railway of the said company as well as the immoveables and dependencies, plant and cars belonging to it and necessary for the operation of the said railway, situate within and without the limits of the said City, by paying the value thereof, to be fixed by arbitrators, and ten per cent. (10%) over and above the estimate. Such arbitrators shall be appointed as follows: One by the City, one by the Company, and the third by a judge of the Superior Court sitting in and for the district of Montreal.

* * *

No municipality other than the City shall have the right to purchase the railway system of the Company, in whole or in part.

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Article 95.

All the provisions of the contracts, compacts or agreements passed between the Company and any municipal corporation outside of the City, inconsistent with the provisions of this contract, shall be and shall remain without effect from the time of the coming into force of the present contract.

As I have stated, one effect of this statute was to take away from appellant the right of expropriation given to it under s. 37 of the franchise and to vest that right in the City of Montreal.

The City of Montreal had, of course, an obvious interest in the continued operation of the tramway system in the city of Westmount since that municipality is completely surrounded by the city of Montreal.

It cannot be assumed that the Legislature in granting this right of expropriation to the City of Montreal was granting an empty right. It would seem clear therefore that in passing the 1918 statute the Legislature intended that the right of the tramways company to operate in Westmount under its contract with that municipality and its obligations under that contract were to be continued until March 24, 1953, subject to termination

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(a) by the City of Montreal exercising its right of expropriation at that date or at the end of each five-year period thereafter, upon giving the requisite notice;

(b) by the tramways company on March 24, 1953, or at the end of each five-year period thereafter failing expropriation by the City of Montreal.

It follows that up to June 11, 1951, the date upon which its assets were acquired by the Montreal Transportation Commission, the tramways company was operating in the city of Westmount in virtue of the contract of August 11, 1893 as amended, and was liable to the City for a share of the cost of snow removal as provided for in that contract. In fact as appears from the stated case the tramways company paid its share of the snow removal costs in accordance with s. 33 of by-law 33 up to the month of June 1951 when its assets were acquired by respondent but the latter has denied any liability therefor since that date.

Respondent's liability for the amount claimed depends upon the effect to be given to the acquisition by respondent of the property and assets of the tramways company pursuant to the authority contained in the statute 14 Geo. VI, c. 79, as amended by 14-15 Geo. VI, c. 124.

Under the statute 14 Geo. VI, c. 79, assented to April 5, 1950, the Quebec Legislature authorized the City of Montreal by by-law to establish a corporation to be known as the Montreal Transportation Commission "to organize, own, develop and administer a general system of public transportation for the benefit of the population of the City and of the Metropolitan District".

As authorized by the said statute, the Commission was created in August 1950, by by-law 1981 of the City of Montreal. The by-law in fact recited all the relevant provisions of the statute 14 Geo. VI, c. 79, although in my opinion it was not necessary to do so in order to constitute the Commission a corporation with all the powers set forth in the statute.

From the statute itself it seems clear that the Legislature conferred upon the Commission when established the right to operate in perpetuity a publicly-owned transportation system in the Montreal area, and in my opinion the right to do so was not made dependent upon any contractual

rights theretofore existing between the Montreal Tramways Company and the various municipalities in the metropolitan area. This seems evident from the terms of s. 57, para. 3, as enacted by the Act 14-15 Geo. VI, c. 124, which reads as follows:

57. Para. 3.

It [the Commission] may also, on its own authority, establish new lines, replace tramway lines by autobus or trolleybus lines, change their routes, and for any such purpose use any public street which it deems necessary or expedient in the territory of the city or of the metropolitan district.

It was argued on behalf of appellant that s. 57 as amended cannot apply to the Commission by reason of the fact that the amending provisions (which include para. 3) were not adopted by a by-law of the City but I do not think this contention is a valid one. Under the provisions of the original statute, it was declared (s. 2) that the by-law of the City creating the Commission should be "subject to the following provisions", and then followed ss. 3 to 61 inclusive relating to the Commission and its powers. The amending Act, 14-15 Geo. VI, c. 124, which is intituled "An Act respecting the Montreal Transportation Commission" was assented to on March 14, 1951. It contains the following preamble:

WHEREAS by the Act 14 George VI, chapter 79, the city of Montreal was authorized to establish a commission designated under the name of "Montreal Transportation Commission" to organize, own, develop and administer a general system of public transportation and such Commission was created by by-law No. 1981 of the city of Montreal passed by the council on the 24th of August, 1950.

Whereas it is necessary to amend such act in order to give additional powers to such commission to enable it to achieve the objects for which it was constituted;

(The italics are mine.)

In my opinion it is quite clear therefore that on June 16, 1951, when the Montreal Transportation Commission became vested with the property and assets of the Montreal Tramways Company, s. 57 of the statute 14 Geo VI, c. 79, as amended, was applicable and the Commission had all the powers conferred under that section.

It is true that under the terms of s. 52, upon acquiring the assets of the tramways company, the City is declared to be the "absolute and inalienable owner of all the property included in the expropriation as well as of all

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franchises, servitudes, rights of way and other rights of the company concerning the expropriated undertaking". As Mr. Justice Martineau has pointed out in the Court below, it is not too clear just what the Legislature had in mind in using the words "franchises, rights of way and other rights of the company" but it might be noted in passing that under s. 37, in establishing the amount of the indemnity to be paid for the company's property, no value was to be placed upon goodwill, franchises, servitudes, rights-of-way or other rights of a similar nature. Be that as it may, it seems to me to have been the clearly expressed intention of the Legislature that the Montreal Transportation Commission when created should acquire the transportation facilities theretofore owned and operated by the Montreal Tramways Company and that it should thereafter operate them as a publicly-owned transportation system for the benefit of the population in the Montreal area by virtue of the authority conferred in the statute without regard to any limitations which might have been imposed under contracts entered into by the tramways company with the various municipalities in the area served.

I am therefore in agreement with the unanimous view expressed in the Courts below that any contractual relationship which existed between the appellant and the Montreal Tramways Company terminated on June 16, 1951, and that since that date the Montreal Transportation Commission has operated the public transportation system in the area concerned exclusively in virtue of the authority conferred by the statute 14 Geo. VI, c. 79, as amended, and that it is not bound by any conditions or obligations arising out of contracts previously in existence between the appellant and the Montreal Tramways Company.

I would dismiss the appeal with costs.

Appeal dismissed with costs, RAND *and* CARTWRIGHT JJ. *dissenting.*

Attorneys for the plaintiff, appellant: Duquet, Mackay, Weldon & Tetrault, Montreal.

Attorney for the defendant, respondent: E. Asselin, Montreal.

CITY OF OUTREMONT (*Plaintiff*) .....APPELLANT; 1957

*Mar. 13
Dec. 19

AND

MONTREAL TRANSPORTATION COMMISSION (*Defendant*) ..... } RESPONDENT.

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

Contracts—Franchise to operate street-cars—Clause for sharing cost of snow removal—Effect of special legislation—Whether contract terminated by special legislaton—An Act to amend the Charter of the City of Montreal, 1918 (Que.), c. 84—An Act concerning the City of Montreal, 1950 (Que.), c. 79, as amended by the Act respecting the Montreal Transportation Commission, 1951 (Que.), c. 124.

The plaintiff claimed the recovery of one-half of the cost of snow removal on certain streets in its territory for the period June 1951 to January 1953, under a contract made in 1906 between it and the Montreal Street Railway Company. The provisions of this contract were similar to the provisions of the contract interpreted in *City of Westmount v. Montreal Transportation Commission, ante,* p. 65.

Held (Rand and Cartwright JJ. dissenting): The claim must fail for the reasons given in the *Westmount* case, since the provisions of the contract and the questions of law involved were the same in both cases.

Per Rand and Cartwright JJ., *dissenting*: There was nothing in the powers conferred on the City of Montreal by the statute 14 Geo. VI, c. 79, as amended, abrogating the franchises in the various municipalities and leaving the Commission to act at large. The City of Montreal replaced the Montreal Tramways Company as the owner and operator of the tramway. *Western Counties Railway Company v. Windsor and Annapolis Railway Company* (1882), 7 App. Cas. 178 at 188, applied. By the vesting of the property of the company in the City the latter became subject in all respects to the liabilities and obligations of the company, which thereafter were to be enforced against the Commission as its mandatary. The substitution of the *lien de droit* from the company to the City was required by the principles laid down in the *Western Counties Railway* case, *supra.*

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming the judgment of Salvas J. Appeal dismissed, Rand and Cartwright JJ. dissenting.

L. P. Gagnon, Q.C., for the plaintiff, appellant.

Gustave Monette, Q.C., and *G. Monette, Jr.*, for the defendant, respondent.

*PRESENT: Taschereau, Rand, Cartwright, Fauteux and Abbott JJ.

[1] [1955] Que. Q.B. 753.

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TASCHEREAU J.:—For the reasons given by Mr. Justice Abbott, I would dismiss this appeal with costs.

The judgment of Rand and Cartwright JJ. was delivered by

RAND J. (*dissenting*):—The issue here arises out of the contract considered in the appeal of *City of Outremont v. Montreal Tramways Company*[1], which, entered into on March 12, 1906, embodied the provisions of by-law No. 72 of December 20, 1905. The suit was brought against the respondent as the successor in title to the tramways company under clause 37:

> The Company shall keep its tracks free from ice and snow to a depth not exceeding eight (8) inches from the ground surface and the Town may at its option remove the whole or such part of the ice and snow from curb to curb as it may see fit from any street or part of street in which cars are running, including the snow from the tracks and from the roofs of houses thrown or falling into the streets and that removed from the sidewalks into the streets, with the consent of the Town, and the Company shall be held to pay one half of the cost thereof.

Clause 41 deals with the duration of the franchise:

> It is agreed between the Town and the Company that the present arrangement or contract for the establishment and operation of the said electric railway shall extend over a period of thirty (30) years reckoned from the date of the contract to be based on the present By-law. At the expiration of the said term of thirty (30) years and at the expiration of every term of five (5) years thereafter the Town shall have the right, after a notice of six (6) months to the Company, to be given within the twelve (12) months preceding the expiration of the said thirty (30) years, and also after a like notice to be given six (6) months before the expiry of each subsequent period of five (5) years, to assume the ownership of the said railway and all its real estate, . . .

I have already construed that language to mean this; a franchise for an indefinite period, subject to expropriation of the undertaking at the end of 30 years or of each subsequent 5-year period thereafter. Clause 37 deals with a matter obviously annexed to the operation of the undertaking without limit of time.

The legislation of 1918, 8 Geo. V., c. 84, in what appears as a more or less standard form used in relation to this particular undertaking, supports that view; and with its relation to and effect on the contract before us, I have dealt in the other appeal.

[1] [1958] S.C.R. 82.

A new element is injected, however, by legislation enacted in 1950 and 1951. By 14 Geo. VI., c. 79, with amendments in 14-15 Geo. VI., c. 124, the entire tramways system serving Montreal and its environs was reorganized. Authority was given Montreal to create by by-law the respondent Commission, and to acquire by expropriation either the total capital stock of Montreal Tramways Company or its total undertaking. Acting under this authority the property has been acquired and is now being administered by the respondent.

The contention is made that by this legislation the respondent as the mandatary of the City has been given powers which enable it to operate the system in Outremont as well as other municipalities regardless of previous contractual arrangements or terms, in fact without any regulations whatever except what it may from time to time itself prescribe, or to which it may, in its operations, by some other law, not so far mentioned, be subject: and that the grant of such comprehensive powers is incompatible with the retention of any vestige of the original franchise. Such a view must depend upon the authority given the Commission and the general basis, within the language of the legislation, on which the future operations were to be conducted. In examining that question a clear distinction should be made, as in the 1918 legislation, between purely transportation or operating matters and matters affecting municipal interests as such.

It is said by Martineau J., delivering the reasons of the Court of Queen's Bench[1], that the transfer of franchises and rights mentioned in s. 52 of 1950, c. 79 must be taken to be rights of a class not clearly indicated, but not, in any case, to include those under which the previous operations were carried out. This view is based on the initial assumption that independent powers of a transcending character are vested in the Commission by which the previous franchises are superseded and the City of Montreal is given *carte blanche* to exercise powers which formerly the other municipalities, including the appellant, could not, even within their own bounds, exercise without specific legislative authority. The operation of a tramway affects not only the rights of a municipality but those of the public

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and the creation of a public nuisance in city streets, as such an unauthorized operation would be, must have legislative warrant to legalize it.

I can find no such paramount authority in the legislation mentioned. The contrary seems envisaged by s. 52:

> From the day on which the arbitration award shall be final, the city shall be absolute and inalienable owner of all the proprety included in the expropriation, as well as of all franchises, servitudes, rights of way and other rights of the Company concerning the expropriated undertaking.

In that provision the basic authority for the operation by the respondent is to be found; and in its absence there is nothing to furnish the substance of the terms, conditions and regulations which, it is argued, were impliedly superseded.

A brief review of the provisions of the two enactments will make this apparent. By s. 16 of the 1951 Act, the Commission is given the status of a corporation and is authorized to acquire and to own all property and to exercise all powers necessary for the execution of the statute; by s. 17 it may acquire and administer on behalf of the city "a public transportation system for travellers by tramways, by autobuses and other vehicles of the same type"; s. 18*b* provides for the vesting of absolute ownership of the property and "of all rights mentioned in section 52"; s. 19 enables the expropriation of any immoveable which may be required by the general system. Among the special features is that called "previous possession", that is, possession prior to the acquisition of title and by s. 47 during that possession the Commission may "exercise all franchises, servitudes, rights of way, and other rights of the Company [the Tramways Company] concerning its transportation system"; s. 47*b* speaks of "all the property moveable and immoveable and rights mentioned in section 52"; s. 48 gives the Commission the right to the possession of all the company's books, records and documents relating to the undertaking; s. 52 has already been set out; by s. 53 all property of the Commission shall be exempt from municipal taxes; by 53*a* the provisions of the contract between the City of Montreal and the tramways company contained in a sched. to 8 Geo. V., c. 84 cease to apply to the undertaking upon its acquisition; s. 56 deals with rates and makes any decision of the Commission subject to revision by the Public Service Board. By s. 57 "with the cooperation of

any interested city or town" the Commission may do whatever surface work it deems necessary to improve the conditions of transportation, including the widening of streets, the building of tunnels, grade separations at street intersections, the establishment of new lines and any other work calculated to relieve traffic congestion and provide the public with an adequate system of mass transportation, but it is not to undertake the construction of underground or elevated lines or express-ways; the Commission may also

on its own authority, establish new lines, replace tramway lines by autobus or control bus lines, change their routes, and for any such purpose use any public street which it deems necessary or expedient in the territory of the city or of the metropolitan district.

Section 58 authorizes the City of Montreal "and the other cities or towns in the territory served by the Commission's transportation system" to guarantee the reimbursement of loans made by the Commission for the organization, etc., of the system. By s. 60 the Commission may, by by-law made under s. 20, which deals with expropriation, "adopt any other provisions and ordain any other measures which may be consistent with this act, in order to assure complete and equitable execution thereof".

I find nothing in these powers abrogating generally the agreements regulating the franchises in the various municipalities and leaving the Commission to act at large in the manner claimed. That construction would write s. 52 and the several references to it out of the legislation. In Outremont the City of Montreal is simply the owner and operator of the tramway in replacement of the Montreal Tramways Company: and to treat this restricted language as impliedly putting an end in their entirety to these agreements, of which there are a number, touching as they do the local arrangements that have harmonized the operation of the tramways with widespread municipal administration, would be an unwarranted extension of its plain meaning. When uniformity in municipal relations was intended, it was expressly provided as in s. 53 exempting all the property taken over from "all municipal taxes".

In some respects the respondent may act without the concurrence of the appellant as under s. 57; that deals with the establishment of new lines and the rearrangement or

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replacement of the existing facilities, but it does not touch the terms of operations thereafter. No right, liberty, franchise or privilege of any sort or description has been suggested in the Court of Queen's Bench or in this Court that furnishes any subject-matter for the language of s. 52 other than these contracts which embody the prior franchises and in that situation I find it quite impossible to exclude either them or the terms and conditions annexed to them.

The principle of law which applies in such a case is well exemplified in *Western Counties Railway Company v. Windsor and Annapolis Railway Company*[1]. At p. 188 Lord Watson states it in these words:

> The canon of construction applicable to such a statute is that it must not be deemed to take away or extinguish the right of the respondent company, unless it appear, by express words, or by plain implication, that it was the intention of the Legislature to do so. That principle was affirmed in *Barrington's Case,* 8 Rep. 138 a., and was recognised in the recent case of *The River Wear Commissioners v. Adamson,* 2 App. Cas. 743. The enunciation of the principle is, no doubt, much easier than its application. Thus far, however, the law appears to be plain—that in order to take away the right it is not sufficient to shew that the thing sanctioned by the Act, if done, will of sheer physical necessity put an end to the right, it must also be shewn that the Legislature have authorized the thing to be done at all events, and irrespective of its possible interference with existing rights.

It is said finally that there is no *lien de droit* between the parties. But if the terms and conditions of the franchise embody an obligation annexed to its exercise, the transfer of the rights of the franchise by an Act of the Legislature effects a transfer as well of the correlative obligations. It cannot be imagined that where the legislation leaves in force cl. 37, and provides for the assumption of capital obligations and for the payment of operating costs, those of snow removal are excepted. By s. 53*e* of 1951, c. 124, in case of the expropriation of the capital stock of the company, when the total amount of the price has been paid, the Lieutenant-Governor in Council is authorized by proclamation to cancel the company's charter; and although no such provision seems to follow the expropriation of the undertaking, it cannot be inferred that the Legislature would intend the tramways company to continue under liability for a service with which it has no concern. By s. 53 "All the Commission's revenues shall be used to meet its

[1] (1882), 7 App. Cas. 178.

obligations and to operate, maintain and improve the transportation system of which it has the administration"; and by s. 18*a* all claims relating, among other things, to the operation, administration or control of the property entrusted to the Commission shall be made, and proceedings for their recovery brought, against the Commission. This necessarily implies that by the vesting of the property in the City the latter became substituted in all respects to the liabilities and obligations of the tramways company, which thereafter are to be enforced against the Commission as its mandatory. *Western Counties Railway v. Windsor and Annapolis Railway Company, supra,* is a good example of the legislative effect of such a transfer and the substitution of the *lien de droit* from the Tramways Company to the City is required by the principles laid down in that case.

I would, therefore, allow the appeal, set aside the judgments below and declare that the Commission is bound by the terms of cl. 37 of the contract of 1906. The City will have its costs in all courts.

The judgment of Fauteux and Abbott JJ. was delivered by

ABBOTT J.:—Appellant's claim is for $23,781.08, representing one-half the cost of snow removal on certain streets in appellant's territory during the period from June 16, 1951, to January 20, 1953. Appellant claimed this amount under a specific provision of the franchise granted by the former Town of Outremont (now the City of Outremont) under the authority of which it contends respondent is operating its tramways in the said city.

The claim was submitted to the Superior Court in a stated case in accordance with the terms of art. 509 of the *Code of Civil Procedure* of the Province of Quebec. The present appeal is from a judgment of the Court of Queen's Bench[1] confirming the judgment of the learned trial judge, the Honourable Mr. Justice Elie Salvas, which declared that respondent was not indebted to appellant in the amount claimed.

The provisions of the contract between the Town of Outremont and the Montreal Street Railway Company (now the Montreal Tramways Company) dated March 12, 1906, are similar to, although not identical with, the

[1] [1955] Que. Q.B. 753.

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provisions of the contract between the said company and the City of Westmount, which was considered by this Court in the appeal of the *City of Westmount v. Montreal Transportation Commission*[1] and which was argued before this Court immediately before the hearing of the present appeal.

Counsel for both parties to this appeal agreed that the same questions of law are involved in the determination of both appeals and this appeal was submitted on that basis without further argument.

For the reasons which I have given in the appeal of the *City of Westmount v. Montreal Transportation Commission*[1], which need not be repeated here, I would therefore dismiss the present appeal with costs.

Appeal dismissed with costs, RAND *and* CARTWRIGHT JJ. *dissenting.*

Attorneys for the plaintiff, appellant: Sauvé, Gagnon & L'Heureux, Montreal.

Attorney for the defendant, respondent: E. Asselin, Montreal.

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*Mar. 13, 14
Dec. 19

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

AND

MONTREAL TRAMWAYS COMPANY (*Defendant*) ..... } RESPONDENT.

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

Contracts—Franchise to operate street-cars—Exemption from municipal taxes—Effect of special legislation—Act to amend the charter of the City of Montreal, 1918 (Que.), c. 84.

By a contract made in 1906, the defendant company was granted (1) an exclusive franchise to operate street-cars in the plaintiff municipality for 30 years subject to certain conditions, and (2) a partial exemption from municipal taxes. The company also held a franchise in the City of Montreal. In 1918, by a contract between the City of Montreal and the defendant, ratified by the statute 8 Geo. V, c. 84, the company's franchise in the city of Montreal was replaced and its

*PRESENT: Taschereau, Rand, Cartwright, Fauteux and Abbott JJ.

[1] Ante, p. 65.

term extended to 1953, but the franchise in the plaintiff municipality was not annulled. However, the right of the latter municipality to expropriate the undertaking of the company was abrogated and given exclusively to the City of Montreal.

In its action, the plaintiff municipality sought recovery of municipal taxes for the years 1936 to 1949, inclusive. The action was maintained by the Superior Court but dismissed by a majority in the Court of Appeal.

Held (Rand and Cartwright JJ. dissenting): The action must fail. For the reasons given in *City of Westmount v. Montreal Transportation Commission, ante,* p. 65, the effect of the 1918 statute was to continue in force, from 1936 until 1953, both the obligations of the company to operate its tramway system in Outremont and its corresponding rights to a franchise and tax exemption. The Court below disposed satisfactorily of the contention that (1) there was incompatibility as regards the tax-exemption provisions in the city of Montreal contract and the Outremont contract, and (2) the company was debarred from pleading the exemption because it had not taken steps at the proper time and by the proper procedure to contest its liability.

Per Rand and Cartwright JJ., *dissenting*: The exemption expired with the first period of 30 years. By the validation of the contract in 1906, the Legislature made it clear that there was no intention to deal with the validation of the exemption for any period beyond that which the municipality was already specially authorized to grant, that is, 30 years. The exemption clause was severable from the remaining provisions of the contract. The abrogation of the right of expropriation in 1918 did not terminate the exemption; the language of the statute clearly indicated that the remaining provisions were to be unaffected so far at least as was necessary to maintain the franchise.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing, Martineau J. dissenting, the judgment of Tyndale, Assoc. C.J. Appeal dismissed, Rand and Cartwright JJ. dissenting.

F. P. Brais, Q.C., and *L. P. Gagnon, Q.C.,* for the plaintiff, appellant.

Jules Deschenes, for the defendant, respondent.

TASCHEREAU J.:—For the reasons given by Mr. Justice Abbott, I would dismiss this appeal with costs.

The judgment of Rand and Cartwright JJ. was delivered by

RAND J. (*dissenting*):—The issue in this appeal depends on the interpretation to be given the language of an agreement made between the parties, the by-law preceding which, no. 72, in identical terms, was confirmed by an Act of the Legislature. The agreement provided generally

[1] [1955] Que. Q.B. *605.*

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for the construction and operation of a tramway line within the city of Outremont. Among the special provisions was one stipulating for exemption from general taxes. The franchise was subject to the right of expropriation of the undertaking at the end of 30 years or of any 5-year period thereafter. The question in dispute is whether the exemption expired with the first period of 30 years or continued during the operation of the undertaking until the year 1949; and it becomes necessary to examine closely the language used.

By s. 12 the grant was made:

> The above-mentioned lines of railway are to be constructed and operated . . . and such other lines as the Company may erect, construct and operate in the Town are to be so constructed and operated . . . throughout the hereinafter mentioned period, in consideration of the Town granting as it now does for thirty (30) years reckoning from the said Eighth of February last past (1906) to the Montreal Street Railway Company, its representatives and assigns AN EXCLUSIVE FRANCHISE for operating Street Railways by electric power, or such other motive power as may be agreed upon on a ground surface for passengers, freight and mails within the limits of the Town and in further consideration that the Company shall be exempt from the payment of all municipal taxes and rates which the Town may now or herafter have the power to levy upon the Company, its moveable or immoveable property or franchise: provided always that if the Company establish a power house or a car shed or a car shop or other building except waiting rooms, the same shall be subject to all municipal taxes imposed by the Town upon immoveable property; . . . provided that the said Town will grant to the said Company such extension of its present franchise in the said Town as will make it terminate at the same date as any extension which may be granted by the said City of Montreal to the said Railway of its franchise in said City.

and by s. 41 the period of its continuance was specified:

> It is agreed between the Town and the Company that the present arrangement or contract for the establishment and operation of the said electric railway shall extend over a period of Thirty (30) years reckoned from the said Eighth day of February last (1906) (the date of the Deed of Contract first above mentioned). At the expiration of the said term of Thirty (30) years and at the expiration of every term of five (5) years, thereafter the Town shall have the right, after a notice of six (6) months to the Company, to be given within the twelve (12) months preceding the expiration of the said Thirty (30) years, and also after a like notice to be given six (6) months before the expiry of each subsequent period of Five (5) years, to assume the ownership of the said railway and all its real estate, appurtenances, plant and vehicles belonging to the said Company situate in the Town of Outremont and necessary for the operation of its line, on payment of their value to be determined by Arbitrators to be appointed as follows: . . .

In 1918, by 8 Geo. V., c. 84, the transportation system of the respondent, serving the city of Montreal and the surrounding municipalities was brought under the general

authority, for construction, operation and maintenance purposes, of the tramways Commission. Uniformity of operation was the main objective and the arrangement was to continue until 1953 at which time or at specified periods thereafter the City of Montreal might expropriate the entire undertaking. Items of special nature touching municipal interests other than of transportation between the company and Montreal were dealt with. Concerning matters essentially of transportation the expression "within and without the limits of the City" was uniformly used, but provisions for matters of municipal interest were expressly limited to Montreal; the existing arrangements on such matters between the company and outside municipalities were left untouched.

The duration of the new arrangement was formulated in language similar to that before us. Paragraph 8 of art. 92 of the contract, for example, provides:

> On March 24, 1953 (the date of expiration of the first named period of 35 years) and at the expiration of every subsequent five-year period, the City shall have the right, after six (6) months' notice given to the Company . . . to appropriate for itself the Railway of the said Company, etc. . . . The purchase price shall also include all privileges, rights and franchises of the Company in any municipality wherein the said assets so acquired are situated, but the City shall not pay for the value of such privileges, rights and franchises, and shall further have the right to operate the system of tramways so purchased in any municipality wherein the same is located.
>
> No municipality other than the City shall have the right to purchase the railway system of the Company in whole or in part.

By s. 75 of the statute it was declared that

> every provision of any contract, agreement or arrangement entered into between the Montreal Tramways Company and any municipal corporation outside of Montreal . . . which may be inconsistent with the said contract of the 28th of January, 1918 shall be and remain without effect from the date of the coming into force of the said contract.

The confirmation of by-law no. 72 was made by 6 Ed. VII., c. 52, in these words:

> 11. Whereas by-law No. 72 of the town granting to the Montreal Street Railway Company an exclusive franchise and exemption from taxes for thirty years, was unanimously adopted by the council on the 20th December, 1905, and unanimously approved by the electors who are proprietors on the 8th January, 1906; and whereas doubts have now arisen as to the right of the town to grant such exclusive franchise and it is expedient to remove such doubts; it is enacted that the aforesaid by-law No. 72 is hereby declared legal and valid and ratified to all intents and purposes.

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In 1915 there was a further confirmation:

> 90. By-law No. 72 of the city, granting to the Montreal Street Railway Company an exclusive franchise and exemption from taxes for thirty years, which was unanimously adopted by the council on the 30th of December, 1905, and unanimously approved by the electors who are proprietors on the 8th of January, 1906, and which has already been ratified by the act 6 Edward VII, chapter 52, section 11, (but which act is hereinafter repealed), is hereby declared legal and valid, and ratified to all intents and purposes.

In 1900 by 63 Vict., c. 55, s. 22, Outremont was authorized, by resolution, to

> exempt from the payment of municipal taxes, for a period not exceeding thirty (30) years, any person who carries on any industry, trade or enterprise whatsoever, as well as the land used for such industry, trade or enterprise, or agree with such person for a fixed sum of money payable annually for any period not exceeding thirty (30) years, in commutation of all municipal taxes.

This section was repealed in 1915 by 5 Geo. V., c. 93, s. 91. Section 518 of the *Cities and Towns Act*, 3 Ed. VII, c. 38, specified a limit of 20 years for the exemption from taxation of any "industry, trade or enterprise", reproducing in substance art. 4559 of R.S.Q. 1888. The authority of Outremont in 1905-6 was, therefore, an exception to the general law.

The contention made by Outremont is this: it was expressly authorized to exempt an enterprise for 30 years but not more; such a limitation is a basic principle of municipal law and in the case of the City a special indulgence of an additional 10 years over the general act was permitted. The exemption has invariably been treated as a strictly collateral benefit for a limited time which would be exhausted as part of the terms of any franchise or contract when its statutory period expired.

The by-law and the contract clearly contemplate an unbroken continuance of operations from the beginning to the termination of the franchise, an indefinite period divided into terms, a contract, in short, for a continuous franchise from its commencement to its indefinite end. If within that period a provision, on its proper interpretation, is to continue only for a limited time, the expiration of that particular time and of the provision affects nothing else; by its nature the latter simply ceases to have force as a

provision, the contract becomes so far fully performed as was intended, and the remaining provisions continue as from the beginning.

The right of expropriation by Outremont was abrogated by the legislation of 1918 and that power transferred to Montreal; and as in the case of Montreal the option to purchase might never be exercised. The question is, then, whether the by-law is to be interpreted as providing the tax exemption for the indeterminate period of the franchise.

The purpose of the validation in 1906 is made clear by the recital to s. 11: "and whereas doubts have now arisen as to the right of the town to grant such exclusive franchise and it is expedient to remove such doubts". With that in mind as its purpose and in view of the fact that the recital mentions the exemption from taxation as being for 30 years, the Legislature by that language has made it clear that there was no intention to deal with the validation of the exemption for any period beyond that which Outremont was already authorized to grant. Neither the contract nor the by-law was annexed to the statute; and the only representation to the Legislature, so far as appears, was that contained in the recital. The exemption for 30 years being within the authority of the City did not need validation and its inclusion with the doubtful exclusiveness of the franchise cannot modify the proper construction of the by-law. So to interpret either the by-law or the clause of validation would be to attribute to the City an intention to ask for and to the Legislature an intention to grant a perpetual exemption from taxation by language that conceals rather than discloses such an intention. After the repeal of the 1900 legislation in 1915, the only power of exemption remaining to the City was that contained in the *Cities and Towns Act* for a period of 20 years; and that circumstance furnishes an additional consideration against such a construction either of the by-law or the validating Act.

Mr. Deschenes argues that the exemption clause is inseparably bound up with the total consideration of the contract and is not severable; and that when the by-law contemplates a continuance beyond 30 years of the franchise it has in mind a continuance of the then existing arrangement. For the reasons given, I cannot agree with this. Tax exemption is essentially a temporary benefit

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intended to assist enterprise in its early stages granted within a long legislative tradition of time limitation. Franchises, particularly those of such public services, may be, as here, virtually perpetual and only in extraordinary circumstances, for unique reasons and in express and unequivocal language, as in the case of works with a national interest, such as, for example, the western section of the Canadian Pacific Railway, has a perpetual exemption ever been created.

It was the view of Martineau J. in the Court of Queen's Bench[1] that on the abrogation, in 1918, of the right of expropriation, the consideration for the franchise came to an end with the consequence that the grant thereupon terminated, and with it, the tax exemption. I am unable to attribute that effect to the legislation; the language clearly indicates that the remaining provisions were to be unaffected so far at least as was necessary to maintain the franchise: otherwise the many provisions for regulating services "within and without the City" would have been abortive; and I cannot construe the right of expropriation given Montreal to be of an undertaking illegally occupying the streets. Assuming that the abrogation gave some remedial right to Outremont, on well established principles, that right, even to rescission, was one the exercise of which could be waived; and that it was waived is conclusively established by this proceeding. This view of the continuance of the franchise becomes of importance to the enforcement of other terms of the contract such as that for the payment of part of the cost of snow removal.

For these reasons, the appeal must succeed. The judgment of the Court of Queen's Bench should be reversed and that of the trial judge restored with costs in this Court and in the Court of Queen's Bench.

The judgment of Fauteux and Abbott JJ. was delivered by

ABBOTT J.:—Appellant's claim is for $19,594.78, representing municipal taxes and assessments for the years 1936 to 1949 inclusive. Respondent denied liability on the ground that it was exempt from the payment of such taxes in virtue of the contract governing its relations with appellant.

[1] [1955] Que. Q.B. *605*.

Appellant is successor to the Town of Outremont and respondent is successor to the Montreal Street Railway Company. The terms and conditions of a franchise granted by the Town of Outremont to the Montreal Street Railway Company are set out in by-law 72 of the said Town, adopted December 20, 1905, which was ratified by the Quebec Legislature, and in a contract implementing the said by-law executed March 12, 1906.

The Town granted to the company for a period of thirty years terminating February 8, 1936, an exclusive franchise to establish and operate lines of electric railway in particular streets in the municipality, subject to the conditions specified in the by-law and the contract. During this period of thirty years, the company was granted two principal rights: (1) an exclusive franchise and (2) a partial exemption from municipal taxes and rates. Section 12, relating to the term of the franchise and the tax exemption, reads as follows:

> The above-mentioned lines of railway are to be constructed and operated at the rate of one fare, and such other lines as the Company may erect, construct and operate in the Town are to be constructed and operated at the rate of one fare for the conveyance of passengers to and from points in the Town of Outremont, to and from points on the Company's Montreal System of tracks throughout the hereinafter mentioned period, in consideration of the Town granting as it now does for thirty (30) years reckoning from the said Eighth of February last past (1906) to the Montreal Street Railway Company, its representatives and assigns, AN EXCLUSIVE FRANCHISE for operating Street Railways by electric power, or such other motive power as may be agreed upon, on a ground surface for passengers, freight and mails within the limits of the Town and *in further consideration that the Company shall be exempt from the payment of all municipal taxes and rates which the Town may now or hereafter have the power to levy upon the Company, its moveable or immoveable property or franchise: provided always that if the Company establish a power house or a car shed or a car shop or other building except waiting rooms, the same shall be subject to all municipal taxes imposed by the Town upon immoveable property*; nevertheless in the event of the Company at any time agreeing with the City of Montreal to reduce the rate of fares at present in force in the City of Montreal, the Company binds itself to reduce the rate of fares in the Town of Outremont, to the same rate as in Montreal: provided that the said Town will grant to the said Company such extension of its present franchise in the said Town as will make it terminate at the same date as any extension which may be granted by the said City of Montreal to the said Railway of its franchise in said City.

(The italics are mine.)

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It will be noted from the terms of the section which I have quoted that the tax exemption applies, generally speaking, only to that portion of the company's property and assets situated on the streets of the appellant.

In consideration of the exclusive franchise and of the tax exemption, the company undertook to establish and operate lines of tramway for the conveyance of passengers in the streets specified in the contract. In other words the obligation on the part of the company to establish, maintain and operate was subject to the reciprocal obligations of the Town to grant it the exclusive franchise and the tax exemption.

On January 28, 1918, the Montreal Tramways Company and the City of Montreal entered into a contract which was ratified by a statute of the Quebec Legislature, 8 Geo. V, c. 84. The contract appears as Schedule A to the said Act. The company's franchise in the city of Montreal was expressly annulled and replaced but the company's franchise in the city of Outremont was not annulled. Its conditions were modified in certain respects, which are not relevant to the issue in this appeal, and, in addition, the right of the City of Outremont under the contract of March 12, 1906, to expropriate the company's undertaking within its limits was abrogated.

The relevant sections of the 1918 statute (para. 8 of art. 92 and art. 95 of Schedule A) read as follows:

Article 92.

Paragraph 8. Expropriation.

On March twenty-fourth (24th) nineteen hundred and fifty-three (1953), and at the expiration of every subsequent five-year period, the City shall have the right, after six months notice given to the Company within the twelve months immediately preceding March twenty-fourth (24th) nineteen hundred and fifty-three (1953), and also after a similar notice of six months and on the same conditions at the end of each subsequent five-years period, to appropriate for itself the railway of the said company as well as the immoveables and dependencies, plant and cars belonging to it and necessary for the operation of the said railway, situate within and without the limits of the said City, by paying the value thereof, to be fixed by arbitrators, and ten per cent. (10%) over and above the estimate. Such arbitrators shall be appointed as follows: One by the City, one by the Company, and the third by a judge of the Superior Court sitting in and for the district of Montreal.

* * *

No municipality other than the City shall have the right to purchase the railway system of the Company, in whole or in part.

CONTRACTS WITH MUNICIPALITIES OUTSIDE OF THE CITY.
Article 95.

All the provisions of the contracts, compacts or agreements passed between the Company and any municipal corporation outside of the City, inconsistent with the provisions of this contract, shall be and shall remain without effect from the time of the coming into force of the present contract.

One effect of this statute was, therefore, to take away from appellant the right of expropriation given to it under the franchise and to vest that right in the City of Montreal.

Although not identical, the provisions of the contract between the Town of Outremont and respondent are similar to those of the contract which has just been considered by this Court in the appeal of *City of Westmount v. Montreal Transportation Commission*[1]. For the reasons which I have given in that appeal, which need not be repeated here, I am of opinion that in passing the 1918 statute, 8 Geo. V, c. 84, the Quebec Legislature intended that the reciprocal rights and obligations of the tramways company and the City of Outremont under the contract of March 12, 1906, were to be continued until March 24, 1953, except to the extent that such rights and obligations may have been modified by the said statute. The effect of the statute was therefore to continue in force from February 8, 1936, until March 24, 1953, both the obligation of the respondent to operate its tramway system in Outremont and its corresponding rights to a franchise and tax exemption.

The points raised by appellant (a) that there is incompatibility as regards the tax exemption provisions in the city of Montreal contract and the Outremont contract and (b) that respondent was debarred from pleading its tax exemption because no steps were taken at the proper time and by the proper procedure to contest its liability, have been satisfactorily disposed of, in my opinion, by the Court below.

For the reasons which I have given and also for those expressed by Bissonette and Gagné JJ., with which I am in respectful agreement, I would dismiss the appeal with costs.

[1] Ante, p. 65.

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Appeal dismissed with costs, RAND *and* CARTWRIGHT JJ. *dissenting.*

Attorneys for the plaintiff, appellant: Sauvé, Gagnon & L'Heureux, Montreal.

Attorneys for the defendant, respondent: Létourneau, Monk, Tremblay, Forest & Deschenes, Montreal.

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*Nov. 12, 13
Dec. 19

JULIEN BEDARD AND DAME LUCIE LEPAGE (*Plaintiffs*) ..... } APPELLANTS;

AND

FREDERIC GAUTHIER (*Defendant*) ...RESPONDENT.

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

Motor vehicles—Negligence—Statutory onus—Whether onus discharged by defendant—Infant hit by car—The Motor Vehicles Act, R.S.Q. 1941, c. 142, s. 53(2).

When a 5-year-old child, who has been playing on the sidewalk with other children behind a truck parked at the side of a one-way street, runs out in front of the truck and into the path of an oncoming car, the onus on the driver of the car, pursuant to s. 53(2) of the *Motor Vehicles Act,* to show that the damage did not arise through his negligence or improper conduct, requires him to prove either (i) that if he had looked towards the sidewalk before coming to the parked truck, the child could not have been effectively visible to him, or (ii) that if, on the contrary, the child would have been visible to him, he could not, if he had seen him, have avoided the accident, taking into account the possible imprudence of children and acting with all reasonable prudence.

Held (Rand J. dissenting): The defendant in this case failed to discharge the statutory onus placed upon him, because he admittedly did not look towards the sidewalk, and there was no evidence to show that if he had looked he would not have seen the child. In the circumstances, the fact that he was driving at a speed of 10 to 12 miles an hour was not sufficient to discharge that onus.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing the judgment of Rhéaume J. Appeal allowed, Rand J. dissenting.

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*PRESENT: Taschereau, Rand, Locke, Fauteux and Abbott JJ.

[1] [1957] Que. Q.B. *344.*

Bernard Desjarlais, for the plaintiffs, appellants.

François Mercier, for the defendant, respondent.

The judgment of Taschereau, Locke, Fauteux and Abbott JJ. was delivered by

FAUTEUX J.:—Le 4 mai 1953, vers les quatre heures et demie de l'après-midi, le fils des appelants, Guy Bédard, un garçonnet de cinq ans, fut renversé sur la chaussée de la rue St-Philippe à Montréal, par un véhicule automobile conduit par l'intimé et lui appartenant. L'enfant en fut grièvement blessé. Les appelants, ses tuteurs conjoints, ont poursuivi l'intimé et obtenu contre lui, en Cour Supérieure, un jugement le tenant responsable et le condamnant à payer, à titre de dommages, une somme totale de $3,926.30.

Porté en appel[1], ce jugement fut infirmé et l'action fut renvoyée. D'où le pourvoi devant cette Cour où seule la question de responsabilité est soulevée.

Les faits:—A la date de l'accident, la circulation des véhicules, sur la rue St-Philippe, n'était permise que dans une direction nord-sud. L'accident s'est produit dans une zone scolaire, entre deux intersections, vis-à-vis une épicerie sise du côté ouest et en face de laquelle se trouvait stationnée, en bordure du trottoir, une camionnette dont l'avant pointait au sud. Venant du nord, l'intimé procédait vers le sud, au centre de la rue, à une vitesse de 10 à 12 milles à l'heure, et allait dépasser la camionnette lorsqu'il aperçut, à 4 ou 5 pieds devant lui, l'enfant surgissant, en courant, de l'avant de la camionnette. L'intimé appliqua immédiatement les freins et arrêta, dit-il, son véhicule dans une distance correspondant à la longueur des marques laissées sur le pavé par l'opération du freinage et qu'il estime être de 3 pieds; mais l'enfant avait déjà été frappé par le côté gauche du pare-choc avant de son véhicule.

Ce récit, qu'a donné l'intimé, sur la conduite de l'enfant à l'instant même où l'accident s'est produit est confirmé par la preuve et, plus particulièrement, par deux témoins, Dugas père et fils, dont le désintéressement est affirmé par les deux parties. Ces derniers, qui cet après-midi là prenaient un bain de soleil sur une propriété sise du côté est et en face de l'épicerie, ajoutent que précédemment à

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l'instant de l'accident, l'enfant jouait près de l'épicerie avec d'autres compagnons et ils l'ont vu tour à tour sur le trottoir et dans la rue. Dugas fils précise que c'est du trottoir que l'enfant est parti en courant pour traverser la rue lorsque l'accident s'est produit.

Il est évident qu'à l'instant même où, dans cette course du trottoir à la rue, l'enfant passa à l'avant de la camionnette, il n'était pas visible pour l'intimé qui en approchait à l'arrière. Mais, à moins de recourir aux conjectures, il est impossible, d'après la preuve, d'affirmer qu'avant cet instant-là, et alors que, d'une part, l'enfant jouait sur le trottoir, et que, d'autre part, l'intimé venait du nord à une vitesse de 10 à 12 milles à l'heure et parcourait ainsi de 14 à 17 pieds à la seconde, qu'à aucun temps et que d'aucun point de son parcours, l'intimé ne pouvait voir l'enfant sur le trottoir. Sur cette question, il y a carence de preuve. En effet, il semble bien que les Dugas avaient une vue directe sur la partie latérale gauche de la camionnette et ne pouvaient conséquemment, de l'endroit où ils étaient, voir ce qui se passait sur le trottoir, entre ce véhicule et l'épicerie. Ils ne paraissent pas, non plus, avoir observé la venue de l'automobile de l'intimé avant qu'il ne procèdât à doubler la camionnette; de toutes façons, leurs témoignages n'apportent aucune assistance sur le point. Et quant à l'intimé, qui pouvait voir ce qui se passait sur le trottoir, au moins durant quelque temps avant d'arriver à proximité de la camionnette, il n'a pas regardé et n'a pu affirmer s'il s'y trouvait des adultes ou des enfants. Voici d'ailleurs l'extrait de son témoignage sur le point:

D.—Connaissez-vous bien cette rue St-Philippe à l'endroit de l'accident? R.—Je la connais comme l'avoir traversée assez souvent.

D.—Vous avez un neveu, là, monsieur Jetté qui demeure là? R.—Oui, monsieur.

D.—Est-ce que vous le visitiez? R.—De temps en temps, monsieur.

D.—Vous saviez qu'à cet endroit-là il y avait une école et que c'était une zone scolaire? R.—Oui, monsieur.

D.—Vous saviez qu'il y avait deux rues-intersections? R.—Oui, monsieur.

D.—Est-ce que vous saviez que c'était une rue bien passante où les enfants jouent dans la rue? R.—Oui, monsieur.

D.—Vous saviez tout cela. Aviez-vous vu le jeune Bédard avant d'arriver à l'endroit de l'accident? R.—Non, monsieur.

D.—Vous ne l'aviez pas vu sur la rue? R.—Non.

D.—Avez-vous vu des enfants sur le trottoir? R.—Je n'ai pas

remarqué s'il y avait des enfants ou des grandes personnes, j'étais tellement intentionné de regarder en avant de moi, je n'ai pas regardé sur le trottoir.

D.—Avez-vous regardé devant vous sur le trottoir? R.—Non, je n'ai pas regardé.

D.—Vous ne regardiez pas sur le trottoir? R.—Non, je ne regardais pas, ce n'est pas ma manière quand je conduis, je regarde en avant.

D.—Malgré que vous saviez que c'était une zone scolaire? R.—Oui.

D.—Saviez-vous que c'était la sortie des écoles? R.—Oui, c'était dans les quatre heures et quart (4.15).

D.—Vous saviez que c'était à la sortie de l'école? R.—Oui.

D.—En aucun moment avant l'accident, vous n'avez regardé sur le trottoir ni à gauche ni à droite? R.—Non.

En droit, cette omission de l'intimé a été retenue, tant par le juge de première instance que par les juges de la Cour d'Appel[1], comme constituant une faute. Ces derniers, cependant, ont exprimé l'avis que cette faute n'a pas contribué à l'accident car, et c'est là la raison de la décision, même si l'intimé avait vu l'enfant sur le trottoir, on ne pouvait lui demander de procéder avec plus de soin qu'il ne l'a fait.

Les dispositions du para. 2 de l'art. 53 de la *Loi des véhicules automobiles,* S.R.Q. 1941, c. 142, sont claires:

53. 2. Quand un véhicule automobile cause une perte ou un dommage à quelque personne dans un chemin public, le fardeau de la preuve que cette perte ou ce dommage n'est pas dû à la négligence ou à la conduite répréhensible du propriétaire ou de la personne qui conduit ce véhicule automobile, incombe au propriétaire ou à la personne qui conduit le véhicule automobile.

La preuve, comme déjà indiqué, établit que l'enfant jouait avec d'autres enfants dans le voisinage de l'épicerie et de la camionnette et que c'est du trottoir qu'il est parti en courant pour aller dans la rue. Dans ces circonstances et pour prouver que le dommage n'est pas dû à sa négligence ou à sa conduite répréhensible, l'intimé devait montrer que la preuve établit (i) qu'en aucun temps utile, avant l'instant où l'enfant passa en courant à l'avant de la camionnette, cet enfant ne pouvait être visible pour lui s'il avait regardé sur le trottoir avant d'arriver à proximité de la camionnette; (ii) ou que si, au contraire, l'enfant était visible, il n'aurait pu, s'il l'avait vu, éviter l'accident, en faisant entrer dans ses prévisions les imprudences possibles des enfants et en adoptant à cet égard toute la prudence raisonnable commandée par la situation qui s'offrait à lui.

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De tous les témoins, l'intimé est le seul qui, en raison de sa position sur la rue, aurait pu établir le premier point. S'il avait regardé sur le trottoir, il eut été facile pour lui d'affirmer au procès, si vraiment tel était le cas, qu'en aucun temps utile l'enfant n'était visible. N'ayant pas regardé, il n'a pu, par sa faute, établir cette première proposition qui l'aurait exonéré.

Pour la même raison et par suite de la même faute, il ne peut, sans faire appel aux conjectures, alors que c'est lui qui a le fardeau de la preuve, établir la seconde proposition. Nous ne pouvons que spéculer sur la situation qui s'offrait à l'intimé et cette situation constitue la donnée principale pour apprécier la conduite de l'intimé dans les circonstances. De quel point du trottoir l'enfant est-il parti pour aller courir et aller passer en avant de la camionnette? Ses agissements étaient-ils tels que, les observant, l'intimé devait nécessairement appréhender l'imprudence qu'il a commise? Sur ces points, et d'après la preuve faite, toutes les conjectures sont possibles. Et, à moins d'admettre, ce qui est impossible, que dans de telles circonstances, l'automobiliste qui ferme les yeux sur ce qui se passe sur le trottoir doit nécessairement être exonéré s'il conduit à une vitesse de 10 à 12 milles à l'heure, la question de savoir s'il a repoussé la présomption édictée contre lui, ne peut recevoir une réponse affirmative. Une vitesse de 10 à 12 milles à l'heure est généralement, mais non nécessairement en regard de tous les dangers possibles que l'automobiliste peut être légalement tenu d'anticiper, une vitesse prudente. Dans chaque cas, les circonstances essentielles à l'appréciation et détermination de la question doivent être considérées et, pour cette raison, il appartient à celui qui doit se libérer de la présomption de faute, comme c'est le cas de l'intimé, de voir à ce que ces circonstances apparaissent dans la preuve. Autrement, la disposition du para. 2 de l'art. 53 devient dénuée de son sens aussi bien que de sa raison d'être.

Je maintiendrais l'appel, rétablirais le dispositif du jugement de première instance, avec dépens de toutes les Cours.

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RAND J. (*dissenting*):—This appeal has given me anxious consideration, but after a careful examination of the evidence I am unable to say that the Court of Queen's Bench[1] is wrong in the view taken by it of the facts and the resulting conclusion.

Those facts are extremely simple. The automobile—a taxi—was proceeding southerly on St. Philippe, a one way street in Montreal of a width ordinarily accommodating three lanes of traffic. It had passed approximately 20 feet beyond Tourville and was within 50 feet of St. Philomène, both cross streets ending at St. Philippe, when the young child aged 5 years suddenly ran out into its path. A small low panel delivery truck facing southerly was parked along the curb of the right hand or westerly sidewalk and the child had run into the street about 2 or 3 feet in front or southerly of the truck in an angular direction toward the northeast. This is evident from the following evidence given by an independent witness who saw the accident from across the street:

D.—Après l'accident, comment se trouvait le camion par rapport au taxi, comment se trouvaient-ils placés, l'un à côté de l'autre ou en avant ou en arrière?

R.—Non, il y avait une petite distance entre le camion et le taxi et, maintenant, le taxi était à peu près à la fin du camion.

D.—Il était au sud?

R.—Oui, le taxi était au nord avant d'arriver au camion, parce que l'enfant est arrivé, il a couru juste sur le taxi, l'enfant traversait en biais.

D.—Il n'a pas traversé en ligne droite?

R.—Non, il n'a pas traversé en ligne droite, c'est pour cela que le taxi se trouvait un petit peu en arrière du camion.

That evidence is not seriously challenged and from it the direction of the child is seen to have been toward the oncoming taxi. The speed of the latter was not greater than 12 miles an hour; the horn had been sounded for Tourville street; it was moving along the centre of St. Philippe and 3 to 4 feet to the left of the truck. It was brought to a stop within 3 or 4 feet after the application of the brakes and its front was then at least no farther south than on a line with the front of the truck: Gauthier says, "Ma voiture par rapport au devant du camion était pratiquement en ligne droite avec le camion". A school stands on the south-east corner of Tourville and St. Philippe

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and the accident happened between 4.15 and 4.30 in the afternoon near the time when the students are let out. The young child was not at school but was playing with one or two other children behind the side of the truck on the westerly sidewalk 100 feet or more northerly from his home on the same side of St. Philippe.

The taxi-driver was well acquainted with the special circumstances of the place and quite evidently was driving with a full appreciation of them. He admitted frankly that he had not looked for children on the westerly sidewalk who might be playing there but in the place where the child was playing, it cannot be said that if he had looked he could have seen him. The two cross streets are only from 75 to 100 feet apart and he had passed the immediate school area, from which it does not appear that any children were then coming or had come out, although before the child had been taken off to the hospital some had gathered around the scene.

That the taxi had stopped within 4 to 6 feet after the sudden appearance of the child; that the latter was picked up 2 or 3 feet from and to the left of the front end of the car; that the car had reached to only the front or even less than that of the truck; and considering that the child was running at an angle towards the taxi; on these facts, so far from being satisfied that the Court of Queen's Bench was wrong, I am disposed to agree with its finding.

If those circumstances are not sufficient to meet the statutory onus by affirmatively showing reasonable care on the part of the driver it would be difficult to say how liability for that class of accident can be avoided. The law cannot be stretched so as to create a virtual insurance against injuries to children. It is, no doubt, a hard case that a young child should have, as here, the hearing in one ear seriously and probably permanently impaired. But so long as children are allowed to play on busy streets, that risk is inherent in that part of their upbringing. The existing law does not put the burden of an absolute avoidance of them on automobile drivers; and while one's natural sympathies are with the child and altogether too many irresponsible drivers are tolerated on the streets,

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in this case, which alone we must consider, and as the evidence compels me to accept, there was nothing of misconduct.

The appeal must, then, be dismissed with costs.

Appeal allowed with costs, RAND J. *dissenting.*

Attorneys for the plaintiffs, appellants: Desjarlais & Ouellette, Montreal.

Attorneys for the defendant, respondent: Brais, Campbell, Mercier & Leduc, Montreal.

FREDERIC CHARTRAND (*Defendant*) ..APPELLANT;

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Dec. 19

AND

DAME ANGELINA TREMBLAY (*Plaintiff*) ..... RESPONDENT.

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

Accounts—Alternative conclusion to pay sum of money—Wrong practice—Code of Civil Procedure, arts. 566 et seq.

When the defendant in an action for an accounting refuses to account, alleging that he owes nothing or has a release, it is not possible to condemn him to pay a sum of money in default of an accounting until a judgment has established the liability to account, the computation of the receipts and expenditures, and the balance, if there is any. In such an action, a condemnation to pay a sum of money can only be made when the action has been transformed into a contestation of accounts. *Cousineau et al. v. Cousineau et al.,* [1949] S.C.R. 694; *Racine v. Barry,* [1957] S.C.R. 92, referred to.

Husband and wife—Separate as to property—Wife's property administered by husband—Liability to account—Nullity of discharge given by wife—Civil Code, arts. 1265, 1425, 1918.

The plaintiff, a married woman separate as to property, whose husband had undertaken, in the marriage contract, to provide alone for the family expenses, asked her husband, through her attorney, for an accounting of his administration, as curator and mandatary, of assets, including immoveables, which had been donated to them as joint property after their marriage. Following this demand, the parties signed two documents. By the first one, the husband undertook to pay his wife $150 as a monthly alimentary pension. By the second, made the following day, the wife acknowledged receipt of a sum of money in settlement

*PRESENT: Kerwin C.J. and Taschereau, Cartwright, Fauteux and Abbott JJ.

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of all claims which she might have under her marriage contract and by reason of his administration of her assets and gave him a final release and discharge of any claims she might have against him; she further agreed that certain immoveables, still jointly owned by the parties, should be administered by the husband and the net revenue divided equally every six months.

An action, based on the first document, was instituted by the wife to recover arrears on the monthly allowance. The action was dismissed by the trial judge on the ground, *inter alia,* that the document, having had the effect of altering the marriage covenants of the parties, was a violation of art. 1265 C.C., and, therefore, null. There was no appeal from that judgment.

Subsequently, the wife instituted the present action for an accounting in which she asked that the second document be set aside and that her husband be ordered to account, and in default to pay the sum of $25,000. The action was dismissed by the trial judge but maintained by the Court of Appeal.

Held: The appeal should be allowed in part; the husband should render an account within 90 days, and in default the wife might proceed to have one made up, but the alternative condemnation should be struck out.

Both documents being part of the same *transaction,* the annulment of the first had the effect of annulling the second. Consequently, the husband must render an account since he had the administration, as curator and mandatary, of assets of his wife.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing the judgment of Montpetit J. Appeal allowed in part.

C. A. Geoffrion, for the defendant, appellant.

John Ahern, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—La demanderesse-intimée allègue dans sa déclaration, telle qu'amendée, qu'elle a épousé le défendeur le 26 octobre 1910, sous le régime de la séparation de biens, et qu'en vertu du contrat de mariage intervenu, le défendeur s'obligeait seul aux frais de ménage, d'entretien et de pension de la future épouse, ainsi que de tous les enfants à naître de ce mariage. A ce contrat de mariage sont intervenus Joseph Brisebois et Dame Philomène Latour, qui ont fait donation à leur fille adoptive, ainsi qu'au défendeur-appelant, de certains biens ainsi décrits:

(a) un lot de terre situé en la cité de Montréal ayant front sur la rue St-Laurent, connu et désigné comme étant la moitié du lot 1138 de la subdivision officielle du lot primitif 11 aux plan et livre de renvois officiels du village incorporé de la Côte St-Louis;

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(b) deux lots de terre situés à Cartierville, étant les subdivisions 49 et 50 du lot 86 aux plan et livre de renvois officiels de la paroisse de St-Laurent;

(c) un lot de terre situé à Cartierville, connu et désigné comme étant la partie nord de la subdivision numéro 48 du lot primitif numéro 86 aux plan et livre de renvois officiels de ladite paroisse de St-Laurent;

(d) un lot situé sur la rue St-Denis à Montréal, connu et désigné comme partie sud du lot 394 de la subdivision officielle du lot primitif numéro 8 aux plan et livre de renvois officiels du village incorporé de la Côte St-Louis;

Ces propriétés avaient une valeur globale de $11,300.

Quelques années après, soit en avril 1913, par acte passé devant Me J. B. Latour, notaire, ces propriétés ont été rétrocédées par les époux Chartrand auxdits Joseph Brisebois et Dame Philomène Latour, et le même jour, devant le même notaire, par acte de donation entre vifs, lesdits Joseph Brisebois et Dame Philomène Latour ont fait de nouveau donation à la demanderesse et au défendeur chacun pour une moitié des biens mentionnés aux paragraphes (a), (b), (c) et (d) (sauf un lot situé sur la rue St-Denis), ainsi que d'un piano se trouvant dans le domicile des donataires, et d'une somme de $200 en argent. Comme l'intimée était mineure, le défendeur agissait comme son curateur.

Il est allégué que le défendeur-appelant a toujours administré seul la part des biens de la demanderesse, les a vendus, échangés et a investi le produit de ces transactions dans d'autres propriétés, dans des commerces, a transporté certaines de ces propriétés au nom de certains enfants des deux parties, et a fait enregistrer au nom de l'intimée la propriété portant le numéro 6728 rue St-Denis à Montreal.

En octobre 1946, l'intimée, par l'entremise de Me Meunier, avocat, a demandé à l'appelant un compte de l'administration des biens qu'il avait gérés pour elle, et en réponse à cette demande, le demandeur suggéra que dans le but de mettre la famille d'accord et d'éviter des frais considérables, il vendrait une propriété située sur la rue St-Laurent et une autre située sur la rue Clarke, et diviserait le produit net de ces ventes avec l'intimée sur remise réciproque d'une quittance finale.

La demanderesse-intimée, sans s'engager à donner une quittance, approuva la suggestion de la vente des deux propriétés ci-dessus mentionnées, et la propriété de la rue

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St-Laurent fut en conséquence vendue au cours du mois d'avril 1947, mais il est allégué que la part revenant à l'intimée comme produit de cette vente, qui était de $5,494.58, ne lui fut pas remise à la date où l'appelant l'a reçue, et qu'il garda cette somme jusqu'au 3 septembre 1947.

Entre la date de ladite vente, soit depuis le mois d'avril 1947 jusqu'au 3 septembre de la même année, la demanderesse-intimée prétend que l'appelant tenta d'obtenir une quittance de la demanderesse, sans lui rendre aucun compte de son administration, disant qu'il ne remettrait pas la somme de $5,494.58 à moins d'obtenir une quitttance, et sans avoir l'obligation de fournir une reddition de comptes.

En plus, comme partie du règlement proposé, il offrit de payer à l'intimée une somme de $150 par mois comme pension alimentaire pour elle et ses enfants, et aussi comme règlement de toute solde qui pourrait être due à l'intimée, comme conséquence de l'administration des biens par l'appelant. L'intimée aurait enfin consenti à transiger avec l'appelant de la façon suivante, afin d'en arriver à un règlement final.

Les parties devaient se donner une quittance mutuelle; la propriété de la rue St-Denis et les meubles qui la garnissaient, enregistrée au nom de la demanderesse, devaient lui rester; la moitié du produit de la vente de la propriété de la rue St-Laurent, soit la somme de $5,494.58, devait être payée à l'intimée; les revenus de la propriété portant les numéros civiques 6481 à 6485 de la rue Clarke et 20 à 28 rue Beaubien est, devaient être partagés en parts égales à tous les six mois; et enfin, l'appelant devait signer un engagement par lequel il s'obligeait de payer à la demanderesse la somme de $150 par mois.

La demanderesse-intimée allègue que cet arrangement fut exécuté en partie par le défendeur-appelant, mais qu'il a fait défaut de verser la somme de $150 par mois au mois de mars 1948, et qu'il ne remit pas, depuis le 3 septembre 1947, à la demanderesse sa part complète dans les revenus nets de la propriété située sur la rue Clarke, coin de la rue Beaubien.

La demanderesse-intimée dut alors se pourvoir en justice pour faire condamner son mari à lui payer la somme de $150 par mois qu'il s'était engagé à payer, mais cette action

fut rejetée le 29 mars 1949 avec dépens, parce que la Cour a déclaré l'engagement du défendeur, en date du 3 septembre 1947, de payer ainsi la somme de $150 par mois comme nul, en violation de l'art. 1265 C.C., comme constituant un changement aux relations matrimoniales des parties.

L'intimée soutient que sans cet engagement du 3 septembre 1947, elle n'aurait jamais signé la quittance en faveur de l'appelant, que d'ailleurs elle ne l'a signée que par esprit de sacrifice, dans le but d'établir la paix dans la famille pour le bénéfice des parties et de leurs enfants. Il est allégué en outre que l'appelant a fait défaut de s'en tenir aux engagements qu'il avait pris le 3 septembre 1947, qu'il a abandonné l'intimée, et ne lui a pas fourni un seul sou depuis le mois de février 1948.

Durant treize ans, le défendeur aurait fait commerce et y aurait tenu un restaurant pendant deux ans où l'intimée a travaillé, et il ne lui a rien payé comme salaire ou part de profits, et c'est la prétention de l'intimée que la quittance du 4 septembre 1947, est nulle comme constituant un changement aux conditions matrimoniales des parties.

L'appelant serait aujourd'hui propriétaire d'immeubles d'une valeur excédant $50,000. Il admet que la demanderesse est propriétaire de la moitié de la valeur de la propriété située au coin des rues Clarke et Beaubien. Il lui a payé la moitié de la propriété située sur la rue St-Laurent, soit $5,494.58, et il a fait enregistrer au nom de la demanderesse-intimée la propriété de la rue St-Denis qui vaut au plus $15,000.

L'intimée allègue qu'elle n'a pas reçu sa part du capital et des revenus administrés par l'appelant, qu'elle n'a jamais reçu de compte de cette administration, et elle demande l'annulation de la quittance donnée par elle le 4 septembre 1947, une reddition de comptes détaillée et affirmée sous serment de la gestion de l'appelant comme curateur et subséquemment comme mandataire depuis sa majorité, et à défaut de se conformer dans le délai voulu, elle demande une condamnation personnelle contre l'appelant d'une somme de $25,000, pour tenir lieu de reliquat en outre des intérêts, et sans préjudice à ses droits de réclamer les objets qui peuvent lui appartenir.

L'honorable Juge Montpetit siégeant à la Cour Supérieure à Montréal, a rejeté cette action en reddition de comptes le 20 avril 1953, chaque partie payant ses frais, mais la

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Taschereau J.

Cour du Banc de la Reine[1], le 10 juillet 1956, a unanimement cassé ce jugement; a déclaré nulle la quittance signée par l'intimée en faveur de l'appelant le 4 septembre 1947; a ordonné à l'appelant de rendre à l'intimée un compte détaillé et affirmé sous serment de sa gestion comme curateur, et subséquemment comme mandataire, et au cas de défaut par l'appelant de se conformer à cette ordonnance, tel que prescrit, soit dans les 90 jours, de payer à l'intimée la somme de $19,305.42 pour tenir lieu du reliquat de compte, avec intérêts de la mise en demeure, soit du 17 octobre 1946, avec les dépens.

Il ne fait aucun doute que l'appelant Chartrand a administré les biens de son épouse intimée, d'abord comme curateur jusqu'à la fin de l'émancipation, et après la majorité en sa qualité de mandataire. Il a eu en mains des biens substantiels, et en vertu de la loi, qu'il s'agisse de sa qualité de curateur ou de sa qualité de mandataire, il doit rendre compte. Mais il refuse, et oppose à la demande, la quittance du 4 septembre 1947, qui se lit ainsi:

PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL — COUR SUPÉRIEURE
No. 248641

DAME ANGELINA TREMBLAY-CHARTRAND
REQUÉRANTE

—vs—

FREDERIC CHARTRAND
INTIMÉ

La requérante reconnaît par les présentes avoir reçu ce jour, de l'intimé, par chèque de ses procureurs, la somme de cinq mille quatre cent quatre-vingt-quatorze dollars et cinquante-huit sous ($5,494.58), en règlement complet et final de toute réclamation qui pourrait lui résulter en vertu de son contrat de mariage, ainsi que de tout reliquat de compte qui pourrait lui être dû par ledit intimé, par suite de l'administration et de la gestion des biens de la requérante.

La requérante reconnaît avoir reçu une reddition de comptes verbale de son mari et lui donne par les présentes quittance complète, générale et finale de toute réclamation qu'elle pourrait avoir contre lui, en raison de son administration et de sa gestion d'affaires.

Il est convenu qu'à compter du premier mai mil neuf cent quarante-sept (1er mai 1947), les revenus de la propriété portant les numéros civiques 6481-6485 Clarke et 20-28 Beaubien est, seront partagés en parts

[1] [1957] Que. Q.B. 456.

égales, à tous les six mois, à compter du premier novembre prochain, déduction faite des dépenses qui auront été payées durant les six mois, l'intimé devant s'occuper de l'administration de ladite propriété.

Signé à Montréal, ce 4 septembre 1947
(Signé) ANGELINA TREMBLAY CHARTRAND

Témoin:
(Signé) J. A. MEUNIER

RENÉ DURANLEAU

Cette quittance faisait suite à un engagement signé par l'appelant le 3 septembre de la même année, par lequel l'appelant s'engageait à payer $150 mensuellement à son épouse afin, dit-il, de ramener la paix dans son foyer, et l'une des conditions était que l'intimée devait avoir à sa charge tous les comptes de la maison, et en un mot s'occuper du budget familial.

Comme l'ont dit le juge de première instance et M. le Juge Bissonnette, écrivant le jugement de la Cour du Banc de la Reine[1], ces deux documents ne font qu'un seul et même contrat. Il s'agit d'une transaction en vertu de laquelle les parties ont voulu prévenir une contestation à naître, au moyen de concessions et de réserves faites par les deux parties (1918 C.C.).

Dans son action, l'intimée invoque la nullité de la quittance et allègue que son mari, comme conséquence de menaces, lui a extorqué sa signature, et qu'il discontinua au bout de quelques mois, soit en mars 1948, de payer la somme mensuelle de $150. L'intimée institua donc des procédures judiciaires pour faire condamner l'appelant actuel à lui payer la somme de $150 par mois qu'il s'était engagé à payer, mais cette action fut rejetée avec dépens, et il fut déclaré par la Cour que l'engagement de l'appelant en date du 3 septembre 1947 de payer à l'intimée cette somme de $150 mensuellement était nul en violation de l'art. 1265 C.C. En vertu de cet article, en effet, il ne peut être fait aux conventions matrimoniales contenues au contrat aucun changement pas même par don mutuel d'usufruit, lequel est aboli.

M. le Juge Caron, qui a rendu jugement dans cette cause, en est venu à la conclusion que cet écrit du 3 septembre était nul, comme contraire à l'art. 1265 C.C., qu'il ne peut affecter en rien les obligations du mari envers sa femme,

[1] [1957] Que. Q.B. 456.

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vu que tous deux restent toujours soumis à l'obligation de nourrir, d'entretenir et d'élever leurs enfants, ainsi qu'à celle de se donner mutuellement secours et assistance, d'après les arts. 165 et 173 C.C., et qu'une semblable action ne peut être instituée lorsque les époux font vie commune. Sans me prononcer sur la valeur juridique de ce jugement, il n'a pas été porté en appel, et il constitue chose jugée. Il s'ensuit logiquement que si cet écrit du 3 septembre 1947, en vertu duquel le mari s'est engagé à payer à son épouse la somme de $150 par mois, est nul, et comme il ne constitue qu'un seul et même contrat avec la quittance du 4 septembre, cette dernière se trouve également inexistante, et l'appelant doit rendre compte de son administration. Il est élémentaire, en effet, que la reddition de comptes est due par ceux qui administrent les biens d'autrui à quelque titre que ce soit. Ainsi doivent des comptes, tout *mandataire* ou gérant, tuteur, héritier bénéficiaire, *curateur,* exécuteur testamentaire, séquestre, associé, fiduciaire, etc. etc., et l'une des conditions essentielles pour qu'une telle personne soit comptable, *est qu'elle ait eu l'administration des biens de l'oyant-compte.*

Je voudrais cependant signaler que je ne comprends pas cette pratique dans une action en reddition de comptes, de demander que le défendeur qui a administré les biens soit, à défaut de rendre compte, obligé de payer un reliquat. Je sais que cela peut arriver, à cause d'une jurisprudence constante à cet effet, lorsque les parties ont transformé l'action en reddition de comptes, en un véritable débat de comptes. Mais lorsque le défendeur refuse de rendre compte, pour le motif qu'en droit il n'en doit pas, ou qu'il a déjà obtenu une quittance, comme dans le cas actuel, il me semble impossible de condamner ce défendeur au paiement d'un reliquat à défaut de reddition, avant qu'il ne soit prononcé sur le droit à la reddition, que les comptes aient été établis, et qu'un reliquat soit dû par le rendant-compte. L'action, dans le cas qui nous occupe, n'a pas été transformée en débat de comptes, et je crois, en conséquence, que l'appelant ne peut pas être condamné au reliquat de $19,305.42. *Cousineau et al. v. Cousineau et al.*[1]; *Racine v. Barry*[2].

[1] [1949] S.C.R. 694.

[2] [1957] S.C.R. 92.

Le Code de procédure est bien précis à ce sujet, et l'art. 566 C.P. nous dit que tout jugement qui ordonne une reddition de comptes doit porter un délai pour ce faire, et c'est dans ce délai que le rendant compte doit le rendre nominativement à la personne qui y a droit; il doit le produire au greffe dans le temps fixé, avec les pièces justificatives. L'oyant-compte doit en prendre connaissance et produire ses débats de comptes, et si le défendeur néglige de rendre compte, le demandeur lui-même peut procéder à l'établir à la manière apportée aux arts. 568 et 578, et c'est alors que l'on peut voir s'il existe ou non un reliquat.

Je comprends difficilement l'argument que sur une action en reddition de comptes, il faut condamner le défendeur à un reliquat, parce qu'autrement, le jugement ordonnant cette reddition serait inefficace, n'étant pas susceptible d'exécution. Si, à l'expiration du délai imparti, le compte n'est pas rendu, c'est précisément l'art. 578 C.P. qui règle le cas, et qui permet au demandeur de procéder à établir les comptes, et à faire déclarer que le reliquat existe.

De plus, il est plus que probable que le montant du reliquat établi par la Cour d'Appel[1] est inexact, car on ne semble pas avoir tenu compte de l'art. 1425 du *Code Civil* qui se lit ainsi:

> Lorsque la femme séparée a laissé la jouissance de ses biens à son mari, celui-ci n'est tenu, soit sur la demande que sa femme peut lui faire, soit à la dissolution du mariage, *qu'à la représentation des fruits existants,* et il n'est point comptable de ceux qui ont été consommés jusqu'alors.

Dans le présent cas, il s'agit évidemment d'un mandat tacite, et, comme le dit Mignault, vol. 6, p. 402, cette disposition se justifie par les relations intimes qui existent entre les parties, et par le fait que la femme, laissant à son mari une administration qu'elle pourrait lui enlever, indique qu'elle approuve l'usage que le mari fait des revenus qu'il perçoit. En effet, la femme peut toujours reprendre, quand elle le désire, l'administration de ses biens. Si elle laisse administrer le mari, il est juste que celui-ci, à la dissolution du mariage, ou plus tôt sur la révocation de ce mandat tacite, ne doive rendre à sa femme que les fruits existants. La loi suppose avec raison que s'il existe des fruits, le mari doit en rendre compte, mais au contraire,

[1] [1957] Que. Q.B. 456.

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s'ils ont été consommés, il y a présomption qu'ils ont été employés dans l'intérêt du ménage, et le mari n'en est pas comptable.

Taschereau J.

Je suis donc d'opinion que le présent appel doit être maintenu en partie avec la modification ci-dessus. L'appelant devra donc rendre compte à l'intimée de sa gestion comme curateur et subséquemment comme mandataire de l'intimée, dans les 90 jours du jugement à intervenir, mais sans être tenu au paiement de la somme de $19,305.42 à défaut de rendre ce compte. Dans ce cas, il appartiendra à l'intimée, suivant les dispositions de l'art. 578 du *Code de procédure civile*, de procéder à l'établissement des comptes, tel que prévu aux arts. 568 et suivants.

L'intimée aura droit à ses frais en Cour Supérieure et en Cour du Banc de la Reine, mais il n'y aura pas d'ordonnance quant aux frais devant cette Cour.

Appeal allowed in part without costs.

Attorney for the defendant, appellant: P. Duranleau, Montreal.

Attorneys for the plaintiff, respondent: Hyde & Ahern, Montreal.

1957

*May 13, 14
Dec. 19

LA VILLE DE JACQUES-CARTIER (*Plaintiff*) ..... APPELLANT;

AND

JOSEPH NAPOLEON B. LAMARRE (*Defendant*) ..... RESPONDENT.

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

Statutes—Operation—Effect of legislation limiting right of appeal—Jurisdiction of Court of Appeal of Quebec—Expropriation—Code of Civil Procedure, art. 1066k.

The right of appeal is a substantive right and not merely a matter of procedure, and a statute limiting an existing right of appeal has no application in an action instituted before its enactment, unless a contrary intention is expressly stated or necessarily implied. *Williams et al. v. Irvine* (1893), 22 S.C.R. 108; *Hyde v. Lindsay* (1898), 29 S.C.R. 99, applied.

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*PRESENT: Taschereau, Rand, Locke, Fauteux and Abbott JJ.

Since, in enacting art. 1066*k* of the *Code of Civil Procedure*, in 1952, the Legislature did not manifest any intention to make it retroactive, the right of appeal in an expropriation case started in 1950 must be based on art. 1066*k* as it was enacted in 1940 by 4 Geo. VI, c. 71, s. 1.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], dismissing, for lack of jurisdiction, an appeal from a judgment homologating a decision of the Public Service Board in an expropriation matter. Appeal allowed.

E. Brais, Q.C., for the plaintiff, appellant.

F. Chaussé, for the defendant, respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—Les faits et procédures conduisant à cet appel peuvent se résumer comme suit:

En juin 1950, l'appelante, ci-après également appelée la Cité, adoptait un règlement autorisant son conseil à acquérir, de gré à gré ou par voie d'expropriation si nécessaire, le terrain de diverses rues projetées ou rues déjà ouvertes à la circulation par les propriétaires de certaines terres subdivisées par eux pour fins de lotissement. Suivant la loi qui la régit, soit l'art. 608 *a* de la *Loi des Cités et Villes* adopté en 1948 par la Loi 12 Geo. VI, c. 74, art. 6, aucune indemnité n'est payable par la Cité pour l'acquisition d'un terrain que le propriétaire d'une subdivision a, suivant les plan et livre de renvoi déposés au bureau d'enregistrement, destiné à l'établissement ou l'élargissement d'une rue ou ruelle. De ce chef, la Cité considéra qu'elle ne devait rien payer pour le terrain lui-même. Quant aux améliorations faites sur icelui, soit travaux de voirie, d'égouttement ou autres, le conseil, ainsi qu'il appert au règlement, fut d'avis qu'elles n'avaient aucune valeur commerciale, que le coût en était inclus dans le prix des lots desservis ou chargés à leurs nouveaux propriétaires et que ne pouvant ni physiquement ni légalement être séparées du terrain, elles étaient, comme le terrain lui-même, couvertes par la disposition précitée. Aussi bien et à l'égard de ces améliorations spécifia-t-on au règlement qu'aucune indemnité ne serait payée dans le cas d'une acquisition faite de gré à gré, mais que, dans ceux où il serait nécessaire de procéder par voie

[1] [1956] Que. Q.B. 204.

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Fauteux J.

d'expropriation, le conseil, sans préjudice au droit de faire valoir ses prétentions, offrirait le montant déterminé par son expert et paierait l'indemnité *fixée par l'autorité judiciaire.*

A la suite de ce règlement, soit le 17 août 1950, la Cité fit signifier à l'intimé, l'un des propriétaires concernés, un avis d'expropriation l'informant qu'il n'avait droit à aucune indemnité pour le terrain et offrant, sans préjudice au droit de faire valoir en justice ses prétentions *"et conditionnellement pour le cas seulement où le juge, le tribunal ou la Régie des services publics, selon le cas, en viendrait à la conclusion qu'il y a lieu de payer une indemnité"*, de lui payer pour ces améliorations les indemnités déterminées quant à chaque rue par l'évaluateur de la Cité et dont la somme s'établissait à $3,579.50. Par lettre en date du 28 août 1950, les procureurs de l'intimé informèrent celui de la Cité qu'ils avaient le même jour comparu pour l'intimé et que ce dernier, pour éviter une contestation, était disposé à recevoir le montant indiqué dans l'avis d'expropriation. Défaut de contester fut enregistré et, sur motion de l'appelante, l'affaire fut référée à la Régie par jugement de la Cour Supérieure. Après enquête, audition et prise en délibéré, le 12 mars 1952, la Régie rendit, le 4 février 1953, une ordonnance affirmant le droit de l'intimé à une indemnité pour ses améliorations et fixant le montant de cette indemnité à celui offert par l'appelante et accepté par l'intimé. Le 2 mars 1953, la Cour Supérieure, sur motion de l'intimé, homologuait la sentence de la Régie et condamnait l'appelante à payer $3,579.50 à titre d'indemnité pour les améliorations, avec, en plus, les frais d'une action de cette somme en Cour Supérieure.

Le 16 mars 1953, la Cité appela de ce jugement. La Cour d'Appel[1], considérant qu'en droit les dispositions de l'art. 1066*k* du *Code de procédure civile* limitent le droit d'appel d'un expropriant au seul cas où l'indemnité accordée est d'au moins $1,000 supérieure à son offre et qu'en fait l'indemnité accordée en l'espèce correspondait exactement au montant de l'offre faite par la Cité, conclut qu'elle n'avait pas juridiction et rejeta l'appel. D'où le pourvoi devant cette Cour.

[1] [1956] Que. Q.B. 204.

La disposition sur laquelle s'est appuyée la Cour d'Appel pour conclure à une absence de juridiction se lit comme suit:

1066*k*. Le jugement homologuant la sentence est un jugement final de la Cour Supérieure. Il est susceptible d'appel à la Cour du Banc de la Reine, quant à l'exproprié, si l'indemnité accordée est inférieure d'au moins mille dollars au montant par lui réclamé, et, quant à l'expropriant, si l'indemnité accordée est d'au moins mille dollars supérieure à son offre.

Ce texte fut adopté par l'art. 6 de la Loi 1-2 Eliz. II, c. 20, sanctionnée le 10 décembre 1952, pour remplacer celui édicté par l'art. 1 de la Loi 4 Geo. VI, c. 71, santionnée le 30 mai 1940, et statuant que:

1066*k*. Le jugement homologuant la sentence est un jugement final de la Cour Supérieure. Il est susceptible d'appel à la Cour du Banc du Roi si le montant en litige est d'au moins cinq cents dollars.

Ainsi appert-il que le droit d'appel en matière d'expropriation tel qu'il existait au moment de l'introduction de la présente instance, soit en août 1950, fut modifié et restreint alors que la cause était en délibéré devant la Régie. Et dès lors se présente la question de savoir si la Cour d'Appel devait appliquer la disposition nouvelle restreignant le droit d'appel édicté par la disposition ancienne, ou cette dernière. La jurisprudence sur le point précise que le droit d'appel est un droit substantif et non une simple matière de procédure et qu'une loi restreignant un droit d'appel préexistant est, à moins qu'une intention au contraire n'y soit manifestée de façon explicite ou nécessairement implicite, sans application à un jugement rendu dans une instance déjà introduite devant le tribunal inférieur lors de son adoption. Cette Cour en a ainsi décidé dans *Williams et al. v. Irvine*[1]; *Hyde v. Lindsay*[2]. Et s'appuyant, entre autres, sur ces deux décisions, la Cour du Banc du Roi exprima sur le point des vues identiques dans *La Cie de chemin de fer Québec et Lac Saint-Jean v. Vallières*[3]. La Législature n'ayant, dans le cas qui nous occupe, manifesté dans la loi nouvelle aucune intention d'y donner un effet rétroactif et l'introduction de l'instance, constituée d'après l'art. 1066*d* par la production de l'avis d'expropriation, ayant eu lieu en août 1950, il en résulte que c'est la loi d'alors, c'est-à-dire la loi ancienne, qui devait être appliquée. Dans cette situation, la Cour d'Appel avait donc juridiction

[1] (1893), 22 S.C.R. 108. [2] (1898), 29 S.C.R. 99.
[3] (1913), 23 Que. K.B. 171.

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Fauteux J.

puisque ce qui était en litige était le droit à une indemnité dont la mesure, déterminée par la Cité et acceptée par l'intimé, était de $3,579.50.

Ce motif du jugement *a quo* doit donc être écarté.

En plus de la question de juridiction, MM. les Juges McDougall et Hyde paraissent avoir considéré qu'en raison des termes de l'offre faite dans son avis d'expropriation, la Cité s'est liée à accepter comme finale la décision de première instance sur le point de droit donnant lieu au litige et qu'en conséquence, il ne lui était pas loisible de soumettre ce point à la considération de la Cour d'Appel. Étant d'avis qu'il convient de retourner le dossier à la Cour d'Appel, rien n'est dit sur ce point aussi bien que sur le pouvoir de la Cité ou l'autorité de son procureur de prendre une telle position dans l'avis d'expropriation. Ces questions, comme toutes autres pertinentes à la considération de l'appel, restent ouvertes.

Je maintiendrais l'appel et retournerais le dossier à la Cour d'Appel pour audition et adjudication en l'affaire; il n'y aura pas de frais devant cette Cour et la question des frais sur le premier appel à la Cour du Banc de la Reine sera déterminée par cette dernière Cour lors du jugement à être rendu par elle sur la présente référence.

Appeal allowed without costs.

Attorney for the plaintiff, appellant: E. Brais, Montreal.

Attorney for the defendant, respondent: F. Chaussé, Montreal.

HEVESY CORPORATION (*Plaintiff*) ....APPELLANT;

AND

J. H. SAUVE (*Defendant*) .....RESPONDENT.

1957
*Nov. 8
1958
Jan. 28

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

Contract—Interpretation—Contract of employment—Cancellation—Pleadings—Whether sufficient—Code of Civil Procedure, arts. 105, 110.

By a contract made in January 1952, the plaintiff agreed to employ the defendant as salesman on a commission basis for a period of one year, with a weekly drawing account of $75 plus travelling expenses which, it was stipulated, "are only advances and are repayable from commissions". A loan of $1,500 was made by the plaintiff to complete payment on the defendant's automobile, and was also to be repaid by deductions from the commissions, and not later than January 15, 1953. The plaintiff had the right to terminate the agreement in case of "proven incompetency" or "well known misconduct" on the part of the defendant. In that event, if the defendant was unable to repay any amounts owing, the car was to be turned over to the plaintiff and a bank draft, payable in 30 days, was to be issued for the balance.

In July 1952 the plaintiff gave 30 days' notice of the termination of the contract, and in September it instituted the present action, claiming a balance in its favour between the advances made and the commissions earned. Proceeding by way of conservatory attachment, the plaintiff alleged that the defendant had not devoted all his skill and energies to his work and was incapable of earning commissions equal to the advances made. It was also alleged that the automobile advance had not been repaid and that the car was now the plaintiff's property. The defendant made a cross-demand, alleging that he had lost commissions because of the plaintiff's inability to make deliveries to purchasers. The trial judge maintained the main action and dismissed the cross-demand, but a majority in the Court of Appeal dismissed both the main action and the cross-demand. The plaintiff appealed to the Supreme Court; the defendant did not appeal.

Held (Locke J. dissenting): The judgment of the trial judge should be restored. The plaintiff was justified in terminating the contract and entitled to recover the amounts owed by the defendant; and the action was not premature.

The pleadings were sufficient to entitle the Court to hold, if the allegations were proved, that the defendant had been guilty of "proven incompetency" if not of "well known misconduct", and left the defendant in no doubt as to the issue which he had to meet. The evidence justified the cancellation of the contract. The amounts advanced as drawing account and travelling expenses were not repayable only out of commissions. The adverb "only" in the contract qualified the word "advances" and not the word "repayable".

*PRESENT: Taschereau, Rand, Locke, Fauteux and Abbott JJ.

1958

HEVESY CORPN. v. SAUVE

Abbott J.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing, Taschereau J. dissenting, the judgment of Montpetit J. Appeal allowed, Locke J. dissenting.

P. Massé, Q.C., for the plaintiff, appellant.

C. A. Geoffrion, for the defendant, respondent.

The judgment of Taschereau, Rand, Fauteux and Abbott JJ. was delivered by

ABBOTT J.:—This appeal is from a judgment of the Court of Queen's Bench[1] allowing, Taschereau J. dissenting, an appeal by respondent from a judgment of the Superior Court which had maintained the action taken by appellant and dismissed the respondent's cross-demand.

The facts which are fully set forth in the judgments below are briefly as follows: On January 9, 1952, by a contract in writing the appellant, a dealer in hospital, surgical and dental supplies, employed respondent as salesman on a commission basis for a period of one year with a weekly drawing account of $75 plus travelling expenses, the relevant clauses of the contract in this respect reading as follows:

4. The party of the first part will pay in advance a weekly drawing account of $75.

5. The party of the first part will advance the money for all expenses encountered during sales trips.

Items 4 and 5 are only advances and are repayable to party of the first part from commissions.

Appellant also advanced to respondent the sum of $1,500, being the balance due on a car owned by him, this amount to "be deducted from the commission accumulated after July 1, 1952, and January 1, 1953", and respondent undertook that the said amount of $1,500 would be reimbursed not later than January 15, 1953. In the light of these arrangements it is a reasonable inference that it was anticipated by the parties—or by the appellant at any rate—that the sales made by respondent during the period January 1952 to January 1953, would entitle the latter to commissions of at least $5,400. So far as appellant was concerned this expectation was no doubt encouraged by a statement produced by respondent before the contract was signed showing sales purporting to have been made by him of some $30,267.50 during a three months' period from

[1] [1956] Que. Q.B. *437*.

September 24 to December 21, 1951, while he was employed as salesman for another concern dealing in hospital and surgical supplies.

In the result the sales made by respondent consistently fell far short of the volume expected and during the period from January 14 to June 30, 1952, respondent earned commissions of only $433.59, against which he had received advances of $1,595 plus the further sum of $1,500, balance due on his car.

The parties had provided for the dissolution of the contract in the event of certain contingencies, the clause relevant to this action reading as follows:

> (*b*) In case of proven incompetency or a well known misconduct on the part of J. H. Sauve. In this case the party of the first part will have to send a written notice to the address of the party of the second part advising him of his leave in thirty days. The party of the second part must then pay in cash any amounts owing the party of the first part. If unable he must turn over the car and issue a bank draft for the balance of the debt, payable in thirty days.

On July 23, 1952, by registered letter, appellant advised the respondent that his services would not be required after the expiry of thirty days, and on September 2, 1952, instituted the present action.

Proceeding by way of conservatory attachment, appellant alleged that respondent had not devoted all his skill and energies to the sale of its products; and that since he was incapable of earning commissions equal to the advances made it had terminated the contract of employment. These two allegations are contained in paras. 2 and 5 of the declaration which read as follows:

> 2. Bien que la compagnie demanderesse ait avancé au défendeur la somme de $1,595 pour lui permettre de travailler entre le 9 janvier 1952 et 30 juin dernier, ce dernier n'a réussi à gagner que $433.59 comme commission, et n'a pas déployé toute son habileté et toute son activité à vendre les produits de la compagnie demanderesse;
>
> * * *
>
> 5. Le 23 juillet 1952, voyant que le défendeur était incapable de gagner les avances qu'elle lui payait, la compagnie demanderesse a décidé de mettre fin à son engagement et lui a adressé l'avis prévu par le contrat tel qu'il appert à la copie dudit avis produit avec les présentes comme exhibit P-2, le défendeur étant requis de produire l'original s'il ne veut que preuve secondaire en soit faite;

The appellant claimed $1,161.41 being the difference between the advances made by it ($1,595) and commissions earned by respondent ($433.59). In addition appel-

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lant alleged the automobile advance of $1,500 and stated that since respondent has failed to repay this sum the automobile was now its property and in the conclusions of its action asked that the automobile be declared to be its property or, alternatively, that respondent be condemned to pay to it the sum of $1,500.

In defence respondent pleaded that he had devoted all his time to appellant's affairs; that if his sales were small it was due to appellant's inability to deliver; that the advances made to him had not exceeded $1,385; that the claim for the automobile advances was premature and that the purported dismissal was illegal.

Respondent also made a cross-demand alleging that because of appellant's inability to make deliveries to the purchasers found by him he had lost commissions amounting to $5,100. From this he deducted advances of $1,385 plus the automobile advance of $1,500, leaving a balance due him of $2,215.

In its plea to the cross-demand appellant denied its inability to make deliveries and in para. 9 made the following allegation:

> Si le défendeur n'a pas obtenu plus de commandes, c'est qu'il ne travaillait pas sérieusement ou n'avait pas la compétence nécessaire pour faire le travail qu'il s'était engagé à accomplir;

The action and cross-demand were joined for proof and hearing, and on June 7, 1954, a single judgment was rendered in which the main action was maintained for $2,661.41 and the cross-demand dismissed.

The Court of Queen's Bench[1], Taschereau J. dissenting, allowed the appeal as to the principal demand and dismissed appellant's action with costs but unanimously confirmed that part of the judgment dismissing respondent's cross-demand and there is no cross-appeal.

The judgment appealed from dismissed appellant's action for the following reasons: (1) that appellant had failed to establish the "proven incompetency" of respondent; (2) that the advances of $1,595 were repayable only out of commissions and could not be claimed otherwise; (3) that the claim for the automobile advance of $1,500 was pre-

[1] [1956] Que. Q.B. 437.

mature and (4) that there being no specific allegation of incompetency in the declaration, appellant was not entitled to submit evidence on the point.

So far as the adequacy of the pleadings is concerned, in any proceeding it is sufficient that the facts and conclusions be concisely, distinctly and fairly stated without entering into argument (C.C.P. 105) and any fact which if not alleged is of a nature to take the opposite party by surprise must be expressly pleaded (C.C.P. 110). The function of a Court is to achieve justice and the rules of pleading are intended to facilitate not to hinder that end. In the circumstances of this case the contract of employment could be validly terminated by appellant prior to January 15, 1953, only if respondent was guilty of either "proven incompetency" or "a well known misconduct", but I share the view of the learned trial judge that the facts alleged by plaintiff in its declaration, if proved, would entitle the Court to hold that the respondent had been guilty of "proven incompetency" if not of "well known misconduct". Moreover, it is clear from the pleadings, both in the principal action and on the cross-demand, that the respondent was in no doubt as to the issue which he had to meet.

On the merits I also share the view expressed by the learned trial judge that on the evidence appellant was justified on July 23, 1952, in invoking the clause in the agreement above referred to and terminating the respondent's contract of employment. It is true, as Taschereau J. has pointed out, that the volume of sales made by a salesman is not necessarily the test of his competence. In the present case, however, the volume of sales made by respondent in a large metropolitan area such as Montreal during a six months' period was consistently so far below the volume which, as I have said, appears to have been anticipated by the parties, as to create a strong presumption of incompetence which respondent completely failed to rebut. Moreover, this presumption was fortified by some evidence of sales made by other salesmen employed by appellant, during a comparable period, which exceeded those of respondent (although these salesmen worked only on a part time basis) as well as by evidence that respondent had failed to devote his whole time to appellant's business as he had contracted to do.

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With respect I am unable to share the view expressed by the majority in the Court below that the amounts advanced to respondent as drawing account and for travelling expenses were repayable only out of commissions earned and not otherwise. In my opinion the terms of the contract are clear: the respondent was engaged on a commission basis not on salary and commission and the clause above quoted referring to drawing account and travelling expenses states explicitly that these "are *only* advances and are repayable to the party of the first part from commissions". The adverb "only" qualifies the word "advances" not the word "repayable."

Since, as I have said, I am of the opinion that appellant was justified in terminating its contract with respondent in August 1952, it follows that it was entitled under the terms of the contract itself to recover the amounts owing to it by respondent and the action which it instituted on September 2, 1952, was not premature.

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

LOCKE J. (*dissenting*):—My consideration of the evidence and the proceedings in this matter leads me to the same conclusion as that reached by the majority of the Court of Appeal and, for the reasons given by Mr. Justice Casey, I would dismiss this appeal with costs.

Appeal allowed with costs, LOCKE J. *dissenting.*

Attorney for the plaintiff, appellant: P. Massé, Montreal.

Attorney for the defendant, respondent: J. Perrault, Montreal.

RONALD GORDON McINTOSH .....APPELLANT;

AND

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

1957
*Dec. 2
1958
Jan. 28

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Profit from real estate transaction—Isolated transaction—Whether capital gain or income—Intention—Income Tax Act, 1948, c. 52, ss. 3, 4, 127(1)(e) (R.S.C. 1952, c. 148, ss. 3, 4, 139(1)(e)).

The appellant sold his grocery and meat business in 1948 and associated himself with one L in the purchase of a parcel of land with the intention of dividing it into lots and building houses thereon. Because of differences with L, the appellant terminated the association and, in 1952, sold some of his vacant lots at a profit.

Held: The profit was taxable as income.

The arrangement between the two associates was an "adventure or concern in the nature of trade" within the meaning of the term "business" as defined in s. 127(1)(*e*) of the *Income Tax Act*, 1948. The subsequent sale of the lots by the appellant was not merely an endeavour to realize upon an investment; there never was an intention on his part to retain the lots as an investment, but rather to dispose of them, if and when suitable prices could be obtained.

An individual is in a different position from that of a company and may not be carrying on a business when he sells investments and buys others, but the profits from an isolated venture may be taxed as well in the case of an individual as in the case of a company. *Smith v. Anderson* (1880), 15 Ch. D. 247; *Edwards (Inspector of Taxes) v. Bairstow et al.*, [1956] A.C. 14, applied.

APPEAL from a judgment of Hyndman D.J. in the Exchequer Court of Canada[1], reversing a judgment of the Income Tax Appeal Board[2]. Appeal dismissed.

K. Laird, Q.C., for the appellant.

D. H. W. Henry, Q.C., and *J. D. C. Boland*, for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is an appeal from a judgment of the Exchequer Court[1] reversing the decision of the Income Tax Appeal Board[2] and restoring the assessment of the appellant to income tax for the year 1952.

*PRESENT: Kerwin C.J. and Locke, Cartwright, Fauteux and Abbott JJ.

[1] [1956] Ex. C.R. 127, [1956] C.T.C. 10, [1956] D.T.C. 1004.
[2] 12 T.A.B.C. 183, [1955] D.T.C. 99.

1958

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Kerwin C.J.

The relevant statutory provisions of *The Income Tax Act*, 1948, c. 52, are:

3. The income of a taxpayer for a taxation year . . . is his income for the year . . . and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses . . .

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

127. (1) In this Act, . . .

(*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment.

Having sold his grocery and meat business in 1948 and being then unoccupied, the appellant entered into an arrangement with a relative to purchase vacant land known as Grandview Park Subdivision, at that time near the city of Sarnia but subsequently incorporated within the limits of that municipality. A consideration of the entire record makes it clear that that arrangement was an adventure or concern in the nature of trade within the meaning of the term "business" as defined in the Act, but the argument is that, because of differences which arose between him and his relative, what he did subsequently was merely an endeavour to realize upon an investment. I agree with Mr. Justice Hyndman that that is not the true conclusion from all the circumstances; nor do I think that it is answered by the reasons of the Income Tax Appeal Board that, in order to escape taxation, the appellant should either have refrained from selling the lots for more than they had cost him, or else should have given them away.

It is quite true that an individual is in a position differing from that of a company and that, as stated by Jessel M.R. in *Smith v. Anderson*[1] (approved by this Court in *Argue v. Minister of National Revenue*[2]),

> So in the ordinary case of investments, a man who has money to invest, invests his money and he may occasionally sell the investments and buy others, but he is not carrying on a business.

However, it is also true, as well in the case of an individual as of a company, that the profits of an isolated venture may be taxed: *Edwards (Inspector of Taxes) v. Bairstow et al.*[3].

[1] (1880), 15 Ch. D. 247 at 261.

[2] [1948] S.C.R. 467 at 476, [1948] C.T.C. 235, [1948] 4 D.L.R. 161.

[3] [1956] A.C. 14, [1955] 3 All E.R. 48.

It is impossible to lay down a test that will meet the multifarious circumstances that may arise in all fields of human endeavour. As is pointed out in *Noak v. Minister of National Revenue*[1], it is a question of fact in each case, referring to the *Argue* case, *supra,* and *Campbell v. Minister of National Revenue*[2], to which might be added the judgment of this Court in *Kennedy v. Minister of National Revenue*[3], which affirmed the decision of the Exchequer Court[4].

In the present case I agree with Mr. Justice Hyndman's findings with reference to the appellant that:

> Having acquired the said property there was no intention in his mind to retain it as an investment, but to dispose of the lots, if and when suitable prices could be obtained.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Donohue & Garrett, Sarnia.

Solicitor for the respondent: A. A. McGrory, Ottawa.

HENRI PAUL COTE (*Defendant*)

AND

LA CAISSE POPULAIRE DE MONTMORENCY VILLAGE (*Mise-en-cause*) ..... } APPELLANTS;

AND

NORMAN STERNLIEB AND MAX CLARFELD (*Plaintiffs*) ..... } RESPONDENTS.

1957
*Nov. 6, 7
1958
Jan. 28

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

Real property—Successive hypothecs—Clause of dation en paiement—Exercise of rights under clause—Right of second hypothecary creditor to pay amount owing under first hypothec and to compel payment to be received—Clause not equivalent to promise of sale—Civil Code, arts. 1067, 1141, 1148.

*PRESENT: Taschereau, Rand, Cartwright, Fauteux and Abbott JJ.

[1] [1953] 2 S.C.R. 136, [1953] D.T.C. 1212, [1954] C.T.C. 6.

[2] [1953] 1 S.C.R. 3, [1952] C.T.C. 334, [1952] D.T.C. 1187.

[3] [1953] 2 S.C.R. at p. VIII.

[4] [1952] Ex. C.R. 258, [1952] C.T.C. 59, [1952] D.T.C. 1070.

1958

CÔTÉ AND CAISSE POPULAIRE *v.* STERNLIEB *et al.*

The defendant C obtained a loan from the plaintiffs and gave them a deed of hypothec on land already subject to hypothecs in favour of the mise-en-cause. The deed provided that any breach by C of his obligations towards the plaintiffs as well as towards the mise-en-cause would put him in default entitling the plaintiffs to pursue any of the remedies provided for in the deed, including a *dation en paiement*. C defaulted in several payments to the plaintiffs as well as to the mise-en-cause, and the plaintiffs requested the mise-en-cause to accept payment from them of the amounts owed by C. This request was refused. The plaintiffs sued, tendering an amount which they considered sufficient to pay the mise-en-cause in full, and asking to be subrogated in the rights of the mise-en-cause and to be declared irrevocable owners of the property, and that the judgment be considered as their title.

The trial judge maintained the action, and declared that the tender was sufficient, save for the payment of a small amount, that the mise-en-cause was bound to accept the plaintiffs' offer of payment, that the plaintiffs were owners of the property retroactively to the date of the deed, but declined to declare that there was subrogation. This judgment was affirmed by the Court of Appeal with the variation that the plaintiffs were declared owners as of the date of the judgment of first instance, and that they were entitled to the subrogation. Both the defendant C and the mise-en-cause appealed to this Court.

Held: Both appeals should be dismissed.

1. When, prior to the taking of the present action, the plaintiffs sued C on a dishonoured cheque given in payment of part of the debt, this was not an election on their part, in the event of further defaults, to adopt a similar recourse and to waive their rights to enforce the *dation en paiement* clause. Where periodical payments have to be made, there are as many distinct obligations as there are contemplated payments to be made, and the occasion for the creditor to exercise, if he so decides, and the necessity in that case to choose the nature of his remedy will arise only at the moment and every time that the debtor is in default. The action was a formal notice of the plaintiffs' election of the *dation en paiement* clause, and placed C *en demeure* to sign a confirmatory deed.

2. The plaintiffs did not have, as in the case of an action *en passation de titre,* to offer a deed of transfer. This was not a promise of sale. The election by the creditor of the *dation* did not give rise to reciprocal obligations; it did not constitute a new contract; as a matter of fact it implemented the clause which put an end to the existing contract.

3. The plaintiffs were not strangers within the meaning of art. 1141 C.C., since they had an interest in the performance by C of his obligations towards the mise-en-cause. In the circumstances of this case, the plaintiffs were entitled to pay C's debt and the mise-en-cause was bound to accept payment. Both C and the mise-en-cause were notified of the plaintiffs' intention to avail themselves of the *dation en paiement* clause by the declaration in the action and from that instant the clause came into operation. In the result the plaintiffs became owners of the property, subject to the right of C to pay before judgment and retake possession. As owners, they became the *ayants-droit* of C who, by the terms of his contract with the mise-en-cause, was entitled, as well as his *ayants-droit,* to pay at any time the mise-en-cause in advance.

APPEALS from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming, with a variation, the judgment of Gibsone J. Appeals dismissed.

Yves Pratte, for the defendant, appellant.

Guy Hudon, Q.C., for the mise-en-cause, appellant.

L. P. Pigeon, Q.C., for the plaintiffs, respondents.

The judgment of the Court was delivered by

FAUTEUX J.:—Aux termes d'un acte d'obligation, fait et signé à Québec le 6 octobre 1952, l'appelant Côté reconnaissait avoir reçu des intimés une somme de $1,240 qu'il s'obligeait à rembourser par onze versements égaux, mensuels et consécutifs de $50, le premier versement devenant dû le 3 novembre de la même année et un douzième et dernier paiement, au montant de $690, étant payable le 3 octobre 1953. Pour garantir l'exécution de ses obligations, Côté donna une hypothèque sur un immeuble déjà affecté, en faveur de l'appelante la Caisse Populaire, de deux hypothèques par lui consenties pour assurer le remboursement, également au moyen de versements mensuels, de prêts totalisés à $4,850. Aussi fut-il convenu que tout manquement de Côté aux obligations stipulées dans sa convention avec les intimés aussi bien que dans celles avec la Caisse Populaire, le constituerait en défaut et que ce défaut donnerait droit aux intimés d'exercer tous recours prévus à l'acte en telle occurrence. Cette éventualité se produisit. En fait, et alors que le prêt des intimés devait être complètement remboursé le 3 octobre 1953, Côté, à cette date, n'avait fait que sept versements de $50. Il était de plus en défaut de faire, à la Caisse Populaire, ses versements mensuels, aux dates fixées dans ses conventions avec cette dernière. Parmi les recours s'offrant alors aux intimés était celui résultant d'une clause de dation en paiement dont il convient de citer les parties pertinentes:

> Si un défaut du débiteur dure huit (8) jours ou si . . ., il y aura lieu en faveur du créancier à une dation de l'immeuble en paiement de ce qui lui sera alors dû, sans avis ni mise en demeure, et par le seul effet du défaut. Cette dation en paiement, rétroagissant à la date des présentes, aura lieu franche et quitte de tous privilèges et hypothèques postérieurs à la présente hypothèque, sans indemnité ni remboursement au débiteur, pour quelque cause que ce soit.
>
> Faute pour le débiteur de signer volontairement un acte confirmatif de cette dation en paiement, les frais du jugement à intervenir lui incomberont.

[1] [1956] Que. Q.B. 111.

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Le débiteur pourra reprendre possession de l'immeuble s'il remédie au défaut, en remboursant au créancier, avant cet acte confirmatif ou ce jugement, le montant alors dû, intérêt, frais et accessoires.

Les intimés optèrent pour ce recours. Pour l'exercer utilement, il leur fallait payer la créance de la Caisse Populaire. Cette dernière, en effet, bénéficiait non seulement d'hypothèques antérieures à celle des intimés, mais avait également le droit, suivant ses conventions avec Côté, d'exiger une dation en paiement prenant un effet définitif dès après 90 jours de défaut de la part du débiteur. Les intimés furent empêchés, cependant, d'effectuer cette intention. C'est que, pour protéger Côté, la Caisse Populaire, en outre de lui accorder un délai non défini et auquel elle pouvait à discrétion mettre terme en aucun temps, avait, à sa demande, convenu de refuser d'accepter des intimés le paiement de sa créance. Vainement les intimés mirent-ils la Caisse Populaire en demeure, par protêt notarié le 14 octobre 1953, d'accepter paiement de toutes sommes dues comme arrérages de versements, de même que, s'il y avait lieu, de toutes sommes formant capital, intérêts et indemnités dues en conformité des termes des actes d'obligation exécutés en sa faveur par Côté. Pour toute réponse au protêt, le gérant de la Caisse Populaire confirma que Côté était bien en défaut de faire ses paiements aux dates prévues dans ses conventions avec la Caisse Populaire, mais refusa tout paiement que les intimés avaient intérêt à faire à titre de seconds créanciers hypothécaires.

Le 16 novembre 1953, les intimés assignèrent en justice Côté comme défendeur et la Caisse Populaire comme mise-en-cause. Ils consignèrent au greffe, à titre d'offres réelles sauf à parfaire, une somme de $4,500 pour payer cette dernière de tous arrérages de versements et de toutes sommes formant capital, intérêts et indemnités à elle dues par le défendeur aux termes des actes d'obligation par lui consentis en faveur de la Caisse Populaire. Et invoquant les faits ci-haut relatés, ils demandèrent en conclusion à ce que (i) acte soit donné de leurs offres et consignation, et que celles-ci soient déclarées bonnes et valables, sauf à parfaire; (ii) qu'à compter du moment où elles le seront, ils soient subrogés dans les droits de la mise-en-cause et déclarés *propriétaires irrévocables* de l'immeuble; et (iii) que le jugement à être rendu soit considéré *comme titre définitif* sur cet immeuble.

Défendeur et mise-en-cause résistèrent à cette action et ce, pour diverses raisons dont celles retenues par les appelants, aux fins de ce pourvoi, seront ci-après considérées.

Le juge de première instance donna raison aux intimés et jugea particulièrement que la Caisse Populaire était obligée d'accepter l'offre du paiement de sa créance par les intimés, que ces derniers étaient devenus propriétaires de l'immeuble et ce, depuis le 6 octobre 1952, date de l'acte d'obligation intervenu entre eux et Côté.

Ce jugement fut porté en appel. La Cour du Banc de la Reine[1] rejeta l'appel de la Caisse Populaire avec dépens et fit droit à l'appel de Côté, mais sans frais, pour réformer le jugement et déclarer que c'était à compter du jugement et non du 6 octobre 1952 que la clause de dation en paiement avait pris effet et que les intimés étaient devenus propriétaires. Pour le reste, le jugement de première instance fut confirmé. De là l'appel de Côté et la Caisse Populaire devant cette Cour.

Comme premier moyen, l'appelant Côté soumet que les intimés ont, pour les raisons de fait et de droit ci-après, forfait leur droit d'exiger une dation en paiement. Le versement de mai 1953 étant devenu dû, Côté remit aux intimés un chèque de $50 que la banque retourna vu une insuffisance de fonds. Aux termes de la convention, le non-paiement d'un versement à échéance constitue le débiteur en défaut, rend toute la créance exigible et donne aux intimés le droit d'exercer, à leur choix, l'un des recours prévus en telle occurrence. Les intimés prirent alors une action sur chèque et obtinrent jugement contre le débiteur pour $51. C'est la prétention de Côté qu'en élisant alors de se faire payer en argent plutôt que, comme ils en avaient le droit, par le transfert de la propriété, les intimés ont fait un choix irrévocable et forfait la faculté d'exiger une dation en paiement, non seulement pour le recouvrement du versement de mai mais également de ceux exigibles par la suite. Qu'une telle proposition puisse être fondée relativement à la prestation due en mai, il ne s'ensuit pas qu'elle le soit pour les prestations mensuelles subséquentes. Dans le cas de prestations périodiques de la part du débiteur, il y a autant d'obligations distinctes qu'il y a de périodes en déterminant l'échéance, et l'occasion pour le créancier

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d'exercer, s'il en décide, et la nécessité dans ce cas de choisir son recours ne s'avèrent qu'au moment et à chaque fois que se présente le fait juridique donnant ouverture aux divers recours prévus en la convention, soit un défaut du débiteur. Dans l'espèce, Côté avait à chaque mois l'obligation de faire à échéance un versement et tout défaut de satisfaire à cette obligation mensuelle donnait aux intimés le droit d'exercer et choisir alors l'un des divers recours. Rien en fait ou en droit ne justifie de dire que l'élection du recours adopté pour le recouvrement du versement de mai impliquait, de la part des intimés, une renonciation au droit de choisir, advenant et à chacun des défauts subséquents, l'un des recours prévus à la convention. Côté ne peut se plaindre de la tolérance des intimés qui n'ont opté pour la dation en paiement que bien après la date où, suivant les termes précis de la convention, la totalité du prêt aurait dû être remboursée, et alors qu'en raison des circonstances déjà indiquées, et particulièrement du délai non défini qu'il rechercha et obtint de la Caisse Populaire en violation virtuelle de son obligation à l'endroit des intimés, la précarité du recouvrement de leur prêt était devenue manifeste. En l'interpellant en justice, les intimés lui signifièrent formellement leur volonté de faire jouer la clause de dation en paiement et le constituèrent en demeure de leur signer, tel qu'il y était tenu suivant la convention, un acte confirmatif de cette dation: art. 1067 C.C.; *Bank of Toronto v. St. Lawrence Fire Insurance Company*[1]. Ce premier moyen doit donc être écarté.

Comme seconde proposition, l'appelant Côté, assimilant la position faite aux intimés par suite de leur option pour le recours de dation en paiement, à celle du bénéficiaire d'une promesse de vente, soumet que, même si les intimés n'ont pas forfait leur droit à la dation en paiement, ils auraient dû, contrairement à ce qui est le cas, prendre une action en passation de titre et, à cette fin, offrir préalablement à Côté, pour être signée par lui, une convention à cet effet dûment exécutée par eux-mêmes et comportant une quittance complète en sa faveur de toutes obligations lui résultant de l'acte de prêt et du jugement obtenu contre lui sur l'action sur chèque, aussi bien qu'une mainlevée de la saisie mobilière pratiquée en exécution de ce jugement.

[1] [1903] A.C. 59.

Pour ainsi assimiler la position des intimés à celle du bénéficiaire d'une promesse de vente, le procureur de l'appelant Côté fait le raisonnement suivant: Les intimés avaient, dit-il, la faculté mais non l'obligation de prendre avantage de la clause de dation en paiement; il ne pouvait y avoir de contrat de dation en paiement à moins et avant que le créancier n'ait opté pour ce recours et n'ait informé le débiteur de cette option; l'obligation du débiteur n'était donc qu'une promesse de sa part de donner la propriété en paiement à l'option du créancier, ce qui est exactement l'obligation du promettant vendeur à l'endroit du promettant acheteur dans le cas où une promesse unilatérale de vente est acceptée par ce dernier.

Ce raisonnement, constituant la prémisse nécessaire de ce second moyen, est, à mon avis, mal fondé.

La promesse unilatérale de vente est une variété d'offre de vente dont l'acceptation par le bénéficiaire donne naissance à un contrat synallagmatique, *i.e.*, un contrat obligeant les parties à des obligations réciproques. Il s'ensuit, ainsi qu'il a été récemment affirmé par cette Cour dans *Lebel v. Les Commissaires d'Ecoles pour la Municipalité de la Ville de Montmorency*[1], que le promettant vendeur ne peut réussir dans une action en recouvrement du prix de vente s'il omet d'offrir au promettant acheteur un contrat de vente conforme à l'avant-contrat et dûment signé par lui. Dans cette décision, mon collègue M. le Juge Taschereau, s'en exprime ainsi, à la page 305:

> C'est la doctrine de *non adimpleti contractus* qui veut que chaque contractant soit autorisé à considérer ce qu'il doit, comme une garantie de ce qui lui est dû, et tant que l'une des parties refuse d'exécuter son obligation, l'autre partie peut agir de même.
>
> *Planiol (Traité Elémentaire de Droit Civil, Vol. 2, p. 239, N° 949) s'exprime ainsi:*
>
> "Malgré le silence de nos textes, nous pouvons donc formuler cette règle: Dans tout rapport synallagmatique, *chacune des deux parties ne peut exiger la prestation qui lui est due* que si elle offre elle-même d'exécuter son obligation . . . Les contrats synallagmatiques doivent donc, dans la rigueur du droit, être exécutés, selon notre expression populaire, 'donnant, donnant'."

Dans le cas actuel, la convention faisant loi entre les parties établit une situation bien différente. Suivant ses termes, le créancier a déjà rempli son obligation; il a prêté son

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argent. Le seul qui est obligé est le débiteur et son obligation est de faire le remboursement complet du prêt, au plus tard le 3 octobre 1953 et ce, au moyen de prestations mensuelles constituant autant d'obligations distinctes. Si bien que, s'il satisfait à ces obligations, toutes les sanctions, prévues à l'acte au cas d'inexécution, disparaissent avec l'obligation elle-même sans jamais avoir été exercées. Aussi bien, au cas de défaut, l'exercice, par le créancier, de la sanction qui le constitue propriétaire de l'immeuble, n'équivaut pas à une exécution de l'obligation, de la part du débiteur, mais tout simplement à une libération de ce faire. Dans cette convention, la dation de l'immeuble en paiement n'est pas, suivant l'expression des Romains, *in obligatione* mais seulement *in facultate solutionis*. L'exercice de cette faculté du créancier ne constitue pas un contrat nouveau; il met en œuvre cette clause qui doit précisément mettre fin au contrat existant. Du fait de cet exercice, il ne résulte aucune obligation pour les intimés, lesquels, pas plus que le créancier ordinaire, ne sont tenus, en l'absence d'un texte, d'offrir préalablement une quittance à leur débiteur pour exercer tous recours résultant de l'inexécution de son obligation. De plus et par définition, la dation en paiement est non seulement un mode de libération, mais un mode de libération qui ne peut être employé que du consentement du créancier: art. 1148 C.C.; Planiol et Ripert, Traité Pratique de Droit Civil Français, tome 7, n° 1249. Aussi bien, l'acceptation par le créancier de la dation en paiement emporte-t-elle nécessairement quittance de sa part pour la dette en relation de laquelle elle est offerte. En l'espèce, la convention a déjà pourvu à la dation en paiement, aux conditions auxquelles elle pouvait être exercée, à la dette qu'elle devait éteindre, et le débiteur, en défaut, a été formellement notifié par interpellation en justice de la volonté des intimés d'accepter en paiement le transfert de la propriété. Tels sont les faits juridiques que les intimés ont demandé au tribunal de constater par un jugement équivalent à l'acte confirmatif qu'il était loisible au débiteur de fournir s'il voulait éviter les frais de jugement qu'il s'était engagé à payer, à défaut de ce faire. Ce jugement, constatant le transfert de la propriété, peut être enregistré. Le second moyen de l'appelant Côté n'est pas fondé.

Les appelants soumettent enfin que la Caisse Populaire n'était pas tenue de recevoir des intimés le paiement de sa créance contre Côté, paiement qui lui fut offert par protêt aussi bien que par action en justice. Ils invoquent les dispositions de l'art. 1141 C.C. prescrivant que:

1141. Le paiement peut être fait par toute personne quelconque, lors même qu'elle serait *étrangère* à l'obligation; et le créancier peut être mis en demeure par l'offre d'un étranger d'exécuter l'obligation pour le débiteur, et sans la connaissance de ce dernier; mais il faut que ce soit pour l'avantage du débiteur et non dans le seul but de changer le créancier que cette offre soit faite.

En somme, ils prétendent que les intimés sont *étrangers* à l'obligation de Côté envers la Caisse Populaire et que bien que, en cette qualité, ils pouvaient validement payer la dette de Côté si la Caisse Populaire n'y faisait d'objection, ils n'avaient, au cas contraire, aucun droit de lui imposer ce paiement qui n'était pas à l'avantage de Côté.

La Cour d'Appel[1] a rejeté ce moyen. Elle a jugé (i) que les intimés n'étaient pas des *étrangers* au sens de l'art. 1141 C.C., mais qu'ils étaient intéressés à ce que soient remplies les obligations de Côté envers la Caisse Populaire et (ii) que la disposition de l'art. 1156 C.C. décrétant que "la subrogation a lieu par le seul effet de la loi et sans demande, au profit de celui qui, étant lui-même créancier, paie un autre créancier qui lui est préférable à raison de ses privilèges ou hypothèques", serait une disposition illusoire de la loi s'il fallait en conditionner l'opération à l'assentiment du créancier ayant préférence, à recevoir du créancier préféré le paiement de sa créance.

Il ne fait aucun doute, à mon avis, que les intimés ne sont pas des *étrangers* au sens de l'art. 1141 et que dans les circonstances de cette cause, les intimés et la Caisse Populaire avaient respectivement le droit de faire et l'obligation de recevoir le paiement de la dette de Côté.

Le texte de l'art. 1141, tel qu'indiqué au premier rapport des commissaires chargés de la codification de nos lois civiles, est inspiré du Code Justinien, de Domat, de Pothier et des arts. 1236 et 1237 du *Code Napoléon*. Domat, Loix Civiles 1-2 (1777), liv. IV, titre I, sect. 3, I et II, p. 241, s'appuyant sur le texte du Code Justinien, s'exprime ainsi:

I. Les personnes qui ont *intérêt* qu'une dette soit acquittée peuvent en faire le payement. Ainsi, les co-obligés solidairement peuvent payer les uns pour les autres; ainsi, les cautions peuvent acquitter ce qu'ils sont

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obligés de payer pour d'autres. Et les payements que font ces personnes, acquittent les débiteurs pour qui ils les font, et annulent leur obligation envers le créancier. Mais ces débiteurs demeurent obligés envers celui qui acquitte leur dette.

II. Un payement peut être fait non seulement par une personne *intéressée* avec le débiteur, mais aussi par d'autres personnes que la dette ne regarde point: et celui pour qui un autre a payé demeure acquitté; soit qu'il sache ou qu'il ignore le payement, et quand même il ne l'agréerait point. Car le créancier peut recevoir ce qui lui est dû: et celui qui paie pour un autre peut faire ce plaisir, ou au créancier, ou au débiteur, ou en avoir d'autres justes causes.

Pothier, Traité des Obligations, 2e ed. 1781, vol. 1, p. 254, n° 500:

La question de savoir si un *étranger* qui n'a ni pouvoir, ni qualité pour gérer les affaires du débiteur, *ni intérêt à l'acquittement de la dette,* peut obliger le créancier à recevoir le paiement qu'il lui offre au nom de son débiteur, est une question qui souffre plus de difficulté. Les Lois ci-dessus citées ne décident pas cette question: elles disent bien que le paiement fait par quelque personne que ce soit, au nom du débiteur, libère le débiteur; mais elles ne décident pas si le créancier peut être obligé ou non à recevoir le paiement.

Ce texte, source de l'expression "étranger" apparaissant dans notre art. 1141, manifeste clairement que celui qui a un intérêt à acquitter la dette du débiteur a les mêmes droits que ceux qui ont pouvoir ou qualité pour gérer les affaires du débiteur et, comme ces derniers, il peut obliger le créancier à recevoir le paiement.

Des arts. 1236 et 1237 du *Code Napoléon,* le premier est le seul pertinent à la considération de la question; le second visant exclusivement le paiement de l'obligation de faire et non de l'obligation de donner.

1236. Une obligation peut être acquittée par toute personne qui y est *intéressée,* telle qu'un coobligé ou une caution.

L'obligation peut même être acquittée par un tiers qui n'y est point intéressé, pourvu que ce tiers agisse au nom et en l'acquit du débiteur, ou que s'il agit en son nom propre, il ne soit pas subrogé aux droits du créancier.

Ce qu'il faut entendre par "toute personne qui y est intéressée" est ainsi expliqué au vol. 42, Pandectes Françaises, Obligations (1893), aux nos 2874 *et seq.,* dont il convient de citer le texte suivant:

2876. L'obligation peut d'abord être payée par un tiers qui y est *intéressé,* et la loi cite à cet égard le codébiteur solidaire et la caution. Ces personnes *doivent* également payer la dette. Si la loi dit ici qu'elles *peuvent* la payer, c'est pour indiquer le droit qu'elles ont de prendre l'initiative, et de n'être point obligées d'attendre que le créancier les poursuive. Elles peuvent, en effet, avoir intérêt à prévenir des poursuites dont elles auraient à supporter les frais, ou bien encore à payer, à un

moment qu'elles estiment plus favorable, afin de pouvoir exercer utilement le recours que la loi leur assure, sans être obligées d'attendre que ce recours devienne illusoire par suite de l'insolvabilité de ceux contre qui elles sont appelées à l'exercer. L'art. 1236 ne parle pas du tiers détenteur d'un immeuble hypothéqué à la dette. Ce tiers n'est point, il est vrai, personnellement obligé: mais comme il est exposé à l'action du créancier hypothécaire, il a intérêt à prévenir ces poursuites, et on doit certainement le ranger parmi les tiers intéressés au payement dont parle l'art. 1236, alin. 1. Il y a, d'ailleurs, entre le payement fait par le débiteur lui-même et celui qui est fait par des tiers intéressés, cette différence que le premier éteint définitivement la dette, à l'égard du débiteur aussi bien qu'à l'égard du créancier, tandis que le payement fait par les tiers intéressés n'éteint la dette qu'à l'égard du créancier, la dette subsistant à l'égard du débiteur en vertu de la subrogation que la loi accorde à ceux qui, étant tenus avec d'autres ou pour d'autres au payement de la dette, avaient intérêt à l'acquitter.—(Art. 1250, 1251.—Comp. Demolombe, t. 4, n. 53; Laurent, t. 16, n. 479).

Un second créancier hypothécaire est aussi un tiers intéressé. S'appuyant sur le droit romain, Basnage, Traité des Hypothèques, 3e ed. 1709, tome 2, ch. XV, p. 77, dit ce qui suit:

Mais lorsqu'un créancier hypothécaire, un acquéreur, un cofidéjusseur ou un coobligé, offrent pour leur assurance ou pour leur décharge, de rembourser un plus ancien créancier, il (ce plus ancien créancier) est tenu de céder ses actions; que s'il refuse la subrogation, on ne peut le contraindre de la consentir, mais elle peut être ordonnée par le juge et même contre le fisc.

Pour conclure que dans les circonstances de cette cause, les intimés et la Caisse Populaire avaient respectivement le droit de faire et l'obligation de recevoir le paiement en totalité de la dette de Côté, il n'est pas nécessaire, cependant, d'adopter le raisonnement fait par la Cour d'Appel[1] comme conséquence du fait que les intimés ne sont pas des *étrangers* au sens de l'art. 1141 C.C.; cette conclusion pouvant s'appuyer sur une raison décisive et à laquelle il paraît prudent de s'arrêter.

Comme en a jugé la Cour d'Appel, la clause de dation en paiement permettait aux intimés, seconds créanciers hypothécaires, d'être constitués propriétaires de l'immeuble de l'appelant en tout temps après 8 jours de défaut de Côté, par simple notification de leur intention de donner effet à cette clause. Cette intention fut notifiée aux appelants par et au moment même de la signification de la déclaration en l'action. C'est à cet instant que la clause de dation en paiement prit son effet. Dans le résultat, les intimés furent

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constitués propriétaires de l'immeuble. Comme tels, ils devenaient les ayants-droit de Côté lequel, suivant ses conventions avec la Caisse Populaire, avait le droit, en aucun temps, de lui payer par anticipation sa créance, en tout ou en partie. Dans cette situation, il me paraît impossible de mettre en doute le droit qu'avaient les intimés de faire l'offre de la totalité de cette créance—offre faite au même temps que la notification d'intention et depuis lors demeurée tenante—et l'obligation de la Caisse Populaire d'accepter ce paiement.

La Cour d'Appel, cependant, a émis l'opinion que la clause de dation en paiement ne prit son effet qu'à compter du jugement final et non de la notification. Les intimés, dit-on, ayant indiqué dans les conclusions de leur action, leur volonté de n'être déclarés propriétaires qu'à compter du moment où leurs offres seraient déclarées bonnes et valables, c'est-à-dire seulement à partir du jugement final, la clause de dation en paiement ne pouvait prendre effet auparavant puisque le transfert de l'immeuble ne pouvait se faire sans leur consentement. Et, ajoute-t-on, s'il y avait doute que ce fut là le sens à donner à leurs conclusions, cette partie de leur réponse dans laquelle ils demandent acte de l'allégation faite par l'appelant, dans le douzième paragraphe de son plaidoyer, qu'il avait déjà été et qu'il était encore propriétaire dudit immeuble, le dissiperait. A mon avis, soit dit en tout respect, c'est la déclaration, et non la réponse au plaidoyer, qui constitue la notification et dans laquelle, par conséquent, il faut chercher l'intention des intimés. Et il apparaît clairement des premier et treizième paragraphes de la déclaration, que les intimés, lors de la notification, ont considéré qu'à la suite des faits relatés dans l'action, Côté n'était plus propriétaire, que la clause de dation en paiement avait pris effet et que c'était en raison du fait que leur débiteur se soustrayait et refusait de signer un acte confirmatif de ce fait qu'ils étaient dans l'obligation de se pourvoir en justice pour le faire constater. Et si, par leurs conclusions en l'action, les intimés ont demandé à être déclarés *propriétaires irrévocables* à compter du jugement final et à ce que ce jugement soit considéré comme un *titre définitif* en leur faveur sur l'immeuble, ce n'est pas qu'ils entendaient retarder la mise à effet de la clause de dation, mais parce

que, suivant cette clause, le débiteur, en remédiant à son défaut entre la notification et l'acte confirmatif ou le jugement, pouvait reprendre possession de l'immeuble.

Dans ces vues, il ne paraît pas nécessaire de poursuivre la considération des autres arguments soumis par les parties.

Je renverrais les appels avec dépens.

Appeals dismissed with costs.

Attorneys for the defendant, appellant: Pratte, Tremblay & Dechene, Quebec.

Attorney for the mise-en-cause, appellant: G. Hudon, Quebec.

Attorneys for the plaintiffs, respondents: Lazarovitz, Lachance & Levesque, Quebec.

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED } APPELLANT;

AND

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

1957
*Oct. 10, 11

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Jan. 28

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Public utility company carrying passenger and freight traffic—Payments made for discontinuance of passenger services—Whether deductible expense or capital outlay—Income Tax Act, 1948, c. 52, s. 12(1)(a), (b) (R.S.C. 1952, c. 148, s. 12(1)(a), (b)).

The appellant company, under agreements with the municipalities concerned, operated a railway providing both passenger and freight service between New Westminster and Chilliwack. The operation of the passenger service became increasingly unprofitable, and by 1949 it resulted in a substantial loss. The appellant, with the consent of the municipalities, obtained permission from the Public Utilities Commission to discontinue its passenger service, and authorization to a subsidiary company to operate a bus-service in its place. This permission was subject to conditions, one of which was that the appellant should pay $220,000 to the municipalities for the improvement of roads. The moneys were paid in 1950 and the appellant wrote them off as operating expenses over a 10-year period and deducted proportionate amounts from income in making its returns for 1950 and 1951.

*PRESENT: Kerwin C.J. and Locke, Cartwright, Fauteux and Abbott JJ.

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The deductions were disallowed on the ground that the moneys were outlays of capital, or paid on account of capital, within s. 12(1)(*b*) of the *Income Tax Act*, 1948, and were not expended for the purpose of gaining or producing income from the appellant's business within s. 12(1)(*a*). The Minister's assessment was affirmed by the Exchequer Court.

Held: The assessment was correct, and the moneys were not deductible from income.

Per Kerwin C.J. and Fauteux and Abbott JJ.: Once it is determined that a particular expenditure is one made for the purpose of gaining or producing income, it must next be ascertained whether the expenditure is an income or a capital outlay. Since income is determined on an annual basis, an income expense is one incurred to earn the income of a particular year and should be allowed as a deduction from gross income in that year. On the other hand, most capital outlays may be amortized or written off over a period of years, depending upon whether or not the asset in respect of which the outlay is made is one coming within the capital cost allowance regulations.

In the present case, the payments were connected with the appellant's profit-making operations, and were, therefore, made "for the purpose of gaining or producing income" within the meaning of s. 12(1)(*a*); but they were made on account of capital within the meaning of s. 12(1)(*b*), since they were made "with a view of bringing into existence an advantage for the enduring benefit" of the appellant's business. *Montreal Light, Heat & Power Consolidated v. Minister of National Revenue*, [1942] S.C.R. 89, affirmed [1944] A.C. 126; *British Insulated and Helsby Cables, Limited v. Atherton*, [1926] A.C. 205, applied.

Per Locke and Cartwright JJ.: Since the appellant was not completely or permanently relieved from its obligations under the franchises, the benefit accruing from the payments was not "enduring" in the sense in which that expression was used in the *British Insulated* case, *supra*.

To say, however, that an expenditure made with a view to bringing into existence an asset or advantage for the enduring benefit of a trade is a capital expenditure is not to say that all other expenditures must, in order to be properly classified as outlays of a capital nature or on account of capital, be made in order to produce such a benefit. Here, the relief obtained through the payments substantially increased the value of the franchises to the appellant. Such payments were outlays of capital and payments on account of capital, within the meaning of s. 12(1)(*b*), to the same extent that payments made to secure the franchises in the first instance, had any been made, would have been. In view of this conclusion, it was not necessary to decide whether the payments were made "for the purpose of gaining or producing income from a property" within the meaning of s. 12(1)(*a*).

APPEAL from a judgment of Dumoulin J. in the Exchequer Court of Canada[1], affirming an income tax assessment. Appeal dismissed.

A. Bruce Robertson, Q.C., and *W. H. Q. Cameron*, for the appellant.

[1] [1957] Ex. C.R. 1, [1957] C.T.C. 120, [1957] D.T.C. 1034.

W. R. Jackett, Q.C., and *G. W. Ainslie,* for the respondent.

The judgment of Kerwin C.J. and Fauteux and Abbott JJ. was delivered by

ABBOTT J.:—The material facts in this appeal, most of which are set out in an agreed statement of facts, may be summarized as follows. For many years prior to 1950 the appellant operated a railway providing freight and passenger service in the Lower Fraser Valley in British Columbia between New Westminster and Chilliwack. The right to operate such service in the municipalities of Surrey, Langley, Matsqui, Sumas and Chilliwack was granted to a predecessor company, Vancouver Power Company Limited, under various agreements, one condition of which was that at least one passenger train would be operated each day each way, including Sunday. For a number of years prior to 1950 passenger revenue had been declining steadily and in 1949 the operating results of the railway showed a substantial loss on its passenger traffic although a substantial profit was made with respect to freight traffic. Moreover, if passenger traffic was to be continued, appellant would be required to make substantial capital expenditures with no prospect of any corresponding increase in revenue.

Under the *Public Utilities Act* of British Columbia, R.S.B.C. 1948, c. 277, appellant could not abandon its rail passenger service without the consent of the Public Utilities Commission and apparently such consent could not be obtained unless an alternative passenger service were made available and approval given by the interested municipalities. In order to obtain the approval of these municipalities to the operation of a bus-service in place of the rail passenger service, appellant entered into agreements with the five municipalities concerned under which these municipalities were paid sums aggregating $220,000 to be expended by them in putting certain roads in shape for the operation of buses thereon. In consideration of these payments the said municipalities consented to the appellant's application to the Public Utilities Commission for permission to cease the operation of passenger service over its railway. This permission was given in due course and the rail passenger service was discontinued.

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In making up its accounts, appellant elected to write off to operations the said sum of $220,000 over a period of approximately 10 years and claimed a deduction of $5,499.99 for 1950 and $22,000 for 1951.

On assessment of appellant for income tax for its 1950 and 1951 taxation years, these deductions were disallowed and subsequently the assessments were confirmed by the respondent. Appellant appealed the 1950 assessment to the Exchequer Court and on January 15, 1957, Mr. Justice Dumoulin rendered judgment[1] dismissing the appeal. The present appeal is from that judgment.

Two questions arise on this appeal: (1) was the expenditure of $220,000 by appellant made for the purpose of gaining or producing income? and (2) if it was so made, was such payment an allowable income expense or was it a capital outlay?

The answer to both questions turns upon the effect to be given to s. 12(1)(*a*) and (*b*) of *The Income Tax Act 1948*, c. 52, as amended, which reads as follows:

> 12. (1) In computing income, no deduction shall be made in respect of
> (*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer,
> (*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part.

Section 12(1)(*a*) and (*b*) was first enacted in 1948 and it replaced s. 6(*a*) and (*b*) of the *Income War Tax Act*, which read as follows:

> 6. Deductions not allowed.—1. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
> (*a*) Expenses not laid out to earn income,—disbursements or expenses *not wholly exclusively and necessarily* laid out or expended for the purpose of earning the income;
> (*b*) Capital outlays or losses, etc.—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 italics are mine.)

The less stringent provisions of the new section should, I think, be borne in mind in considering judicial opinions based upon the former sections.

[1] [1957] Ex. C.R. 1, [1957] C.T.C. 120, [1957] D.T.C. 1034.

Since the main purpose of every business undertaking is presumably to make a profit, any expenditure made "for the purpose of gaining or producing income" comes within the terms of s. 12(1)(*a*) whether it be classified as an income expense or as a capital outlay.

Once it is determined that a particular expenditure is one made for the purpose of gaining or producing income, in order to compute income tax liability it must next be ascertained whether such disbursement is an income expense or a capital outlay. The principle underlying such a distinction is, of course, that since for tax purposes income is determined on an annual basis, an income expense is one incurred to earn the income of the particular year in which it is made and should be allowed as a deduction from gross income in that year. Most capital outlays on the other hand may be amortized or written off over a period of years depending upon whether or not the asset in respect of which the outlay is made is one coming within the capital cost allowance regulations made under s. 11(1)(*a*) of *The Income Tax Act*.

Turning now to the facts of this particular case, it is clear that the payments aggregating $220,000 made by appellant to various municipalities were connected with appellant's profit-making operations. The evidence established that as a result of being relieved of its obligation to operate the highly unprofitable rail passenger service, while retaining the right to operate the freight service, the appellant's profits were increased substantially and by the terms of s. 4 of the Act "income for a taxation year from a business or property is the profit therefrom for the year". In my view, therefore, the payment in issue here was clearly one made for the purpose of gaining or producing income within the meaning of s. 12(1)(*a*).

The general principles to be applied to determine whether an expenditure which would be allowable under s. 12(1)(*a*) is of a capital nature, are now fairly well established. As Kerwin J., as he then was, pointed out in *Montreal Light, Heat & Power Consolidated v. Minister of National Revenue*[1], applying the principle enunciated by Viscount Cave in *British Insulated and Helsby Cables, Limited v.*

[1] [1942] S.C.R. 89 at 105, [1942] 1 D.L.R. 596, [1942] C.T.C. 1, affirmed [1944] A.C. 126, [1944] 1 All E.R. 743, [1944] 3 D.L.R. 545.

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Atherton[1], the usual test of whether an expenditure is one made on account of capital is, was it made "with a view of bringing into existence an advantage for the enduring benefit of the appellant's business".

Applying this test to the facts of the present case, in my opinion the payment of $220,000 made by appellant was a payment on account of capital within the terms of s. 12(1)(*b*), and that is sufficient for the disposal of the appeal which should be dismissed with costs.

The judgment of Locke and Cartwright JJ. was delivered by

LOCKE J.:—The agreement entered into between the corporation of the District of Surrey and the Vancouver Power Company Limited, dated March 1, 1907, is in similar terms to those made by the power company at the same time with the municipalities of Langley, Matsqui, Sumas and Chilliwack.

The moneys sought to be charged as an operating expense of the appellant were paid for the purpose of obtaining an alteration in the rights of the municipalities and the obligations of the appellant under these contracts. By their terms, the power company was granted the right to construct and operate a single or double line of railway for the transportation of passengers and freight on its own right-of-way to connect the city of New Westminster and the town of Chilliwack. The company agreed, *inter alia,* to complete the line within 48 months from the passage of the necessary by-law authorizing the making of the contract by the municipality and, thereafter, to run one passenger train per day each way, Sunday included, over the line. On its part, the municipality agreed that the property rights, franchises and privileges belonging to the company subject to taxation by it should be exempt from such taxation for a period of 10 years, and agreed that it would not allow any other electric railway or tramway to be built or operated along any public highway or road thereafter used by the company under the provisions of the agreement. The agreement further provided that it should be binding upon and enure to the benefit of the successors and assigns of the parties.

[1] [1926] A.C. 205 at 214, 10 T.C. 155.

While these rights, which may be properly referred to as a franchise, were granted to the power company, the line when built and equipped was operated by the appellant company under the terms of agreements made between the companies dated March 1, 1909, and March 31, 1915, and, by agreement made between the two companies dated June 30, 1924, the appellant company purchased the assets of the power company and its rights under the contracts made with the various municipalities, agreeing to fulfil the obligations of the power company under these contracts. It does not appear whether the appellant company entered into direct contractual relations with the municipalities, but it is common ground that the line was operated by it under the terms of the 1907 agreement.

While under no obligation to do so under the terms of the various franchises, the material shows that the appellant company operated three trains daily in each direction over the line, and during the years in question in this appeal these operations resulted in serious losses.

In view of an argument advanced on behalf of the appellant, it is necessary to consider the manner in which the appellant was relieved of the obligation to maintain this passenger service. By the *Public Utilities Act* of British Columbia, first enacted as c. 47 of the statutes of 1938 and which now appears as R.S.B.C. 1948, c. 277, certain public utilities, which included that of the appellant company, were made subject to certain duties and restrictions. By s. 7 a public utility which has been granted a franchise and has commenced operations under it may not cease or desist from such operations or any part of them without the permission of the Public Utilities Commission constituted under the Act. By s. 120 the powers vested in the Commission apply, notwithstanding that the subject-matter in respect of which the powers are exercisable is the subject-matter of any agreement or statute.

The appellant company applied to the Public Utilities Commission for leave to discontinue the passenger service. The municipalities were interested parties entitled to be heard on this application and, after the application had been made, agreement was reached between the interested parties for a substituted passenger service, in consideration

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of which the municipalities consented to the Commission making an order permitting the appellant to discontinue the passenger service upon certain defined terms.

Contemporaneously with the application by the appellant company, British Columbia Motor Transportation Limited, its wholly-owned subsidiary, had applied to the Commission for approval of the operation of motor buses over certain routes to the municipalities through which the railway-line ran. By an agreement dated September 25, 1950, made with the District of Surrey, the appellant agreed to pay to the municipality a sum of $50,000 to be expended for putting the roads in the municipality over which British Columbia Motor Transportation Limited proposed to operate in suitable condition for their operations and, thereafter, to spend such sums as it would ordinarily spend on the roads. The municipality agreed to advise the Public Utilities Commission that it consented to the company's application for permission to cease the operation of passenger service and, on its part, the appellant agreed that until the roads had been improved in accordance with the agreement it would keep available passenger cars and give service on the line whenever bus service was cancelled for more than a "short while". Similar agreements were reached with the other municipalities and a total sum of $220,000 was paid.

Thereupon, on September 20, 1950, the Public Utilities Commission made an order granting permission to the appellant to cease the operation of the passenger service on terms that British Columbia Motor Transportation Limited should provide a bus-service in the area served by the railway line in accordance with the application made by it to the Commission, directing the appellant to make the payments specified to the five municipalities and that, after the cessation of passenger service on the railway line, the appellant was to keep passenger cars available and, as an emergency measure, operate them whenever the bus-service was cancelled for more than a short while, and directing the appellant to continue the freight service in operation.

This order was approved by an order in council made on September 22, 1950.

It was contended for the appellant that what took place did not work any change in its various franchises from the municipalities, since there was no agreement releasing the obligation to operate one passenger train daily over the line and none which affected its right to resume the passenger service if it saw fit. While it is true that the covenant of the power company to operate a passenger service was not released, it would be manifestly impossible for any of the municipalities after there has been compliance with the terms of the Commission's order of September 20, 1950, and so long as such compliance continued, to insist upon the restoration of the service. The moneys stipulated to be paid have been paid and the right to insist upon the maintenance of the passenger service on the line waived, except under the circumstances defined. In my opinion, the terms upon which the franchises are held were modified by what took place in the same manner as if they had been accomplished by agreements between the parties.

The appellant company contends that these payments were made for the purpose of gaining or producing income from its business, within the meaning of s. 12(1)(*a*) of *The Income Tax Act 1948,* c. 52, and that such payments were not outlays of capital or payments on account of capital, within the meaning of subs. 1(*b*) of that section.

It is not decisive of the question as to whether the payments were made for the purpose of gaining income, within the meaning of the subsection, that making them resulted in an increase of the income of the appellant. Since, however, that question does not arise if they fall within the prohibition of s. 12(1)(*b*), this question should be first considered.

The language of *The Income Tax Act* differs from that employed in the Income Tax Acts in England which applies in the numerous cases there decided on the question as to what constitutes a capital disbursement. The words "outlay, loss or replacement of capital or any payment on account of capital" first appeared in the *Income War Tax Act 1917* by an amendment made in 1923 (c. 52, s. 3). It was continued in this form and appeared as s. 12(1)(*b*) when *The Income Tax Act* which applies to the present matter was enacted as c. 52 of the statutes of 1948.

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The Imperial Act of 1842 (5 & 6 Vict., c. 35) provided in the rules for the application of Schedule D that in estimating profits there should be no deduction

> on account of any capital withdrawn therefrom; nor of any sum employed or intended to be employed as capital in such trade, manufacture, adventure or concern.

This language, with an immaterial change, was repeated in the *Income Tax Act 1918*, s. 3(*f*) of Schedule D.

Neither the Canadian nor the Imperial Act attempts to define the term "capital" nor, in the case of our Act, what is meant by a payment on account of capital.

The question has, however, been discussed in a number of cases. In *Vallombrosa Rubber Co., Ltd. v. Farmer*[1], Lord Dunedin said in part:

> Now, I don't say that this consideration is absolutely final or determinative, but in a rough way I think it is not a bad criterion of what is capital expenditure as against what is income expenditure to say that capital expenditure is a thing that is going to be spent once and for all, and income expenditure is a thing that is going to recur every year.

In *Atherton v. British Insulated and Helsby Cables Limited*[2], Lord Cave said that:

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

As the quotation shows, this was not intended as an exhaustive definition, as pointed out by Scott L.J. in *Bean v. Doncaster Amalgamated Collieries, Ltd.*[3], but as a useful guide.

In *Mallett v. The Staveley Coal and Iron Company, Limited*[4], a colliery company held the right to work certain beds of coal under mining leases in one of which they covenanted to restore the surface of the land after completing the mining operations. No provision was made in the leases for the surrender of any part of the seams demised. By agreement with the lessor, the company was permitted to surrender some of the seams demised and to be absolved from the obligation to restore the surface

[1] (1910), 5 T.C. 529 at 536.
[2] (1925), 10 T.C. 155 at 192, [1926] A.C. 205.
[3] (1944), 27 T.C. 296 at 305, 175 L.T. 10.
[4] (1928), 13 T.C. 772, [1928] 2 K.B. 405.

of the land, paying substantial sums as consideration. The company claimed to deduct these payments as an expense of operation. Rowlatt J., after saying that it was abundantly clear that when a colliery company acquires a lease the expense of acquiring it is a capital expenditure, said[1]:

> If they sell the lease that they have acquired, or part of it, at an advantage, I cannot but think that that is a receipt on account of capital, and here what they have done is to get rid of some areas which they thought would be unremunerative; . . . they have now got a list of leases or a field of mineral which has the advantage of being minus an undesirable part of it, instead of having one that is encumbered with an undesirable part of it.

On appeal the judgment was approved. Lawrence L.J., after referring to the facts, said[2]:

> The Company, for sufficient reasons, decided to get rid of certain seams of coal constituting part of its fixed capital assets. The only practical way of disposing of those seams was to procure the lessors to accept a surrender of the leases under which they were held, and in order to effect such surrender the Company had to pay the £6,500 in question . . . In substance and in fact it was a sum paid for the purpose of getting rid of a capital asset of the Company which had become burdensome to the Company. In principle, such a payment seems to me to stand on precisely the same footing as a loss or profit sustained or made by a trading company on the disposal of part of its fixed capital.

In *Anglo-Persian Oil Company, Limited v. Dale*[3], Rowlatt J., referring to the word "enduring" in the passage from Lord Cave's judgment, said that quite clearly he was speaking of a benefit which endures in the way that fixed capital endures, not a benefit that endures in the sense that for a good number of years it relieves you of a revenue payment. A further passage from his judgment reads:

> It means a thing which endures in the way that fixed capital endures. It is not always an actual asset, but it endures in the way that getting rid of a lease or getting rid of onerous capital assets or something of that sort as we have had in the cases, endures.

On appeal, Romer L.J. agreed with this interpretation and said[4]:

> The advantage may consist in the getting rid of an item of fixed capital that is of an onerous character, as was pointed out by this Court in the case of *Mallett v. Staveley Coal and Iron Company.*

[1] 13 T.C. at 778.
[2] 13 T.C. at 787.
[3] (1931), 16 T.C. 253 at 262, [1932] 1 K.B. 124.
[4] 16 T.C. at 274.

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Lord Hanworth M.R. said[1]:

> Lord Cave's test that where money is spent for an enduring benefit it is capital, seems to leave open doubts as to what is meant by "enduring". In the case of *Noble v. Mitchell* (1927) 11 T.C. 372, the dismissal of the director once and for all might have connoted an enduring benefit, but the expenditure was held not to be a capital expense.

In *West Africa Druy Co., Ltd. v. Lilley*[2], the appellant company held business premises in West Africa under a lease for 21 years under which the lessee covenanted to keep the premises in repair. The premises were completely destroyed by earthquake and a dispute arose as to whether the lessor or the lessee was liable to rebuild and the lessee to pay the rent for the balance of the terms. The lessors accepted a net sum of £2,753 for the surrender of the lease and the release of the company from all liability thereunder. On appeal to the special commissioners, the appellant company contended that the payment was made to relieve the company of an onerous contract and did not bring into existence any asset or advantage for the enduring benefit of its trade and should be allowed as a deduction in computing its profit. The commissioners held that the expenditure being a sum paid for the purpose of getting rid of a permanent disadvantage or onerous liability arising under the terms of the lease was of a capital nature and not an admissible deduction.

This decision was upheld on appeal by Atkinson J., who considered that the matter was determined by the decision in *Mallett's Case* above referred to.

If by the use of the word "enduring" the Lord Chancellor meant permanent, as Rowlatt J. and Romer L.J. in the *Anglo-Persian Oil Company* case seemed to think, the benefits accruing to the appellant in the present matter were not of that nature. It may be noted in passing that that is not the interpretation placed upon the expression by Sir Lyman Duff C.J. in *Montreal Light, Heat & Power Consolidated v. Minister of National Revenue*[3]. The covenant of the Vancouver Power Company Limited to operate one passenger train a day on the line to Chilliwack is still outstanding though, as I have said, it is my view that, so long as there is compliance with the order of the

[1] 16 T.C. at 268.

[2] (1947), 28 T.C. 140.

[3] [1942] S.C.R. 89 at 92, [1942] 1 D.L.R. 596, [1942] C.T.C. 1, affirmed [1944] A.C. 126, [1944] 1 All E.R. 743, [1944] 3 D.L.R. 545.

Public Utilities Commission, the municipalities may not enforce that term. It would also appear to be the case that the appellant is still entitled to operate a passenger service over the line, subject to the approval of the Public Utilities Commission. If British Columbia Motor Transportation Limited were to cease to operate a bus-service in accordance with the order of the Commission, there appears to be no reason why, assuming that the company remained a subsidiary of the appellant, the municipalities might not apply to that body for an order directing the appellant to provide a suitable passenger service. In that sense, the benefit is not permanent.

To say, however, that an expenditure made with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade is a capital expenditure is not to say that all other expenditures must, in order to be properly classified as outlays of a capital nature or on account of capital, be made in order to produce such a benefit.

The franchises held by the appellant which were acquired by the assignment from the power company were capital assets. The payments in question were made to obtain relief from the obligation to maintain passenger service, an obligation which was resulting in heavy annual losses to the company, and the relief obtained, to the extent above indicated, substantially increased the value of the franchises to the appellant. In my opinion, such payments were outlays of capital and payments on account of capital, within the meaning of the subsection, to the same extent that payments made to secure the franchises in the first instance, had any such payments been made, would have been.

In view of this, I find it unnecessary to consider whether the payments were made "for the purpose of gaining or producing income from a property", within the meaning of s. 12(1)(*a*) and I express no opinion on that point.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: A. Bruce Robertson, Vancouver.

Solicitor for the respondent: A. A. McGrory, Ottawa.

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MONTREAL TRUST COMPANY, ROBERT OREM TORRANCE, AND MURRAY LAWRENCE DOWDELL (EXECUTORS OF THE WILL OF THE LATE SAMUEL OREM TORRANCE) ..... APPELLANTS;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Succession duties—Duty on duty—Charitable bequest conditional upon payment of all duties on dutiable bequests—Whether this constitutes an additional dutiable succession to legatees benefiting therefrom—Dominion Succession Duty Act, 1940-41, c. 14, ss. 2(k), (m), (n), 6(1)(a), 7(1)(d), 12 (R.S.C. 1952, c. 89, ss. 2(k), (m), (n), 6(1)(a), 7(1)(d), 13.

A testator set up, out of the residue of his estate, a "Charities Fund", to be divided equally between two charitable institutions (exempt from succession duties under s. 7(1)(*d*) of the *Dominion Succession Duty Act*). There were dutiable gifts to other beneficiaries, and the gifts to the charities were made "absolutely conditional" upon the payment by them, in equal shares, of all duties payable on the estate, and if they refused or failed to pay the gifts to them were to lapse and the trustees were to use the Charities Fund to pay the duties. The charities agreed to pay the duties to the extent that the fund would suffice.

Held: The right of the beneficiaries to have duties paid by the charities constituted "property" and a "succession" within the meaning of the Act, and duty was accordingly payable on the duties paid on the shares of those beneficiaries.

APPEAL from a judgment of Thurlow J. in the Exchequer Court of Canada[1], affirming a succession duty assessment. Appeal dismissed.

John de M. Marler, Q.C., and *Norman O. Seagram, Q.C.*, for the appellants.

D. H. W. Henry, Q.C., and *A. L. DeWolf*, for the respondent.

The judgment of Taschereau and Locke JJ. was delivered by

LOCKE J.:—The facts are stated in other reasons to be delivered in this matter. The question to be determined is as to the nature and extent of the rights of the legatees, other than the charities, under the will of the late S. O. Torrance.

*PRESENT: Taschereau, Rand, Locke, Cartwright and Fauteux JJ.

[1] [1957] Ex. C.R. 120, [1957] D.T.C. 1162, [1957] C.T.C. 217.

As pointed out by the learned trial judge[1], the nature of these rights is to be determined as of the date of the death of the testator. The bequest to the charities was not absolute but conditional upon their agreeing, within six months of the death, to pay and upon each of them paying one-half of all succession duties and inheritance and death taxes payable in respect of the estate and, in default of their so agreeing, such legacies were to lapse and such duties and taxes were to be paid out of that portion of the corpus of the estate designated by the will as the Charities Fund.

Within the six-month period, both charities agreed in writing to pay such duties and taxes to the extent that the Charities Fund would suffice for that purpose, and it was not argued before us that these acceptances were not a sufficient compliance with the terms of the bequests.

The charities have not paid the duties and the trustees remain in possession of the fund.

The word "property", where it appears in the *Dominion Succession Duty Act*, 1940-41, 4 & 5 Geo. VI, c. 14, s. 2(*k*), is to be interpreted as including:

> property, real or personal, movable or immovable, of every description, and every estate and interest therein or income therefrom capable of being devised or bequeathed by will or of passing on the death, and any right or benefit mentioned in section three of this Act;

In my opinion, the legacies in question each included the amounts designated and, in addition, the right to have either the corpus of the Charities Fund or the moneys paid by the charities, pursuant to their respective agreements, if they elected to accept the legacy to them upon the terms of the will, applied in payment of the duties. As matters stand, the covenants of the charities to pay the duties are enforceable against them by the trustees. It is true that the legatees have no remedy directly against the charities, but they may each require the trustees under the will to enforce compliance with these covenants and, failing such compliance, to pay the succession and other duties out of the corpus of the Charities Fund, as directed by the will.

In my opinion, this right of each of the legatees falls within the definition of property in s. 2(*k*) and the succession to that right is subject to duty.

[1] [1957] Ex. C.R. 120, [1957] D.T.C. 1162, [1957] C.T.C. 217.

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I am further of the opinion that both the Charities Fund and the covenants of the charities which run in favour of the trustees are impressed with a trust in favour of the other legatees for payment of the succession duty, to the extent of the fund and its accumulations. I think the principle applied in *In Re Kirk*; *Kirk v. Kirk*[1], is applicable to the present matter.

I would dismiss this appeal with costs.

RAND J.:—This appeal raises the question under the *Dominion Succession Duty Act,* now R.S.C. 1952, c. 89, whether in the circumstances payment of succession duty by, or out of property passing to, another than the successor is itself an additional succession to which duty attaches.

A certain fraction of the testator's estate, described as "the Charities Fund", was set aside which trustees were directed to invest and which, subject to the acceptance and performance by two charitable organizations of two conditions, was to be divided equally between them. The payment to one, including accrued income, was to be in a lump sum, and the other, with income, in three equal annual instalments, commencing not later than one year after his death.

The bequests were made "absolutely conditional" upon both charities

agreeing within the period of six (6) months immediately following my death to pay, and upon each of them paying, respectively, to the complete exoneration of my Trustees and my estate, one-half of all succession duties and inheritance and death taxes, whether imposed by or pursuant to the law of this or any province, state, country, or jurisdiction whatsoever, that may be payable in connection with . . . any gift or *benefit* given by . . . this Will or any Codicil thereto, . . .

The will continued:

In the event of the refusal or failure of either or both of the aforementioned charitable organizations to accept and to perform the conditions hereinbefore set out in this paragraph (6)(c) imposed on them, then the bequests in their favour hereinbefore contained and set forth shall lapse and determine absolutely, and my Trustees shall hold and stand possessed of the said Charities Fund upon trust, firstly, to pay out of the said fund all succession duties and inheritance and death taxes . . .; and I hereby authorize my Trustees to pay any such duty or tax prior to the due date thereof or to commute the duty or tax on any interest in expectancy; and secondly, to add any balance of the Charities Fund remaining in their hands after making such payments of duties and taxes to the Annuitants Fund as a part thereof . . .

[1] (1882), 21 Ch. D. 431.

The charities elected to perform the conditions, and in the assessment of duties the Minister, taking the view that the benefit to the legatees of the tax exoneration was itself a succession, held it in turn subject to tax.

Section 2(*m*) defines "succession":

> . . . every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property . . . upon the death of any deceased person, . . . either certainly or contingently, . . .

and the issue is whether, in respect of the tax benefit, the legatees can be said to have become "beneficially entitled to any property" of the estate.

The direction to pay taxes means all taxes, and its extent here is illustrated by the conception of successive recoupments by the legatee until all increments have been paid. This is analytically simplified by visualizing the legatee as making an initial payment, the product of the rate applied to the amount of the legacy, as then recouping himself from the fund in the sum so paid, as then paying tax on that recoupment, and so on until the tax disappears.

Mr. Marler for the appellants urged as the test to determine whether a successor had become "beneficially entitled to any property" that formulated by Wynn-Parry J. in *In Re Miller's Agreement*; *Uniacke v. Attorney-General*[1]. The test was, that it must be "postulated of him [the successor] that he has a right to sue for and recover such property". If the word "recover" extends to the application of money to one's benefit, and "sue for" to an ultimate and alternative resort as the effective cause of payment, I am disposed to accept it.

Incidentally to this contention Mr. Marler challenged the relevancy of the authorities in England to the effect that tax directed to be paid out of another fund than the succession constitutes a new taxable legacy. As he argued, what those cases held was that the benefits were legacies within the meaning of the *Legacy Duty Act*, 1796. The language there was:

> Every gift by any will . . . which . . . shall be payable or shall have effect or be satisfied out of the personal or movable estate or effects of such person . . . shall be deemed a legacy.

He contrasts that with the requirement of the Act here which is argued to be narrower; the benefit under the direction in the case before us may be, he concedes, a legacy, but

[1] [1947] 1 Ch. 615, [1947] 2 All E.R. 78.

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it is not a succession, the difference being that between a purely voluntary benefit and one of an enforceable property interest.

The case before Wynn-Parry J. was a simple one of an agreement between a retiring partner and his continuing co-partners settling the disposal of his interest. Included in the arrangement was a covenant by the co-partners, from his death, to pay life annuities to his three daughters, a contract, as it is generally described, for the benefit of a third person. It seems to have been assumed that the right to the obligation of the contract had been transmitted to the legal representative of the father; but what relief was available or for whose benefit was not inquired into; as I read the reasons, if the annuities had been paid to the legal representative they could not have been recovered from him by the daughters. Consistently with the rule observed in England, there being no trust or statute, the third person, the annuitant, was held to have no interest enforceable at law or in equity; there was, consequently, no succession. The position of the annuitant was that[1]

> upon the receipt by each of the plaintiffs of any payment in respect of her annuity, the payment and the money so paid will pass to her, but she has no right to compel any payment. At common law, so far as the plaintiffs are concerned, the deed is *res inter alios acta*, and they have no right thereunder.

In other words, once money was paid under the covenant the recipient would be protected in keeping it, but nothing more.

On that view of "beneficially entitled", what is the situation here? Specified property was set apart as a trust fund to be held by the trustees until the conditions of its devolution on the charities were performed. The duty of the trustees, on the agreement of the charities to pay the taxes, is to continue the fund invested until the payments have been made, and thereupon to distribute the corpus with the accrued interest. In case of failure to agree or to pay, the trustees were, out of the fund, to pay the succession duties, and to add any balance remaining to another segregated fraction of the estate called the Annuitants Fund which had its own directions.

[1] [1947] 1 Ch. at 619.

The charities were thus to pay the taxes originally out of their own moneys before their right to the fund became absolute. Their "agreement" to pay is not to be taken as raising a legal obligation to do so; the agreement and the performance were simply conditions precedent to vesting the right to the bequests; if the agreement is taken to establish an obligation, the conclusion at which I have arrived will, *a fortiori,* be supported.

I construe the clauses to the effect that although the taxes may be paid by the charities they are, *ab initio,* charged upon the fund in the hands of the trustees. This is specifically so if the conditions are not fulfilled: and that the legatees are intended to be the beneficiaries of that charge there can be no doubt. Being so, they have an equitable interest in the fund which is protected by a right against the trustees to have the fund so applied, and the test, in that event, is satisfied.

Assuming an obligation on the charities resulting from their agreement to pay, running to the trustees, it is, in my opinion, equally clear that that obligation would be held in trust for the benefit of the legatees, and a similar equitable right against the trustees would arise.

But if no obligation binds the charities to pay, is the legatee, at that moment, "beneficially entitled" to any property within the test, that is, at that moment can it be said that any right of enforcement exists? By viewing the bequest with its conditions in isolation, as relating to the payment only as a purely voluntary detached act, it can, no doubt, be said that there is no basis for the notion of a beneficial "entitlement". But the bequests and the conditions are not in isolation; they and the contingent substitution of interest constitute one arrangement providing for the payment of the duty. The condition laid on the charities is the discharge of duties in relief of the retained fund, to discharge what, otherwise, that fund must discharge; and the amount must be the same whether paid by the charities or out of the fund. The property is to be retained until the conditions are performed and the contingent trust so preserved; the fund is made a security guarantee from the beginning for the payment in exoneration of the legatees; and the fact that there are two formal modes of discharge, though in substance only one—by subtraction from the

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fund—or that the trust resort to the fund is a contingent alternative does not, as the definition of "succession" shows, affect the reality of the interest created.

The equitable interest and the right to compel payment lacking in *Miller* are present and the benefit from the discharge of the duties plus the means of enforcement render the legatees persons "beneficially entitled". That benefit is a succession on which duty is payable.

It is urged that the existence of different rates for different brackets of value of the succession makes it difficult, if not impossible, by any mathematical formula, to determine what the ultimate rate and the total imputed legacy will be. But that in each case the total imputed legacy and its rate can be determined by provisional assumptions of the bracket within which it may be there can be no doubt.

I would, therefore, dismiss the appeal with costs.

The judgment of Cartwright and Fauteux JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of Thurlow J.[1] dismissing an appeal from an assessment of succession duties made by the respondent in respect of successions derived from the late Samuel Orem Torrance, hereinafter referred to as "the testator".

The testator died on April 26, 1952, domiciled in the Province of Ontario. By his will he appointed the appellants to be his executors and trustees and devised and bequeathed all his property to them upon trust, after the payment of his debts, funeral and testamentary expenses and certain specific and pecuniary legacies, to convert the whole residue into money and to divide it (amounting in value to $843,177.22) into 12 equal shares, of which 4, called "the Wife's Fund", were directed to be used for his widow initially and then for his children and ultimately for certain of his grandchildren; 5 shares, called "the Annuitants Fund", were, subject to the payment therefrom of certain annuities to the testator's sisters and brother, directed to be used initially for the testator's children and ultimately for certain of his grandchildren; and as to the

[1] [1957] Ex. C.R. 120, [1957] D.T.C. 1162, [1957] C.T.C. 217.

remaining 3 shares, called "the Charities Fund" and amounting in value to $210,794.31, the testator provided by art. IV, para. 6, sub-para. (c) of his will as follows:

(c) My Trustees shall set aside the remaining three (3) of such shares as a trust fund to be known as "the Charities Fund" and shall invest and keep such fund invested and subject to the acceptance and performance by both the charitable organizations hereinafter named of the conditions hereinafter mentioned my Trustees shall divide the Charities Fund equally between the EAST TORONTO GENERAL HOSPITAL of Toronto and the FIRST AVENUE BAPTIST CHURCH of Toronto (to be used and applied for the general purposes of the said Church); the payment to the said Hospital, including any income then accrued on its share, to be made in one lump sum and the payment to the said Church, including any income accrued on its share or portion thereof to the time or times of payment to be made in three (3) equal annual instalments, commencing not later than one year after my death.

The bequests to the said EAST TORONTO GENERAL HOSPITAL and the FIRST AVENUE BAPTIST CHURCH hereinbefore contained and set forth are absolutely conditional upon both of the said charitable organizations agreeing within the period of six (6) months immediately following my death to pay, and upon each of them paying, respectively, to the complete exoneration of my Trustees and my estate, one-half of all succession duties and inheritance and death taxes, whether imposed by or pursuant to the law of this or any province, state, country, or jurisdiction whatsoever, that may be payable in connection with any insurance on my life or any gift or benefit given by me either in my lifetime or by survivorship or by this my Will or any Codicil thereto, and whether such duties and taxes be payable in respect of estates or interests which fall into possession at my death or at any subsequent time.

In the event of the refusal or failure of either or both of the aforementioned charitable organizations to accept and to perform the conditions hereinbefore set out in this paragraph (6)(c) imposed on them, then the bequests in their favour hereinbefore contained and set forth shall lapse and determine absolutely, and my Trustees shall hold and stand possessed of the said Charities Fund upon trust, firstly, to pay out of the said fund all succession duties and inheritance and death taxes whether imposed by or pursuant to the law of this or any province, state, country or jurisdiction whatsoever, that may be payable in connection with any insurance on my life or any gift or benefit given by me either in my lifetime or by survivorship or by this my Will or any Codicil thereto, and whether such duties and taxes be payable in respect of estates or interests which fall into possession at my death or at any subsequent time; and I hereby authorize my Trustees to pay any such duty or tax prior to the due date thereof or to commute the duty or tax on any interest in expectancy; and secondly, to add any balance of the Charities Fund remaining in their hands after making such payments of duties and taxes to the Annuitants Fund as a part thereof and thereafter to deal with the Annuitants Fund as so augmented in the same manner as the said Annuitants Fund is hereinbefore directed to be dealt with in paragraph (6)(b) of this Clause IV of my Will.

1958

MONTREAL TRUST CO. v. MINISTER OF NATIONAL REVENUE

Cartwright J.

Following the death of the testator, the two charitable organizations in question, after applying to the Supreme Court of Ontario for directions and securing an order dated October 22, 1952, accepted the bequest made to them in the testator's will, limiting their liability in so doing, however, to an amount not exceeding their prospective share of the residue of the estate.

The testator's reference to "East Toronto General Hospital of Toronto" was erroneous; he intended the "Toronto East General and Orthopaedic Hospital".

It is conceded that the Toronto East General and Orthopaedic Hospital and First Avenue Baptist Church are charitable organizations within the meaning of s. 7(1)(*d*) of the *Dominion Succession Duty Act,* now R.S.C. 1952, c. 89. They will be referred to hereinafter as "the Charities".

In making the assessment in the case of each legatee other than the Charities the respondent first determined the amount (which I shall call X) of the dutiable value of the succession to the legatee, then calculated the amount (which I shall call Y) of the succession duties which would have been payable by the legatee without regard to the provision for payment of duties contained in art. IV, para. 6(c) of the will quoted above, and then took X plus Y as being the dutiable value of the succession to which he applied the rates provided for in the first schedule to the Act. The sole question arising on this appeal is whether instead of X plus Y the respondent should have taken X, and its solution must depend on the application of the relevant words of the *Dominion Succession Duty Act,* hereinafter referred to as "the Act", to the terms of the testator's will and to the events that have happened.

Section 6(1) of the Act imposes the duties and reads, so far as relevant:

> 6. (1) Subject to the exemptions mentioned in section seven of this Act, there shall be assessed, levied and paid at the rates provided for in the First Schedule to this Act duties upon or in respect of the following successions, that is to say,—
>
> (*a*) where the deceased was at the time of his death domiciled in a province of Canada, upon or in respect of the succession to all real or immovable property situated in Canada, and all personal property wheresoever situated;

It will be observed that duties are levied only upon or in respect of a "succession" which term is defined in s. 2(*m*) as follows:

(*m*) "succession" means every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any deceased person, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any such deceased person, to any other person in possession or expectancy, and also includes any disposition of property deemed by this Act to be included in a succession;

Clause (*n*) of s. 2 defines a "successor" as "the person entitled under a succession".

By s. 12 it is provided that every successor shall be liable for the duty levied upon or in respect of the succession to him.

The main argument of the appellants was that the learned trial judge failed to distinguish between (i) the mere conferring of a benefit upon a beneficiary, and (ii) causing a beneficiary to become beneficially entitled to property. It was submitted that duty is levied only in cases where a successor becomes beneficially entitled to property, and that in the events that have happened the charities alone became beneficially entitled, and were sole successors, to the Charities Fund. Applying the words of s. 2(*m*) to the facts of this case, it was argued: that the Charities became beneficially entitled to the whole of the Charities Fund immediately upon the death of the testator, contingently upon the performance by them of two conditions precedent, first agreeing to pay, and secondly actually paying, all succession duties payable by reason of the testator's death; that the duties must of necessity be paid out of the Charities' own moneys since the trustees under the will could not pay over any portion of the Charities Fund until satisfied that all duties had actually been paid; that consequently the beneficiaries other than the Charities, hereinafter referred to as "the legatees", would not at any time receive any part of the Charities Fund.

If all this be conceded, there still remains the question whether by reason of the will the legatees became beneficially entitled to any property upon the death of the testator. For the reasons given by the learned trial judge[1]

[1] [1957] Ex. C.R. 120, [1957] D.T.C. 1162, [1957] C.T.C. 217.

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MONTREAL TRUST CO. v. MINISTER OF NATIONAL REVENUE

Cartwright J.

I agree with his conclusion that on the true construction of the will the Charities Fund was impressed with a trust in favour of the legatees which bound the trustees of the will to hold the fund as security to insure payment of the duties, that a Court of equity would enforce the performance of this trust at the suit of the legatees, that the legatees became beneficially entitled to an interest in the Charities Fund which interest, by virtue of the definition in s. 2(*k*), was property within s. 2(*m*) of the Act, and that the value of that interest is equal to the amount of the duties limited to the amount of the Charities Fund.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Common, Howard, Cate, Ogilvy, Bishop & Cope, Montreal.

Solicitor for the respondent: A. A. McGrory, Ottawa.

1957

*Nov. 25, 26

1958

Feb. 11

ROY O'CONNOR AND NORMA O'CONNOR (*Plaintiffs*) ..... APPELLANTS;

AND

ROBERT JAMES QUIGLEY, GORDON BRUCE AND ARROW TRANSIT LINES LIMITED (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence — Findings of trial judge — Trial without jury — Evidence apparently overlooked—New trial ordered.

A car driven by the plaintiff O collided with a car driven in the opposite direction by the defendant Q, and almost simultaneously O's car was struck in the rear by a transport owned by the defendant company and driven by the defendant B. The trial judge refused to accept the evidence of O, Q, or B, and proceeded to find the facts from independent testimony, as a result of which he dismissed the action and gave judgment for Q on his counterclaim. He found in particular that O had not satisfied the onus of proving, as he alleged, that Q had been driving on the "wrong" side of the road, and that O had been negligent in several respects. This judgment was affirmed by the Court of Appeal.

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*PRESENT: Kerwin C.J. and Locke, Cartwright, Fauteux and Abbott JJ.

Held (Abbott J. dissenting): There must be a new trial, since there was nothing in the evidence accepted by the trial judge to support his findings of negligence against O, and others of his findings were inconsistent with the objective evidence. Although it was true that the question of negligence or no negligence was one of fact and that there were concurrent findings in the Courts below, nevertheless those Courts had failed to make clear findings as to how and where the collisions occurred and there were inconsistencies between the findings made that were so serious as to necessitate a new trial.

APPEAL from a judgment of the Court of Appeal for Ontario affirming a judgment of Moorhouse J. Appeal allowed, Abbott J. dissenting.

W. B. Williston, Q.C., for the plaintiffs, appellants.

J. J. Robinette, Q.C., and *E. J. R. Wright, Q.C.*, for the defendant Quigley, respondent.

W. S. Gray, for the defendants G. Bruce and Arrow Transit Lines Limited, respondents.

THE CHIEF JUSTICE:—Since I consider that there should be a new trial, I refrain from discussing the evidence. Notwithstanding the findings as to credibility made by the trial judge and confirmed by the Court of Appeal, there was testimony by disinterested witnesses, to which, apparently, consideration was not given. Although Quigley changed his evidence at the trial, his testimony on examination for discovery may be treated as an admission that, at the date of the examination, he understood that what he then swore to had actually occurred at the time of the accident. Although the action was dismissed on the basis that the plaintiffs had failed to meet the usual onus, the counterclaim by Quigley was allowed.

Under all the circumstances the trial of the action was so unsatisfactory that a new trial should be held. The costs of the action and appeals will be disposed of by the judge presiding at the new trial.

The judgment of Locke, Cartwright and Fauteux JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario, dismissing an appeal from a judgment of Moorhouse J. whereby the appellants' action was dismissed and judgment was given in favour of the respondent Quigley on his counterclaim against the appellant Roy O'Connor for $10,223 without costs.

1958

O'CONNOR *et al.* *v.* QUIGLEY *et al.*

Cartwright J.

As I have reached the conclusion that there must be a new trial, I propose to refer to the evidence only so far as is necessary to indicate my reasons for so deciding.

The action arose out of an accident which occurred on May 9, 1954, at about 12.10 a.m. on no. 2 highway a few miles west of the city of London. The highway runs east and west. The paved surface is 30 feet wide consisting of a middle strip of asphalt 20 feet in width with a 5-foot cement strip on either side of the asphalt. At the place where the accident occurred a solid double line divides the east- and west-bound traffic-lanes for a distance of slightly more than 113 feet. Proceeding east from this area there is a down-grade approximately 600 feet long. Three vehicles were involved in the accident, a Ford car owned and driven by the appellant Roy O'Connor in which his wife, the appellant Norma O'Connor, was a passenger, a Pontiac car owned and driven by the respondent Quigley and a tractor-trailer transport owned by the respondent Arrow Transit Lines Limited and driven by the respondent Bruce.

The O'Connor car and the transport were travelling west and the Quigley car was travelling east. The O'Connor car had followed the transport from the city of London and passed it a very short time prior to the collisions, which were between the front of the O'Connor car and the front of the Quigley car and between the front of the transport and the rear of the O'Connor car.

The conflicting theories as to how the collisions occurred were briefly as follows. For Quigley it was contended that he was driving at all relevant times in the lane for east-bound traffic and that the collision between his car and that of O'Connor took place to the south of the centre-line of the highway. For O'Connor it was submitted that the transport was at all times travelling in the lane for west-bound traffic, that O'Connor having completely passed it was proceeding westerly in the lane for west-bound traffic a short distance ahead of the transport when Quigley's car without warning turned to the north of the centre-line and that this action on Quigley's part was the sole cause of the collisions. The theory of the respondents Bruce and Arrow Transit Lines Limited was substantially the same as that of O'Connor.

The learned trial judge placed no credence in the testimony of Quigley, O'Connor or Bruce, and was of opinion that he must find the facts from the independent testimony of four witnesses and from the marks on the road which some of them described and which were indicated in photographs filed as exhibits. These four witnesses were Haight and Haines, police officers who made an investigation after the accident and described the marks on the pavement and the position of the vehicles, and Waterworth and Shortt who were in a motor car driven by the former which was following the O'Connor car, saw it pass the transport and were following a short distance behind the transport when the collisions occurred.

The learned trial judge was of opinion (i) that the appellants had not satisfied the onus of proving that the Quigley car was driven to the north of the centre-line of the highway, and (ii) that the collision between the transport and the O'Connor car occurred before the collision between the O'Connor car and the Quigley car. His reasons continue as follows:

> Now we turn to the statement of defence of the defendant Quigley. They allege that the plaintiff Roy O'Connor was negligent in that:
>
> (*a*) He failed to keep a proper lookout.
>
> There is certainly evidence of this fact again from the independent witnesses altogether apart from the parties.
>
> (*b*) He was driving at an excessive rate of speed.
>
> (*c*) In failing to have his motor vehicle under proper control.
>
> (*d*) In operating his motor vehicle on the wrong side of the highway.
>
> (*e*) In passing the motor vehicle of the defendant Arrow Transit Lines Limited at a time when the motor vehicle of the defendant Robert James Quigley was approaching so closely as to render a collision inevitable.
>
> (*f*) In driving on Highway No. 2 at approximately midnight of May 8th, 1954, without lighted headlights.
>
> Now, in respect to all of these allegations there is evidence which the Court can and does accept. When we look at the situation as to who created the emergency, O'Connor was unquestionably primarily responsible and Bruce had no opportunity to avoid the accident.
>
> Since the Court has found that the transport truck struck O'Connor first it is not possible to say that Quigley was negligent. It is true the mark from the Quigley vehicle commenced at the centre line of the road. The Court has given anxious consideration as to whether this was sufficient to conclude that Quigley was on the north half of the road. That the Court has not been able to do.
>
> In the result the action is dismissed. The defendant Quigley is entitled to succeed on his counterclaim . . .

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O'CONNOR *et al.* v. QUIGLEY *et al.*

Cartwright J.

As the learned trial judge had expressly discredited Quigley and the one of his passengers who gave evidence I can find nothing in the record to establish any of these items of negligence except item (f) as to which the evidence shows that O'Connor was turning his lights off and on, apparently as a signal to the driver of the transport that he intended to pass. The evidence of Shortt and Waterworth indicates that O'Connor completed the manoeuvre of passing the transport some hundreds of feet to the east of the scene of the accident and the marks on the road indicate that the O'Connor car was well to the north of the centre-line of the road when struck in the rear by the transport. The evidence of Bruce is to the same effect. Bruce's explanation of running into the rear of the O'Connor car was that the Quigley car came across the centre-line of the highway into the path of the O'Connor car. If this evidence is rejected, as it has been by the learned trial judge, it leaves Bruce without an explanation and I am unable to appreciate how, if the theory that the Quigley car was driven to the north of the centre-line of the highway be discarded, Bruce can escape being found negligent. This difficulty is not dealt with in the reasons of the Court of Appeal. In that Court neither counsel for the appellants nor counsel for Quigley asked for a finding that Bruce was negligent but this does not remove the inconsistency between rejecting the theory of Bruce and O'Connor and absolving Bruce from blame.

I am unable to find in the reasons of either Court below a reconciliation between the position of the mark on the pavement which they took to have been made by the rim of the left front wheel of the Quigley car and the finding that at the instant of collision between that car and the O'Connor car the former was not at least partly to the north of the centre-line of the highway.

We were pressed with the argument that the question of negligence or no negligence is one of fact and that in the case at bar there are concurrent findings which we ought not to disturb; but, in my view, the Courts below have failed to make clear findings as to how and where the collisions occurred and there are inconsistencies between the findings which have been made which are so serious as to necessitate a new trial.

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O'CONNOR et al. v. QUIGLEY et al.

Cartwright J.

For the above reasons I would allow the appeal, set aside the judgments below and direct a new trial. The costs of the former trial and of the appeals should be disposed of by the judge presiding at the new trial.

ABBOTT J. (*dissenting*):—This appeal turns upon questions of fact and these are fully set forth in the judgments below.

I have read the evidence with care and in my opinion there was evidence upon which both Courts below could find as they have done (1) that the Arrow transport truck struck the O'Connor vehicle before the latter collided with the Quigley vehicle; (2) that at all relevant times the Quigley vehicle was travelling on its own side of the road and (3) that the accident was caused by the negligence of O'Connor.

Appellant has failed to satisfy me that the Court below was wrong in reaching the conclusion which it did and I would, therefore, dismiss the appeal with costs.

New trial ordered, ABBOTT J. *dissenting.*

Solicitors for the plaintiffs, appellants: Thompson & Brown, London.

Solicitors for the defendant Quigley, respondent: Wright & Poole, London.

Solicitors for the defendants Bruce and Arrow Transit Lines Limited, respondents: Borden, Elliot, Kelley, Palmer & Sankey, Toronto.

MICHAEL PEREPELYTZ (*Plaintiff*) ....APPELLANT;

1957

*Nov. 27, 28

1958

Jan. 28

AND

THE DEPARTMENT OF HIGHWAYS FOR THE PROVINCE OF ONTARIO (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Crown—Actions against—Proper style of cause—Special statutory provisions—The Highway Improvement Act, R.S.O. 1950, c. 166, s. 87—Binding effect on Crown—The Interpretation Act, R.S.O. 1950, c. 184, s. 11.

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

1958

PEREPELYTZ v. DEPT. OF HIGHWAYS FOR ONT.

Highways—Liability of "Department" for non-repair of the King's Highway—Proper style of cause for action—Amendment—The Highway Improvement Act, R.S.O. 1950, c. 166, s. 87.

Section 87 of *The Highway Improvement Act*, which provides for a cause of action arising out of non-repair of the King's Highway, refers throughout to the liability of, and an action against, "the Department". Subsection (8), providing that in an action under the section "against the Department" the defendant may be described in the style ordinarily used for the Crown in the right of the Province, is merely permissive and does not have the effect that a writ in which the defendant is described merely as "the Department of Highways for the Province of Ontario" is an absolute nullity. If, therefore, an action is brought within the time prescribed by s. 87(4) with the defendant so described, there can be no objection to the making of an order after the expiration of that time permitting the amendment of the style of cause by substituting "Her Majesty the Queen in the Right of the Province of Ontario, Represented by the Minister of Highways for the Province of Ontario" as the description of the defendant, although such an amendment is not necessary.

The Highway Improvement Act clearly provides that the Crown is bound by its provisions and there is, therefore, no room for the application of the rule embodied in s. 11 of the Ontario *Interpretation Act*.

APPEAL by the plaintiff from a judgment of the Court of Appeal for Ontario[1], setting aside an order of McDonald J. of the District Court of the District of Algoma, amending the style of cause. Appeal allowed.

W. B. Williston, Q.C., for the plaintiff, appellant.

K. D. Finlayson, for the defendant, respondent.

The judgment of Kerwin C.J. and Taschereau, Locke and Cartwright JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal by the plaintiff from a judgment of the Court of Appeal for Ontario[1] setting aside an order of a District Court Judge which contained the following paragraphs:

1. IT IS ORDERED that the style of cause herein be amended by striking out the words "The Department of Highways for the Province of Ontario" and substituting therefor the words "Her Majesty the Queen in the Right of the Province of Ontario, Represented by the Minister of Highways for the Province of Ontario".

2. AND IT IS FURTHER ORDERED that the Writ of Summons herein as so amended be re-served on the proper person on behalf of the said Plaintiff.

[1] [1956] O.R. 553, 4 D.L.R. (2d) 8 (*sub nom. Perepelytz v. The Township of Korah et al.*).

3. AND IT IS FURTHER ORDERED that such amendment and re-service shall not be taken as prejudicing the position of the Plaintiff insofar as compliance with the pertinent Sections of Sec. 87 of The Highway Improvement Act being R.S.O. 1950 Chap. 166 is concerned.

4. AND IT IS FURTHER ORDERED that the costs of this Motion be costs in the cause.

The writ of summons was issued September 6, 1955, claiming damages said to have been caused July 8, 1955, by the non-repair of a highway. Apparently there was some doubt as to whether that highway was a township road or a King's Highway and, therefore, the defendants were the Municipal Corporation of the Township of Korah and the Department of Highways for the Province of Ontario. We are concerned only with the latter. On September 7, 1955, the plaintiff's solicitor sent the Minister of Highways the writ and a copy and asked that the Department's solicitors accept service and sign the undertaking to appear, endorsed on the original. This letter was not answered until September 17, when the solicitors acting for the Department returned the original writ without signing the undertaking, but stating "we are proceeding to enter an Appearance thereto". Such appearance was entered September 27 in the name of the Department. On November 24, 1955, the solicitors for the Department wrote the following letter to the plaintiff's solicitor:

> Will you please deliver your Statement of Claim.
>
> We do not know by what right the Plaintiff sues "The Department of Highways for the Province of Ontario". We know of no right on the part of anyone to sue a Government Department.

On December 1, 1955, the plaintiff's solicitor wrote the solicitors for the Department, referring to various sections of *The Highway Improvement Act,* R.S.O. 1950, c. 166, and stating that, while he considered the action was properly constituted, he preferred to use the style of cause suggested in the Act and enclosed a consent to be signed by the solicitors for the Department that this should be done. Upon this consent being refused, an application was made by the plaintiff to the District Court Judge, who made the order referred to, and it was this order which was set aside by the Court of Appeal[1], F. G. MacKay J.A. dissenting.

It was argued by the plaintiff in the Court of Appeal that the order of the District Court Judge was an interlocutory order from which there was no appeal and that Court was

[1] [1956] O.R. 553, 4 D.L.R. (2d) 8.

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PEREPELYTZ v. DEPT. OF HIGHWAYS FOR ONT.

Kerwin C.J.

unanimous in rejecting that contention. Leave was granted by the Court of Appeal to appeal from its judgment, but, in order to avoid any difficulty that might arise, in view of the terms of s. 38 of the *Supreme Court Act*, R.S.C. 1952, c. 259, this Court upon the opening of the appeal, with the consent of counsel for the respondent, granted leave to appeal under s. 41 of the *Supreme Court Act*, as amended by 1956, c. 48, s. 3.

Under the provisions of subs. (4) of s. 87 of *The Highway Improvement Act*, such an action as this is barred unless commenced within three months of the time of the occurrence. In view of the correspondence set about above, it would be unfortunate if that were the result, but, with respect, I must say there is no question in my mind that paras. 1 and 4 of the District Court Judge's Order should be affirmed.

Before dealing with s. 87 it is advisable to set out ss. 64 and 65:

64. (1) The Lieutenant-Governor in Council, upon the recommendation of the Minister, may designate any highway or a system of public highways throughout Ontario to be laid out, acquired, constructed, assumed, repaired, relocated, deviated, widened and maintained by the Minister as the King's Highway.

(2) Every highway heretofore or hereafter constructed, designated and assumed in accordance with this section shall be known as "the King's Highway".

65. The King's Highway and all property acquired by Ontario under this Act shall be vested in His Majesty and shall be under the control of the Department.

The relevant parts of s. 87 read as follows (the italics are mine):

(1) Every portion of the King's Highway shall be maintained and kept in repair by the Department . . . . . .

(2) In case of default by the Department to keep any portion of the King's Highway in repair, *the Department shall be liable for all damages* sustained by any person by reason of the default, and the amount recoverable by any person by reason of the default may be agreed upon with the Department before or after the commencement of any action for the recovery of the damages.

(3) No action shall be brought *against the Department* for the recovery of damages caused by the presence or absence or insufficiency of any wall, fence, guard rail, railing or barrier or caused by or on account of any construction, obstruction or erection or any situation, arrangement or disposition of any earth, rock, tree or other material or thing adjacent to or in, along or upon the highway lands or any part thereof not within the travelled portion of the highway.

(4) No action shall be brought for the recovery of damages occasioned by such default, whether the want of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained.

(5) No action shall be brought for the recovery of the damages mentioned in subsection 2, unless notice in writing of the claim and of the injury complained of has been *served upon or sent by registered post to the Department* within ten days after the happening of the injury.

(6) The failure to give or the insufficiency of the notice *shall not be a bar to the action,* if the court or judge before whom the action is tried is of the opinion that there is reasonable excuse for the want or insufficiency of the notice and that *the Department was not thereby prejudiced in its defence.*

(7) All damages and costs recovered under this section and any amount payable as the result of an agreement in settlement of any claim for damages which has been approved of by counsel in writing *shall be payable in the same manner as in the case of a judgment recovered against the Crown in any other action.*

(8) In any action under this section against the Department, the *defendant may be described as "His Majesty the King in right of the Province of Ontario, represented by the Minister of Highways for the Province of Ontario",* and it shall not be necessary to proceed by petition of right or to procure the fiat of the Lieutenant-Governor or the consent of the Attorney-General before commencing the action but every such action may be instituted and carried on and judgment may be given thereon in the same manner as in an action brought by a subject of His Majesty against another subject.

There is no doubt as to the general rules discussed in the reasons for judgment of the majority of the Court of Appeal. In substance they are embodied in s. 11 of *The Interpretation Act,* R.S.O. 1950, c. 184:

11. No Act shall affect the rights of His Majesty, His Heirs or Successors, unless it is expressly stated therein that His Majesty shall be bound thereby.

However, as stated by the Judicial Committee in *Nisbet Shipping Co. Ltd. v. The Queen*[1], this section has no relevance to a statute which expressly enacts that the rights of the Crown shall be affected.

In the present case *The Highway Improvement Act* clearly so provides. If the road in question is a King's Highway under the earlier sections, then subs. (1) of s. 87 enacts that it shall be kept in repair by "the Department", *i.e.,* the Department of Highways. By subs. (2), in case of default, "the Department shall be liable for all damages".

[1] [1955] 1 W.L.R. 1031, [1955] 3 All E.R. 161, [1955] 4 D.L.R. 1, 73 C.R.T.C. 32.

1958

PEREPELYTZ v. DEPT. OF HIGHWAYS FOR ONT.

Kerwin C.J.

By subs. (3) no action is to be brought "against the Department" under certain circumstances. By subs. (5) notice of a claim and injury is to be "served upon or sent by registered post to the Department within ten days after the happening of the injury", but by subs. (6) the failure to do so "shall not be a bar to *the* action" in specified events, including one that "the Department was not thereby prejudiced in *its* defence". By subs. (7) all damages and costs recovered under s. 87 and any amount payable as the result of a settlement "shall be payable in the same manner as in the case of a judgment recovered against the Crown in any other action". Subsection (8) is merely permissive as to the manner in which the defendant may be described. Upon consideration of its terms, read together with the preceding subsections, it is clear that "may" is not to be read as "must".

The right of action given by the Act is against the Crown in the right of the Province of Ontario, but in the provisions of the Act, quoted above, which confer the right of action the term consistently used to describe the Crown in the right of the Province is "the Department". When the appellant in his writ named as one of the defendants "The Department of Highways for the Province of Ontario" it is clear that he intended to designate the entity described in s. 87 by the words "the Department", that is, the Crown in the right of the Province. He cannot I think be criticized for using to describe the Crown the very words repeatedly used by the Legislature for that purpose. In my opinion, the amendment ordered by the learned District Court Judge was not necessary to the valid constitution of the action but there can be no objection to paras. 1 and 4 of his order.

The appeal should be allowed with costs throughout and the order of the District Court Judge restored, subject to the omission of paras. 2 and 3.

RAND J.:—The effect of the several statutory references to the "Department of Highways", in respect of duties and the created liability toward an injured person, is to permit an action to be brought against the Crown designated by that expression as a name. Any other construction would

be little short of a statutory snare for the practitioner. The permission to bring the proceeding in the name of Her Majesty does not exclude that but is to be taken as furnishing an additional mode.

I would, therefore, allow the appeal and restore the order of the District Court Judge as proposed by the Chief Justice.

Appeal allowed with costs.

Solicitor for the plaintiff, appellant: I. A. Vannini, Sault Ste. Marie.

Solicitors for the defendant, respondent: Kingsmill, Mills, Price & Fleming, Toronto.

JOHN MEDUK (*Defendant*) AND BESSIE MEDUK (*Plaintiff*) ... } APPELLANTS;

AND

JOHN SOJA AND ALICE SOJA (*Defendants*) ..... } RESPONDENTS.

1957
*Oct. 16
1958
Jan. 28

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Dower—Rights of husband under The Dower Act—Absence of consent to sale of wife's homestead—Estoppel—The Dower Act, R.S.A. 1955, c. 90, ss. 2(b)(i), 3(1), 6.

B.M., a married woman, was the registered owner of a house and lot in Edmonton, which was her homestead within the meaning of *The Dower Act*. She accepted an offer in writing to purchase the property "upon execution by the Vendor of necessary conveyances and formal documents required". B.M.'s husband, J.M., did not consent in writing to the making of the agreement. He was asked by the agent, in the presence of the prospective purchasers, whether he would sign the agreement and said he would not since the property belonged to his wife and she could do what she pleased with it.

Held: The agreement was not enforceable by the purchasers and they must deliver up possession of the property to B.M., who, however, must return the deposit paid by them. Apart from the procedural errors in the Courts below, fully set out in the reasons for judgment, the effect of s. 3(1) of *The Dower Act* was that without J.M.'s consent in writing B.M.'s acceptance of the offer was ineffective to form a contract. Even if the doctrine of estoppel could be invoked in the circumstances, there was nothing in the evidence to support an estoppel by matter

*PRESENT: Taschereau, Rand, Locke, Cartwright and Abbott JJ.

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in pais. 15 Halsbury, 3rd ed., s. 338, p. 169, quoted with approval. It was not suggested in argument that the purchasers understood, from anything that was said or done by B.M. or J.M., that the property in question was not a homestead, and the conduct of J.M. and B.M., taken either separately or collectively, could not amount to a representation that in fact J.M. had consented in writing to the sale; indeed the evidence of both purchasers made it clear that they had moved into the property knowing that he had not done so. A transaction expressly forbidden by statute was not rendered valid by the circumstance that the parties to it were all ignorant of the statutory prohibition. The evidence of the purchasers, even if accepted *in toto*, furnished no ground for extinguishing the dower rights of J.M. which, under the combined effect of ss. 2(*b*)(i) and 3(1) of the Act, included the right to prevent a disposition of the homestead by withholding his written consent.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, dismissing an appeal from a judgment of Primrose J. Appeal allowed.

J. W. K. Shortreed and *R. L. Brower,* for the appellants.

W. G. Morrow, Q.C., for the respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta dismissing an appeal from a judgment of Primrose J., whereby the claim of the appellant Bessie Meduk for possession of a property known as no. 10521-83rd Street in the city of Edmonton was dismissed and the respondents were granted specific performance of an agreement for the sale to them of the said property.

To make clear the questions raised for decision it is necessary to state with some particularity not only the facts but also the procedure followed in the Courts below.

In his reasons the learned trial judge did not set out his findings of fact in detail, but stated that he did not believe the evidence of the appellants and that where there was any conflict he accepted the evidence of the respondents. Consequently in stating the relevant facts I shall give the version of the respondents where it differs from that of the appellants.

The appellants are husband and wife. At all relevant times the appellant Bessie Meduk was the registered owner of no. 10521-83rd Street, which, it is conceded, was her

homestead within the meaning of that term as defined in *The Dower Act, 1948* (Alta.), c. 7 (now R.S.A. 1955, c. 90), hereinafter referred to as "the Act".

The respondents made an offer in writing, dated June 14, 1955, to purchase the property in question for $7,700 payable in cash "upon execution by the Vendor of necessary conveyances and formal documents required", possession to be given on June 17, 1955, and adjustments to be made as of that date. On June 15, 1955, a written acceptance of the offer was signed by Bessie Meduk. The offer and acceptance were on a printed form headed "Offer to Purchase and Interim Agreement", on the back of which was printed a form headed "Consent of Spouse" in the wording of Form A in the schedule to the Act. The name of the appellant John Meduk was not filled in on this form and it is common ground that he did not sign it and that he did not at any time consent in writing to the making of the agreement for sale.

Bessie Meduk signed the acceptance at the home of the respondents both of whom were present as were also John Meduk and a real estate agent, Chmelyk. Before she signed there was some discussion and the respondents agreed to pay $2 for a clothes-line and to let the Meduks have one-half of the produce of the garden of the property in question. After signing Bessie Meduk handed the key to John Soja and said that the respondents could move in at any time. Chmelyk asked John Meduk to sign and his evidence as to what occurred is as follows:

On examination-in-chief

Q. Now, you asked Mr. Meduk to sign? A. Yes, I did.

Q. Did he give you any answer, or did he sign? A. He said it is not his property. That is his wife's property and she can do whatever she pleases.

On cross-examination:

Q. Did you know that The Dower Act had to be complied with on the disposition of property? A. Yes sir.

Q. Why was not the dower affidavit taken? A. It was not taken, because usually they do the balance of the papers in the office.

Q. Did you ask Mr. Meduk to sign the interim agreement? Did you ever ask him to sign it? A. Well, I mean, I did not ask him the second time.

Q. Did you ask him to sign it? A. No, I did not, because it was not his property so I did not ask him to sign it.

Q. When you gave the document to his wife to sign, she signed it? A. Right.

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Q. Did you then say to Mr. Meduk, "Will you sign this document?" A. I asked him if he wanted to sign it, and he said, "Well, it is not my property, so I do not have to sign it."

Alice Soja did not testify at the trial but her evidence on examination for discovery, put in as part of the case of the appellant Bessie Meduk, reads, on this point, as follows:

Q. I am showing you an interim agreement marked Exhibit "A". Is that your signature on the agreement? A. That's right.

Q. Mrs. Soja, could you tell us, were you present when your husband signed this? A. I was present.

Q. Were you there when Mrs. Meduk signed this agreement? A. I was.

Q. Was Mr. Meduk present? A. He was.

Q. Did he sign the agreement? A. No.

Q. Did anyone ask him to sign the agreement? A. Yes.

Q. Who asked him? A. The agent.

Q. What did he say? A. He just asked him to sign it and he said he wasn't going to.

John Soja's evidence on this point is as follows:

On examination-in-chief:

Q. And did Mr. Meduk sign? A. No, he never sign.

Q. Did he give any explanation of why he did not sign? Did you hear him give any explanation? A. I hear what he said. He said "I do not have to sign."

Q. What did you think he said? A. He says "It is not necessary to sign it" because it is not his property. He said it is his wife's property.

On cross-examination:

Q. When Mrs. Meduk signed that paper, did her husband sign it? A. Her husband never signed.

Q. He refused to sign it? A. He said it is not necessary. It is no my property.

The respondents moved into the property in question on the night of June 15, 1955, and are still residing there. About a week after they had moved John Meduk gave to John Soja the key to a shed at the back of the property in question and also gave him some blinds which were in the shed. John Soja testified that some time after this John Meduk came to him and said: "We had better leave that deal off, he says, till listing expired. He says we are going to make this deal between ourselves." This proposal was not elaborated. Soja consulted a lawyer as to whether he could "make that kind of a deal" and did not agree to it. Subsequently, "about July 20, 1955", undated notices in writing signed by Bessie Meduk were delivered to each of the respondents, requiring them to quit and deliver up possession of the

property in question on August 1, 1955; these notices were accompanied by letters dated July 19, 1955, addressed to each of the respondents. The letter addressed to John Soja read as follows:

On the 15th day of June, A.D. 1955, you and Alice Soja signed an Interim Agreement whereby you accepted my offer to sell the premises legally described as Lot 5, Block 50, Forest Heights Subdivision, Plan 3829 H.W. and municipally described as 10521-83rd Street.

The Purchase price of $7,700 was to have been paid in cash. More than a month has elapsed and payment has not as yet been made.

This is therefore to inform you that my offer to sell is hereby withdrawn and that the said Interim Agreement is hereby rescinded and cancelled.

Yours truly,
(Sgd.) Mrs. Bessie Meduk

cc to Morrow & Morrow
Barristers & Solicitors
Edmonton, Alberta.

The letter addressed to Alice Soja was the same except that for the words "you and Alice Soja" in the opening sentence the words "you and John Soja" were substituted.

At the opening of the trial a letter from the solicitors for the respondents to the solicitors for the appellants was filed; it reads as follows:

Further to your letter of July 28th this will confirm our arrangement, firstly, that our clients admit that the formal tender of the full cash balance under their agreement was not made until two days after receipt of your client's notice purporting to cancel the agreement, and, secondly, that you admit that two days following service of the notice above formal tender was made by our clients.

On September 30, 1955, the appellant Bessie Meduk commenced proceedings by way of originating notice, directed to both of the respondents, claiming an order for possession and damages. On October 13, 1955, Egbert J. made an order directing the trial of an issue to determine the rights of the parties in and to possession and ownership of the property in question. By arrangement between the solicitors for the parties pleadings were delivered, Bessie Meduk being plaintiff and John Soja and Alice Soja defendants.

In the statement of claim, Bessie Meduk alleged that the respondents had improperly taken possession of the property in question on June 15, 1955, and in spite of repeated demands refused to deliver up possession. The prayer for relief claimed possession and damages.

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The respondents delivered a statement of defence and counterclaim setting out the agreement of June 15, 1955, their readiness and willingness to perform the same and claiming "Specific performance of the said agreement for sale and an Order directing that they are entitled to a conveyance covering the title to the said property."

Bessie Meduk delivered a reply and defence to counterclaim, para. 2 of which is as follows:

2. The Plaintiff states that on or about the 14th or 15th day of June, A.D. 1955, an Interim Agreement was executed whereby the Defendants offered to purchase the property described in the Plaintiff's Statement of Claim, but that the provisions of the Dower Act of the Province of Alberta, were not complied with and that the Plaintiff's husband, in the presence of the Defendants, refused to sign the Dower Affidavit required by the Act and still refuses to do so.

As a further defence to the counterclaim it was pleaded that the respondents had been unable to make payment in accordance with the terms of the agreement; but I understood counsel for the appellants to state, on the argument before us, that the defence that John Meduk has never consented in writing to the agreement and refuses to do so was the only one that need be considered.

The respondents delivered a reply to the defence to the counterclaim, paras. 3 and 7 of which are as follows:

3. In further reply to paragraph 2 of the Defence to Counterclaim the Defendants state that at all times material to making the Agreement between the Plaintiff and the Defendants the Plaintiff's husband indicated a willingness to sign the Dower Affidavit if, in fact, signature by him was required, and the Defendants state that this is no defence to the Counterclaim of the Defendants.

7. The Defendants further state in reply to paragraphs 2, 3 and 4 and 5 of the Defence to Counterclaim that The Dower Act is no defence to the present action and that the present Plaintiff has no right in law to plead the said statute as a defence to the present Counterclaim by the Defendants: and pleads estoppel.

At the commencement of the trial counsel for the respondents asked leave to amend by adding at the end of para. 7, quoted above, the words: "and pleads further that the plaintiff is estopped from setting up this statute as a defence." Counsel for Bessie Meduk stated that he had no objection and the amendment was allowed.

In his reasons for judgment the learned trial judge said in part:

Having considered the authorities cited by counsel, I hold that this was a voidable agreement and that the plaintiff is estopped from denying the validity of the agreement in favor of the defendants, who are innocent purchasers. It would be inequitable to assist the plaintiff in avoiding specific performance of the agreement and her reliance on the Dower Act was a patent attempt to escape liability.

The formal judgment directed specific performance and concluded with the following paragraph:

IT IS FINALLY ORDERED AND ADJUDGED that failing delivery of a registrable conveyance by the Plaintiff to the Defendants, the Defendants may apply on two days' notice to this Honourable Court for an order cancelling the Plaintiff's title to the lands covered by the aforesaid agreement for sale in favor of the Defendants.

Bessie Meduk appealed. Her appeal was heard on May 8, 1957, and judgment was reserved. On May 10, 1957, the Appellate Division made an order in the following terms:

IT IS HEREBY ORDERED that the husband of the plaintiff be added as a party defendant and that a copy of this Order be served upon him by the solicitor for the defendants.

THAT inasmuch as the vesting order was made without the husband being a party, the vesting provisions of the judgment of Primrose J. shall be stayed for thirty days after service of this Order to permit the husband to launch appropriate proceedings to establish that the agreement should be set aside because of the absence of his consent under The Dower Act. In such proceedings the respondents shall be entitled to plead *inter alia* that the husband is estopped by his conduct of setting up his claim to dower. In the event such claim is not proceeded with by the husband, or is resolved against him, the appeal stands dismissed. In the event of his success in such proceedings, the present appeal shall be further spoken to.

The respondents shall have the costs of the trial and the costs of this appeal may be spoken to after the question above set out has been determined.

On August 19, 1957, a formal judgment of the Appellate Division was entered. In this for the first time the name of John Meduk appears in the style of cause, in which he is described as "JOHN MEDUK joined as a party defendant by order of the Court appealed from [*sic*], Defendant". The judgment reads as follows:

THIS IS TO CERTIFY that the appeal of the above-named Appellant from the Judgment of The Honourable Mr. Justice Neil Primrose, of the Supreme Court of Alberta, pronounced on the 10th day of December, A.D. 1956, having come to be argued before this Honourable Court on the 8th day of May, A.D. 1957, whereupon and upon hearing Counsel as well for the Appellant as for the Respondent, this Court was pleased to reserve judgment until May 10th, 1957, whereupon, on May 10th, 1957, this Court was pleased to grant an Order directing that the vesting provisions of the

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adjudgment appealed from be stayed for thirty days after service of the said Order of May 10th, 1957, upon John Meduk, husband of the Plaintiff (Appellant) for the purpose of permitting the said John Meduk to launch appropriate proceedings to establish that the agreement forming the subject matter of the lawsuit be set aside because of the absence of his consent under The Dower Act, failing the proceedings being taken by the said John Meduk or in the event the proceedings, if taken, be resolved against him, the appeal should stand dismissed, the said Order further providing that the Respondent should have the cost of the trial in any event, the cost of the appeal to be spoken to after the disposition of the above with respect to John Meduk, whereupon following the service of a copy of the aforesaid Order of May 10th, 1957, upon said John Meduk and the said John Meduk being noted in default of any appearance on the 17th day of June, A.D. 1957, whereupon this Court was pleased to settle the question of costs of the appeal on the 18th day of July, A.D. 1957;

IT WAS ORDERED AND ADJUDGED that the said appeal should be, and the same was, dismissed with costs.

With respect, there appear to me to be grave objections to the procedure followed in the Appellate Division.

As John Meduk had not consented in writing to the making of the agreement of sale and had not given the acknowledgment required by s. 6 of the Act, it was necessary to enable the respondents to acquire a registered title in fee simple to the property in question that they should obtain an order vesting the title in them and extinguishing not only the title of Bessie Meduk but also the dower rights of John Meduk. The counterclaim amended simply by adding the name of John Meduk as a defendant did not disclose any cause of action against him. It is difficult to see what proceedings John Meduk could appropriately take in the circumstances. The order of May 10, 1957, does not provide that he is to be served with the amended counterclaim. It does not provide for any amendment of the counterclaim to set out the grounds on which relief is claimed as against him, unless the permission given to the respondents to plead *inter alia* that he was estopped by his conduct from setting up his claim to dower is to be construed as an order permitting an amendment of the counterclaim. The order appears to contemplate John Meduk initiating proceedings of some sort, in defence to which the respondents would be free to plead such matters as they might choose including estoppel. The cases to which counsel referred in which parties were added for the first time in appellate Courts furnish no precedent for an order such as was made in the case at bar, and I know of none.

However, I do not find it necessary to pursue this question as, even on the assumption that the pleadings had been amended so as to set up every claim for relief to which it was argued before us that the respondents were entitled, it is my opinion that on the evidence their claim could not succeed.

The wording of the order of May 10, 1957,—"to permit the husband to launch appropriate proceedings to establish that the agreement should be set aside"—indicates that the order was founded upon the erroneous assumption that there was an agreement in existence. No doubt the acceptance by Bessie Meduk of the respondents' offer would have formed a contract if the property had not been the homestead, but, since it was so, the making of the agreement by her without the consent in writing of her spouse was expressly forbidden by s. 3(1) of the Act and unless John Meduk did consent in writing, her acceptance was ineffective to form a contract.

The submission of the respondents is that both Bessie Meduk and John Meduk are estopped by reason of their conduct from averring that John Meduk did not give the required consent. For the purposes of this branch of the matter I will assume, without deciding, that the doctrine of estoppel could be invoked to render valid a transaction which the Legislature has expressly forbidden, but even on that assumption, it is my opionion that the submission of the respondents fails.

The general rule as to estoppel by matter *in pais* is satisfactorily stated in Halsbury's Laws of England, 3rd ed., vol. 15 (1956), s. 338, p. 169, as follows:

> Where one has either by words or conduct made to another a representation of fact, either with knowledge of its falsehood, or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable man, understand that a certain representation of fact was intended to be acted on, and that the other has acted on the representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be.

It was not suggested in argument that the respondents understood from anything that was said or done by the appellants that the property in question was not the homestead and there was no evidence sufficient to support such an argument had it been made.

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It being admitted that the property in question was the homestead, the fact which, unless the appellants are estopped from averring it, is fatal to the respondents' claim is that John Meduk has never consented in writing to the sale. It is argued that the conduct of John Meduk in stating that it was not necesary for him to sign, in standing by while Bessie Meduk gave the respondents permission to move into the property, in handing the key to the shed to John Soja, and in making the proposal as to "leaving the deal off" until the listing expired, and the failure of either Bessie Meduk or John Meduk to assert the dower rights of the latter until the delivery of the defence to the counterclaim, are circumstances sufficient to raise an estoppel; but, whether taken separately or collectively, they do not amount to a representation that in fact John Meduk had consented in writing to the sale, and indeed the evidence of both John Soja and Alice Soja makes it clear that they moved into the property knowing that he had not done so.

The evidence is consistent with the view that all the parties acted in ignorance of the provisions of the Act and that on learning of them from her solicitors Bessie Meduk set them up in the defence to the counterclaim, the first occasion on which, as a matter of pleading, it became necessary for her to do so. A transaction expressly forbidden by statute is not rendered valid by the circumstance that the parties to it were all ignorant of the statutory prohibition.

In my opinion, the evidence of the respondents, accepted *in toto*, furnishes no ground for extinguishing the dower rights of John Meduk which, under the combined effect of s. 2(*b*)(i) and s. 3(1) of the Act, include the right to prevent disposition of the homestead by withholding his consent in writing. I conclude that the appeal must succeed.

Counsel for the appellants stated in answer to a question from the bench that, in the event of the appeal succeeding, their claim for damages would not be pressed. The respondents are, in my opinion, entitled to the return of their deposit.

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For the above reasons, I would allow the appeal, set aside the judgments below, and direct that judgment be entered providing, (i) that the respondents deliver up possession of the property in question to the appellant Bessie Meduk, (ii) that the claim of the appellant Bessie Meduk for damages be dismissed without costs, (iii) that the appellant Bessie Meduk repay to the respondents the sum of $500, the amount of their deposit, without interest, (iv) that the counterclaim be dismissed, and (v) that the appellants recover from the respondents their costs throughout.

Appeal allowed with costs throughout.

Solicitors for the plaintiff Bessie Meduk, appellant: Shortreed, Shortreed & Stainton, Edmonton.

Solicitors for the defendant John Meduk, appellant: Brower & Johnson, Edmonton.

Solicitors for the defendants John Soja and Alice Soja, respondents: Morrow, Morrow & Reynolds, Edmonton.

E. A. BEATTY AND J. MACKIE (*Defendants*) ..... } APPELLANTS;

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DORIS M. KOZAK (*Plaintiff*) .....RESPONDENT. *Oct. 21, 22, 23

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ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

False imprisonment—Special statutory definitions and limitations—The Mental Hygiene Act, R.S.S. 1953, c. 309, ss. 15, 61, 64.

Mental diseases—Apprehension without warrant—Justification for acts of police officers—Whether person "apparently" mentally ill and behaving in disorderly manner—Bona fide belief—The Mental Hygiene Act, R.S.S. 1953, c. 309, ss. 2(8), (11), (14), 15, 61, 64.

The plaintiff was apprehended by two police officers in purported compliance with s. 15 of *The Mental Hygiene Act*. She was kept in custody and subsequently sent to a mental hospital, from which she was discharged after 44 days. She brought an action claiming, *inter alia*, damages for false imprisonment, from the deputy chief constable who had directed her apprehension, and a police matron who took part in the arrest. The defendants pleaded the provisions of the statute, and particularly ss. 15, 61 and 64.

Held (Rand J. dissenting): Both defendants were liable in damages.

Per Kerwin C.J.: To justify the apprehension of a person without warrant under s. 15 of the Act, two conditions must be satisfied: (1) the person must be "apparently" mentally ill or mentally defective, as

*PRESENT: Kerwin C.J. and Rand, Locke, Cartwright and Abbott JJ.

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defined in the statute, and (2) he must be conducting himself in a manner which, in a normal person, would be disorderly. Whether or not it could be said that it was apparent to the appellants that the plaintiff was mentally ill, it was clear on the evidence that she was not acting in a disorderly manner at the time of her apprehension, since she was at her own office going about her business. It was true that s. 61 of the Act barred an action against a person acting under the authority of s. 15, but only if that person had acted in good faith and with reasonable care. It might be said, in this case, that the defendants had acted in good faith but it could not be said, on the evidence, that they had acted with reasonable care. Section 61 was, therefore, inapplicable.

Per Locke, Cartwright and Abbott JJ.: The apprehension of the plaintiff without a warrant was not authorized under s. 15, which envisaged, as a condition of its application, something in the nature of an emergency. This being the case, it could not be said that the acts of the defendants were "done under the authority of" or "done in pursuance of" s. 15, even if those words were interpreted as equivalent to "intended to be done under the authority of" and "done in intended pursuance of". Lightwood, The Time Limit on Actions, p. 393, quoted with approval. It was obvious that neither of the defendants had a *bona fide* belief in facts which, if they had existed, would have afforded a justification under s. 15, nor was there anything on which they could reasonably found the belief that in fact the conditions prescribed by that section existed. Therefore neither s. 61 nor s. 64 of the Act afforded any defence to the defendants.

Per Rand J., *dissenting*: Section 61 of the Act was of the widest scope in the justification it furnished and expressly mentioned acts done under s. 15; its application should not be limited to acts that were justified under that section. Considering the object of the statute, the extent to which lay persons might become involved, and the safeguards mentioned, the restricted interpretation given by the Courts below to s. 64 failed to take into account the basic principle underlying the special conditions of bringing action. Section 64 accordingly applied to bar the action because of the lapse of time before its institution.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], reversing a judgment of Doiron J.[2] Appeal dismissed, Rand J. dissenting.

J. E. MacDermid, Q.C., for the defendants, appellants.

Walter Tucker, Q.C., and *(Miss) Shirley J. Tucker*, for the respondent.

THE CHIEF JUSTICE:—The appellant Mackie was deputy chief constable of Saskatoon and the appellant Mrs. Beatty was a police matron. On June 16, 1953, two Saskatoon

[1] (1957), 20 W.W.R. 497, 7 D.L.R. (2d) 88, 118 C.C.C. 72.
[2] (1955), 17 W.W.R. 166.

police officers, whose names the respondent was unable to obtain, accompanied by Mrs. Beatty, took the respondent from her office in Saskatoon to the psychiatric ward of the Saskatoon Hospital where she was examined by two doctors on June 17 and 18 and then transferred to the Provincial Mental Hospital in North Battleford. There she was examined by two experts in mental illness and received treatment, but at the end of 44 days she was discharged. Two actions brought by the respondent were tried together by Doiron J. and dismissed[1]. We are not concerned with the other action, but only with the present one and that as against the two appellants for damages for false arrest.

The Court of Appeal for Saskatchewan[2] allowed the plaintiff's appeal and directed judgment to be entered against Mackie for $1,000 and against Mrs. Beatty for $100. The five members of that Court were in agreement as to Mackie, but McNiven J.A. would have dismissed the action against Mrs. Beatty. There can be no question as to the liability of Mackie, as admittedly he directed the arrest of the respondent, unless he is saved by the provisions of *The Mental Hygiene Act*, 1950 (Sask.), c. 74 (now R.S.S. 1953, c. 309). While Mrs. Beatty was attached as matron to the Royal Canadian Mounted Police, she admitted in her examination for discovery, put in at the trial, that from time to time and on June 16, 1953, she was employed by the Saskatoon police. She knew that the respondent was to be "picked up"; she accompanied the officers who identified themselves as such to the respondent, and I agree with the majority of the Court of Appeal that what she did was sufficient to make her a party to the arrest and therefore liable in damages unless she also is protected under the statute.

Section 2 of that Act contains the following definitions:

8. "institution" includes a mental hospital and a school for mental defectives;

11. "mental defective" or "mentally defective person" means a person in whom there is a condition of arrested or incomplete development of mind whether arising from inherent causes or induced by disease or injury, and who requires care, supervision and control for his own protection or welfare or for the protection of others;

[1] (1955), 17 W.W.R. 166.

[2] (1957), 20 W.W.R. 497, 7 D.L.R. (2d) 88, 118 C.C.C. 72.

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14. "mentally ill person" means a person other than a mental defective who is suffering from such a disorder of mind that he requires care, supervision and control for his own protection or welfare or for the protection of others;

Section 11 provides for admission to an institution in various ways, such as by the certificates of two physicians or on the warrant of the Lieutenant Governor in Council. Section 15 then provides an alternative method of apprehension:

15. Any person, apparently mentally ill or mentally defective and conducting himself in a manner which in a normal person would be disorderly, may be apprehended without warrant by any constable or peace officer and detained until the question of his mental condition is determined under section 12.

Sections 61 and 64 enact:

61 [as amended by 1951, c. 74, s. 5]. No person who lays an information under this Act, or who signs a certificate or does any act to cause a certificate to be signed under the provisions of section 12 or 44, or who otherwise acts under the authority of section 12, 15 or 44 or who commits any person to safe custody upon the ground that such person is mentally ill or mentally defective or who signs or carries out or does any act with a view to signing or carrying out an order purporting to be an order for the removal of any person to an institution, shall be liable to civil proceedings whether on the ground of want of jurisdiction or on any other ground if the person so acting has acted in good faith and with reasonable care.

64. All actions, prosecutions and other proceedings against any person for anything done or omitted to be done in pursuance of this Act shall be commenced within six months after the act or omission complained of has been committed, and not afterwards.

Under s. 15 two things are required before a person may be apprehended without warrant:

(1) Such person must be apparently mentally ill or mentally defective; and

(2) He must be conducting himself in a manner which in a normal person would be disorderly.

Whether or not it could be said that it was apparent to the appellants that the respondent was mentally ill, the evidence is clear that she was not acting in a disorderly manner as she was at her own office going about her business.

It is quite true that s. 61, when applicable, performs its function so as to bar an action against a person who acts under the authority of s. 15, whether on the ground of want of jurisdiction or on any other ground; but only if such person has acted (1) in good faith and (2) with reasonable care. It is difficult to envisage how "want of jurisdiction"

could apply to the appellants in the circumstances of this case, but, however that may be, I find it impossible to say that, even if they acted in good faith, they also acted with reasonable care.

The evidence is detailed elsewhere. There is no doubt that Mackie had received complaints from time to time from the respondent's sister, Mrs. McWilliams, and the latter's husband, to the effect that the respondent was annoying them and others and undoubtedly these two told Mackie that they considered her mentally ill. It is beyond question that she had been drinking, but it is also clear that during the eight or nine days preceding June 16, 1953, there was no evidence that she had acted in a disorderly manner. The evidence that Mrs. McWilliams went to see the police magistrate, who took her to see Mackie and pointed out to him s. 15 and told Mackie that he did not need a warrant, does not justify the stringent action of attempting to proceed under the provisions of that section when the respondent was not disorderly in any sense on June 16, 1953, and had not been for some time. Nor does the fact that Mr. McWilliams furnished Mackie on June 13, 1953, with his own affidavit that in his opinion the respondent was mentally ill and was conducting herself in a manner which in a normal person would be disorderly bring the appellants within the protection of s. 61. The appellants did not act with reasonable care.

Section 64 may be compared with s. 2 of *The Public Officers' Protection Act*, R.S.S. 1953, c. 17, the relevant part of which reads as follows:

> 2. (1) No action, prosecution, or other proceeding shall lie or be instituted against any person for an act done in pursuance or execution or intended execution of any statute, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such statute, duty or authority, unless it is commenced . . . .

This wording follows s. 1 of *The Public Authorities Protection Act*, 1893 (Imp.), c. 61, and is the same as corresponding provisions in some of the other Provinces of Canada. For the reasons stated at p. 392 of Lightwood's The Time Limit on Actions (1909), I agree that the fuller form on which the words of the 1893 Act are based is no more efficacious than the original short form "in pursuance of the Act", as that was interpreted by the Courts. Many of the cases cited by counsel for the appellants and which, we

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were advised, were not brought to the attention of the Courts below, are referred to in the text-book and, after a consideration of all of them, I agree with the author's conclusion, at p. 393, that:

> The necessary check upon the defendant's assumption of statutory power was finally found in the requirement that he should have a *bona fide* belief in facts which, if they had existed, would have afforded a justification under the statute.

In the present case I find it impossible to say that the appellants thought for a moment that the respondent was acting in a manner which in a normal person would be disorderly. On the contrary, they knew that at least that prerequisite for the application of s. 15 did not exist and therefore there was not any belief in facts which, if they had existed, would have afforded a justification.

Although possibly it might have been argued that the $100 awarded against Mrs. Beatty was part of the $1,000 awarded against Mackie, no such question was raised and therefore nothing is said about it. The appeal should be dismissed with costs, including the costs of the motion for leave to appeal.

RAND J. (*dissenting*):—This appeal hinges on the application to the facts of s. 64 of *The Mental Hygiene Act* of Saskatchewan, now R.S.S. 1953, c. 309:

> All actions, prosecutions and other proceedings against any person for anything done or omitted to be done in pursuance of this Act shall be commenced within six months after the act or omission complained of has been committed, and not afterwards.

The action was brought for false imprisonment arising out of the following circumstances: The respondent was apprehended and taken to a hospital for examination by the appellants, members of the police force of Saskatoon, purporting to act under the provisions of s. 15 of the Act:

> Any person, apparently mentally ill or mentally defective and conducting himself in a manner which in a normal person would be disorderly, may be apprehended without warrant by any constable or peace officer and detained until the question of his mental condition is determined under section 12.

They were acting in good faith and believed on reasonable grounds that the respondent was a person mentally ill who had been leading a life of recurrent disorderliness. The information on which they acted was furnished by the respondent's sister who had made a complaint to a magistrate and with the magistrate had gone to police headquarters. On the

discussion there the magistrate gave his opinion that on the facts s. 15 authorized the officers to proceed to apprehend her. After a delay of three or four days, awaiting an available room in the hospital, she was taken and kept there for about 40 days and then discharged. In the opinion of the superintendent, on admittance she was suffering from mental illness aggravated by alcoholic indulgence, and on discharge she was a border-line case in which the risks of giving her liberty were about in balance with the considerations in favour of freedom, a situation which called for her release. The evidence clearly established a pattern of behaviour extending over a period of eight or nine months exhibiting itself in bouts of excessive drinking, disorderly conduct seriously disturbing neighbours in nearby apartments, making annoying use of the telephone, and threats of injury to herself and her brother-in-law. The officers believed that they were authorized to take her into custody by s. 15, that in acting as they did they were exercising power vested in them by that section.

At the trial Doiron J. held that the section did authorize what was done. On appeal the language was interpreted as applying only to occasions on which a peace officer should come upon a person apparently mentally ill and then and there acting in a disorderly manner. On that view it was held that the apprehension was not made "in pursuance of this Act"; and that s. 61, which provides justification for acts done "under the authority of section . . . 15", did not apply. The action was maintained for damages of $1,000 against Mackie and $100 against Beatty, and the question is whether the Court was right in holding that s. 64 could not be invoked.

The scope of the expressions "in pursuance of", "pursuant to", "in the execution of", and others of like import, in each case with the qualification of the word "intended"—all of which are now to be treated as having the same signification —has been the subject of a great deal of judicial effort to reach a rule that would fit all cases; but as is virtually inevitable in such pursuits, that object has proved to be illusory. In a series of decisions in the early years of the 19th century the interpretation tended to put the good faith of the public authority in acting in his official capacity as the test; then the "reasonableness" of that faith became

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a question; and this was followed by modifications based upon mistake in matters of fact as well as in those of law. A reference to a number of them seems desirable.

In *Morgan v. Palmer*[1], a fee was exacted by a mayor from a publican upon renewing his licence. In an action to recover the amount back it was held that as no fee was legally collectable the taking could not be said to have been done under colour of authority, and the defendant was not entitled to notice of action. Three years later *Cook v. Leonard et al.*[2] applied the same test. Bayley J. used this language:

> [The words] extend to all acts done bona fide which may reasonably be supposed to be done in pursuance of the Act. But where there is no colour for supposing that the act done is authorized, then notice of action is not necessary.

Wright v. Wales[3] followed. There it was held that a person spreading beach and shingle by order of the magistrates but not doing malicious injury, was not liable to arrest; but as he had exhibited no warrant for what he was doing, the defendant as a reeve of the parish and in charge of the land could not be said to have had no colour for supposing he ought to arrest him. In the language of Park J., "if he made a mistake when he had reason to suppose he was acting in pursuance of the statute, he was entitled to the protection given". In *Hopkins v. Crowe*[4], where a son of the owner of a horse that had been ill-used gave the party in charge, whereas the statute enabled only the owner to do that, clearly excluding the son, the latter was held not entitled to notice. In *Rudd v. Scott*[5], an owner of a house had given in charge the plaintiff, employed by a tenant to execute repairs, for pulling down and stealing part of the materials of the house; and in the language of Tindal C.J. the Court could not say that the course pursued by the owner was so wide of the mark that he could not have been acting *bona fide* in the belief that the statute justified it. These were followed by *Read v. Coker*[6], in which the

[1] (1824), 2 B. & C. 729, 107 E.R. 554.
[2] (1827), 6 B. & C. 351, 108 E.R. 481.
[3] (1829), 5 Bing. 336, 130 E.R. 1090.
[4] (1836), 4 Ad. & El. 774, 111 E.R. 974.
[5] (1841), 2 Scott, N.R. 631.
[6] (1853), 13 C.B. 850, 138 E.R. 1437.

defendant, being entitled to give into custody a person found committing the offence, was held entitled to notice if "he bona fide believed that he was acting in pursuance of the statute", though, as in the present case, the plaintiff was taken, not in the act of "committing" but some hours afterwards. Maule J. used this language:

> The case of *Booth v. Clive* [(1851), 10 C.B. 827] decides that a party is entitled to notice of action provided he has acted bona fide in the belief that he is pursuing the statute even though there may be no reasonable foundation for such belief. Where the question is whether a man has acted bona fide, the reasonableness of the ground of belief may be fit to be considered . . .

But as Williams J. in *Cann v. Clipperton*[1] said:

> It would be wild work if a party might give himself protection by merely saying that he believed himself acting in pursuance of a statute. . . . The case to which they [protecting clauses] refer must lie between a mere foolish imagination and a perfect observance of the statute.

Hermann v. Seneschal[2], lays down the test of a *bona fide* belief in the existence of a state of fact which, had it existed, would have justified the action taken. This, in *Roberts v. Orchard*[3], was extended to a belief by the defendant that the plaintiff was "found committing", as in *Read v. Coker, supra,* the pertinency of which to the case before us is obvious. In *Heath v. Brewer*[4], a cab proprietor, instead of summoning one of his drivers under the statute, defaced the latter's licence by writing on it that he had been dismissed for damaging the cab and bringing home no money. Erle C.J. remarked: "The defendant could not honestly believe that he was a magistrate, or that he could be justified in acting as judge in his own case."

The test of *Hermann v. Seneschal* will meet many if not most of the cases arising, but, as the history of the rule shows, we cannot rule out all mistakes in interpreting the statute, and sooner or later special circumstances will be met which, if injustice is to be avoided, will call for a modification. That was exemplified in *Burns v. Nowell*[5], which held that it was sufficient if the person acting believed that facts existed which in his honest and reasonable belief would in law justify what he had done. There

[1] (1839), 10 Ad. & El. 582, 113 E.R. 221.
[2] (1862), 13 C.B.N.S. 392, 143 E.R. 156.
[3] (1863), 2 H. & C. 769, 159 E.R. 318.
[4] (1864), 15 C.B.N.S. 803, 143 E.R. 1000.
[5] (1880), 5 Q.B.D. 444.

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a naval officer seized a vessel, believing that an offence had been committed under the *Kidnapping Act* of 1872, 35 & 36 Vict., c. 19. The statute authorized the detention of any vessel "suspected upon reasonable grounds" of an offence. The circumstances which the officer believed to exist did not, assuming them to exist, amount to an offence, although it was his belief that they would. In the language of Baggallay L.J., at p. 451:

> . . . an officer should be considered to have had reasonable grounds for suspicion, if at the time of the seizure, he reasonably believed in the existence of a state of circumstances which, in his honestly formed opinion, amounted to the commission of an offence under the Act.

This harks back to the earlier requirement of some colour of belief that the act was authorized by the statute, as in *Hazeldine v. Grove*[1]. There the defendant, as police magistrate, in a matter brought before him over which he had no jurisdiction, had disbelieved the evidence given by the plaintiff as a witness and had detained him until after the case was disposed of, as beyond his jurisdiction, when, without a charge having been made, he informed the plaintiff that he would be committed unless he found bail to appear on a stated day. The bail was immediately furnished and the plaintiff discharged. The statute under which the defendant acted gave him authority to take preliminary proceedings "on charges of misdemeanour" and, with no charge before him, the proceedings were illegal. At p. 795 (E.R.) Lord Denman C.J., giving the judgment of the Court, said:

> That principle seems to be this: that, where the magistrate, with some colour of reason, and bonâ fide, believes that he is acting in pursuance of his lawful authority, he is entitled to protection, although he may proceed illegally, or exceed his jurisdiction. Whether he acts with such colour of reason, and bonâ fide, are questions for the jury . . . .
>
> It is true that no direct charge or information had been laid before the defendant when he first caused the plaintiff to be removed into another room; and he may have exceeded his authority in so doing; but there is ample ground for believing that he thought he might himself institute the proceeding when the offence had been committed in his presence; and all his subsequent conduct flowed from this. . . .
>
> There was a fault in the commencement, which made the whole proceedings illegal: but these statutory protections suppose an illegality, so that there is no defence on the merits.

[1] (1842), 3 Q.B. 997, 114 E.R. 791.

The importance of *Burns v. Nowell* lies in the recognition that no hard and fast rule is sufficient, and that the circumstances must issue in a result that will reasonably execute the policy underlying the protective provision. In *G. Scammell and Nephew, Limited v. Hurley et al.*[1], Scrutton L.J. says:

> When defendants are found purporting to execute a statute, the burden of proof in my opinion is on the plaintiffs to prove the existence of the dishonest motives above described and the absence of any honest desire to execute the statute, and such existence and absence should only be found on strong and cogent evidence.

Here is an Act dealing with situations that not infrequently arise and in which the action to be taken calls essentially and primarily for good faith and reasonable grounds. Section 61 is of the widest scope in the justification it furnishes when those conditions have been satisfied. In it acts done under s. 15 are expressly mentioned but the Court of Appeal has apparently limited its application to those that are justified, for which the inclusion would seem to be quite unnecessary. Considering the objects of the statute, the extent to which lay persons may become involved, and the safeguards mentioned, the restricted interpretation given s. 64 fails to take into account the basic principle underlying these special conditions of bringing action; and we were told by Mr. MacDermid that none of the authorities mentioned was brought to the Court's attention.

The special circumstance here is that s. 15, on its face, is certainly not obvious in meaning. It was read by a magistrate to extend to apparent mental illness accompanied by a record of past persistent disorderly conduct, and not to be confined to those conditions as they appear to a peace officer when about to take into custody. The same view was taken by Doiron J., who thought the limitation urged too narrow. When a statutory provision to be acted upon by a peace officer lends itself to such an erroneous interpretation, to require him to act at the risk of being found to be wrong only after the question has been deliberated on by a superior appeal tribunal would frustrate the intended administration of the statute and would be contrary to the principle of the rulings from the beginning.

[1] [1929] 1 K.B. 419 at 429.

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In *Norris v. Smith*[1], Williams J. says:

> The question is, not whether the defendant and the trustees were strictly justified by the provisions of the statute, but whether there was a semblance of acting under it.

In *Selmes v. Judge et al.*[2], surveyors of highways illegally demanding a highway rate under a repealed statute were held to be entitled to notice. Blackburn J. said:

> . . . it is clear that the defendants intended to act according to the duties of their office as surveyors . . . it was the duty of the defendants to collect highway rates, and they intended to act in pursuance of the statute. . .

There was not a semblance of statutory authority for what was done and, whether or not the ruling would be followed to-day, it bears the authority of a great judge. It is significant that in the Act before us s. 61 provides its justification even when the ground of liability is a want of jurisdiction.

The circumstances here are in sharp distinction from those in *Chaput v. Romain et al.*[3] The reasons of Kellock J. were relied upon by Mr. Tucker. But the offending act of Chaput was presumably some common law offence for a belief in the existence of which there was not a particle of foundation; and the act of the officers in breaking up the religious service with no justification or excuse was itself an offence. There was no statute and no colour of acting under their common law duty; every fact was known and any other result would have left it to them to believe and act upon any set of facts which they might imagine to constitute an offence.

It should be emphasized that s. 64 assumes that the persons entitled to its benefit have been guilty of an illegal act for which they must answer, and the requirement is only that proceedings against them be taken within a certain period; and it is necessary to guard oneself against unconsciously allowing this to become associated with the idea of a justification for the act done, which it is not.

I would, therefore, allow the appeal and restore the judgment at trial. Following the terms on which leave to appeal was granted, the appellants must pay the party-and-party costs of the application for leave and of the appeal in this Court. For the reason that the responsible officials of the

[1] (1839), 10 Ad. & El. 188, 113 E.R. 72.
[2] (1871), L.R. 6 Q.B. 724.
[3] [1955] S.C.R. 834, 1 D.L.R. (2d) 241, 114 C.C.C. 170.

City refused to disclose to the respondent the names of those who were concerned in the apprehension there should be no costs in either the Court of Appeal or the trial Court.

The judgment of Locke, Cartwright and Abbott JJ. was delivered by

CARTWRIGHT J.:—This is an appeal, brought pursuant to special leave granted by this Court, from a judgment of the Court of Appeal for Saskatchewan[1], allowing an appeal from a judgment of Doiron J.[2] and directing that judgment be entered in favour of the respondent against the appellant Mackie for $1,000 damages and against the appellant Beatty for $100.

While at the trial other parties and matters were before the Court, we are now concerned only with the claim of the respondent against the appellants for damages for false imprisonment.

The relevant facts are set out in the reasons for judgment in the Courts below and it is not necessary to repeat them in detail.

The appellant Mackie was at all relevant times deputy chief constable of the City of Saskatoon. On the morning of June 16, 1953, two police officers, whose names are unknown to the respondent but who were admittedly acting on the instructions of the appellant Mackie, arrested the respondent. They were accompanied by the appellant Mrs. Beatty, who is also a police officer, and a question arises as to whether she took part in the arrest. At the time of the arrest the respondent was in her office in the city of Saskatoon and behaving in a normal manner.

The appellant Mackie had from time to time received complaints from the respondent's sister and brother-in-law to the effect that the respondent was drinking excessively, was acting in a disorderly manner, was annoying them and others by repeated telephone-calls and appeared to be mentally ill. It is clear from the evidence, and is indeed admitted, that the respondent had not acted in a disorderly manner during the nine days preceding her arrest and was not showing any signs of mental illness or defect at the time she was apprehended.

[1] (1957), 20 W.W.R. 497, 7 D.L.R. (2d) 88, 118 C.C.C. 72.
[2] (1955), 17 W.W.R. 166.

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The defence of the appellants was based on the provisions of *The Mental Hygiene Act,* 1950 (Sask.), c. 74, as amended, and particularly ss. 15, 61 and 64 which read as follows:

15. Any person, apparently mentally ill or mentally defective and conducting himself in a manner which in a normal person would be disorderly, may be apprehended without warrant by any constable or peace officer and detained until the question of his mental condition is determined under section 12.

61 [as amended by 1951, c. 74, s. 5]. No person who lays an information under this Act, or who signs a certificate or does any act to cause a certificate to be signed under the provision of section 12 or 44, or who otherwise acts under the authority of section 12, 15 or 44 or who commits any person to safe custody upon the ground that such person is mentally ill or mentally defective or who signs or carries out or does any act with a view to signing or carrying out an order purporting to be an order for the removal of any person to an institution, shall be liable to civil proceedings whether on the ground of want of jurisdiction or on any other ground if the person so acting has acted in good faith and with reasonable care.

64. All actions, prosecutions and other proceedings against any person for anything done or omitted to be done in pursuance of this Act shall be commenced within six months after the act or omission complained of has been committed, and not afterwards.

It was argued, (i) that the arrest of the respondent was authorized by s. 15, (ii) that if it was not authorized the appellants were none the less acting under the authority of s. 15 in good faith and with reasonable care, and so were relieved from liability by s. 61, and (iii) that what they did was done in pursuance of s. 15 and that the action was barred by s. 64 as admittedly it was not commenced until more than six months after the act complained of had been committed.

As to the first of these arguments, for the reasons given by Gordon J.A., concurred in on this point by all the other members of the Court of Appeal, I agree with his construction of s. 15 and with his conclusion that its terms did not authorize the apprehension of the respondent without a warrant. I wish to add only a few brief observations as to the meaning and apparent purpose of that section. Read, as it must be, in the context of the whole Act, it appears to me to envisage as the condition of its application something in the nature of an emergency. The Act contains ample provision for the apprehension and admission to an institution by due process of law of persons who are, or are suspected of being, mentally ill or mentally defective; see, for example, ss. 11, 12 and 17. Section 15, on the other

hand, gives to any constable or peace officer the power to apprehend and detain a person without warrant if two conditions coexist. These are (i) that the person is apparently "mentally ill" or "mentally defective", each of which terms by reason of cls. 11 and 14 of s. 2 denotes such a condition that the person requires care, supervision and control for his own protection or welfare or for the protection of others, and (ii) that the person is conducting himself in a manner which in a normal person would be disorderly. The coexistence of these conditions might well bring about a situation in which any delay in placing the person concerned under restraint would be fraught with danger. To hold that a statutory provision which authorizes an interference with the liberty of the subject, provided two conditions exist, could extend to a case in which neither exists would be contrary to the well-established rule of construction referred to by Gordon J.A.

The second and third of the arguments mentioned above may conveniently be dealt with together, as neither can avail the appellants unless the arrest of the respondent can be said to have been an act "done under the authority of" or "in pursuance of" s. 15. For the purposes of this branch of the matter I am prepared to accept Mr. MacDermid's submission that the words quoted are equivalent to "intended to be done under the authority of" and "done in intended pursuance of". English statutory provisions couched in similar terms have been dealt with in many decisions. After examining a number of these and tracing the development of the jurisprudence on the subject, the learned author of Lightwood's The Time Limit on Actions (1909) says at p. 393:

> The necessary check upon the defendant's assumption of statutory power was finally found in the requirement that he should have a *bona fide* belief in facts which, if they had existed, would have afforded a justification under the statute. This test, first formulated in *Hermann v. Seneschal* (1862),13 C.B.N.S.392, was repeated in *Roberts v. Orchard* (1863), 2 H. & C. 769, and was adopted as a practical solution of the difficulty: see *Heath v. Brewer* (1864), 15 C.B.N.S.803; *Chambers v. Reid* (1866), 13 L.T.703; *Downing v. Capel* (1867), L.R.2 C.P.461. After an apparent reversion to the requirement of reasonable belief in *Leete v. Hart* (1868), L.R. 3 C.P.322, the new test was re-affirmed by Willes, J., in *Chamberlain v. King* (1871), L.R. 6 C.P. 474; see also *Griffith v. Taylor* (1876), 2 C.P.D.194,C.A.; and it has not since been doubted.

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It is true that in *Selmes v. Judge et al.*[1], Blackburn J. said at p. 728:

> Neither in *Hermann v. Seneschal* nor in *Roberts v. Orchard* was it decided that a defendant would not be entitled to notice of action, because he had been mistaken in the law . . .

but in that case the defendants were public officers carrying out a purpose authorized by statute and their error was a failure to act strictly in accordance with the statute. The statute did empower them to levy and collect a rate, and the judgment of Blackburn J. proceeds on the view stated by him, at pp. 727-8, as follows:

> The only illegal act done by the defendants was to make an informal rate; they proceeded to collect it, and received from the plaintiff the amount assessed upon him; in these transactions it is clear that the defendants intended to act acording to the duties of their office as surveyors, although they mistook the legal mode of carrying out their intention.

In my opinion the passage from Lightwood quoted above is a correct statement of the general rule and sets out the test to be applied in the case at bar. Cases may arise in which special circumstances complicate the application of the rule and in which the statutory protection may extend to a defendant who has proceeded partly on a *bona fide* mistake as to the facts and partly on an erroneous view of the law; see, *e.g., Cann v. Clipperton, infra*; but I find it difficult to suppose a case in which a defendant who was perfectly acquainted with all the facts would be protected merely because he entertained a mistaken opinion as to the law, and I am satisfied that there is nothing in the facts of the case at bar to remove it from the operation of the general rule.

In *Cann v. Clipperton*[2], a case to which my brother Kellock referred with approval in *Chaput v. Romain et al.*[3], the defendant had caused a policeman to arrest the appellant on a charge of doing malicious injury to property contrary to 7 & 8 Geo. IV, c. 30; the arrest without warrant was justified only if the party arrested was found committing the offence; the jury decided that when taken into custody the plaintiff was not found committing any offence against the Act; it was argued for the plaintiff that the defendant,

[1] (1871), L.R. 6 Q.B. 724.
[2] (1839), 10 Ad. & El. 582, 113 E.R. 221.
[3] [1955] S.C.R. 834 at 857-8, 1 D.L.R. (2d) 88, 118 C.C.C. 72.

who was a solicitor, was acting under the mistaken view of the law, that the situation was covered by another statute under which the offender could be arrested without warrant if he had actually committed the offence although he was not found committing it, and that therefore the defendant was not entitled to notice of action. In giving judgment Lord Denman C.J. said at p. 588:

> The defendant seems not merely to have had that impression which was suggested, as to the law, but to have thought that the mischief was actually going on at the time. Else I am unwilling to say that, if a party acts bona fide as in execution of a statute, he is justified at all events, merely because he thinks he is doing what the statute authorises, if he has not some ground in reason to connect his own act with the statutory provision. The doctrine attributed to Bayley J. goes too far. But here the defendant might reasonably think that, in point of fact, the circumstances were those to which the protection of stat. 7 & 8 G. 4 c. 30 s. 41 attaches. The rule for a nonsuit must therefore be absolute.

The reference to the doctrine attributed to Bayley J. appears to be to the judgment of that learned judge in *Cook v. Leonard et al.*[1], and particularly the following passage, at pp. 355-6:

> These cases fall within the general rule applicable to this subject, viz. that where an Act of Parliament requires notice before action brought in respect of any thing done in pursuance or in execution of its provisions, those latter words are not confined to acts done strictly in pursuance of the Act of Parliament, but extend to all acts done bona fide which may reasonably be supposed to be done in pursuance of the Act. But where there is no colour for supposing that the act done is authorized, then notice of action is not necessary.

In *Burns v. Nowell*[2], the officer who seized the schooner "Aurora" knew of facts (*i.e.*, that she was carrying native labourers of the South Sea Islands not being part of the crew and had no licence to do so) which would have been a good cause for her arrest but for the circumstance, which appears to have been unknown to him at the time of seizure that she had sailed prior to the date of the *Kidnapping Act*, 1872, c. 19, coming into force. Baggallay L.J., who delivered the unanimous judgment of the Court, appears to have accepted the general rule to which I have referred above but to have regarded the case as an exception to it. This is indicated by the following passage in his reasons at pp. 450-1:

> It has been contended by Mr. Wills, on behalf of the plaintiff, that an officer detaining or seizing a vessel, cannot properly be considered either as having reasonable grounds to suspect that an offence has been

[1] (1827), 10 B. & C. 351, 108 E.R. 481.
[2] (1880), 5 Q.B.D. 444.

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committed, or as acting in pursuance of the Act, unless he believes in the existence of facts which if they did actually exist, would be sufficient to establish the commission of the offence; and, in support of this contention he has referred to decisions and dicta in cases in which notice of intended action having been required by law to be given to persons sought to be made responsible for having exceeded their powers, questions have arisen as to the circumstances under which such persons are entitled to notice.

We are, however, unable to accede to the argument based upon the supposed authority of these cases. We do not doubt their value as guides for the decision of cases of a similar character, but the words, which we have now to interpret, are contained in a statute of a very special character, and their true meaning can only be arrived at by a consideration of the general scope of the statute and of the circumstances under which, and the purposes for which, it was avowedly passed. To adopt the limited construction, contended for by Mr. Wills, would render the Act almost a dead letter; the practical effect of so doing would be to make the justification of the officer depend, in almost every case, upon the offence having been in fact committed; and he would consequently have to discharge his duty at the risk of being held responsible in damages, should he make a mistake in applying a newly made law to a state of facts, believed or suspected by him to exist, but as to the existence of which he can, speaking generally, have but very slight means of informing himself.

If the test set out in the passage from Lightwood, quoted above, be applied in the case at bar it is obvious that neither of the appellants had a *bona fide* belief, or any belief, in facts which if they had existed would have afforded a justification under s. 15, for arresting the respondent without a warrant. The facts were simple and obvious. It cannot, on the evidence, be suggested that the respondent either appeared to be mentally ill or was conducting herself in a disorderly manner at the time of her arrest. The most favourable way in which, on the evidence, the case can be put for the appellant Mackie is that he gave the order for the arrest in the honest belief that the conditions prescribed by s. 15 had in fact coexisted at a time not less than nine days prior to the day of the arrest, and under the mistaken impression that that circumstance empowered him to proceed under s. 15. His conduct was no mere mistake in the legal mode of carrying out a statutory duty; rather it was, as Gordon J.A. points out, a violation of the common law rights of the respondent without statutory authority.

If the test suggested by Lord Denman, in the passage quoted above from *Cann v. Clipperton,* is applied, it is my view that there was nothing upon which the appellants could reasonably found the belief that, in point of fact, the conditions prescribed by s. 15 existed.

Even if "the doctrine attributed to Bayley J.", which Lord Denman regarded as going too far in favour of the defendant, were adopted as the proper test it would not avail the appellants since there was, in my opinion, no colour for supposing the arrest to be authorized and no reasonable ground for thinking that s. 15 gave the appellants the authority which they used.

The submission of the appellants on the points now under consideration, if accepted, would bring about the result that, provided he is acting honestly and with no improper motive, a defendant who arrests a person without a warrant should be regarded as intending to act under the authority, or in pursuance, of a section which empowers him so to act only if two conditions coexist, although he is fully aware that in fact neither condition exists. In my opinion the mere statement of such a proposition is sufficient to refute it.

I conclude that neither s. 61 nor s. 64 affords a defence to the appellants.

There remains the question whether the appellant Beatty took any part in the arrest of the respondent. In my opinion her evidence given on discovery and put in at the trial as part of the respondent's case shows that she and the other two police officers acted together in carrying out the orders of the appellant Mackie to arrest the respondent, and that from the time of her apprehension until she was handed over to the authorities at the hospital the respondent was in the joint custody of the appellant Beatty and the other two officers.

No question was raised as to the amount at which the damages were assessed or as to the terms of the formal judgment of the Court of Appeal.

I would dismiss the appeal with costs, including the costs of the motion for leave to appeal.

Appeal dismissed with costs, RAND J. *dissenting.*

Solicitors for the defendants, appellants: Ferguson, MacDermid & MacDermid, Saskatoon.

Solicitors for the plaintiff, respondent: Tucker & Simpson, Rosthern.

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THE BOARD OF EDUCATION FOR THE TOWNSHIP OF ETOBICOKE, THE METROPOLITAN SCHOOL BOARD, AND THE CORPORATION OF THE TOWNSHIP OF ETOBICOKE ... APPELLANTS;

AND

HIGHBURY DEVELOPMENTS LIMITED ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Town planning—Powers and discretion of Minister and Municipal Board —Draft plan in conformity with The Planning Act, 1955 (Ont.), c. 61, s. 26(2), duly settled by Minister under s. 26(3)—Details of agreement as to school sites—The Planning Act, s. 26(4), (9).

Although The Planning Act, 1955, gives a very wide discretion to the Minister in respect of granting or withholding approval of a plan, that discretion must be exercised judicially and it is not a judicial exercise of the discretion to impose upon the applicant, as a condition of the giving of approval, an obligation the imposition of which is not authorized by the Act. Subsections (4) and (9) of s. 26 of the Act do not have the effect of giving an unfettered discretion to the Minister (or to the Ontario Municipal Board if the matter is referred to it under s. 29). The provisions of the statute do not permit the Minister or the Board to withhold approval of a draft plan which complies with all the provisions of s. 26(2), and which has been duly settled by the Minister pursuant to s. 26(3), on the sole ground that it is "premature" until the applicant for approval has agreed to sell the school sites shown on the plan to the school board at such price as the latter sees fit to fix. *The Township of Markham v. Langstaff Land Development Limited et al.,* [1957] S.C.R. 336, distinguished.

Per Rand J.: *The Planning Act* contains no provisions as to compensation to be paid for lands required for municipal purposes, except in the case of roads. This clearly contemplates the use of the procedure elsewhere established to determine compensation by arbitration.

APPEAL from a judgment of the Court of Appeal for Ontario[1] affirming a decision of the Ontario Municipal Board. Appeal dismissed.

J. J. Robinette, Q.C., for the Board of Education of Etobicoke and the Metropolitan School Board, appellants.

D. R. Steele, for the Township of Etobicoke, appellant.

J. D. Arnup, Q.C., for the respondent.

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

[1] [1957] O.W.N. 198, 8 D.L.R. (2d) 694 (*sub nom. Re Highbury Estates and Highbury Developments Ltd.*).

The judgment of Kerwin C.J. and Taschereau, Locke and Cartwright JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from an order of the Court of Appeal for Ontario[1] made on March 15, 1957, setting aside a decision of the Ontario Municipal Board dated July 18, 1956.

The appeal to the Court of Appeal was brought pursuant to an order of that Court, made under s. 98 of *The Ontario Municipal Board Act,* R.S.O. 1950, c. 262, granting leave to the respondent to appeal from the decision of the Board on a question of law stated as follows:

> As a matter of law did the Ontario Municipal Board err in the construction which it placed on Section 26 of The Planning Act 1955?

The following statement of the relevant facts is taken with some slight modification from the reasons of Aylesworth J.A. who delivered the unanimous judgment of the Court.

The respondent owns substantial parcels of land in the township of Etobicoke. It prepared a draft plan of subdivision of certain of these lands involving a total acreage of slightly less than 200 acres and approximately 700 lots. The usual and normal negotiations consequent upon subdivision were carried on between the respondent, the Township and the Township Board of Education relevant to the provision of municipal services, the location and sizes of school sites, the dedication of highways and various other matters. As a result the respondent agreed to dedicate to the municipality 5 per cent. of its residential lands for public purposes, to install a trunk sewerage system to serve its land and other lands in the township now owned by it at a cost of $250,000, to install on the streets shown on the draft plan various municipal services at a cost of $879,000, and to set aside for school sites on its draft plan precisely the lands agreed upon by the school board, aggregating approximately 25 acres in area (12.77 per cent. of the area of the entire subdivision) and consisting of a high school site of 12.1 acres, a senior public school site of 8.1 acres and a public school site of 4.52 acres. The township council on April 3, 1956, "released" part of the draft plan, that is to say, the approximate easterly half of the lands delineated

[1] [1957] O.W.N. 198, 8 D.L.R. (2d) 694 (*sub nom. Re Highbury Estates and Highbury Developments Ltd.*).

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on the plan including all of the school sites; "release" is the term used by the council in its resolution approving of the plan of subdivision, so far as it is concerned, before approval of the Minister is sought. The reason that only part of the plan was so "released" and that therefore part only is involved in the present appeal is that the lands covered by the plan are bisected by the watershed of the Humber River and the respondent had an agreement with the Township for the "release" of all of its residential lands lying within the watershed in consideration of the respondent agreeing to service certain industrial lands in the township at its own expense. The "release" by the council was made subject to certain conditions, of which only the following is relevant:

> (1) Subject to the completion of arrangements with the Board of Education for the Township with respect to three sites as shown on the plan.

The board of education for the township and the respondent reached no agreement as to the price to be paid by the board for the aforesaid school sites. Involved in this question of price is the question of allocation of the cost of municipal services on the streets on which the school sites are located, the respondent requesting that, as an element of the value of the land agreed upon as school sites, the board of education pay a *pro rata* share of the cost of such services and the school board, on its part, taking the position that all the cost of such services should be absorbed by the respondent. In these circumstances, the Minister appears to have indicated that his approval to the draft plan would be conditional upon the respondent and the school board resolving their differences as to the price to be paid for the school sites and thereupon the respondent requested the Minister to refer the matter of approval to the Ontario Municipal Board. Since the provisions of s. 29 of *The Planning Act, 1955* (Ont.), c. 61, required the Minister so to refer the matter, the Ontario Municipal Board, pursuant to such reference, heard the application on June 25, 1956. No evidence was taken before the Board for the simple reason that none of the facts were in dispute. Counsel for all the appellants urged the Board to withhold its approval, advancing as the ground for such action by the Board, the respondent's failure to reach an agreement with the board of education for the township as to the price to be paid for

the school sites. Specifically they argued that the availability of school facilities for the future inhabitants of the area covered by the plan was a matter affecting "the convenience and welfare" of such inhabitants within the meaning of subs. (4) of s. 26 of *The Planning Act, 1955,* and, until it was shown that such facilities would be available, a subdivision could be said to be "premature" within the meaning of cl. (*b*) of the subsection. For the "school facilities" to be available, it was said, the "school sites" must be available and the sites could not be said to be "available" if the school board could not pay for them. Aylesworth J.A.[1] set out as sufficient to illustrate these submissions the two following excerpts from the argument made at the hearing before the Board:

> Now, all the Board of Education in this case is asking is that the subdivider be asked to subsidize to some extent the Board of Education in the acquisition of school sites and, in effect, in the supplying of school facilities. We have not gone into the question of how far apart we were —and I don't think it is necessary that we do—but, in effect, the Board of Education is asking Highbury Developments to give up a portion of the profit which they will make out of this land once it is subdivided; and, in effect, they are frankly asking to be subsidized in that respect. The Board of Education is not in a position to pay the retail price for that land.
>
> It is recognized that area school boards are required, at the present time, to pay for such school sites. Such payments should be however on an equitable basis of land costs on the assumption that education is an important public service comparable to the recognized responsibility of subdividers to provide other public services, i.e., road, water service, sewers, etc., etc.

That these submissions were acceded to by the Ontario Municipal Board is apparent from the Board's decision, which reads:

> The Board is of the opinion that until the question of the acquisition of the school site [*sic*] has been settled, the plan is premature and is, therefore, not approved.

The question calling for determination is whether the provisions of the statute permit the Minister or the Board to withhold approval of a draft plan which complies with all the provisions of s. 26(2) of *The Planning Act, 1955,* as amended, hereinafter referred to as "the Act", and which has been duly settled by the Minister pursuant to s. 26(3) of the Act, on the sole ground that it is premature until the

[1] [1957] O.W.N. at pp. 200-1.

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applicant for approval has agreed to sell the school sites shown on the plan to the board of education at such price as the latter sees fit to fix.

The reasons of Aylesworth J.A. make it clear that there is nothing in the Act which expressly gives any such power. It is, however, contended for the appellants that the general words with which s. 26(4) opens:

> In considering a draft plan of subdivision, regard shall be had, among other matters, to the health, safety, convenience and welfare of the future inhabitants and to the following: . . .

when read with s. 26(9):

> Upon settlement of the draft plan, the Minister may give his approval thereto, and may in his discretion withdraw his approval or change the conditions of approval at any time prior to his approval of a final plan for registration.

in effect give an unfettered discretion to the Minister or the Board to give or withhold approval. I agree with Aylesworth J.A. that the discretion, wide though it is, must be exercised judicially and that it is not a judicial exercise of discretion to impose upon the applicant, as a condition of the giving of approval, an obligation the imposition of which is not authorized by the Act. I wish to adopt the following passage from the reasons of the learned justice of appeal[1]:

> I must conclude that the Ontario Municipal Board is in error in the construction it has placed on s. 26 and that its decision is without legal foundation. I think the error in the decision proceeds from failure to distinguish in the application of the Act between acquisition of school sites, which is not dealt with, and adequacy of school sites, which is, from a misapplication of the term "premature" as applied in the Act to a "proposed subdivision" and to a certain confusion of thought as between the terms, school sites and school facilities, the latter of which also is not within the purview of the Act.
>
> The Act directly affects the common law right of the individual freely to subdivide his lands and sell lots therein and "the law is also well established that common law rights are not held to have been taken away or affected by a statute, . . . unless it is so expressed in clear language, or must follow by necessary implication, and in such cases only to such an extent as may be necessary to give effect to the intention of the Legislature thus clearly manifested." Grant J.A. in delivering the unanimous judgment of the Court of Appeal in *Re Stronach,* 61 O.L.R. 636, at p. 640, 49 C.C.C. 336, [1928] 3 D.L.R. 216. If the Legislature intended, as I think it did not, to compel an owner seeking to subdivide his lands to accept a nominal or any price less than a fair price as established by arbitration, if necessary, for his lands agreed upon as adequate for school sites, then

[1] [1957] O.W.N. at p. 204.

it has not said so either expressly or by necessary implication. For this reason also I think the Ontario Municipal Board erred in the construction which it placed on s. 26 of the Act.

Counsel for the appellants referred to the judgment of this Court in *The Township of Markham v. Langstaff Land Development Limited et al.*[1] in which it was held that the Ontario Municipal Board had jurisdiction to impose the conditions set out in the order made by it in that case; but those conditions related only to the taking of the necessary steps to substitute the name of one Selkirk as applicant in place of the name of a limited company controlled by him. I am unable to find anything in the reasons delivered in that case which assists the argument of the appellants in the case at bar.

I would dismiss the appeal with costs.

RAND J.:—I agree that this appeal should be dismissed with costs. Throughout *The Planning Act, 1955* (Ont.), c. 61, there is a conspicuous avoidance of any dealing with the amount of compensation for lands required for municipal purposes except in the case of roadways. That fact by itself in the context of the statute establishes a consideration restrictive of the exercise of discretion by the Minister. It is contemplated that for the taking of land, apart from roadways, the procedure elsewhere provided of a semi-judicial nature to determine compensation will take into account all relevant circumstances. It seemed to be assumed that the compensation for, say, the school site, would be based upon the price at which the surrounding lots would be sold. In that form, the statement fails to take into account what that price might be were no school site reserved. I mention this only to avoid any inference that that question has been given any consideration.

Nor is there considered any analogy between the compensation for a school site and the requirement of such facilities as water, light, sewerage, etc.

Appeal dismissed with costs.

Solicitors for The Board of Education for the Township of Etobicoke, appellant: McCarthy & McCarthy, Toronto.

[1] [1957] S.C.R. 336, 7 D.L.R. (2d) 593.

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ETOBICOKE BD. OF EDUC. *et al.* v. HIGHBURY DEVELOPMENTS LTD.

Rand J.

Solicitor for The Metropolitan School Board, appellant: C. Frank Moore, Toronto.

Solicitors for the Corporation of The Township of Etobicoke, appellant: McMaster, Steele, Willoughby, McKinnon & MacKenzie, Toronto.

Solicitors for the respondent: Taylor, Joy, Baker & Lawson, Toronto.

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DISTRICT NO. 26, UNITED MINE WORKERS OF AMERICA (*Defendant*) ..... } APPELLANT;

AND

HAROLD McKINNON *et al.* (*Plaintiffs*) RESPONDENTS;

AND

DOMINION COAL COMPANY LIMITED (*Defendant*).

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Trade unions—Whether district president has power under constitution to extend life of collective agreement—Subsequent ratification by higher authority.

The articles of a trade union's constitution which provide that its district president has "full power to direct the workings of the district organization" between sessions of the district executive board and that "all general agreements shall be voted upon by the members", do not empower the district president to make a new collective agreement embodying the provisions of a previous one or to make an agreement extending the term of a previous one without a vote being taken. No subsequent purported ratification by the district executive board, the district convention, the international president and the international convention, can validate such proceedings made by the district president. (*Per* Kerwin C.J. and Taschereau, Cartwright and Fauteux JJ.; Rand J. *contra.*)

Labour law—Check-off clause in collective agreement—Expiration of agreement—Short term extension by president—Statutory extension—Request by some employees to discontinue check-off—Injunction—Trade Union Act, R.S.N.S. 1954, c. 295, ss. 13, 15(b), 67(3), (4).

By the terms of a collective agreement expiring on January 31, 1956, the employer agreed to check off all dues, etc. from all employees, members of the union, and every employee undertook to maintain his membership in the union and to submit to deduction of the dues, etc., during the life of the agreement. In the fall of 1955, the union and the employer commenced to bargain with a view to renewing

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

the agreement. The negotiations foundered, and a conciliation board recommended, on May 4, 1956, that the agreement should be renewed on the same terms; this recommendation was rejected by a vote of the members of the union. The district president and the employer agreed on short term extensions of the expired agreement.

In November 1955, the plaintiffs revoked the check-off authorization they had given the employer, and on May 11, 1956 (which was the day on which the prohibition against the employer altering the terms or conditions of the agreement expired pursuant to s. 15 of the *Trade Union Act*), the plaintiffs sued for the recovery of deductions made from February 4 to May 5, 1956, and asked for an injunction restraining the employer from making future deductions.

The trial judge dismissed the claim to recover the amounts already deducted but granted the injunction. This judgment was affirmed by the Court of Appeal. The union appealed to this Court as to the injunction, and there was no cross-appeal by the plaintiffs as to the deductions.

Held (Rand J. dissenting): The appeal should be dismissed. The plaintiffs were entitled to an injuction restraining the employer from making deductions from their wages after the prohibition enacted by s. 15 of the Act had ceased to be operative. The right of the employer to make deductions was contained in the collective agreement, but after May 11, 1956, the plaintiffs were no longer bound by it.

Per Cartwright J.: There was no term in the agreement permitting its temporary extension, in the manner attempted in this case, and the Court could not supply such a term by implication. *Hamlyn & Co. v. Wood & Co.*, [1891] 2 Q.B. 488, applied.

Per Rand J., *dissenting*: The fair inference to be drawn from the evidence respecting the holding of a district convention in June 1955 was that the district executive were directed to give notification to reopen the agreement for negotiation. It must be assumed that the possibility of negotiations prolonged beyond January 31 was then contemplated. The mandate given the executive must be taken, therefore, to embrace the power to effect the temporary continuance of the agreement until an accord was reached. Such a power was recognized by the implication of the articles of the constitution. It followed that the agreement did not expire until at least November 30, 1956, the last date to which it was extended.

APPEAL from a judgment of the Supreme Court of Nova Scotia, *in banco*[1], affirming a judgment of MacDonald J.[2] Appeal dismissed, Rand J. dissenting.

D. McInnes, Q.C., and *J. H. Dickey, Q.C.*, for the defendant union, appellant.

I. M. MacKeigan, Q.C., and *E. G. DeMont*, for the plaintiffs, respondents.

[1] (1957), 40 M.P.R. 42, 8 D.L.R. (2d) 217.
[2] (1956), 5 D.L.R. (2d) 481.

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UNITED MINE WORKERS OF AMERICA, DIST. No. 26 v. MCKINNON et al.

W. H. Jost, Q.C., for the defendant Dominion Coal Company Limited.

The judgment of Kerwin C. J. and Taschereau and Fauteux JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal by the defendant District No. 26, United Mine Workers of America, against a judgment of the Supreme Court of Nova Scotia *in banco*[1], affirming that of MacDonald J.[2], which had dismissed the claim by the twelve individual plaintiffs-respondents for $156, arrears of wages in part from February 4, 1956, to May 5, 1956, but which had granted an injunction restraining the other defendant, Dominion Coal Company Limited, from paying over the sum of $1 per week, or any other sum, from the wages of each of the plaintiffs by way of check-off of union dues to or for the benefit of the appellant. The cross-appeal of the respondents to the Court *in banco* from that part of the trial judgment disallowing their claim for $156 was dismissed and as no cross-appeal to this Court has been taken by them we are not concerned with that issue, but only with the injunction.

The respondents, together with about 350 others, worked in the company's repair and maintenance plant at Glace Bay, and prior to the summer of 1955 they and their fellow-employees were members of Local 4522 of the appellant. The great majority of the company's miners were, and still are, members of other locals of the appellant. Section 1(d) of the *Trade Union Act*, R.S.N.S. 1954, c. 295, defines "collective agreement" and, effective February 1, 1953, such a collective agreement was entered into between the company and the appellant, the relevant clauses of which are:

No. 20. *Check-off*:

The Company agrees to check off all dues, fines and initiation fees from all members of the United Mine Workers of America employed in and around the collieries. The Company also agrees to check off for assessments or levies for strictly U. M. W. purposes. Authority to make such deductions shall be given to the Company by the President and Secretary of District No. 26, United Mine Workers of America, such authorities to state the purpose for which the assessment or levy is to be made.

[1] (1957), 40 M.P.R. 42, 8 D.L.R. (2d) 217.
[2] (1956), 5 D.L.R. (2d) 481.

No. 28. *Maintenance of Membership*:

Every employee who is a member of the U. M. W. of A. at the effective date of the beginning of this Agreement, or who becomes a member of the Union during the life of this Agreement, shall continue to be a member, in good standing, of the Union during the life of the Agreement provided he continues to be eligible to be a member, and during the life of the Agreement shall have deducted from his wages all dues, levies, fines and assessments in accordance with Clause 20 of this Agreement.

No. 29. *Term of Agreement and Provision for Renewal*:

This Agreement is in effect from February 1st, 1953, and will continue in full force and effect until January 31st, 1955, and from year to year thereafter unless notification to re-open the Agreement is served by either of the parties hereto, such notification to be served in writing not later than October 1st in any year later than the year 1953, ...

subject to a proviso which is not material.

In accordance with the provisions of this agreement each of the respondents signed a check-off card authorizing the company to deduct weekly from his wages the sum of $1. In the summer of 1955, being dissatisfied with the appellant as their bargaining agent, the respondents and about 300 skilled artisans organized an independent union, Central Auxiliary Workers' Union, but attempts to have the latter certified as bargaining agent failed.

Section 13 of the *Trade Union Act* enacts:

13. Either party to a collective agreement whether entered into before or after the commencement of this Act, may, within the period of two months next preceding the date of expiry of the term of, or preceding termination of the agreement, by notice, require the other party to the agreement to commence collective bargaining with a view to the renewal or revision of the agreement or conclusion of a new collective agreement.

Pursuant thereto, in September 1955, a notification to commence collective bargaining with a view to the renewal or revision of the agreement or conclusion of a new collective agreement was given by the appellant to the company. In accordance with s. 15(a) of the Act representatives of the company and the appellant commenced to bargain collectively, but these negotiations proved unavailing. On the application of the appellant a conciliation board was appointed in accordance with the Act by the Minister of Labour. The Board's recommendation filed

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with the Minister on May 4, 1956, was that the terms of the old agreement should be inserted in a new one. In view of s. 15(b) of the Act:

(b) if a renewal or revision of the agreement or a new collective agreement has not been concluded before expiry of the term of, or termination of the agreement, the employer shall not without consent by or on behalf of the employees affected, decrease rates of wages, or alter any other term or condition of employment in effect immediately prior to such expiry or termination provided for in the agreement, until a renewal or revision of the agreement or a new collective agreement has been concluded or a conciliation board, appointed to endeavour to bring about agreement, has reported to the Minister and seven days have elapsed after the report has been received by the Minister, whichever is earlier, or until the Minister has advised the employer that he has decided not to appoint a conciliation board.

the seven days mentioned expired May 11, 1956.

In the meantime, on November 29, 1955, each of the respondents and about 328 others had filed with the company an "off-set card" signed by him revoking the authority given by him to the company by the check-off card to deduct from his wages and pay to Local 4522 of the appellant any sums of money whatsoever as initiation fees or dues or for any other purpose whatsoever. According to a statement contained in each of these cards, it was given pursuant to subss. (3) and (4) of s. 67 of the *Trade Union Act*. Subsection (3) refers to the check-off card as an assignment and subs. (4) provides:

(4) Unless the assignment is revoked in writing delivered to the employer, the employer shall remit the dues deducted to the union or organization named in the assignment at least once each month, together with a written statement of the names of the employees for whom the deductions were made and the amount of each deduction.

Notwithstanding the "offset" cards the company continued to deduct $1 weekly from the wages of each of the respondents and to remit that sum to the appellant. Finally, pursuant to art. XIX of the appellant's constitution, the following question was submitted on June 19, 1956, to the members of the appellant: "Are you in favour of continuation under the present agreement for the duration of the agreement year" (*i.e.*, January 31, 1957), and was answered in the negative by a vote of 4417 to 1899.

Industrial peace between employer and employees, which it is the aim of the *Trade Union Act* to maintain, is important, but the above history of the disputes between the appellant union on the one hand and the respondents

and their adherents on the other indicates that difficulties may arise, as in all fields of human relationships. So long as no applicable law is infringed, labour unions and their members are free to provide, by arrangement, for their mutual rights and obligations. Those of the parties to this appeal are governed by the constitution of the appellant, s. 3(c) of art. VIII of which and art. XIX of which provide:

Article VIII

3(c) Between sessions of the District Executive Board he [the president] shall have full power to direct the workings of the District organization and shall report his acts to the District Executive Board for its approval.

Article XIX

1. All general agreements shall be voted upon by the members who are parties to such general agreements, and no general agreements shall be signed by the District Officers unless a majority of those voting approve of same.

These are the terms upon which the respondents became members of the union and, unless authority may be found in the *Trade Union Act* or the collective agreement effective February 1, 1953, between the company and the appellant, justification for the actions shortly to be related must be found in these articles. It is agreed that prior to October 1, 1955, a notice had been duly served on the company to reopen the collective agreement and, therefore, by virtue of cl. 29 thereof, as authorized by s. 13 of the Act, that agreement would cease to be in force on and after January 31, 1956, unless legally extended as a result of the following. On or about January 24, 1956, the appellant, through its president, and the company purported to extend that agreement for a period of two months, *i.e.*, until March 31, 1956. Later, similar documents from time to time purported to extend the agreement to April 30, 1956, to June 30, 1956, to September 30, 1956, and to November 30, 1956.

I agree with Parker J.[1] that the phrase "the workings of the District organization" in art. VIII of the appellant's constitution does not include the making of a new collective agreement embodying the provisions of the old one, nor the making of an agreement extending the term of the latter. I also agree with him that no purported ratification

[1] (1957), 40 M.P.R. 42, 8 D.L.R. (2d) 217.

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by the district executive board in May 1956, the district convention in September 1956, the district executive board in September 1956, the international president, and the international convention in October 1956, can validate proceedings not authorized by the appellant's constitution. That constitution governs officers of the union, as well as the rank and file, and if, as I think, the former exceeded the powers conferred upon them, no effect may be given to their illegal actions.

The appeal should be dismissed with costs to be paid by the appellant to the individual respondents. No order should be made as to costs of Dominion Coal Company Limited.

RAND J. (*dissenting*):—This appeal raises a question under a labour agreement. The appellant is an international union to which approximately 10,000 miners and associated workers in Nova Scotia and New Brunswick belong. The organization of the union can be shortly described. In a territorial sense the union is District No. 26 of the international union, and is divided into 7 sub-districts; within each of the latter are mine localities in which local unions are organized. The district union has a constitution and its executive apparatus consists of a president, vice-president, secretary-treasurer, and an executive board, made up of those officers *ex officio* and one member from each sub-district. The highest district authority is the convention. Representatives to that are elected by the local unions, and the number is determined by the membership of each. The convention meets at such time and place as it may determine; special conventions may be called by the district executive board and shall be summoned on the requisition of a majority of the local unions. Underlying the district organization is the international constitution and the executive organs which it provides. Each district elects a representative to the international executive board.

The district executive board carries out the duties imposed upon it by the district constitution in harmony with the policies enunciated or decisions made by the convention. The president, in the tradition of unionism, is, generally speaking, the source and spearhead of action. By art. VIII, s. 3, of the constitution, between sessions of the

district executive board, he is invested with power to direct the workings of the district organization and is to report his acts to the executive board for approval. By art. XIX, it is provided that:

> All general agreements shall be voted upon by the members who are parties to such general agreements, and no general agreements shall be signed by the District Officers unless a majority of those voting approve of same.

As of February 1, 1953, a general agreement between the appellant and the defendant company became effective which was to continue until January 31, 1955, and thereafter from year to year unless notification to "reopen" the agreement was served by either of the parties prior to October 1 of any year later than 1953. This was modified by a proviso that should a national emergency be declared by the federal government, either party could "terminate" the agreement on 30 days' notice.

In September 1955, a notification to reopen was given by the union. On October 8, negotiations for modifying the existing agreement began. They continued without success until well along in January 1956 when the union applied for the appointment of a conciliation board by the Minister, charged with that duty, under the powers of the *Trade Union Act*. The board was set up and without delay entered upon its task. On May 4, 1956, its report was filed with the Minister. In effect the recommendations made were that owing to the conditions affecting the industry the existing terms should be re-embodied in a new agreement.

In the meantime the union and the company had on or about January 26 purported to enter into a temporary extension of the existing agreement, continuing it until March 31. Shortly before that was to expire a similar extension until April 30 was made; a third carried it to June 30, another until September 30 and finally, so far as the matter before us shows, it was prolonged until November 30 of that year. As of January 1, 1957, a new agreement became effective.

By cl. 28 of the 1953 agreement, what is known as a "maintenance of membership" provision required every employee a member of the union at the time of its coming into force or becoming a member before its expiration to maintain his membership in good standing "during the life"

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of the agreement, provided he continued to be eligible for membership; and during that period there were to be deducted by the company from his wages, in accordance with cl. 20, all dues, levies, fines and assessments imposed by the union. The respondents were members of the union and were bound by these clauses and they furnished the company with written authority to make the deductions as contemplated by s. 67 of the Act.

In the autumn of 1955, a relatively small group of employees of the machine-shop and one or two other non-mining departments of the company, including the respondents, being dissatisfied with terms of the agreement applicable to them, and the apparent inability of the union to effect any improvement, decided to withdraw and to form a new union. An application under the Act was made to the Labour Board for an order declaring the group to constitute an appropriate unit for collective bargaining purposes, but early in 1956 the application was dismissed on the merits. In the meantime notice had been given to the company by the respondents purporting to revoke the consents to deductions. These notices were disregarded by the company in view of the clauses of the contract mentioned which were still effective and s. 18 of the Act which requires every person bound by a collective agreement or on whose behalf a collective agreement has been entered into to do everything he is required to do and refrain from doing anything he is required to refrain from doing by the provisions of the agreement.

By s. 15 of the Act, if a revision of an agreement has not been concluded before the "expiry of the term, or termination of the agreement", the employer is forbidden, without the consent of the employees affected, to

> . . . decrease rates of wages, or alter any other term or condition of employment in effect immediately prior to such expiry or termination . . .

or unless

> . . . a conciliation board, . . . has reported to the Minister and seven days have elapsed after the report has been received by the Minister, ...

Such a report was received on May 4 and the bar of the section thus expired on May 11. On that day the respondents began this action, claiming a recovery of deductions amounting to $156 made after January 31, 1956, and for an injunction restraining future deductions.

At trial MacDonald J.[1] found the agreement to have expired as of January 31, 1956; but he held that s. 15 enabled the company to continue the deductions until May 11. He held also that the so-called extensions were invalid both because they were themselves general agreements, the authority to enter into which required the prior approval of a referendum not taken, and, seemingly, because once a term in time had been given an agreement any alteration including an extension was forbidden by s. 20. The agreement having expired, cl. 28 had been fulfilled and the respondents were freed from their assignment. The claim for the deductions was dismissed but that for an injunction against future deductions allowed. On appeal these views, except as to the effect of s. 20, were concurred in by the Court *in banco*[2].

The controversy is seen, then, to hinge on the question whether the extensions were valid and continued the "life of the contract" until a new general agreement had been concluded, or whether they had been entered into without authority or as against the statute and were, as found and held, ineffectual.

A district convention was held in June 1955. Although it does not seem to be expressly so stated, the fair inference from the evidence is that at that meeting it was decided that notification to reopen the agreement for negotiation should be given and that the district executive were directed accordingly. What, then, if anything, relating to incidental action by the district executive was impliedly and necessarily involved in that decision and instruction to proceed with negotiation looking to revision?

That negotiations of this sort can drag out for months is a matter of every-day knowledge and it was confirmed in this case, and retroactive applications, for example, of wage increases, the usual result of that delay, are a commonplace. On the other hand, the actual termination of a working agreement containing provisions beneficial to both employer and labour, the product of years of trial, experience and contention, might have serious consequences. At the very least it would be embarrassing to the hearing of grievances, the settlement of disputes, the questions of

[1] (1956), 5 D.L.R. (2d) 481.
[2] (1957), 40 M.P.R. 42, 8 D.L.R. (2d) 217.

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vacations, of prices of workmen's coal, of recognition of mining committees and others. Such a hiatus between agreements would violate not only the principle underlying labour and management relations, that a contract is to be coterminous with work, but also the basic desirability of the Act that employment be maintained under settled understandings to avoid the economic and industrial wastage of strikes and controversies poisoning labour relations.

The possibility of negotiations protracted beyond January 31 is then to be assumed as contemplated by the convention. Previous negotiations had gone through a similar protraction and similar extensions of agreement had been made by the president with the approval of the district executive. I take the mandate, therefore, given the latter to embrace as part of the negotiating authority the power to effect the temporary continuance of the agreement until accord on terms acceptable to the membership had been reached which would constitute a new general agreement for a defined period which the parties would respect and which, for that period, would put an end to controversy.

That such a power is recognized by the implication of the articles of the constitution seems to me to be inescapable from a proper interpretation of art. XIX. It is headed "General Agreement Referendum", and seems to be the only specific reference in the constitution to collective agreements. The practice of negotiation and bargaining, apart from its adoption by the Act, has long been a feature of labour and management action, an established practice which the constitution contemplates and in the light of which the article is to be given meaning. What is meant by a general agreement is that a comprehensive consensus on terms is given new formal embodiment and duration. A referendum is not a light matter equivalent to a motion in a meeting; it involves a highly detailed procedure to ascertain the opinion of the union, in an extended constituency with a large number of voters, on a matter of vital importance. The mere continuation of the *status quo* while their representatives are negotiating for new conditions is not such a matter, nor is an extension agreement a "general agreement". An extension might be needed for, say, three weeks, and the inappropriateness in that case of resorting to a referendum or of treating it as a "general agreement" is

patent. Were these extensions not made in good faith, not to maintain the existing terms of the working conditions for negotiating purposes, but to effect some ulterior object such as keeping cl. 28 in force to coerce employees seeking to escape it, a different situation would be presented. But there is nothing of that sort here. MacDonald J. describes the action taken as a "subterfuge" to obtain a "prohibited result", namely, the continuance of the agreement beyond its expiry date. He apparently interprets s. 20, enacting that no provision "relating to the terms of a collective agreement" shall be revised, as preventing an extension. But the prohibition is against a revision "during the term thereof" meaning the expressed term and a revision effective during the term; its object is to prevent, in the interests of industrial peace, the period so agreed upon from being reduced. But I am unable to draw the implication of a prohibition that would be in the face of the primary policy of the Act. A perusal of the evidence satisfies me that the actions of the president and the district executive were in good faith and that the extensions were for the purpose solely of preserving the existing labour relations pending, among other things, the action of the convention, a full consideration of further negotiating steps in the interest of the union, and the reaching of agreement between the men and the company by a change of opinion of one or both.

The use of the different expressions, "to reopen" and "to terminate" the agreement in lines 3 and 5 of cl. 29 and the limit of time within which the notification is to be given are significant to the scope and character of the negotiations envisioned. The first points to an immediate parley for the modification of something previously closed to discussion; it implies a continuation of the thing being dealt with; there is an existing structure of relations to be worked at, repaired or altered, and it is presupposed that the structure will continue while that work proceeds. The word "terminate", on the other hand, bears the sense of finality; the structure, in the presence of emergency, is put an end to.

On the view of the Courts below that the extension was a new contract, keeping in mind s. 20 of the Act which declares that a collective agreement shall be deemed, in my opinion conclusively, to be for a term of at least one year from when it comes into operation, there could never be a

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valid temporary extension less than a year notwithstanding that the object of the section, a specific period which will have been achieved, would be furthered. On its approval by a referendum, or with an express authorization to the president by the convention to enter into it, either party could thereupon decline further negotiation until a year had elapsed. Against that view every practical and policy consideration is ranged.

It should not be overlooked that the agreement could have been continued indefinitely if the convention had so decided, and against that the respondents admittedly would contend in vain. Their sole ground is that the agreement was "reopened" by a notice and they must accept the subsidiary and consequential action necessarily involved in the instruction given to take that step.

From this it follows that the president, confirmed by the executive board, entered into these extension agreements with the authority of the convention, that they were made for the sole purpose of continuing the existing terms until a new general agreement could be agreed upon and approved by a referendum, and that within the meaning of the language of cl. 29 of the agreement, the life of the latter did not expire until at least November 30, 1956.

I would, therefore, allow the appeal and dismiss the action with costs throughout.

CARTWRIGHT J.:—For the reasons given by the Chief Justice I agree with the conclusion at which he has arrived and I wish to add only a few words.

The right of the Dominion Coal Company Limited to make deductions from the wages of any of its employees against their will and to pay the amounts deducted to the appellant must, if it exists, be found in a statute or in a contract binding upon those employees. That right was contained in the collective agreement so long as by its terms or by virtue of the statute it continued in force, but I can find no escape from the conclusion that it no longer bound the respondents after May 11, 1956.

The desirability of a term in the collective agreement permitting its temporary extension, in the manner attempted in this case, while negotiations are proceeding is shown in the reasons of my brother Rand; but I can find no such term expressed and, in my opinion, the Court cannot supply

it by implication. The applicable rule as to the making of such implications by the Court is stated in *Hamlyn & Co. v. Wood & Co.*[1] Lord Esher M.R. said at p. 491:

> I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned.

Bowen L.J. and Kay L.J. agreed, and the latter added, at p. 494:

> I agree with the rule as laid down by the Master of the Rolls, viz., that the Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied.

I would dispose of the appeal as proposed by the Chief Justice.

Appeal dismissed with costs, RAND J. *dissenting.*

Solicitor for the defendant, appellant: D. McInnes, Halifax.

Solicitor for the plaintiffs, respondents: I. M. MacKeigan, Halifax.

Solicitor for the defendant, Dominion Coal Co. Ltd.: W. H. Jost, Halifax.

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[1] [1891] 2 Q.B. 488.

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CHARLES GLASS GREENSHIELDS AND CHARTERED TRUST COMPANY (*Suppliants*) ..... } APPELLANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

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

Succession duties—Bequest for life of net income of residue of estate—Capital to be paid to tax-exempt institution upon death of life beneficiary—Whether bequest to life beneficiary a dutiable transmission—Quebec Succession Duties Act, 1943, c. 18, ss. 2, 13, 19, 31, as amended by 13 Geo. VI, c. 32.

A testatrix directed her executors and trustees to hold the residue of her estate on trust to pay the total net income from it to two of her friends for life, and on the death of the survivor to pay the whole capital to an institution exempt from duties under s. 13 of the *Quebec Succession Duties Act*. She further directed that all succession duties be paid out of the capital of the residue, without the intervention of the beneficiaries.

Held (Locke J. dissenting): Succession duties, under s. 31 of the Act, must be calculated as if the life beneficiaries had received the fund as absolute owners. This was clearly an "attribution of the revenue from . . . capital or from [a] trust fund" within the meaning of that section.

Per Locke J., *dissenting*: On a proper interpretation of s. 31 of the Act, that section does not apply where the transmission in remainder is to a charity entitled to the benefit of the exemption provided by s. 13. However, duty was payable upon the life interests in the revenue, as these were transmissions within the ambit of the Act. A value for succession duty should, therefore, be placed on the life interests pursuant to ss. 38 and 39 of the Act.

APPEALS from two judgments of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing the judgment of Gibsone J. The suppliants-appellants claimed the repayment of $84,183.91 paid under protest and Gibsone J. gave judgment for $83,983.03. Appeals dismissed, Locke J. dissenting.

A. M. Watt, Q.C., and *P. M. Laing*, for the suppliants, appellants.

Guy Hudon, Q.C., for the respondent.

*PRESENT: Taschereau, Locke, Cartwright, Fauteux and Abbott JJ.

[1] [1957] Que. Q.B. 63.

TASCHEREAU J.:—Tous les faits de cette cause ont été rapportés dans les raisons écrites de certains de mes collègues, et il est en conséquence inutile de les citer de nouveau. Je ne désire qu'ajouter quelques mots pour préciser davantage ma pensée.

Je m'accorde avec mon collègue M. le Juge Abbott sur l'interprétation qu'il faut donner aux arts. 13, 19 et 31 de la *Loi des droits sur les successions,* 1943 (Que.), c. 18, et sur le point que dans le présent cas, il ne s'agit pas d'usufruit, ni d'usage, ni de substitution, mais bien *d'attribution des revenus d'un capital ou d'une fiducie.* Il s'ensuit que le jugement majoritaire de cette Cour dans *Guaranty Trust Company of New York et al. v. The King*[1], ne peut nous guider dans la détermination du litige. Il s'agissait en effet, dans cette cause, de l'application d'une loi différente de celle qui existe maintenant.

De plus, si la loi concernant la fiducie (Loi des Trusts) doit s'appliquer dans la présente cause comme on le prétend, ce dont je doute fort, je suis convaincu que c'est bien celle, telle que comprise dans la province de Québec et introduite ici par la législature, lorsqu'elle a été ajoutée aux lois publiques en octobre 1879, et incorporée au *Code Civil* lors de la refonte de 1888. La "Loi des Trusts" anglaise était jusqu'à cette dernière date totalement étrangère au droit français de notre province, et ce n'est que partiellement qu'on a adopté certaines de ses dispositions. Comme le dit le Conseil Privé dans la cause de *Laverdure v. Du Tremblay et al.*[2]:

> It may be useful to add that *the English law relating to trusts and trustees was only adopted to the limited extent involved in those specific provisions and of any implications necessarily flowing from them. The English system of Equity was clearly not introduced.* In view of those sections, however, there can be no reason for doubting that the true position of the children, including Edouard Berthiaume, after the death of the donor, was that they were beneficiaries under the deed of gift and under the will, with personal rights against the fiduciary donees (*donataires fiduciaires*) in the case of the deed, and the fiduciary legatee (*légataire fiduciaire*) in the case of the will.

(Les italiques sont miennes.)

Le Comité Judiciaire ne faisait que confirmer ce qui avait été dit précédemment par M. le Juge Rinfret, rendant la décision unanime de cette Cour dans *Curran v. Davis*[3], et

[1] [1948] S.C.R. 183, [1949] 1 D.L.R. 565.
[2] [1937] A.C. 666 at 682, [1937] 2 D.L.R. 561.
[3] [1933] S.C.R. 283 at 284, 293, 294, [1934] 1 D.L.R. 161.

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par M. le Juge Mignault dans un article remarquable intitulé "A propos de fiducie", publié dans la Revue du Droit, vol. 12 (1933-34), p. 73.

Avec cette notion de la fiducie telle qu'elle existe dans la province de Québec, et non pas telle qu'on la trouve ailleurs, comme en Angleterre ou dans les provinces de droit commun, il n'y a pas d'obstacle à la détermination de cette cause, de la manière que l'a proposée la Cour du banc de la reine[1].

Evidemment, les appelants sont véritablement des administrateurs fiduciaires des biens légués. Il exercent sur ces derniers un droit de propriété limité par le texte de la loi et par la jurisprudence que j'ai citée; il sont comptables aux légataires des revenus qui leur sont attribués. Le temps venu, ils devront remettre le capital à "The School for Crippled Children" qui est le légataire ultime, en déduisant cependant le montant employé au paiement des droits, tel que l'a voulu la testatrice, et comme d'ailleurs l'autorise l'art. 31 de la *Loi des droits sur les successions.*

Pour ces raisons, ainsi que pour celles données par mon collègue M. le Juge Abbott, je suis d'avis que les appels doivent être rejetés avec dépens.

LOCKE J. (*dissenting*):—The proceedings in this matter were commenced by petition of right by the executors of the late Isabel Greenshields to recover certain moneys paid under protest to the Crown under the provisions of the *Quebec Succession Duties Act,* 1943, 7 Geo. VI, c. 18, as amended. The claim of the suppliants was allowed in the Superior Court by Gibsone J. but that judgment was set aside in the Court of Appeal[1] and the action dismissed.

By the will, all of the estate of the testator was bequeathed to the executors upon certain trusts which included the following:

(*c*) To pay to my friends, Claire Johnston and Dorothy Hamilton, wife of Dr. Griffin Hill or the survivor of them, during their lifetime, the net income of the residue of my said Estate;

(*d*) Upon the death of the survivor of the said Claire Johnston and or Dorothy Hamilton-Hill, to deliver the residue of my Estate to the School for Crippled Children at Montreal;

[1] [1957] Que. Q.B. 63.

It was further directed that all succession and other death duties should be paid out of the capital of the residue, without the intervention of the beneficiaries.

The evidence discloses that the residue of the estate, after providing for a legacy to Charles Glass Greenshields, one of the executors, was $342,118 and upon this amount the Province required payment of succession duties in the sum of $83,983.03, and the suppliants sought the return of this amount or, alternatively, that amount less any amount payable as succession duties upon the life interests.

Section 9 of the *Quebec Succession Duties Act* specifies the rates of duty upon transmissions which vary where the property is transmitted to the wife or to relations in blood or in law and where the beneficiary is a stranger. In this case, the beneficiaries of the life interests provided were strangers and the bequests attracted accordingly a higher rate of duty.

Section 31 of the Act provides in part:

> In the case of usufruct, use, substitution or attribution of the revenue from any capital or from any trust fund, the amount of duties payable shall be calculated as though the usufructuary, the person having the right to use, the institute or the beneficiary of the revenue, received, as absolute owner, the property subject to the usufruct, right of use, substitution or trust, and the said duties may be paid from the capital.

While it is admitted that no succession duties were exigible upon the gift of the residue to the School for Crippled Children by reason of the provisions of s. 13 of the Act, the Crown, relying upon the above provision, levied duty on the bequest of the life interests as if the beneficiaries, Miss Johnston and Mrs. Hill, had received the corpus of the residue of the estate. In the result, as the will directed, and s. 31 permitted, the executors to pay the duties levied out of the capital of the residue, the value of the legacy to the charity declared exempt under the Act has been reduced by the amount to which the duty thus exacted exceeded such duty as would have been payable upon the life interests in question.

The following further sections of the Act are to be considered. Section 2 reads:

> All property, moveable or immoveable, the ownership, usufruct or enjoyment whereof is transmitted owing to death, shall be liable to duties, calculated upon the aggregate value of the property transmitted, at the rates fixed in section 9.

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Section 4 defines property in a manner which would include the life interests in question.

Section 9 is the charging section and the duty is imposed on the property transmitted.

Section 13, so far as applicable, reads:

> . . . no duties shall be exigible on legacies, gifts and subscriptions for religious, charitable or educational purposes.

Section 19 reads:

> Life rents or other rents and endowments shall be capitalized and valued at the amount required, on the date of the death, by a life insurance company, to secure a rent or endowment of a like sum.

Articles 981*a* to 981*n* of the *Civil Code* and the nature of the rights of *cestuis-que-trust* were considered by the Judicial Committee in *Laverdure v. Du Tremblay et al.*[1]. From the date of the death of Mrs. Greenshields the appellants, as trustees, were seized of the corpus of this estate in trust upon the trusts declared by the will and were entitled to possession of it as against the beneficiaries named in the will and, in that capacity, were liable to account to the beneficiaries and to pay to those entitled to the life interests the income from the residue in accordance with the terms of the will and to transfer the residue to the School for Crippled Children on the death of the survivor of those entitled to the life interests.

The property transmitted to Miss Johnston and to Mrs. Hill was a life interest in the net income and it is upon such interests alone that the duty was imposed by ss. 2 and 9. The property transmitted to the School for Crippled Children was the right upon the death of the survivors of those beneficiaries to a conveyance of the residue of the estate. The corpus of the estate, as it was as of the death of the testator, was made subject to the payment of the debts and funeral and testamentary expenses, in addition to such succession and other death duties as might be payable upon the bequests to Charles Glass Greenshields and to Miss Johnston and Mrs. Hill, to the fees and expenses of the Chartered Trust Company and to the payment of such expenditures as might be incurred for repairing, improving or rebuilding any property of the estate. The amount of the residue would not, accordingly, be determined until the expiry of the last of the life interests.

[1] [1937] A.C. 666 at 682, [1937] 2 D.L.R. 561.

In *Guaranty Trust Company of New York et al. v. The King*[1], the facts were similar to those affecting the present matter. The net revenues were given to three life beneficiaries and, on the extinction of these interests, were to be paid to charitable institutions, bequests to which were entitled to exemption. The judgment of the majority of this Court delivered by Rand J. held that the Province was not entitled to assess succession duties upon the corpus of the estate, but merely upon the value of the life interests. That case, however, was decided under the terms of the *Quebec Succession Duties Act* as it appeared as c. 80 of the Revised Statutes of 1941. In that statute, s. 13 (which was repealed and re-enacted by c. 18 of the statutes of 1943), so far as relevant, read:

> In the case of transfer of property with usufruct or substitution, the amount payable shall be calculated as if the usufructuary or the institute received as absolute owner and the duties shall be paid only on the actual capital of the property transmitted.

Rand J., in delivering the judgment which allowed the appeal from the Court of Appeal of Quebec, said in part[2]:

> But here we have a life interest, not usufruct, in income with the interest in the corpus exempt from tax. The beneficiary has no contact with much less possession of the corpus and the duty of the trustee under section 13 is to deduct the tax from property in his hands belonging to the person liable for it. To deduct tax in respect of the property of the charity would be in the face of the exemption.

Section 31 was again repealed and re-enacted by s. 8 of c. 32 of the statutes of 1949 and now reads as first above quoted. The words "attribution of the revenue from any capital or from any trust fund" appear to me to be sufficient to describe the bequest to the beneficiaries of the life interest in the present matter and, if the section applies to a case such as the present where the corpus of the estate, after the satisfaction of the charges imposed upon it, is held upon terms such as exist in the present matter, the position taken on behalf of the Crown would appear to be justified.

The taxing sections of the *Quebec Succession Duties Act* in terms impose the duties upon the property transmitted at specified rates. There was no transmission to Miss Johnston or Mrs. Hill of either the corpus or the residue of the estate. The exemption given to legacies for charitable

[1] [1948] S.C.R. 183, [1949] 1 D.L.R. 565.
[2] [1948] S.C.R. at pp. 213-4.

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purposes is in the clearest terms and no duties were exigible upon the bequest to the School for Crippled Children, payable either at the time of death or at the time when, on the extinction of the life interests, the trustees convey the corpus to them.

The status of the property held in trust by the executors under the will in question must, of necessity, be considered in the present matter, since it has been resorted to to pay the succession duties.

Article 981*a* reads:

> All persons capable of disposing freely of their property may convey property, moveable or immoveable, to trustees by gift or by will, for the benefit of any persons in whose favor they can validly make gifts or legacies.

Article 981*b* reads in part:

> Trustees, for the purposes of their trust, are seized as depositaries and administrators *for the benefit of the donees or legatees of the property* . . . conveyed to them in trust. . . .

Article 981*d* provides that trustees dissipating or wasting the property of the trust, or refusing or neglecting to carry out the provisions of the document creating the trust, or infringing their duties, may be removed by the Superior Court.

By art. 981*h* it is declared that trustees are obliged to execute the trust which they have accepted, unless they be authorized by a judge of the Superior Court to renounce.

Article 981*k* declares the duty of the trustees to exercise reasonable skill and care in administering the trust and art. 981*l* provides that at the termination of the trust, they must render an account and deliver all the properties in their hands to the persons entitled.

These are the same duties that are imposed upon trustees under the laws of England.

Articles 981*a* to 981*n* were added to the Code in 1888.

In *Curran v. Davis*[1], Rinfret J. (as he then was), in delivering the judgment of the Court, said in part:

> Après la revue que nous venons de faire de la jurisprudence et de la doctrine dans la province de Québec sur la matière de ce litige, il est difficile de ne pas conclure que le chapitre de la fiducie dans le code est vraiment d'inspiration anglaise.

[1] [1933] S.C.R. 283 at 302, [1934] 1 D.L.R. 161.

In *Curran's* case, Sir Mortimer Davis had executed a trust deed conveying property to trustees in trust, *inter alia,* to pay an annuity on the death of the said Davis to his adopted son. Before his death, Davis assumed to revoke the trust in favour of the son who in the action, following his father's death, asserted that the revocation was ineffective, the trust deed having become effective upon the acceptance of the trust by the named trustees. There was no evidence that the son had accepted the gift to him and it was contended that, in these circumstances, the donor might validly rescind the trust. This contention was rejected in this Court. While that was the issue, the learned judge who delivered the judgment of the Court discussed at some length the effect to be given to the article in question, saying that he was of the opinion that art. 981*a* was the fundamental article and that it contained all that was necessary to define a deed of trust. Speaking of the position of the trustees, he said[1]:

> Les "trustees" n'en seront cependant pas propriétaires, dans le sens absolu du mot. Les "trustees", bien que seuls propriétaires apparents à l'égard des tiers, n'auront ni l'*usus,* ni le *functus* [*fructus?*] ni l'*abusus* de la "trust property".

And, speaking of the right of the beneficiary, said[2]:

> En conséquence, Philippe Meyer Davis n'a aucun droit de propriété sur la "trust property". Il n'a que des droits conservatoires; et l'on peut se demander s'il a le droit de suite, ce qu'il n'est pas nécessaire de décider pour les fins de ce litige.

A second appeal of *Curran v. Davis*[3] was heard at the same time and the judgment follows at p. 307 of the report. Rinfret J. said that there was no distinction, in the legal sense, between the cases and, speaking of the status of the trust property conveyed to the trustees, said[4]:

> It follows that the trust property would, immediaetly upon being received, become subject to all the terms and conditions of the trust, which would at once be binding upon the trustees.

And again[5]:

> "As and when received" by the trustees, the trust property became affected *ipso facto* by the terms and conditions of the deed.

[1] [1933] S.C.R. at 293.
[2] At p. 294.
[3] [1933] S.C.R. 307.
[4] At p. 309.
[5] At p. 310.

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The case of *Laverdure v. Du Tremblay*[1] was decided by the Judicial Committee four years later and there is nothing in the judgment delivered by Lord Maugham conflicting with the above-quoted passages from the judgment in the *Curran* cases, though something of importance was added. After saying that the *Civil Code* of Quebec had originally no article relating to trusts and that, generally speaking, the French system does not recognize trusts, he said that their great convenience was recognized in Quebec and arts. 981*a* to 981*n* were added to the Code. Lord Maugham then said in part[2]:

> It may be useful to add that the English law relating to trusts and trustees was only adopted to the limited extent involved in those specific provisions *and of any implications necessarily flowing from them.* The English system of Equity was clearly not introduced. In view of those sections, however, there can be no reason for doubting that the true position of the children, including Edouard Berthiaume, after the death of the donor, was that they were beneficiaries under the deed of gift and under the will, with personal rights against the fiduciary donees (*donataires fiduciares*) in the case of the deed, and the fiduciary legatee (*légataire fiduciaire*) in the case of the will.

(The italics are mine.)

That the English system of equity was clearly not introduced into Quebec is a circumstance that has no bearing on the present question. The English law as to trusts, to the extent described, was introduced, which is the only matter with which we are concerned. The latter part of this quotation does not purport to define or limit the rights which the beneficiaries might assert for the protection of their interest or the status of the trust estate. The words in italics are to be noted and are of importance.

The duties of the trustees are defined in the present case by the will and by the terms of the article which I have quoted. As declared by the article, the property is held by the trustees for the benefit of the *cestuis-que-trust.* The legal title is vested in the trustees as well as the right to possession but, from the time of the death of the testator, that estate was in their hands impressed with a trust in favour, *inter alia,* of the School for Crippled Children. To say this is but to paraphrase the language of Rinfret J. in *Curran's* case[3].

[1] [1937] A.C. 666. [2] At p. 682.

[3] [1933] S.C.R. 283 at 309-10.

It is perfectly clear from the language of the article and from what was said in *Curran's* case and in the judgment of the Judicial Committee in *Laverdure's* case that the *cestuis-que-trust* were entitled, in respect of the property and the revenues from the property held in trust for them, to assert the same rights against the trustees for the protection of their respective interests as might be had under the English law and which are described at p. 706 *et seq.* of Lewin on Trusts, 15th ed. 1950.

It is with these considerations in mind that s. 31 of the *Quebec Succession Duties Act* is to be interpreted.

Put bluntly, the argument for the Crown is that while the transmission to the School for Crippled Children, which the will directs, is by virtue of s. 13 exempt from succession duty, due to the interposition of the life estate in the revenues, the corpus held by the trustees and impressed with a trust in favour of the School may be resorted to to pay duties assessed against Miss Johnston and Mrs. Hill.

This construction obviously ignores the right of exemption which the charity is entitled to by law. It is true that the duty is not assessed against it and it is only the property held in trust for it, art. 981*b*, that is levied upon. But this is a distinction without a difference. It is construing the statute in a manner which permits the Crown to do indirectly what it cannot do directly. No statute should be so interpreted unless its terms make it perfectly plain that no other reasonable construction can be placed upon it.

The broad general rule for the construction of statutes is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest: *Jennings v. Kelly*[1]. The law will not allow the revocation or alteration of a statute by construction when the words may be capable of proper operation without it. It cannot be assumed that Parliament has given with one hand what it has taken away with another: Maxwell on The Interpretation of Statutes, 10th ed. 1953, p. 160.

It is not, I think, without significance that when the *Quebec Succession Duties Act* was repealed and re-enacted in 1943 and amended in 1949, while changes were made in the terms of s. 31, the absolute nature of the exemption of

[1] [1940] A.C. 206, 229, [1939] 4 All E.R. 464.

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legacies to charitable institutions such as the School for Crippled Children was not changed.

In my opinion, the proper interpretation to be placed upon s. 31 is that it applies to cases where the transmission of property such as a life interest in the revenue and of the residue upon the extinction of the life interest are all liable to duty under the charging sections. By reason of its terms, where, as in the present case, the life interest is given to strangers, the amount of the duty must be calculated at the higher rate imposed by s. 9(3) and be payable upon each of the transmissions.

Where the transmission in remainder is entitled to the benefit of the exemption provided by s. 13, s. 31 does not apply, in my opinion.

It has been said in argument that the language of s. 31 is clear, but that is equally true of s. 13. Applied literally to a case such as the present, they are inconsistent and irreconcilable. It is, however, not merely the interpretation of the language of s. 31 that is to be considered but the subject-matter to which it applies. The language of s. 13 is specific and that of s. 31 general. In the case of conflict between an earlier and a later statute, a repeal by implication is never to be favoured and is only effected where the provisions of the later enactment are so inconsistent with, or repugnant to, those of the earlier that the two cannot stand together. Unless the two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal cannot be implied. Special Acts are not repealed by general Acts unless there be some express reference to the previous legislation or a necessary inconsistency in the two Acts standing together which prevents the maxim *generalia specialibus non derogant* being applied: Broom's Legal Maxims, 10th ed. 1939, p. 349: Maxwell, *op. cit.*, p. 176. This principle is, in my opinion, applicable in the present case. There is no difficulty in giving both sections a reasonable and precise meaning without injustice either to the taxpayer or to the Crown. The interpretation which I would give the Act complies, in my opinion, with the rule stated in s. 41 of the *Interpretation Act,* R.S.Q. 1941, c. 1, which reads:

> Every provision of a statute, whether such provision be mandatory, prohibitive or penal, shall be deemed to have for its object the remedying of some evil or the promotion of some good.

Such statute shall receive such fair, large and liberal construction as will ensure the attainment of its object and the carrying out of its provisions, according to their true intent, meaning and spirit.

What, in my opinion, is the fallacy of the argument addressed to us on behalf of the Crown may perhaps best be demonstrated by an illustration. As pointed out by my brother Cartwright, if the will in question directed that the estate be held in trust for any period of time for the charity and, upon the expiration of that period, for those to whom the life interest was given, if effect be given to the Crown's contention there would be no duties payable under the *Quebec Succession Duties Act* by anyone, since none would be payable upon the succession in favour of the charity. It is a cardinal rule for the interpretation of all statutes that they should be so construed, if possible, that they do not lead to an absurdity. In *Grey v. Pearson*[1], Lord Wensleydale said:

I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.

The cases on the matter are collected in the 10th edition of Maxwell and the learned author, after repeating the above statement of Lord Wensleydale, says (p. 6):

In repeating this canon in *Abbott v. Middleton* (1858) 7 H.L.C. 114, 115, Lord Wensleydale said: "This rule in substance is laid down by Mr. Justice Burton in *Warburton v. Loveland,* 1 Huds. & Bro. 648, H.L. It had previously been described as 'a rule of common sense as strong as can be,' by Lord Ellenborough, in *Doe v. Jessep,* 12 East 292. It is stated (by Lord Cranworth, when Chancellor) as 'a cardinal rule,' from which, if we depart, we launch into a sea of difficulties not easy to fathom; and as the 'golden rule' when applied to Acts of Parliament, by Jervis C.J., in *Mattison v. Hart,* 14 C.B. 385."

While this interpretation is urged upon us by counsel for the Crown, and while to approve it would clearly be beneficial to the Province in this matter, it would be obviously disastrous to the revenue in the future since, by the simple expedient of making a bequest of an interest in the revenue of an estate for a short period to a charity entitled to exemption under the terms of s. 13 and leaving the remainder of the estate to other persons such as Miss

[1] (1857), 6 H.L. Cas. 61 at 106, 10 E.R. 1216.

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Johnston and Mrs. Hill, transmissions to whom would normally be taxable under the *Quebec Succession Duties Act,* liability for any such duty would be avoided entirely. That, of course, is a matter with which we are not concerned. The statute, however, is to be expounded "according to the intent of them that made it": *Sussex Peerage Case*[1], and I decline to believe that the Legislature of Quebec intended by the language of s. 31 to deprive charitable institutions of the immunity given to them by s. 13 or to permit transmissions which would otherwise be liable to duty to be exempted by an expedient of the nature above mentioned.

While the appellants contended that no duty was payable upon the life interests in the revenue, that claim cannot be sustained. These transmissions are clearly within the ambit of the taxing sections.

Gibsone J., who considered that the duty payable in respect of these interests should be computed from year to year and paid by the trustees when the amount of the annual revenue was determined, gave judgment for the full amount of $83,983.03. Sections 38 and 39, however, contemplate that the amount of the duty upon a transmission is to be calculated once and for all by the collector forthwith following the death of the testator, which involves placing a value on each transmission in order that the rate and the amount payable may be determined under s. 9. I do not think that the evidence given by the witnesses Gammell and Baldwin is sufficient to enable us to determine the value for succession duty of the legacies of the life interests.

I would, therefore, set aside the judgment of the Court of Appeal and at the trial and direct that the appellants recover judgment against the Crown in the amount of $83,983.03, less the amount of duty payable upon the bequests to Miss Johnston and Mrs. Hill, with leave to apply in the event that the parties are unable to agree upon the proper amount of the latter assessment. I would allow the appellants their costs in the Court of Appeal and in this Court.

[1] (1844), 11 Cl. & F. 85 at 143, 8 E.R. 1034.

CARTWRIGHT J.:—The relevant facts and statutory provisions and the contentions of the parties are set out in the reasons of other members of the Court.

The question before us may be summarized as follows: When a deceased has bequeathed a fund to his executors in trust to pay the income therefrom to A for life and on the death of A to transfer the capital of the fund to B, what duties, if any, are exigible under the provisions of the *Quebec Succession Duties Act,* hereinafter referred to as "the Act", when A is a stranger in blood to the deceased and B is a charitable institution a legacy for whose purposes falls within s. 13 of the Act?

I have reached the conclusion that the answer to this question given by the unanimous judgment of the Court of Queen's Bench (Appeal Side)[1] is correct.

The case stated appears to me to fall within the words of s. 31 of the Act, those which are relevant being as follows:

> In the case of . . . attribution of the revenue from any . . . trust fund, the amount of duties payable shall be calculated as though the . . . beneficiary of the revenue, received, as absolute owner, the property subject to the . . . trust, and the said duties may be paid from the capital.

If I have understood correctly the arguments of counsel and the reasons of the other members of this Court and those of the learned justices in the Courts below it has not been suggested in any of them that s. 31 would not govern this case if B instead of being a charitable institution were an individual belonging to either of the classes defined in s. 9(1) and s. 9(2) of the Act.

For the appellants, however, it is contended that since B is a charitable institution the application of s. 31 would result in the nullification or virtual repeal of s. 13, that the two sections should, if possible, be reconciled and that if reconciliation is impossible s. 13 should be given effect under the rule expressed in the maxim *generalia specialibus non derogant.* But, assuming that the maxim is applicable, it appears to me that, as between the two sections, s. 31 rather than s. 13 is the special one. Sections 9(1), 9(2), 9(3) and 13 contemplate four classes, of which the first three are liable to pay duties at different rates and the fourth is free from duty. Into one of these classes will fall every legatee to whom property is transmitted owing to death. If it

[1] [1957] Que. Q.B. 63.

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were not for the terms of s. 31, where property is transmitted in trust for two persons successively each would pay duties at a specified rate or would be free from duty according to the rule for the class of which he was a member; but the Legislature has seen fit to make a special rule for the case in which certain successive interests are given.

Prior to the enactment of s. 31, by 7 George VI, c. 18 (1943), the case with which we are concerned did not fall within the terms of the second paragraph of s. 13 of R.S.Q. 1941, c. 80, which was the predecessor of s. 31, and read as follows:

> In the case of transfer of property with usufruct or substitution, the amount payable shall be calculated as if the usufructuary or the institute received as absolute owner and the duties shall be paid only on the actual capital of the property transmitted.

It was so held by this Court in *Guaranty Trust Company of New York et al. v. The King*[1]. Dealing with dispositions which fell within the second paragraph of s. 13, as then worded, Rand J. said:

> Here the conception is the transfer of ownership "with usufruct or substitution"; all interests are dealt with as a single whole, and the implication is clear that the provision is special.

It is true that Rand J. was not discussing the application of the maxim *generalia specialibus non derogant* and that what was said as to the meaning and effect of the provision of which he was speaking may be regarded as *obiter*, as that provision was held inapplicable to the terms of the will there before the Court, but I agree with the view expressed that the provision is a special one.

I am unable to discern a satisfactory reason in principle for holding that s. 31 applies where B is in a class liable to pay duty at a rate higher or lower than that payable by A but does not apply where B is in a class not liable to pay duty at all. It is argued that there is a fundamental difference between holding that s. 31 is effective to change the rate which would but for the section be payable by B to that payable by A where the former is either greater or less than the latter and holding that the section is effective where the former is zero; but this difference appears to me to be one of degree rather than of kind.

It appears to me that wherever a fund is given to two persons successively, whether by usufruct, use, substitution

[1] [1948] S.C.R. 183 at 212, [1949] 1 D.L.R. 565.

or (as in the case at bar) by attribution of revenue, the Legislature has provided that, as it was put by Rand J. in the passage quoted above, the successive interests given are to be dealt with as a single whole, that the duty on that whole is to be calculated as though the beneficiary of the revenue received the whole property as absolute owner, that is to say at the rate, if any, applicable to the beneficiary of the revenue, regardless of the rate, if any, that would otherwise have been applicable to the one who takes in remainder, that the duty so calculated is payable out of the capital of the property and that no other duty is exigible from the property or from any of the persons successively entitled thereto. By this construction s. 13 is not repealed or nullified, it has full effect except in cases in which the successive interests embraced in s. 31 are given; in those special cases s. 13 supersedes or yields to the provisions of s. 9 according as the charitable institution is or is not the first in order of those who take successively.

I find support for the view that this construction should be adopted in the reasons of the majority in *Guaranty Trust Company of New York v. The King, supra,* particularly at pp. 210, 211 and 212. In rejecting the argument of the respondent in that case that s. 3 of the Act, as it then read, should be construed so as to bring about a result similar to that at which I have arrived in the case at bar, Rand J. contrasted the language of s. 3 with that of the second paragraph of s. 13, and his reasons appear to me to imply that had the case fallen within the words of that paragraph he would have accepted the respondent's argument. I, of course, do not regard this as in any way decisive of the present case, for I am not unmindful of the words of Lord Halsbury in *Quinn v. Leathem*[1]:

> . . . a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it.

It is argued that if s. 31 be construed in the manner I have indicated above an absurdity results, in that if a testator bequeathed a fund in trust directing that the income be paid to a charity for any length of time and that the capital of the fund thereafter be paid to an individual, falling within any of the classes defined in s. 9(1), (2) and (3), no duties whatever would be payable on any part of

[1] [1901] A.C. 495 at 506.

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the fund. I can see no escape from the conclusion that such a result would follow. In the supposed case, which is the converse of that in the present appeal, the duties payable would be calculated as though the charity received as absolute owner the property subject to the trust and, by virtue of s. 13, no duties would be exigible. I have some difficulty in supposing that the Legislature intended this result, but I am unable to regard it as such a manifest absurdity as requires or permits the Court to refuse to apply the literal and, I think, plain words of s. 31 and to read into the first paragraph of that section some such words as "provided all those who take successively are liable to pay duties". In dealing with such an argument, as is pointed out in Maxwell on The Interpretation of Statutes, 10th ed. 1953, p. 7, "the difficulty lies in deciding between words that are plain but absurd, and words that are so absurd as not to be deemed plain".

In view of the differences of judicial opinion that exist in the case at bar I have reached my conclusion with hesitation; but the difficulties in construing the Act in the manner contended for by the appellants seem to me to be even more formidable than those raised against the construction I have adopted.

Before parting with the matter I wish to make two further observations. First, I agree with all that is said in the reasons of my brother Locke in stating the rules of construction by which the Court should be guided in ascertaining the meaning of the statute here in question, although I have the misfortune to differ from him as to the result which flows from the application of those rules in this case. Second, I am unable to see that the questions arising for decision in these appeals are affected by any differences there may be between the law relating to trusts and trustees as it exists in Quebec and as it exists in those Provinces which apply the law of England.

I would dismiss the appeals with costs.

FAUTEUX J.:—Pour les raisons données par mes collègues MM. les Juges Taschereau et Abbott, je suis d'avis que les appels doivent être rejetés avec dépens.

ABBOTT J.:—The facts are set out in the reasons of Mr. Justice Hyde in the Court below[1] and I need refer to them only briefly. In their petition of right appellants claim the reimbursement with interest of succession duties in an amount of $84,183.91, paid under protest by appellants in their quality of testamentary executors and trustees of the late Mrs. Hugh Mackay. The testatrix died on January 20, 1952, domiciled in Quebec, and under the terms of her will bequeathed all her property to the appellants in trust for the execution of certain trusts, two of which were as follows:

(c) To pay to my friends, CLAIRE JOHNSTON and DOROTHY HAMILTON, wife of Dr. Griffin Hill or the survivor of them, during their lifetime, the net income of the residue of my said Estate;

(d) Upon the death of the survivor of the said CLAIRE JOHNSTON and or DOROTHY HAMILTON-HILL, to deliver the residue of my Estate to the School for Crippled Children at Montreal;

It is conceded that the School for Crippled Children at Montreal qualifies for exemption under s. 13 of the *Quebec Succession Duties Act*, and claim for reimbursement of the duties paid is made by reason of the assessment of the legacies of revenue to Miss Johnston and Mrs. Hill as though these two ladies had been bequeathed the residue of the estate as absolute owners.

Three questions arise on this appeal, all relating primarily to the interpretation to be given to certain provisions of the *Quebec Succession Duties Act*, 7 Geo. VI, c. 18, as amended. These questions are (1) Are there any succession duties imposed under s. 2 of the Act with respect to the bequest of revenue made to Miss Johnston and Mrs. Hill? (2) If there are duties payable with respect to such bequest, upon what basis is the amount of such duties to be calculated? and (3) By whom are such duties payable?

As to the first of these questions, the said bequest, in my view, comes clearly within the terms of s. 2, which reads as follows:

2. All property, moveable or immoveable, the ownership, usufruct or enjoyment whereof is transmitted owing to death, shall be liable to duties, calculated upon the aggregate value of the property transmitted, at the rates fixed in section 9.

Moreover, the question as to whether such a bequest is subject to succession duties under the Act was settled in

[1] [1957] Que. Q.B. 63.

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my opinion by the decision of this Court in *Guaranty Trust Company of New York et al. v. The King*[1], in which a similar bequest of revenue was in issue. The argument that the bequests to Miss Johnston and Mrs. Hill were not subject to any duties was not pressed too strenuously by Mr. Watt.

As to the second question, duties being payable under s. 2, the amount falls to be determined under ss. 9 and 31. Section 9, which deals with rates, is not in issue, and the relevant portion of s. 31 reads as follows:

> 31. In the case of usufruct, use, substitution or attribution of the revenue from any capital or from any trust fund, the amount of duties payable shall be calculated as though the usufructuary, the person having the right of use, the institute or the beneficiary of the revenue, received, as absolute owner, the property subject to the usufruct, right of use, substitution or trust, and the said duties may be paid from the capital.

Sections 2 and 31 read together provide (1) for duties with respect to property transmitted subject to "usufruct, use, substitution or attribution of revenue"; (2) that the duties payable shall be calculated as though the usufructuary, the person having the right of use, the institute or the beneficiary of the revenue, received, as absolute owner, the property subject to such life or other similar interest; and (3) that payment of the duties may be made out of such property. Section 42 provides for a privilege upon the property of an estate to secure the payment of succession duties.

In the *Guaranty Trust* case, *supra,* a majority of this Court held that, on the facts, the bequest of revenue there in issue came within the terms of what is now s. 19 of the Act for the purpose of fixing the value of the bequest for succession duty purposes, and that finding was conclusive so far as the question at issue in that appeal was concerned.

In 1943 however, subsequent to the death of the testator whose estate was in issue in the *Guaranty Trust* case, the *Quebec Succession Duties Act,* R.S.Q. 1941, c. 80, was revised and replaced by the Act 7 Geo. VI, c. 18. In this new Act the second paragraph of s. 13 (considered in the *Guaranty Trust* case) was amended *inter alia* by adding the words "or attribution of income from any capital or from any trust fund" to the words "usufruct, use and substitution" already contained in the section, and it became s. 31 of

[1] [1948] S.C.R. 183, [1949] 1 D.L.R. 565.

the new Act. In my opinion this amendment is clear and unambiguous and it has the effect of bringing a bequest of revenue (such as is in issue here) squarely within the terms of s. 31, thus rendering the provisions of s. 19 inapplicable.

If I am right in this view, the reasons of my brother Rand, speaking for the majority in the *Guaranty Trust* case, are of little assistance in determining the second question to which I have referred.

It was argued by Mr. Laing that if the Crown's contention as to the interpretation to be given to s. 31 were to be accepted, the effect would be implicitly to repeal, in part at any rate, the provisions of s. 13. I cannot accept this contention. The two sections forming part of the same statute must, of course, be read together, but I am unable to see any conflict between them, however unfortunate the result may seem to be in certain cases. It was also suggested during the course of the argument that had the income of the residue been bequeathed to the charity even for one day and the capital to an individual, no duties would have been payable by the latter and that this could not have been intended by the Legislature. I am far from being satisfied that such a result would follow (since in my view in such a case s. 31, which is not the charging section, never comes into play) but even if it did, I can see no reason for refusing to apply the plain words of s. 31.

The Act does not purport to determine the apportionment to be made, if any, of the duties payable, between a person entitled to receive revenues and a person ultimately entitled to receive capital. In the present case the testatrix provided that all duties payable with respect to the benefits conferred under her will, including those on a particular legacy to her brother, were to be paid by her executors and trustees out of the mass of her estate before any distribution of capital or revenue. Had she not done so, this matter of apportionment, if any, might have had to be determined in accordance with the general law as was the case in *Lamarche v. Bleau*[1], referred to in argument, but as to this I do not find it necessary to express any opinion.

Since preparing these reasons I have had the advantage of reading the notes of my brother Taschereau and I am in

[1] [1930] S.C.R. 198, [1930] 3 D.L.R. 545.

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agreement with the views which he has expressed as to the law concerning "trusts" in the Province of Quebec.

Appellants also appealed against the judgment of the Court of Queen's Bench maintaining the Crown's appeal against that portion of the judgment of the learned trial judge which reserved to the respondent the right to collect duties from year to year upon the annual payments to Miss Johnston and Mrs. Hill.

For the reasons which I have given, as well as for those delivered by Mr. Justice Hyde in the Court below, with which I am in substantial agreement, I would dismiss both appeals with costs.

Appeals dismissed with costs, LOCKE J. *dissenting.*

Attorneys for the suppliants, appellants: Foster, Hannen, Watt, Leggat & Colby, Montreal.

Attorney for the respondent: G. Hudon, Quebec.

GEORGES BRASSARD (*Plaintiff*) .....APPELLANT;

AND

AUTOBUS & TAXIS LIMITEE (*Defendant*) ..... RESPONDENT.

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*Feb. 27
Apr. 1

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

Motor vehicles—Collision—Loss of control—Damages to a building—Responsibility—Whether presumption of s. 53 of Motor Vehicles Act, R.S.Q. 1941, c. 142, applies.

The defendant company's bus, following a collision with a truck, was forced off the road and struck the plaintiff's building. *Held,* the plaintiff was not entitled to judgment against the defendant for the damages to his building, since the evidence clearly established that the driver of the truck was solely responsible for the collision. Assuming (without deciding) that the presumption of fault under s. 53 of the *Motor Vehicles Act* applied in the circumstances, that presumption was rebutted by the evidence, and, the cause of the accident having been established, the rule laid down in *Parent v. Lapointe,* [1952] 1 S.C.R. 376, did not apply.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Langlais J. Appeal dismissed.

R. Fradette, Q.C., and *M. Cain,* for the plaintiff, appellant.

J. Landry, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—Un accident de véhicules-automobiles est à l'origine de ce litige. Comme conséquence d'une collision survenue à Arvida, à l'intersection des rues Hudson et 25ième, l'autobus de l'intimée alla frapper la façade du magasin de l'appelant, lui causant des dommages substantiels. Le juge au procès a maintenu l'action jusqu'à concurrence de $1,597 avec intérêts depuis l'assignation et les dépens. Si on ajoute les intérêts au capital, tel que l'autorise l'art. 43 de la *Loi de la cour suprême,* le montant dépasse $2,000 et cette Cour a, en conséquence, la juridiction voulue pour entendre cet appel. La Cour du banc de la reine[1], l'honorable juge en chef Galipeault dissident, a maintenu l'appel et a rejeté l'action.

*PRESENT: Taschereau, Rand, Fauteux, Abbott and Judson JJ.

[1] [1957] Que. Q.B. 23.

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BRASSARD v. AUTOBUS & TAXIS LTÉE.

Taschereau J.

Les faits de la cause peuvent sommairement se résumer ainsi. Le ou vers le 3 octobre 1941, alors qu'il faisait noir et que la pluie tombait, l'autobus de l'intimée dans lequel avaient pris place deux passagers, outre le conducteur, procédait dans une direction nord-sud, sur la rue Hudson. A une distance d'environ 150 pieds de la rue 25ième, qui traverse perpendiculairement, l'autobus dépassa une voiture stationnée du côté droit. La rue Hudson a une largeur de 36 pieds, et est marquée au centre d'une ligne blanche. L'autobus continua sa route à une vitesse d'environ 15 milles à l'heure, et rendu à l'intersection, vint en collision avec un camion citerne, propriété de Joron & Cie Inc., qui venait à sa gauche dans une direction ouest-est. Comme résultat du choc, l'autobus dont le conducteur avait nécessairement perdu contrôle, est allé frapper le magasin de l'appelant, situé au coin sud-ouest des deux rues, avec le résultat que l'on connaît.

Le juge au procès a appliqué les dispositions de l'art. 1054 C.C. qui rend responsable une personne du dommage causé par une chose qu'elle a sous sa garde. Il a aussi affirmé que si l'intimée n'est pas responsable de cet accident, elle aura quand même à payer au demandeur le montant des dommages, quitte à exercer plus tard une action récursoire contre le véritable auteur du quasi-délit. Evidemment, ces deux propositions sont dénuées de tout fondement légal et ne peuvent être acceptées. Il est inutile de dire que ces deux motifs n'ont jamais été invoqués par le procureur de l'appelant, et qu'ils n'ont pas été retenus par l'honorable juge en chef de la Cour du banc de la reine, comme base de sa dissidence.

L'honorable juge en chef s'appuie sur la présomption créée par l'art. 53 de la *Loi des véhicules automobiles*, S.R.Q. 1941, c. 142, ainsi que sur la cause de *Parent v. Lapointe*[1], jugée par cette Cour, où il a été décidé que lorsqu'il s'agit d'un fait exceptionnel qui n'aurait pas dû se produire dans des conditions normales, il existe une présomption de faute contre l'auteur du délit ou du quasi-délit qu'il lui incombe de repousser.

La majorité de la Cour, au contraire, en est venue à la conclusion que l'intimée avait établi qu'elle n'avait commis aucune faute engendrant sa responsabilité, et que toute

[1] [1952] 1 S.C.R. 376.

présomption avait donc été totalement repoussée. L'on sait que la présomption édictée par l'art. 53 de la *Loi des véhicules automobiles* n'existe qu'en autant que le dommage est causé dans un *chemin public*. Sans me prononcer sur la question de savoir si elle s'applique dans le présent cas, je crois, assumant qu'elle s'appliquerait, qu'elle a été complètement détruite par la preuve offerte par l'intimée, et que la cause de cet accident ayant été parfaitement établie, il n'y a pas lieu d'appliquer les principes énoncés par cette Cour dans la cause de *Parent v. Lapointe*.

En effet, la preuve révèle clairement qu'en arrivant à l'intersection des rues Hudson et 25ième, le chauffeur de l'autobus conduisait son véhicule du côté droit de la rue. C'est ce qu'il jure, et c'est ce que confirment deux témoins, Simard et Cooper, qui étaient passagers dans l'autobus. Ces mêmes témoins établissent hors de tout doute que l'autobus allait à une vitesse raisonnable, soit environ 15 milles à l'heure.

De plus, le chauffeur de l'intimée avait préséance et par conséquent droit de passage, et il importait au conducteur du camion de protéger sa droite, tel que le veut la loi. Il aurait dû immobiliser son camion avant de s'engager dans l'intersection, mais il négligea ce devoir de prudence imposé par la loi, et au moment du choc, il avait dépassé la ligne médiane de la rue Hudson. Les photographies démontrent que c'est bien lui qui a frappé l'autobus, en avant sur le côté gauche, et d'ailleurs, toute autre conclusion serait irrationnelle, et il serait impossible d'expliquer que l'autobus fût projeté sur le magasin de l'appelant.

Je suis donc d'opinion que la Cour du banc de la reine n'a pas fait d'erreur en statuant que l'intimée s'est libérée de toute présomption de faute, et que l'action a été justement rejetée.

Le jugement *a quo* doit être confirmé avec dépens de toutes les Cours.

Appeal dismissed with costs.

Attorneys for the plaintiff, appellant: Fradette, Bergeron & Cain, Chicoutimi.

Attorneys for the defendant, respondent: Talbot & Landry, Chicoutimi.

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*Nov. 18, 19, 20
1958
Apr. 1

KATHLEEN LAHAY (*Plaintiff*) ..... APPELLANT;

AND

MAY ADELENE BROWN, Executrix of the Estate of William Eli Brown and the said MAY ADELENE BROWN (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Evidence—Corroboration—Claim against estate of deceased person—Agreement to make will—The Evidence Act, R.S.O. 1950, c. 119, s. 12.

The plaintiff alleged that one B, for whom she had acted as housekeeper and nurse for many years, had promised, if she remained with him, to make a will leaving his entire estate to her. B died and by his will he directed that one-third of the residue of his estate be paid to the plaintiff and the other two-thirds to the defendant, his widow and executrix. The plaintiff sued, claiming, *inter alia,* specific performance of the alleged agreement to leave her the entire estate. The trial judge believed the plaintiff's evidence as to the making of the agreement but dismissed her claim under this head because there was no corroboration as required by s. 12 of the Ontario *Evidence Act.* These findings were affirmed by the Court of Appeal.

Held (Rand J. dissenting): The judgments below must be affirmed. The evidence relied upon by the plaintiff as corroboration of her evidence was equally consistent with B having promised to see that the plaintiff was "well paid" for her services as with a promise to make a will solely in her favour. Facts, though independently established, could not amount to corroboration if, in the view of the tribunal of fact, they were equally consistent with the falsity as with the truth of the evidence that needed corroboration.

Per Rand J., *dissenting*: The fact that B had previously made and later destroyed a will leaving all his property to the plaintiff was, when read in the light of all the other circumstances of the case, sufficient corroboration of her evidence that he had contracted to make such a will. *Loffus v. Maw* (1862), 3 Giff. 592 at 604, quoted with approval.

APPEAL from a judgment of the Court of Appeal for Ontario[1], varying a judgment of Spence J. Appeal dismissed, Rand J. dissenting.

The plaintiff was for many years housekeeper and nurse to Dr. William Eli Brown. Dr. Brown's second wife, Grace Huff Brown, suffered a stroke in 1945, and the plaintiff's

*PRESENT: Kerwin C.J. and Taschereau, Rand, Cartwright and Abbott JJ.

[1] [1957] O.W.N. 210, 8 D.L.R. (2d) 728.

duties became much more onerous from then until Mrs. Brown's death in 1949. Mrs. Brown, by her will, bequeathed her entire estate to the plaintiff. The plaintiff was given as remuneration $20 a month until 1954, and $30 a month thereafter. She alleged that in addition Dr. Brown had promised in 1945, after his wife's stroke, that she "would be well paid" if she stayed with him, and that in 1950 and again in 1954, he had said that if she stayed with him until his death he would make a will leaving her his entire estate.

In 1954, shortly before the second promise above referred to, Dr. Brown married the defendant. He died on February 8, 1955, and by his will he appointed the defendant his executrix, and directed that one-third of the residue of his estate (of about $41,000) should be paid to the plaintiff and two-thirds to the defendant.

The plaintiff sued, claiming (1) specific performance of the contract to make a will in the plaintiff's favour, and, alternatively, damages in the value of the estate; (2) $15,000 for work and services at the rate of $5 a day; (3) delivery of certain chattels or proceeds of chattels forming part of the estate of Grace Huff Brown. The trial judge dismissed the action under head 1, awarded the plaintiff $18,150 under head 2, and granted relief under head 3. The Court of Appeal reduced the amount awarded under head 2 to $10,950, but otherwise dismissed the appeal. The plaintiff appealed in respect of head 1 only.

Lewis Ducan, Q.C., and *W.B. Williston, Q.C.*, for the plaintiff, appellant.

John J. Robinette, Q.C., for the defendant, respondent.

The judgment of Kerwin C.J. and Taschereau, Cartwright and Abbott JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] varying a judgment of Spence J. The judgment awards the appellant $10,950 (instead of the sum of $18,150 allowed at the trial), declares her to be the owner of a large number of chattels, awards her certain relief against the respondent in her personal capacity and declares that the legacy to the respondent of

[1] [1957] O.W.N. 210, 8 D.L.R. (2d) 728.

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Cartwright J.

one-third of the residue of the estate of the late William Eli Brown does not discharge in whole or in part the debt of $10,950 for which judgment was given in her favour.

A cross-appeal by the respondent was abandoned and the only question before us is whether the appellant ought to have been granted the relief claimed in para. 1 of the statement of claim, that is, specific performance of an oral contract alleged to have been made by the late William Eli Brown, hereinafter referred to as "the deceased", to leave the whole of his estate to the appellant, or, in the alternative, damages in the value of the said estate.

The appellant was employed from late in 1939 to the date of the death of the deceased, February 8, 1955, as his housekeeper and as companion to his second wife, Grace Huff Brown, during her lifetime. Grace Huff Brown suffered a stroke in 1945 and required detailed attention thereafter to the date of her death on March 7, 1949. Grace Huff Brown by her will bequeathed her entire estate to the appellant. The appellant lived in the deceased's home in Orillia as a member of the family, was given her board and lodging and was paid $20 per month until 1954 and $30 per month thereafter.

The appellant says that in the year 1945, after Grace Huff Brown had suffered a stroke, she asked the deceased for extra pay and that in reply he said "she would be paid". She says that in 1946 the deceased repeated this promise in the words that "she would be well paid" and that in 1947 he told her "to put in $100 a month to his estate".

Further, the appellant deposed that in 1950 and again in 1954, shortly after the deceased's marriage to the respondent on June 16, 1954, he said that if she promised to stay with him until his death he would leave her his whole estate and that she agreed to stay. The learned trial judge believed the appellant and accepted her evidence with respect to all these conversations with the deceased. He found that her evidence with respect to the statements made in 1945, 1946 and 1947 was corroborated but that her evidence regarding the promises made by the deceased in 1950 and 1954 to leave her his whole estate was not corroborated as required by s. 12 of *The Evidence Act*, R.S.O. 1950, c. 119.

Aylesworth J.A., who delivered the unanimous judgment of the Court of Appeal, stated that having read all the evidence with great care he very gravely doubted whether, had he been trying the case, he would have accepted the appellant's evidence as to her conversations with the deceased in which he was said to have agreed to leave her his whole estate. He concluded however that the Court should accept this finding of the learned trial judge. I share the doubt expressed by the learned justice of appeal but it is not suggested that we should disturb the concurrent findings of fact that these conversations were as deposed to by the appellant.

The appellant relies mainly on the following matters as furnishing corroboration of her evidence that the deceased promised to leave the whole of his estate to her in consideration of her promise to remain with him and look after him until his death.

First: the evidence of Weldon Fowler that in 1951 and 1952 the deceased told him on several occasions that he was going to leave all his money to the appellant and that he had made a will leaving everything to her.

Second: the following evidence of John Croft:

Q. Did Doctor Brown say anything to you about a promise? A. Yes. He told me that Mrs. Lahay had promised to stay with him as long as he lived and look after him.

Q. Did he say anything about what he would do because of that? A. Yes. He told me that Mrs. Lahay would not have to work again. He was going to look after her because she made that promise.

Third: the following evidence of the respondent:

Q. Well then, the question of the will of the late Doctor Brown. When did you learn that the Doctor had a will? A. Well, while I was ill, the Doctor came upstairs one day and said to me, "What do you think I did today?" I said, "I am not sure. I haven't any—I haven't lived with you long enough to keep track of what you do." He said "I was out and made a will". He told me that he had left one-third of his estate to Mrs. Lahay and two-thirds to me. He said, "What do you think of that?" I said—he said he had always told Mrs. Lahay if she stayed with him he would remember her. I said, "I am very glad that you made a will. If you made a promise, that was the thing to do, to keep it. I am glad you attended to it."

Q. Did you see the will? A. I didn't see the will nor know anything further about it, nor I didn't really ask him anything further about it.

Q. About how soon after your marriage did that conversation take place? A. It must have been about a week, I would think it would be two weeks after. It might have been three; very shortly after.

* * *

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Q. You have told us about his promise to her and Mrs. Lahay's promise to him. Does that not indicate that he considered himself indebted to her? A. Considering that I understand—he showed me his indebtedness by remembering her.

Q. Then there was an indebtedness, is that correct? A. Yes, I guess that is right.

Q. The Doctor admitted to you that he had an indebtedness to her? A. Yes.

Q. Did he feel he could discharge it by a will? A. By his will.

The learned trial judge, after reviewing the evidence with care, reached the conclusion that none of it afforded corroboration of the appellant's evidence that the deceased had promised to make a will only in her favour; in his view everything relied on by the appellant was equally consistent with the deceased having expressed the intention, or having promised, that he would see that the appellant was "well paid" or that "she would be taken care of" or that "he was going to look after her". This view of the evidence was expressly concurred in by the Court of Appeal.

It is well settled that facts, though independently established, will not amount to corroboration if, in the view of the tribunal of fact, they are equally consistent with the truth as with the falsity of the evidence of which corroboration is required. After a consideration of all the evidence I agree with the finding of the learned trial judge, concurred in by the Court of Appeal, that there is no corroboration of the evidence of the appellant on the vital question whether the deceased promised to leave the whole of his estate to her. It follows that I would dismiss the appeal and it becomes unnecessary to consider the submissions of the respondent, based on *The Statutes of Frauds,* R.S.O. 1950, c. 371.

The question of the proper order as to costs is made less difficult by the submission of counsel for the respondent that whatever the result of the appeal the costs of all parties should be paid out of the estate. Success was divided at the trial and in the Court of Appeal and while in this Court the appellant fails in her appeal the cross-appeal was not abandoned until the commencement of the argument of counsel for the respondent. The costs will not have been substantially increased by the claims made against the respondent in her personal capacity. Under the somewhat unusual circumstances of the case, I would

therefore dismiss the appeal and the cross-appeal and direct that the costs of all parties in this Court and in the Courts below be paid out of the estate of the late William Eli Brown, those of the respondent in her capacity as executrix as between solicitor and client.

RAND J. (*dissenting*):—I am unable to agree that the evidence given by the claimant establishing the contract which the trial judge accepted and which in both the Court of Appeal and this Court is stated also to be accepted, was not corroborated by "some other material evidence". The deceased's second wife had died in 1949. The contract was entered into in 1950, the year the deceased retired from medical practice; in 1951 and 1952 on several occasions he told the witness Fowler, a near neighbour and a close friend, that he had made a will giving all of his property to the claimant; in 1954 he married again but told the claimant that he "needed" her more than ever; within two weeks or so he had made a new will which, apart from two legacies of $500 each, gave one-third of the estate to the claimant and two-thirds to his wife. Within that time also, the latter had seen her husband destroy a will by burning it in the fireplace. The new will was made known to the wife on the day it was made while she was ill in bed, and the deceased, thinking apparently that explanation was needed for the gift to the claimant, put it on the ground of being indebted to her, to which he received his wife's assurance, if he had made a promise to make provision, that that "was the thing to do".

The fact of a will being made giving all the testator's property to such a claimant may or may not be corroborative evidence of a contract to do so; that depends on the whole of the circumstances; and here the coincidence of the death of the second wife in 1949, the contract in 1950, the acknowledgment in 1951 or 1952 of having made a will with such a provision, the fact that in 1954, within days after his third marriage, he destroys a will and makes another under which the claimant receives half as much of the residue as the wife; the absence of near relatives and the fact that only two other legacies of $500 each were provided to a niece and a nephew: these circumstances taken together furnish an overwhelming probability that

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there was such an agreement and are, consequently, an ample corroboration of the claimant's testimony.

In *Loffus v. Maw*[1], Stuart V.-C., in dealing with a similar situation in which, instead of a contract, there was a promissory "representation", said this:

> No evidence of the representation can well be stronger than the actual preparation and production of the instrument, whether revocable or not . . .

The decision there that the service rendered was such a part performance as took the case out of the *Statute of Frauds* was overruled by *Maddison v. Alderson*[2]; but the relevancy and probative value of the existence of the will to the representation as it was viewed by a judge of wide experience in such matters was, of course, unaffected by that result.

As given by the evidence of the widow, from the occasion and the manner of disclosing to her the new will, it is clear that the deceased was a bit embarrassed by that circumstance and felt the necessity or desirability of an explanation. Under the influences of the new marriage, it was an easy transition in his atitude towards the claimant to come to view himself as a sort of tutelary guardian, to change his role from that of a master in a business relation with a woman who knew his pattern of living, was very competent, understanding and dependable, to that of benevolent patron. He took pains to emphasize, on that occasion, his "indebtedness". This conduct itself adds contractual colour to his repeated statements to Fowler. Conceivably he vaguegly thought of himself at all times as more or less an indulgent benefactor but that subjective impression would have no relevance to the words he uttered and the meaning they conveyed to the claimant. It is beyond the slightest doubt, as the trial judge found, that corroboration was shown of an obligation toward the claimant that originated in 1945, and in view of the specific statement to Fowler, there is equally corroboration of the agreement of 1950 to include the whole of his property.

In 1950 he was a man of 70 and healthy except for psoriasis which he spoke of to the claimant as likely to grow more serious,—he died in fact of gall bladder trouble and jaundice—and from appearances might well have lived

[1] (1862), 3 Giff. 592 at 604, 66 E.R. 544 at 548.
[2] (1883), 8 App. Cas. 467.

10 or more years longer, as his wife says she expected him to do. In that event, having retired from practice, his expenses, including the paltry $20 a month to the claimant, increased in 1950 to $30, might easily have consumed a substantial portion of what he possessed. Heavy medical and hospital outlays might have been called for or other contingencies might have had the same result, the total drain of which, happening at a time when the claimant would be approaching 60, might furnish her with far less than the most ordinary remuneration.

The words "all my property" relating to the death of a person are to be read as if they specified "all my real and personal property", and the property becomes fixed at the moment of death. So far as the oral contract relates to an interest in land it is, under the *Statute of Frauds,* unenforceable, and *Maddison v. Alderson, supra,* precludes specific performance. But the question is whether or not a contract of that nature is to be looked upon as an entirety or as distributive in the sense of divisible, and I think there can be no doubt that it is to be viewed as the latter. Where the total consideration by the promisee is fully executed and all that remains is a will in general terms, it would be somewhat absurd to say that the transmission of each portion of the property was conditional upon or inseparably bound up with the transmission of the whole. If, for example, assuming corroboration, a will gave to the claimant only the real estate, could it possibly be said that no claim could be made under such a contract for the personalty which the statute would not affect? I should say clearly not. The contract in this case is, then, enforceable to the extent of the net worth of the personal estate.

One further question remains. Land was included in the assets estimated at the value of $22,000 of a total estate of $48,693.91. Against the latter were debts amounting to $7,720.06, leaving an estimated residue of $40,973.85. A question might be raised whether the debts should be paid out of the personalty in exoneration of the land or *vice versa;* but as it has not been argued, I express no opinion on it. With the determination of that question, there should probably be a right of election to the claimant as on a material breach, but this also I leave untouched.

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I would, therefore, allow the appeal, but since the majority of the Court are for dismissal there is no purpose in doing more than recording this dissent.

Appeal dismissed, RAND J. *dissenting.*

Solicitor for the plaintiff, appellant: Lewis Duncan, Toronto.

Solicitor for the defendant, respondent: A. E. McKague, Toronto.

THE CORPORATION OF THE CITY OF LONDON, THE LONDON RAILWAY COMMISSION AND THE LONDON AND PORT STANLEY RAILWAY COMPANY	APPELLANTS;	1957 *Nov. 26, 27 1958 Apr. 1
AND		
THE CORPORATION OF THE CITY OF ST. THOMAS	RESPONDENT.	
THE CORPORATION OF THE CITY OF LONDON, THE LONDON RAILWAY COMMISSION AND THE LONDON AND PORT STANLEY RAILWAY COMPANY	APPELLANTS;	
AND		
THE CORPORATION OF THE TOWNSHIP OF YARMOUTH	RESPONDENT.	
THE CORPORATION OF THE CITY OF LONDON, THE LONDON RAILWAY COMMISSION AND THE LONDON AND PORT STANLEY RAILWAY COMPANY	APPELLANTS;	
AND		
THE CORPORATION OF THE VILLAGE OF PORT STANLEY	RESPONDENT.	

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Taxation—Municipal real property assessment—Effect of amendment of ss. 4(9) and 39 of The Assessment Act, R.S.O. 1950, c. 24, by 1952, c. 3, ss. 1(1), 10.

Under the relevant legislation the lands owned by The London and Port Stanley Railway Company were leased by it to the City of London and managed and controlled by the London Railway Commission.

Held: The effect of the 1952 amendments to ss. 4(9) and 39(1) of *The Assessment Act* was that these lands, although they were previously assessable and taxable as "land . . . leased by . . . a municipal corporation" became exempt from taxation on the coming into force of the 1952 amendments.

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*PRESENT: Kerwin C.J. and Rand, Locke, Cartwright and Fauteux JJ.

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CITY OF LONDON *et al.* *v.* CITY OF ST. THOMAS *et al.*

Generally speaking, the interests of an owner and of a tenant are not valued separately under *The Assessment Act* for purposes of assessment or taxation, and it is only in special cases, such as those referred to in ss. 21 and 32, that the tenant is assessed or deemed to be the owner. The words "land" and "lands" as used in s. 39, as re-enacted, are not to be interpreted as including leasehold interests, notwithstanding the provisions of s. 1(*g*) of *The Municipal Act* and s. 33 of *The Interpretation Act*.

APPEALS from the judgments of the Court of Appeal for Ontario[1], in three appeals argued together. Appeals allowed.

W. B. Williston, Q.C., and *J. D. Taylor*, for the appellants.

J. J. Robinette, Q.C., and *D. K. Laidlaw*, for the respondents.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—These are appeals by the Corporation of the City of London, the London Railway Commission and the London and Port Stanley Railway Company from three orders of the Court of Appeal for Ontario[1], in one of which the Corporation of the City of St. Thomas is respondent, in another of which the Corporation of the Township of Yarmouth is respondent, and in the third of which the Corporation of the Village of Port Stanley is respondent. One point in connection with the City of St. Thomas will be mentioned and dealt with later, but, in the meantime, the appeals with respect to the three municipalities may be considered together.

The proceedings commenced with applications to the courts of revision of the several municipalities under s. 124 of *The Assessment Act*, R.S.O. 1950, c. 24, the applicable part of which reads as follows:

> 124. (1) An application to the court of revision for the abatement or refund of taxes levied in the year in respect of which the application is made may be made by any person . . .
>
> (*f*) in respect of land which has become exempt from taxation during the year . . .

In each case the London and Port Stanley Railway Company was registered as owner of the "land".

[1] [1957] O.R. 37, 7 D.L.R. (2d) 140 (*sub nom. Yarmouth, Port Stanley and St. Thomas v. City of London, London Railway Commission, London and Port Stanley Railway Company*).

That company was incorporated by c. 133 of the 1853 statutes of Canada. The City of London, by its holding of shares and bonds with share-voting rights, owned in 1952, and now holds, a majority of the share-voting rights in the company. By c. 103 of the Ontario statutes of 1913 the City of London was empowered to enter into a lease with the railway company for a lease of the railway and to operate the same. By statute of Canada 1914, c. 96, a 99-year lease and agreement, dated November 28, 1913, from the company to the Corporation of the City of London was confirmed "and the whole management and control of the making, completion, equipment, operation, alteration and maintenance of the said The London and Port Stanley Railway for, and as the agents of, the Corporation" was entrusted to a body corporate known as The London Railway Commission. The lease set forth in a schedule to the Act was given "subject to all the rents, conditions, provisos and agreements" mentioned in it and by para. 6 of the said lease it was provided that:

> The parties of the second part [The Corporation of the City of London] shall pay all taxes, rates, duties and assessments whatsoever, whether municipal, parliamentary, or otherwise, or which may or shall during the term aforesaid, be charged upon the said The London and Port Stanley Railway or its appurtenances, or upon the said parties of the first part [The London and Port Stanley Railway Company] on account thereof, or on account of any of its property.

By Ontario statute 1950, c. 105, ss. 7 and 8, it was enacted:

> 7. The Corporation of the City of London is hereby authorized and empowered, in addition to all other powers now vested in it, to acquire, operate and dispose of the undertaking and assets of The London & Port Stanley Railway Company, or any part thereof, and such authority and powers may be, by by-law, delegated to The London Railway Commission.
>
> 8. The Corporation of the City of London is hereby authorized and empowered and declared to have had the authority and power to acquire, use, hold and dispose of lands, premises, buildings and equipment throughout the County of Middlesex and the County of Elgin for the purposes of or in any way used in connection with the operation of The London & Port Stanley Railway or the advancement of the business thereof.

It may be added that (although this occurred after 1952) there is an Ontario statute, 1953, c. 118, ratifying and confirming an agreement of October 23, 1952, between the City of London and Canadian National Realties Limited and another, by the terms of which the City became the owner of the Canadian National company's 2,347 shares

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CITY OF LONDON *et al.* *v.* CITY OF ST. THOMAS *et al.*

Kerwin C.J.

of the railway company, and it was agreed that, upon obtaining the necessary statutory authority, all the assets and undertaking of the railway should be transferred to the city. All parties to these proceedings agree that no such transfer may be made without a special Act of the Parliament of Canada and this has not been obtained.

In the year 1951 the City of St. Thomas assessed the railway company as owner of certain lands within its limits; the Village of Port Stanley assessed the railway company and the City of London as owners of certain lands within the limits of that municipality; and the Township of Yarmouth assessed the railway company and the City of London as owners of certain lands within its limits. In each case in 1952 the taxes imposed for that year on the lands assessed in 1951 were paid by the London Railway Commission to the assessing municipality and it was for a refund of these taxes that the applications were made under s. 124 of *The Assessment Act*. The applications went through the regular channels and were ultimately granted by the Ontario Municipal Board, but the latter's orders were set aside by the Court of Appeal. The present appellants allege that by virtue of certain provisions of *The Assessment Act*, as amended in 1952, the real property upon which the taxes had been paid had become exempt from taxation during the year 1952. The validity of that contention depends upon the proper construction of s. 4(9) and s. 39 of the Act, as amended by 1952, c. 3, which amendments, although assented to on April 10, 1952, were by virtue of s. 21 of the amending Act deemed to have come into force on January 1, 1952.

At the time of the assessments in 1951, s. 4(9) of *The Assessment Act* read as follows:

> 4. All real property in Ontario shall be liable to taxation subject to the following exemptions: . . .
>
> 9. Except as provided in sections 39 and 40, the property belonging to or leased by any county or municipality or vested in or controlled by any public commission wherever situate and whether occupied for the purposes thereof or unoccupied; but not when occupied by a tenant or lessee, nor when used for parking vehicles where a fee is charged for such parking.

As to the exceptions referred to, we are concerned only with subs. (1) of s. 39:

> 39. (1) Land owned or leased by or vested in a municipal corporation or commission or in trustees or any other body acting for and on behalf of a municipal corporation and used for the purpose of supplying water,

light, heat or power to the inhabitants of the municipality, or for the purposes of a transportation system or telephone system shall be liable to assessment and taxation for municipal and school purposes in the municipality in which it is situate at its actual value, according to the average value of land in the locality.

By the amending Act of 1952, para. 9 of s. 4 was amended by striking out the words at the commencement thereof "Except as provided in sections 39 and 40"; and s. 39 was repealed and the following substituted therefor:

39. (1) In this section,

(*a*) "commission" means the council of a municipal corporation, or a commission or trustees or other body, operating a public utility for or on behalf of the corporation;

(*b*) "public utility" means a public utility as defined in *The Department of Municipal Affairs Act.*

(2) For the purposes of this section, land and buildings owned by and vested in a municipal corporation and used for the purposes of a public utility shall be deemed to be vested in the commission operating the public utility.

(3) Every commission shall pay in each year, to any municipality in which are situated lands or buildings owned by and vested in the commission and used for the purposes of the public utility it operates, the total amount that all rates, except, subject to subsections 4 and 5, rates on business assessment, levied in that municipality for taxation purposes based on the assessed value of the land at the actual value thereof according to the average value of land in the locality and the assessed value of such buildings, would produce.

* * *

(10) The provisions of this section shall apply notwithstanding anything in this or any other general or special Act or any agreement heretofore made and any agreement heretofore made, under which a commission pays taxes, or money in lieu of taxes or for municipal services, shall be void.

By s. 1(*g*) of *The Department of Municipal Affairs Act,* R.S.O. 1950, c. 96 (referred to in para. (*b*) of s. 39(1)) "public utility" is defined as including:

. . . any street or other railway system . . . which [is] vested in or owned, controlled or operated by a municipality or municipalities or by a local board.

It appears to be clear that if the latter part of s. 4(9) of *The Assessment Act* before the 1952 amendments had stood alone, the lands of the railway company, which had been leased by the City of London, would have been exempt from taxation, because such lands were "property . . . leased by [a] . . . municipality". However, that provision commenced "Except as provided in sections 39 and 40", and the effect of the exception in s. 39(1) was that such lands were assessable and taxable as "land . . . leased by . . . a municipal corporation".

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By the amendments in 1952, the words quoted above at the commencement of s. 4(9) were stricken out and in the new s. 39 the only provision for the payment of rates is in connection with lands or buildings "owned by and vested in the commission", which, by virtue of subs. (2), applies only to "land and buildings owned by and vested in a municipal corporation". Undoubtedly the words "owned" and "owner" may be susceptible of different meanings, depending upon the subject-matter under consideration. That is shown by the cases referred to in the reasons for judgment of the majority of the Court of Appeal, although it might be pointed out that the decision of the Divisional Court in *York et al. v. Township of Osgoode et al.*[1] was reversed by the Court of Appeal[2] and that it was the latter's judgment which was affirmed by this Court[3]. The distinction between an owner and tenant in the law of real property is well known and is recognized by s. 1(*o*) of *The Assessment Act:*

> (*o*) "tenant" includes occupant and the person in possession other than the owner.

Generally speaking, under *The Assessment Act* the interests of an owner and of a tenant are not valued separately for the purposes of assessment or taxation. In s. 21 the Legislature is concerned with farmers and their relatives. Section 32, relating to the assessment of Crown lands, is dealing with a specific subject and there the tenant of such lands is to "be assessed in respect of the land in the same way as if the land was owned or the interest of the Crown was held by any other person". I cannot agree that the majority of the Court of Appeal were justified in relying upon subs. (10) of s. 30:

> (10) Where land is assessed against a tenant under subsection 4 or 9, the tenant, for the purpose of imposing and collecting taxes upon and from the land, shall be deemed to be the owner.

Under this provision the tenant is deemed to be the owner only for the purpose of imposing and collecting taxes upon and from the land which has been assessed against the tenant under subs. (4) or (9), the first of these providing that occupied land owned by a person who is not a resident in the municipality shall be assessed against the owner, if

[1] (1892), 24 O.R. 12.
[2] (1894), 21 O.A.R. 168.
[3] (1895), 24 S.C.R. 282.

known, and against the tenant, and the second providing for the case of joint owners one of whom is not resident in the municipality and particularizing what is to happen if the land is occupied by any of the owners or if it is unoccupied.

It was argued that in any event the City of London is the owner of the lease; that "land" in s. 39(2) and "lands" in s. 39(3), enacted by 1952, c. 3, s. 10, included a leasehold interest by virtue of the combined operation of s. 33 of *The Interpretation Act,* R.S.O. 1950, c. 184:

> 33. The interpretation section of *The Municipal Act* shall extend to all Acts relating to municipal matters.

and s. 1(*g*) of *The Municipal Act,* R.S.O. 1950, c. 243:

> 1. In this Act, . . .
>
> (*g*) "land" includes lands, tenements and hereditaments, and any estate or interest therein, and any right or easement affecting them, and land covered with water.

However, s. 1 of *The Interpretation Act* enacts:

> 1. The provisions of this Act shall apply to every Act of the Legislature contained in these Revised Statutes or hereafter passed, except in so far as any such provision,
>
> (a) is inconsistent with the intent or object of the Act; or
>
> (*b*) would give to any word, expression or clause of the Act an interpretation inconsistent with the context; or
>
> (*c*) is in the Act declared not applicable thereto

and s. 2 provides:

> 2. Where an Act contains an interpretation section or provision, it shall be read and construed as subject to the exceptions contained in section 1.

To give to "land" or "lands" in s. 39(2) and (3), as enacted in 1952, the meaning contended for by the respondents would be both inconsistent with the intent or object of *The Assessment Act* and would give to those words an interpretation inconsistent with the context.

Upon a consideration of *The Assessment Act* in its entirety, even before the 1952 amendments, I am of opinion that a lease to the City of London for 99 years did not place that municipality in the position of an owner. I am also of opinion that the effect of those amendments is to exempt from taxation the railway property leased by the City of London because it is not "owned by and vested in"

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the City. I have not overlooked s. 18 of *The Interpretation Act*:

> 18. The amendment of an Act shall not be deemed to be or to involve a declaration that the law under such Act was, or was considered by the Legislature to have been, different from the law as it has become under such Act as so amended.

But this cannot apply if the meaning of the Act as amended and read as a whole is clear, as in my view it is.

The special point with reference to the appeal as against the City of St. Thomas relates to the powers of the Ontario Municipal Board. It was argued that on June 24, 1954, the Board gave a decision which, not having been appealed from, prevented the Board from reconsidering the matter and making its order of October 18, 1955. However, for the reasons given by Hogg J. A., with whom the other two members of the Court of Appeal agreed, there is no substance in the point, since the Board had power to vary its order as provided by s. 46 of *The Ontario Municipal Board Act,* R.S.O. 1950, c. 262, as amended. This view, however, does not affect the proper disposition of the appeals, which should be allowed, the orders of the Court of Appeal set aside and those of the Board restored. These latter have the effect of directing a refund of the 1952 taxes paid to each of the respondents. The appellants are entitled to their costs in this Court and in the Court of Appeal.

Appeals allowed with costs throughout.

Solicitors for the appellants: Fasken, Robertson, Aitchison, Pickup & Calvin, Toronto.

Solicitor for the respondents: W. Scott McKay, St. Thomas.

STANLEY OSBORNE (*Plaintiff*) .....APPELLANT; 1958

*Mar. 4
Apr. 1

AND

LA COMMISSION DE TRANSPORT DE MONTREAL (*Defendant*) ....} RESPONDENT.

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

Damages—Young child falling in front of bus—No negligence on part of driver—Injuries aggravated by subsequent conduct of driver amounting to fault—Liability—Amount of damages—Motor Vehicles Act, R.S.Q. 1941, c. 142, s. 53.

The plaintiff's infant son fell in front of a moving bus. The bus was stopped almost instantly and it was found that a wheel was resting on the child's arm. The driver, alleging orders from the defendant company, his employer, refused at first to move the bus until the police arrived, but he was finally persuaded to move it. The medical evidence was to the effect that the child was left with a permanent partial incapacity of 25 per cent., resulting from amputation of the index finger and the thumb necessitated by interference with the circulation of his blood, and that the injuries had been aggravated by the continued pressure of the wheel. The trial judge found: (1) that the accident had not been caused by the negligence of the driver; (2) that the driver had committed a fault in not moving the bus immediately; (3) that this fault had aggravated the injuries; and (4) that the plaintiff was entitled to an indemnity. At this stage of the proceedings there was "chose jugée" on points 2, 3 and 4.

Held: The evidence did not justify interfering with the award of $1,500, which both Courts below had found reasonable. It was true that the evidence showed that the injuries were aggravated generally and to an undetermined degree by the fault of the driver; but it did not establish that the lack of blood circulation (which it was alleged was caused by the failure to remove the bus immediately) was the result of that fault rather than, as it was reasonable to infer, the result of the crushing movement of the wheel as it first ran over the child's arm and later when it was removed.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming the judgment of Tellier J. Appeal dismissed.

J. Lessard and *N. Denys,* for the plaintiff, appellant.

J. Deschenes, for the defendant, respondent.

The judgment of the Court was delivered by

*PRESENT: Kerwin C.J. and Taschereau, Fauteux, Abbott and Judson JJ.

[1] [1956] Que. Q.B. 853.

1958

OSBORNE v. COMM. DE TRANSPORT DE MONTRÉAL

FAUTEUX J.:—Au cours de la matinée du 9 novembre 1951, l'épouse de l'appelant et leur enfant âgé de deux ans et demi, attendaient sur le trottoir, au coin des avenues Verdun et Woodlands en la cité de Verdun, la venue d'un autobus de la Commission de Transport de Montréal. Madame Osborne portait des colis et tenait son enfant par la main. Au moment même où l'autobus allait arriver au point d'arrêt, elle laissa la main de l'enfant pour arranger ses colis; c'est alors que ce dernier se pencha pour ramasser un objet dans la rue, perdit l'équilibre et tomba sur la chaussée. Témoin de ces faits, le conducteur de l'autobus appliqua immédiatement le frein d'urgence; et ayant mis le véhicule à l'arrêt, il en sortit pour constater, avec la mère et les personnes présentes, que la roue droite d'avant du véhicule reposait sur l'avant-bras, le poignet et la main gauches de l'enfant. Sous le prétexte qu'il fallait attendre la venue d'un agent de police, le conducteur refusa d'abord, nonobstant les supplications de la mère et des citoyens, de libérer l'enfant; mais cédant finalement à leurs instances, il consentit à enlever le frein d'urgence pour leur permettre de pousser sur l'autobus et retirer la victime.

En raison des blessures causées au tiers inférieur du bras, au poignet et à la main gauches lors de cet accident, soit écrasement, fractures multiples, défaut de circulation, l'enfant fut hospitalisé pendant environ deux mois, subit diverses interventions chirurgicales, perdit l'index et à toutes fins pratiques l'usage du pouce. Il demeure en somme avec une main partiellement atrophiée, et en souffrira une incapacité partielle permanente de 25 pour cent.

L'appelant fut nommé tuteur à son enfant et institua, en cette qualité, contre l'intimée, une action en dommages pour $15,000. Il invoqua la présomption de faute décrétée par l'art. 53 de la *Loi des véhicules automobiles*, S.R.Q. 1941, c. 142, et l'omission du conducteur de libérer l'enfant immédiatement après l'accident.

La Cour supérieure a jugé que la présomption de faute avait été repoussée et qu'en conséquence, l'accident lui-même ne pouvait être imputé à la Commission ou à son préposé. Elle considéra, cependant, que le défaut de ce dernier de libérer immédiatement l'enfant après l'accident constituait une faute d'omission aggravant les blessures; et, pour cette raison, accorda une indemnité de $1,500.

A l'encontre de ce jugement, Osborne et la Commission logèrent, à la Cour du banc de la reine[1], un appel et un contre-appel. Vainement le premier soumit-il que la présomption de faute n'avait pas été repoussée et que du chef de cette faute présumée, aussi bien que du chef de cette faute prouvée d'omission du chauffeur à immédiatement libérer l'enfant, la Commission devait être condamnée à réparer l'entier préjudice. Vainement, de son côté, la Commission plaida-t-elle qu'après, pas plus qu'avant l'accident, aucune faute n'avait été commise par son préposé, qu'aucune aggravation des blessures causées par l'accident lui-même n'était résultée de cette omission du conducteur, et qu'en conséquence, la condamnation à payer une indemnité de $1,500 était injustifiée. Partageant sur tous les points les vues exprimées par le juge de première instance, la Cour du banc de la reine rejeta l'appel et le contre-appel.

Osborne est seul à se pourvoir devant cette Cour et invoque exclusivement cette faute d'omission postérieure à l'accident, pour obtenir que le montant de $1,500 accordé en raison de cette faute soit porté à $10,000, indemnité réclamée pour incapacité permanente.

Il convient de noter qu'au stade où en est maintenant la cause, il y a non seulement unanimité d'opinion aux deux Cours inférieures, mais également chose jugée sur les questions suivantes:
(i) faute d'omission; (ii) aggravation en résultant; (iii) et pour cette raison, condamnation à une indemnité.

L'appelant prétend qu'en fait l'incapacité permanente résulterait de cette absence de circulation, constatée dès l'hospitalisation, et qui aurait été causée par le maintien injustifiablement prolongé de la roue de l'autobus sur le membre blessé de l'enfant et soumet qu'en droit, l'intimée doit être tenue totalement responsable de cette incapacité en raison de la faute de son préposé à procéder sans délai à le libérer.

Malheureusement pour la victime de cet accident, il faut dire que si la preuve autorise la conclusion que cette faute du préposé a généralement et dans une proportion inconnue, aggravé les blessures, elle n'établit pas que ce manque de circulation soit lui-même attribuable à cette faute plutôt,

[1] [1956] Que. Q.B. 853.

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Fauteux J.

comme il est raisonnable de l'inférer, qu'à l'écrasement causé par le mouvement de la roue lorsque d'abord elle est arrivée sur le membre de l'enfant et lorsque, par la suite, elle en a été retirée par recul du véhicule. Cette double action d'écrasement n'est pas imputable et l'appelant ne songe pas d'ailleurs à l'imputer au préposé de l'intimée; elle est inhérente à l'accident rendu inévitable par les agissements de la victime; et il en est de même du maintien de la roue sur le membre de l'enfant durant cette période de temps qu'il était raisonnable de prendre pour apprécier la position de la victime et organiser sa libération.

Avec la preuve au dossier, je ne vois pas comment le juge de première instance et les juges de la Cour d'appel auraient pu se justifier d'accorder en l'espèce la totalité du montant réclamé pour incapacité permanente et qu'il y ait lieu d'intervenir pour augmenter le montant que ces deux Cours ont jugé raisonnable d'accorder pour aggravation.

Je renverrais l'appel avec dépens.

Appeal dismissed with costs.

Attorneys for the plaintiff, appellant: Taschereau, Eudes & Denys, Montreal.

Attorneys for the defendant, respondent: Létourneau, Quinlan, Forest, Deschenes & Emery, Montreal.

JOSEPH DESIRE BELLEROSE .....APPELLANT;

1958

*Feb. 28
Apr. 1

AND

THE HONOURABLE MAURICE DUPLESSIS, AS ATTORNEY GENERAL OF THE PROVINCE OF QUEBEC, AND THE HONOURABLE ANTONIO TALBOT, AS MINISTER OF ROADS FOR THE PROVINCE OF QUEBEC RESPONDENTS.

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

Expropriation—Compensation—Relocation of provincial highway—Code of Civil Procedure, arts. 1066a et seq.—Applicability of s. 97 of the Roads Act, R.S.Q. 1941, c. 141.

The plaintiff was awarded $1,515.90 for the expropriation of a small portion of his farm needed for the relocation and widening of a provincial highway. In this Court, he disputed two items: (1) an allowance for the future maintenance of a new access road, and (2) the compensation for inconvenience by reason of the new highway being located some 200 feet farther away from his buildings than the old highway.

Held: The appeal should be dismissed. The amounts awarded by the Public Service Board were not so manifestly inadequate as to call for any interference by either the Court of Appeal or this Court, nor was it shown that the Board had proceeded upon any wrong principle.

It was not necessary to express an opinion as to whether or not s. 97 of the *Roads Act* had any application.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Ferland J. homologating a decision of the Public Service Board in an expropriation matter. Appeal dismissed.

L. Dugas, Q.C., for the appellant.

L. Tremblay, Q.C., and *J. R. Piette*, for the respondents.

The judgment of the Court was delivered by

ABBOTT J.:—This appeal involves a claim for indemnity arising out of the expropriation of a small portion of appellant's farm needed for the relocation and widening of a provincial highway. The matter was submitted to the Public Service Board, as required by arts. 1066*a* and

*PRESENT: Taschereau, Rand, Fauteux, Abbott and Judson JJ.

[1] [1957] Que. Q.B. 637.

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Abbott J.

following of the *Code of Civil Procedure*, for the purpose of fixing the amount of the compensation to which the appellant was entitled.

Following a hearing by the Board, appellant was awarded as compensation a total sum of $1,515.90, which included items for the area of land expropriated (1.05 *arpents*), depreciation of another small strip (1.89 *arpents*) between the proposed new highway and the old highway, and two items which are the only ones in issue in the present appeal, the first covering the future maintenance of a new access road, and the second, compensation for inconvenience by reason of the new highway being located some 200 feet farther away from appellant's buildings than the old highway. For these two items appellant was awarded the sums of $500 and $250, respectively.

On appeal to the Court of Queen's Bench[1], the majority of that Court affirmed the award made by the Board, but Bissonnette J. would have increased by $500 the amount awarded for maintenance of the new access road, by $2,400 the amount awarded as compensation for inconvenience and loss resulting from the increased distance from the farm buildings to the new highway, and would have added to the award the relatively small amount of $15.70 for compulsory taking.

At the conclusion of the hearing I was satisfied that the amounts awarded by the Public Service Board were not so manifestly inadequate as to call for any interference either by the Court of Appeal or by this Court, nor was it shown that the Board had proceeded upon any wrong principle in reaching the decision which it did.

Having reached this conclusion, I do not find it necessary to express an opinion as to whether or not s. 97 of the *Roads Act*, R.S.Q. 1941, c. 141, has any application.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Attorneys for the appellant: Dugas, Dugas & Dugas, Joliette.

Attorney for the respondents: J. R. Piette, Joliette.

[1] [1957] Que. Q.B. 637.

THE MUNICIPALITY OF THE CITY AND COUNTY OF SAINT JOHN, AUBREY D. LOGAN AND ROY E. CLAYTON (*Defendants*) .....APPELLANTS;

1957
*Dec. 10, 11
1958
Apr. 1

AND

FRASER-BRACE OVERSEAS CORPORATION, TERMINAL CONSTRUCTION COMPANY, LIMITED AND J. A. JONES CONSTRUCTION COMPANY, DOING BUSINESS UNDER THE NAME AND STYLE OF FRASER-BRACE-TERMINAL CONSTRUCTORS; AND JOHNSON, DRAKE & PIPER INTERNATIONAL CORPORATION, AND MERRITT, CHAPMAN & SCOTT CORPORATION, DOING BUSINESS UNDER THE NAME AND STYLE OF DRAKE-MERRITT (*Plaintiffs*) .....
RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

International law—Exemption of foreign sovereigns and their property from taxation in Canada—Leasehold interests and chattels personal.

Taxation—Municipal exemptions—Property owned by or held on behalf of foreign Government.

The Governments of Canada and the United States of America agreed to construct a radar defence system. Pursuant to this arrangement, a group of construction companies undertook the erection and completion of buildings on properties in Saint John leased to the companies by their owners. All materials used in this work were already the property of the United States Government or were ordered by the companies on its behalf. The municipality imposed taxes both on the leasehold interests in the lands and on the personal property. These taxes were paid by the companies, in most cases expressly "under protest".

Held: The companies were entitled to recover the taxes so paid. Under the rules of international law as recognized by Canadian Courts, property of a foreign sovereign was exempt from taxation by local authorities. Although the leasehold interests were not in name held by the United States Government, they were held by the companies as bare trustees for that Government and the exemption accordingly extended to them. The circumstances in which the taxes had been paid did not amount to acquiescence in their imposition or preclude the companies from recovering them.

*PRESENT: Rand, Locke, Cartwright, Fauteux and Abbott JJ.

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MUNICIPALITY OF SAINT JOHN *et al.* *v.* FRASER-BRACE OVERSEAS CORPN. *et al.*

APPEAL and cross-appeal from a judgment of the Supreme Court of New Brunswick, Appeal Division[1], varying a judgment of McNair C.J.N.B.[2] Appeal dismissed; cross-appeal allowed.

A. B. Gilbert, Q.C., for the defendants, appellants.

E. N. McKelvey and *L. M. Machum*, for the plaintiffs, respondents.

RAND J.:—This appeal raises a question of liability to taxation by the appellants of property used by the respondents as contractors with the Government of the United States in the construction of what is described as the "extension and co-ordination of a continental radar defence system within Canada", to serve as an agency of defence for both countries against possible air attacks.

The property consisted of both chattels personal and real, the latter being two leases of land on which temporary buildings were erected which, with other property set up in them, are alleged by the municipality to be fixtures and by the contractors to be personalty. The local establishment was a field station for the purposes of the radar work carried out in northern Canada and extending from the Atlantic coast to the westerly boundary.

The joint participation in such an undertaking was obviously dictated by the international situation. It was entered into under the terms of letters exchanged between the two Governments which provided generally for the joint construction, maintenance and operation of the line. To the extent so defined, the agreement involved an invitation to personnel and property of the United States Government to enter upon the territory of this country for the execution jointly of the common purpose.

A preliminary question concerns the title, legal and equitable, to the two classes of property. At the trial McNair C.J.N.B.[2] found the legal title to both to be vested in the respondents but in trust for the United States Government. In the Appeal Division[1] all three members, Richard, Bridges and Jones JJ., agreed that the legal title

[1] (1957), 9 D.L.R. (2d) 391 (*sub nom. Fraser-Brace Overseas Corp. v. Municipality of the City and County of Saint John et al.*).

[2] (1956), 39 M.P.R. 33 (*sub nom. Fraser-Brace et al. v. Saint John County et al.*).

to the movable property had vested in that Government, and that to the leases, executed under seal, in the contractors, the named lessees, but subject to the trust. Each lease contained a provision permitting an assignment to the United States Government.

The matter of title is expressly covered by the provisions of the construction contract. By art. 24(b) it is declared, among other things, that:

> Title to all property purchased by the contractor, for the cost of which the contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass to and vest in the Government upon delivery of such property by the vendor. Title to other property, the cost of which is reimbursable to the contractor under this contract, shall pass to and vest in the Government upon (i) issuance for use of such property in the performance of this contract, or (ii) commencement of processing or use of such property in the performance of this contract, or (iii) reimbursement of the cost thereof by the Government, whichever first occurs.

All of the property taxed except the leases was within the first category as having been "purchased by the contractors for the cost of which" they were entitled to reimbursement "as a direct item of cost"; and the beneficial interest in the leases would attach under the second. The form of the purchasing orders for the movables was headed with the name of the contractors at the top, followed by a notation immediately below, "Department of the Army Contract No. . . ." etc. They were signed at the foot on behalf of the contractors by their purchasing agent. The shipping instructions directed the goods to be addressed to the transport officer of the United States army in care of the contractors at their address in Saint John, New Brunswick, within the municipality. A further notation mentioned exemption from certain taxes, for which it was certified that the goods were being purchased on behalf of the United States Government for use in the project mentioned and that they were

> to become and remain the property of the Government of the United States and are not for Resale, Personal or Private use, and are exempt from Sales Tax, Excise Tax, and Duty

by virtue of an order in council of the Dominion Government. This was followed by a statement of exemption from taxes imposed by the Province of New Brunswick by way of reference to a certificate of registration in the Department of the Secretary Treasurer of the Province.

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Rand J.

In the light of these matters, I agree with the Appeal Division[1] that at the time of the assessment the legal title to the personal property was in the United States Government, and that of the leases in the contractors but held in trust.

The action was dismissed by the Chief Justice[1] on the ground that it could not be said that the property so owned by the United States was "destined for its public use" as that expression was used by Davey L.J. in *Mesurus Bey v. Gadban et al.*[2], or "devoted to public use in the traditional sense" as expressed by Duff C.J. in the *Reference re Powers of the City of Ottawa and the Village of Rockcliffe Park to Tax Foreign Legations, etc.*[3] On the appeal, Richard J., with whom Jones J. concurred, found the purpose of the property to be that of a public use, in the appropriate sense, of the United States and that it was consequently immune from taxation; but that the taxation of the contractors, though trustees, in respect of the leases, could not be challenged. Bridges J. agreed with the Chief Justice that the immunity did not, in the circumstances, extend to any part of the property.

Enough has been said to indicate the precise obligation of the contractors to the United States Government. It was essentially one to furnish services, with all property, materials, tools, equipment and other means used or employed in or for the work of construction, supplied by the United States. The fact that this field station was at some distance from the scene of the permanent works does not affect its relation to them or its derivative character. If the works would be exempt, then all property used in or for their construction, including that in field operations, regardless of *situs*, is necessarily identified with the ultimate purpose. All that was done within the municipality is to be taken as one with the final accomplishment, and the purpose of that accomplishment will determine that of the property used by these subsidiary agencies.

The general principle of immunity from legal processes in the broadest sense in what may be called the host country of public property of a foreign state has been given

[1] (1957), 9 D.L.R. (2d) 391.
[2] [1894] 2 Q.B. 352 at 361.
[3] [1943] S.C.R. 208 at 221, [1943] 2 D.L.R. 481.

its authoritative statement for Canada by Duff C.J. in the *Foreign Legations Reference, supra.* There, as here, he was dealing with taxation under general language in which only the interpretation of the statute was in question. The significant aspect of the matter examined by him was that of the theory on which the immunity is to be placed. In the early considerations given it, the idea of exterritoriality, the physical projection of one sovereignty within the borders of another, arose probably from one of its earliest examples, that of a public vessel entering a foreign port. But as new contacts and relations between states developed, the multiplied situations appearing rendered necessary a more realistic and flexible conception. On p. 218 of his reasons, after quoting a passage from Vattel on the immunities of an ambassador's residence, which includes the qualification in the application of the rule, "at least in all the ordinary affairs of life", Duff C.J. observes, on the latter, that it must be read "as excluding the fiction of exterritoriality in its extreme form". The notion was, in his view, finally rejected by the Judicial Committee in *Chung Chi Cheung v. The King*[1]; and reverting to it at p. 230 he repeats: "This fiction of exterritoriality must be disregarded."

What is substituted is the conception of an invitation by the host state to the visiting state. That is the core of what was laid down by Marshall C.J. in *The Schooner Exchange v. M'Faddon et al.*[2], which Duff C.J. adopts. The fundamental attitude which states adopt towards each other is the recognition and observance of individual sovereignty, that is, the acknowledgment of the absolute independence of each; and on this basic footing their intercourse is conducted. When one state admits within its boundaries a foreign sovereign or his representative, the terms of that entry are to be gathered from the circumstance of the invitation and its acceptance. In the language of Marshall C.J. at pp. 139 and 143:

> A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain. . . .

[1] [1939] A.C. 160, [1938] 4 All E.R. 786, [1939] 1 W.W.R. 232.
[2] (1812), 11 U.S. (7 Cranch) 116.

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> [The] extent [of the implied consent] must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act.

In the absence of something special or unusual, when a visiting sovereign steps upon the foreign soil he does so free from any submission to its immanent law; from that he remains insulated; and the recourse against what may be considered to be an infringement of the privileges of the invitation becomes a matter for diplomatic and not legal adjustment. In the language of Marshall C.J. at pp. 138-9, quoted by Duff C.J. at p. 215:

> The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

On the same page there is a pertinent quotation from Vattel reinforcing the same view which it is unnecessary to reproduce.

Freedom from the coercion of the public law is coextensive with the requirements of the purpose for which the entry is made. In general, the immunity of a sovereign, his ambassadors, ministers and their staffs, together with his and their property, extends to all processes of Courts, all invasions of or interferences with their persons or property, and all applications of coercive public law brought to bear affirmatively, including taxation.

It is obvious that the life of every state is, under the swift transformations of these days, becoming deeply implicated with that of the others in a *de facto* society of nations. If in 1767 Lord Mansfield, as in *Heathfield v. Chilton*[1], could say, "The law of nations will be carried as far in England, as any where", in this country, in the 20th century, in the presence of the United Nations and

[1] (1767), 4 Burr. 2015, 98 E.R. 50.

the multiplicity of impacts with which technical developments have entwined the entire globe, we cannot say anything less.

In the language of Sir Alexander Cockburn quoted by Lord Atkin in *Chung Chi Cheung, supra,* at p. 172, in the absence of precise precedent we must seek the rule which "reason and good sense . . . would prescribe". In this we are not to disregard the practical consideration, if not the necessity, of that "general assent and reciprocity", of which Lord Macmillan speaks in *Compania Naviera Vascongardo v. The "Cristina" et al.*[1], cited in the reasons of McNair C.J. But to say that precedent is now required for every proposed application to matter which differs only in accidentals, that new concrete instances must be left to legislation or convention, would be a virtual repudiation of the concept of inherent adaptability which has maintained the life of the common law, and a retrograde step in evolving the rules of international intercourse. However slowly and meticulously they are to be fashioned they must be permitted to meet the necessities of increasing international involvements. It is the essence of the principle of precedent that new applications are to be determined according to their total elements including assumptions and attitudes, and in the international sphere the whole field of the behaviour of states, whether exhibited in actual conduct, conventions, arbitrations or adjudications, is pertinent to the determination of each issue.

The nature and purpose of the invitation before us, interpreted against the background of the assumptions implied by sovereignty, and the generality of assent and reciprocity, furnish the data for the juridical deductions of its implications. A similar situation arose during the late world war from the admission to Canada of members of the United States forces. The question of the jurisdiction of their military tribunals over offences committed in this country was referred to this Court[2] and the opinions expressed appear to me to have accepted that basis of determination.

[1] [1938] A.C. 485 at 497, [1938] 1 All E.R. 719.

[2] *Reference re Armed Forces of the United States of America,* [1943] S.C.R. 483, [1943] 4 D.L.R. 11, 80 C.C.C. 161.

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That the subject-matter was of the most vital importance to both countries surely does not require debate; it was national defence in the most sensitive area. A foreign state, in peacetime, was privileged to exercise, in this country, powers of high sovereign character. Its necessity was equal to its uniqueness, and the scope and character of those powers determine the scope and character of the implied privileges.

Public works of this sort are not ordinarily considered subjects of taxation. Their object is to preserve the agencies that produce national wealth, the source of taxes. So to tax Government is simply to remit locally what has been exacted nationally. The work carried on by either Government in its own land would be untaxable, and that principle must carry over to the territory of the joint work.

I am unable, then, to infer that with an identity of purpose, status and role in each country, either the invitation or its acceptance proceeded upon any other basis than that of the rule of exemption from taxation. Why should we deny to property designed for common national preservation a sovereign character and purpose equal at least to that of an ambassador's furniture? Works of this sort are not to be looked upon, in principle, as furnishing a source of taxation for municipalities nor state necessities an object of revenue; any other view would be a strange commentary upon our conception of the role of Government in these days. Public works may, at times, impose upon local resources burdens of municipal responsibility; but the exemption here does not touch services for which payment is ordinarily made, as water, electricity, etc. These the foreign invitees must, as their food-supply and property generally, acquire as purchasers. If strictly general municipal services providing fire-protection, repair of streets, etc., are excessively affected, the appeal must be to the domestic Government as participant in the work; and adjustment between the two countries becomes a political matter.

The immunity extends likewise to the leases. Since the argument there has been brought to our attention a recent decision of the House of Lords which is most pertinent to this feature. In *Rahimtoola v. Nizam of Hyderabad et al.*[1],

[1] [1957] 3 W.L.R. 884, [1957] 3 All E.R. 441.

moneys belonging to the state of Hyderabad had been transferred by an agent to a bank in London in the name of the High Commissioner of Pakistan to Great Britain. While the money was still held by the bank, notice was received from the Nizam that the transfer had been made without authority and a demand was made on the bank for its return. This the bank refused. The Nizam thereupon commenced proceedings against both the High Commissioner and the bank. On application by the defendants, the writ was set aside *in toto,* but in the Court of Appeal the order was reversed. In the House of Lords it was held that as the legal title to the account was admittedly in the High Commissioner as bare trustee or proprietary agent for Pakistan, the latter's exemption from proceedings against its property had been infringed; the interest of Pakistan, the right to direct the action of the agent, was sufficient to raise the immunity, notwithstanding that the ultimate beneficial interest was not claimed. The decision, restoring the original order, demonstrates that what is to be looked at is the substance of the matter raised and not the form; and if, in that view, an infringement appears, the consequence is rigorously applied. It was assumed in all Courts that if the beneficial interest in the money had been shown to be in Pakistan the immunity arose; but even without that the bare legal title sufficed. It is unnecessary to do more than to indicate the difference between an ordinary trustee and such a fiduciary. The former is charged with active duties towards both the property and the beneficiary; and it is contemplated that for all such ordinary incidents of ownership as taxes he represents all interests. But even for such a case, we have been referred to no authority which holds a trustee taxable in respect of the interest of a beneficiary exempt. Here a bare title is held passively by the agent, and he is chargeable with no active responsibility in any capacity beyond what arises under the construction contract.

A further question remains. For the years 1952 and 1953 the taxes were paid. Before that happened the contractors had made it clear to the municipal authorities that the property belonged to the United States Government and that they stood on the position that it was exempt. Full discussion of this question took place and the evidence

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puts it beyond controversy that the authorities had no intention of holding their hand in prosecuting collection and that that was made known to the contractors. It is equally evidenced that the ground taken by the contractors was maintained consistently throughout. The personal property taxes for 1952 and the total for 1953 were paid under express protest: in the payment of those on the real estate for 1952 the word "protest" was not used but that the municipal authorities understood it to be so is not to be seriously doubted. In considering the question of voluntariness or coercion, the status and circumstance of the party resisting is a matter to be taken into account. As representing the United States the contractors were firm in their objection to the taxation, and the municipal authorities, with all the information before them, equally insistent on pressing it. In that state of things, to require either the contractors or the United States Government to take proceedings that might later be obviated, or to await action taken to seize the property, is going beyond what is necessary to rebut the inference of voluntary payment. "Voluntariness" implies acquiescence, the absence of pressure inducing payment. That pressure was present here inducing payment as a temporary means of avoiding rancorous controversy, as well as interference with the prosecution of the work. Nothing in the circumstances of payment makes it unfair to require the municipality to submit to an action for its return.

The considerations bearing upon a refusal to allow a recovery of this nature are indicated in *Grantham v. The City of Toronto*[1]. At p. 215 Robinson C.J. says:

> It is unreasonable to contend that the plaintiff paid the rate under compulsion, for the just presumption is, that if the plaintiff had made the defendants aware of the fact, nothing more would have been exacted than was right. If this action could lie, then it must follow that whenever an inhabitant of the city has been assessed for property which he did not own, or for more than he owned, and has paid the tax without objection, he can harass the corporation with an action to recover it back again.

and at p. 216 Macaulay J.:

> He [the plaintiff] should have remonstrated it first; if actions like this are tenable, any number of persons accidentally overrated, may pay the rates without saying a word, and then bring actions for money had and received. It is too late.

[1] (1847), 3 U.C.Q.B. 212.

What was done in the present case was precisely what is impliedly suggested by these quotations as furnishing ground for recovery.

For the assessment of 1953 there was an express protest in writing, with the same insistence on the right and intention to proceed to collect, and the same resistance.

I would, therefore, dismiss the appeal with costs and allow the cross-appeal with costs throughout.

The judgment of Locke and Cartwright JJ. was delivered by

LOCKE J.:—An examination of the evidence given on behalf of the parties to these proceedings discloses that there is no dispute as to any material fact. By agreement between the Governments of the Dominion of Canada and of the United States of America, effected by an exchange of notes, the contracting parties agreed to construct a radar defence system for their mutual protection against air attacks. The installations necessary were to be, and were in fact, constructed in Newfoundland, Labrador and elsewhere in Canada and it was agreed that the cost of the construction should be borne one-third by Canada and two-thirds by the United States. The Canadian Government granted and assured to the United States Government without charge such rights of access, use and occupation as might be required for the construction, equipment and operation of the stations allocated to that country, and agreed that, within the sites so made available, the United States might do whatever was necessary or appropriate to the carrying out of its responsibility in Canada in connection with the work. The stations when completed were to be manned by the two countries according to arrangements agreed upon between them.

It was pursuant to this arrangement that three companies which carried on business in Saint John, New Brunswick, and elsewhere under the name and style of Fraser-Brace-Terminal Constructors (hereinafter referred to as "Fraser-Brace"), and the two companies which carried on business under the name of Drake-Merritt arranged and continued the leases from Agnes L. McDonald and H. G. Fowler and Victoria Fowler, of the lands situate

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within the limits of the appellant municipality upon which their activities were carried on.

Upon these lands certain buildings were placed, constructed of prefabricated material, which, as the evidence of the witness Joseph Hantman shows, were the property of the United States Government and were brought at its direction from St. John's, Newfoundland, and erected on the leased property. These buildings were placed upon concrete footings: whether they rested of their own weight on the footings or were in some way attached to them is not clear from the evidence and, in any event, in the view I take of the matter, this is an immaterial consideration.

Two other small buildings containing radio equipment were either built or erected from prefabricated materials brought from Newfoundland. These radio installations were for the purpose of communicating with the sites where the work of construction was carried on in Newfoundland and northern Canada. To these premises, which were devoted entirely to the enterprise undertaken by the American Government in Canada for the above purposes, considerable quantities of material of all kinds were brought during the periods in question for shipment to the sites. Part of the buildings was used by Fraser-Brace, part by the Corps of Engineers of the United States, part by the American Army Audit Division and part by a firm of architects employed by the Corps of Engineers. Apparently some 200 people were employed upon the activities there carried on.

It was shown by the witness Hantman that two classes of personal property were brought by Fraser-Brace to the premises, these being property owned by the American Government and shipped there at its direction, such as the prefabricated buildings, and property purchased by Fraser-Brace for use in the work, for which that organization was reimbursed by the American Government. The personal property purchased by Fraser-Brace was ordered from various manufactures and other people dealing in the required supplies upon a purchase order form which, according to the evidence, was used for all such purchases. One of these forms put in evidence at the trial, ordering a motor from Canadian General Electric Company Limited, to be delivered at Saint John, New Brunswick, required

delivery to the Transportation Officer of the East Ocean Division of the Corps of Engineers, U.S. Army, c/o Fraser-Brace at Saint John. One of the general conditions endorsed upon the order read:

> The articles and/or services furnished hereunder are for the exclusive use of the United States Government but invoices shall be submitted to the Purchaser for payment in accordance with the provisions of War Department Contract.

Endorsed upon the face of such order, which was signed on behalf of Fraser-Brace by its purchasing agent, the following appeared:

> I hereby certify that the goods herein described are being purchased on behalf of the Government of the United States for use in the Construction, Maintenance and Operation of the joint Canada-United States project "PINETREE" and are to become and remain the property of the Government of the United States and are not for Resale, Personal or Private use . . .

The lease entered into by Fraser-Brace with Agnes L. McDonald and with the Fowlers each contained a provision that the lessee might assign the ageement to the United States of America. The Fowler lease contained a further provision reading:

> NOTWITHSTANDING any provision to the contrary herein contained, the Lessors grant to the Lessees and to the United States of America the right of any employees of the United States Government to occupy any part of the said premises, during the term hereby granted.

The leases were not assigned to the United States but, when Fraser-Brace finished its work early in the year 1954, the McDonald lease was assigned to the respondent Drake-Merritt and possession of the premises and of the personal property was apparently handed over to the latter organization about May 1, 1954.

Discussions took place between representatives of Fraser-Brace and the council and assessor of the appellant municipality during the years 1952 and 1953 as to the liability of the leasehold and personal property to municipal taxation. It is clear that it was explained to the municipal authorities at the outset that exemption from such taxation was claimed by Fraser-Brace on the ground that all of the property sought to be taxed was the property of the United States of America. Notices of assessment in respect of the buildings and personal property were sent to Fraser-Brace for part of the year 1952, for 1953 and part of 1954 and to Drake-Merritt for the years 1954 and 1955.

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On July 16, 1952, Fraser-Brace forwarded to the municipality its cheque for $437 in response to an assessment notice, the tax being levied in respect of certain of the personal property, stating that the payment was made under protest. In November of 1952 a further amount of $3,113.62 was paid in respect of an assessment made upon the leasehold interest, the buildings and other personal property. There is no evidence to show that, at the time this amount was paid, the municipality was informed that the amount was paid under protest. Further assessments were made upon Fraser-Brace for the year 1953 and, on July 28 of that year, Fraser-Brace wrote to the appellant saying that it had been instructed by the Corps of Engineers of the United States Army not to pay the taxes demanded for the year 1953. On September 1, 1953, the county secretary wrote to Fraser-Brace saying that unless the taxes were paid a levy would be made, and this threat was repeated in a further letter dated September 25, 1953. In consequence, on September 29, 1953, Fraser-Brace forwarded a cheque for the amount of $14,273.35 stating that this payment of real and personal property tax "is made *under protest*". When Drake-Merritt took over possession of the buildings and the personal property early in the year 1954, further assessments were made upon that organization, as well as upon Fraser-Brace, for part of the year. Further assessments were made against Drake-Merritt for the year 1955. The respondents launched their action on June 7, 1955, to recover the amounts paid as taxes by Fraser-Brace totalling $17,823.97, and for an injunction to restrain the appellant from levying or otherwise imposing taxes, rates or other assessments against the respondents or either of them in respect of the years 1954 and 1955.

It was a term of the contract between the United States and the contractors engaged in performing the work under the direction of the Corps of Engineers that the Government of that country should deliver certain property to the contractors and that the title to such property should remain in the Government, and that title to any property purchased by the contractors for the cost of which they were entitled to be reimbursed as an item of cost under the contract should pass to and vest in the Government, upon delivery of such property by the vendor.

McNair C.J.N.B.[1], by whom the action was tried, being of the opinion that the assessments of both the personal and the leasehold property made against the contractors were valid, dismissed the action. On appeal[2], the judgment of the majority of the Court delivered by Richard J. allowed the appeal of Fraser-Brace against the assessments upon the personal property and gave judgment for the amount of the taxes paid by that organization in respect of such property but dismissed the appeal in so far as it affected the levy made upon the leasehold interests and the buildings. The appeal of Drake-Merritt was allowed to the extent of granting an injunction restraining the municipality from enforcing payment of the taxes levied on personal property for the years 1954 and 1955, but dismissed in respect of the other levies made. Bridges J., who dissented, would have dismissed both appeals while directing that the assessment rates for the years 1952 to 1955, both inclusive, be amended so that the personal property would be assessed in the name of the United States Government. On the appeal to this Court, the respondents have cross-appealed against that portion of the judgment of the Appeal Division dismissing the claims in respect of taxes paid or assessed in respect of the leasehold interests and the buildings.

The arrangement between the Government of Canada and the Government of the United States was made under the powers vested in the former by head 7 of s. 91 of the *British North America Act*, which assigns to Parliament exclusive legislative authority in relation to militia, military and naval service and defence. The installations made in northern Canada were matters undertaken for the defence of this country, and the arrangements to be made for effecting that purpose fell within the exclusive jurisdiction of the Government of Canada. It was for that Government to decide and settle the terms and conditions upon which the United States was permitted to join with it in carrying out these defence measures and the privileges and immunities to be afforded to the Corps of Engineers

[1] (1956), 39 M.P.R. 33 (*sub. nom. Fraser-Brace et al. v. Saint John County et al.*).

[2] (1957), 9 D.L.R. (2d) 391 (*sub nom. Fraser-Brace Overseas Corp. v. Municipality of the City and County of Saint John et al.*).

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of the United States Army and the contractors and others employed by the Government of that county to carry out these works.

It was under the *Rates and Taxes Act*, R.S.N.B. 1952, c. 191, that the assessments in the present matter were made. The personal property in question falls within the definition of that expression in s. 1(1)(*e*), and the leasehold interests and the buildings placed on the land within the definition of real property in para. (*h*) of that subsection. The statute, which has since been repealed by the *Municipal Tax Act*, 1955, c. 14, contained the usual provisions for levying municipal taxes upon such property, declared that they should "bind and be a special lien or charge" upon all the lands of the taxpayer in the parish within which the assessment was made (s. 171), and by s. 84, where default in payment within the prescribed time was made, provided for the issuing of execution and the sale of the property affected. By s. 85, execution might be issued against a non-resident whose property within the municipality had been assessed. It was under these powers that the secretary of the appellant municipality wrote to the respondents on September 1 and on September 25, 1953, and, had payment not been made by Fraser-Brace in that year, it is to be assumed that these properties of the United States Government, brought to the premises for the above-described purposes, would have been seized and sold and the work upon the defence installations consequently impeded.

While the question as to the liability to municipal taxation of the properties of foreign countries used as legations under the statutes of Ontario, which was considered in the *Reference re Powers of the City of Ottawa and the Village of Rockcliffe Park to Tax Foreign Legations, etc.*[1], related to property of a different nature from that with which this case is concerned, in my opinion the principles applied by Sir Lyman Duff C.J. and by Rinfret J. (as he then was) and Taschereau J. (the majority of the Court) are applicable.

The history of the immunity of the sovereign and his property from suit or seizure within his own dominions is traced from the earliest times in England in the judgment

[1] [1943] S.C.R. 208, [1943] 2 D.L.R. 481.

of Gray J. in *Briggs et al. v. The Light-Boats*[1] commencing at p. 166. It is only by permission of the sovereign that such actions or proceedings against his person or his property may be taken and this principle is applicable in the United States, as is shown by the judgment of Marshall C.J. in *The Schooner Exchange v. M'Faddon et al.*[2]

In *The Parlement Belge*[3], where reference is made to the judgments in the Courts of the United States above mentioned, Brett L.J., delivering the judgment of the Court, quotes from Blackstone's Commentaries, Book 1, c. 7, a passage reading (p. 206):

> Our king owes no kind of subjection to any other potentate on earth. Hence it is that no suit or action can be brought against the king, even in civil maters, because no Court can have jurisdiction over him. For all jurisdiction implies superiority of power; authority to try would be vain and idle without an authority to redress, and the sentence of a Court would be contemptible unless the Court had power to command the execution of it, but who shall command the king?

The immunity of the property of a foreign sovereign from seizure in a friendly country proceeds upon the ground that the exercise of jurisdiction over him or his property would be incompatible with his regal dignity, that is to say, with his absolute independence of every superior authority.

In the *Schooner Exchange* case, the property declared by the judgment of the Supreme Court of the United States to be exempt from seizure in that country was a war vessel of France. In *The Parlement Belge,* immunity from seizure was claimed for an unarmed packet belonging to the King of the Belgians which was in the hands of officers commissioned by him and employed in carrying mails. The Court of Appeal held that the ship was not liable to be seized in a suit *in rem* to recover redress for a collision and that the right of immunity was not lost by reason of the fact that it also carried merchandise and passengers for hire. The first clause of the headnote to the report accurately summarizes the grounds for the decision:

> As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each

[1] (1865), 93 Mass. (11 Allen) 157. [2] (1812), 11 U.S. (7 Cranch) 116.
[3] (1880), 5 P.D. 197.

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state declines to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory.

The first of the questions to be decided was, as stated by Brett L.J., whether the Admiralty Division had jurisdiction to entertain an action *in rem* against a ship the property of a foreign sovereign,

> a public vessel of his state, in the sense of its being used for purposes treated by such sovereign and his advisers as public national services, it being admitted that such ship, though commissioned, is not an armed ship of war or employed as a part of the military force of his country.

In the case of the *Light-Boats, supra,* where the contest was between a litigant relying upon a right of lien claimed under a statute of the State of Massachusetts and the United States Government, and where it was held that the lien could not attach, Gray J. said (p. 165):

> The immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty; and does not depend on the extent or manner of their actual use at any particular moment, but on the purpose to which they are devoted.

In the *Schooner Exchange* case, *supra,* Chief Justice Marshall said in part (pp. 136-7):

> The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all soverigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers . . .
>
> This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

This statement of the law was quoted with approval and adopted in the judgment of the Judicial Committee delivered by Lord Atkin in *Chung Chi Cheung v. The King*[1].

In *The Tervaete*[2], a claim for a maritime lien was asserted against a vessel which at the time of a collision was the property of the Belgian Government and employed on government service but which subsequently had been

[1] [1939] A.C. 160 at 168, [1938] 4 All E.R. 786, [1939] 1 W.W.R. 232.
[2] [1922] P. 259.

transferred to a private owner. Dealing with a contention that, while the authorities were to the effect that the Courts were without jurisdiction to entertain an action against a sovereign state, they did not apply when the claim was for a lien upon the ship, Bankes L.J. said (pp. 268-9):

> It seems to me impossible consistently with the law as there expressed [in *The Parlement Belge, supra*] to hold that it is permissible to recognize a maritime lien as attaching to the property of a sovereign or a sovereign state. I see no distinction in principle between the act of the individual issuing the writ and the act of the law attaching the lien. Each equally offends the rule affording immunity.

There is no evidence in the present matter as to whether the United States granted the immunity here claimed to Canada or to other nations, but this was clearly unnecessary. The question is what is the law of nations by which civilized nations in general are bound, not how two individual countries may treat one another: *United States of America et al. v. Dollfus Mieg et Cie S. A. et al*[1].

The property assessed in the present matter was the property of the United States destined for use for works which were for the defence of that country, and thus "destined to its public use", as that expression was used in the *Light-Ships* case, *The Parlement Belge,* and *The Tervaete.* The Government of that country, with the approval and consent of the Government of Canada, brought the property in question into Canadian territory and was thus entitled to rely upon the fact that, in accordance with the principles of international comity, it would not be subject to taxation, seizure or sale at the instance of municipal or other bodies empowered to impose taxes for their own purposes.

The true view of the matter is not that the *Rates and Taxes Act,* in so far as it purported to authorize the imposition of municipal taxes generally upon real or personal property within the limits of the municipalities and to give a right of seizure and sale and a lien to enforce payment, was *ultra vires,* but rather that it should be construed as inapplicable to property brought into the country with the approval and consent of the Government of Canada exercising the powers vested in it by head 7 of s. 91 of the *British North America Act* for purposes such as

[1] [1952] A.C. 582 at 618, [1952] 1 All E.R. 572 at 586.

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are above described. As pointed out by Sir Lyman Duff in the *Reference re Foreign Legations, supra,* at p. 231, it was there unnecessary to consider the respective jurisdictions of the Parliament of Canada and the local Legislatures in respect of real estate owned or occupied by a foreign state, since the general language of the enactment imposing the taxation must be construed as saving the privileges of foreign states.

In my opinion, neither the leasehold interests, the buildings nor the personal property in question were liable to taxation by the appellant municipality and, unless the respondent Fraser-Brace has disentitled itself by its conduct to recover the amounts paid, there should be judgment for their recovery.

In the case of the sum of $14,273.35 paid on September 29, 1953, the right of recovery appears to me to be clear. The amount was paid following the threats made in the letters of September 1 and September 25, 1953, that unless the amounts were paid a levy would be made: *Valpy et al. v. Manley*[1], per Tindall C.J. at p. 602; *Maskell v. Horner*[2], per Lord Reading C.J. at p. 118.

As to the earlier payments made in the year 1952, while there is no direct evidence that the payment of $3,113.62 made in November 1952 was made under protest, as was done in respect of the payment of $437 made earlier, it is clear from the evidence that the contractors insisted from the outset that, as the property was that of the United States, it was immune from taxation and that the municipal authorities insisted the contrary, and it should be inferred, in my opinion, that both amounts were paid under protest and to avoid proceedings being taken to recover the amounts. In these circumstances, the moneys are, in my opinion, recoverable: *Watt v. The City of London*[3].

I would dismiss the appeal and allow the cross-appeal and direct that judgment be entered for the respondent Fraser-Brace for the amount of $17,823.79 and declare that the assessments made against the respondent Drake-

[1] (1845), 1 C.B. 673, 135 E.R. 673. [2] [1915] 3 K.B. 106.
[3] (1892), 19 O.A.R. 675.

Merritt for the years 1954 and 1955 were invalid. The respondents should have their costs throughout.

FAUTEUX J.:—I agree that the appeal should be dismissed with costs and the cross-appeal allowed with costs.

ABBOTT J.:—I have had the advantage of considering the reasons of my brother Rand and I am in agreement with the views which he has expressed as to the principles upon which are based the immunities of a foreign state, its diplomatic agents and its property. I desire to add only the following observations.

As Duff C.J. pointed out in the *Legations Reference*[1], the principles governing the immunities of a foreign state, its diplomatic agents and its property do not limit the legislative authority of the legislature having jurisdiction in the particular matter affected by any immunity claimed or alleged. After stating that in the view which he took it was not necessary to consider the respective jurisdictions of Parliament and the local Legislatures in the matter of taxation of property of a foreign state in Canada, the learned Chief Justice then made the following statement, with which I am in agreement:

> *The general language of the enactments imposing the taxation in question must be construed as saving to the privileges of foreign states.* The general principle is put with great clearness and force in the judgment of Marshall C.J. [in *The Schooner Exchange v. M'Faddon et al.* (1812), 11 U.S. (7 Cranch) 116], from which I have quoted so freely. These are his words:
>
> > "Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals . . . Those general statutory provisions . . . which are descriptive of the ordinary jurisdiction . . . ought not, in the opinion of this Court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction."

(The italics are mine.)

As my brother Rand has pointed out, there, as here, Duff C.J. was dealing with taxation under general language in which the interpretation of the statute only was in question. There is nothing in the statutes of New Brunswick authorizing the imposition of taxes by municipalities in that Province upon real and personal property, which can be construed as "destroying this

[1] [1943] S.C.R. 208 at 231, [1943] 2 D.L.R. 481.

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implication" that in acquiring property in Canada for public purposes a foreign state does so upon the condition that such property is exempt from local taxation.

For the reasons given by my brother Rand I would therefore dismiss the appeal with costs and allow the cross-appeal with costs.

Appeal dismissed with costs and cross-appeal allowed with costs.

Solicitors for the plaintiffs, respondents and cross-appellants: Gilbert, McGloan & Gillis, Saint John.

Solicitors for the defendants, appellants: McKelvey, Macaulay & Machum, Saint John.

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*Jan. 23, 24, 25
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**Jan. 28

IN THE MATTER OF an Act for Expediting the Decision of Constitutional and other Provincial Questions, being Chapter 44 of the Revised Statutes of Manitoba, 1954,

AND

IN THE MATTER OF a Reference Pursuant Thereto by the Lieutenant-Governor in Council to the Court of Appeal for the Hearing or Consideration of Certain Questions Arising With Respect to Section 198 of the Railway Act, being Chapter 234 of the Revised Statutes of Canada, 1952, and The Real Property Act, being Chapter 220 of the Revised Statutes of Manitoba, 1954, and The Law of Property Act, being Chapter 138 of the Revised Statutes of Manitoba, 1954.

THE ATTORNEY GENERAL OF CANADA ..... APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY AND CANADIAN NATIONAL RAILWAYS ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Constitutional law—Subject-matters of legislation—Validity and application of the Railway Act, R.S.C. 1952, c. 234, s. 198—Effect of provincial legislation in respect of title to real estate.

Railways—Acquisition of lands in Manitoba—Whether mines and minerals pass to railway in absence of express provision—The Railway Act, R.S.C. 1952, c. 234, s. 198—The Real Property Act, R.S.M. 1954, c. 220, s. 91—The Law of Property Act, R.S.M. 1954, c. 138, s. 4.

Section 198 of the *Railway Act* is not *ultra vires*, in whole or in part, and its effect is that, with the exception there stated, no railway to which the Act applies acquires title to mines and minerals in any land acquired by it, either by purchase or by compulsory taking under the Act, unless the mines and minerals are expressly purchased by and conveyed to it, notwithstanding the provisions of provincial legislation to the effect that a conveyance of land shall be deemed to include mines and minerals.

Per Kerwin C.J. and Taschereau, Rand, Kellock, Cartwright and Fauteux JJ.: Parliament is clearly competent to provide for the acquisition of land by a railway, and to limit by conditions the effect of acquisition, and it must also be able to provide reasonable means for ensuring that limitation. The question in such a case is not primarily how far Parliament can trench on s. 92 of the *British North America Act*, but to what extent property and civil rights are within

*PRESENT: Kerwin C.J. and Taschereau, Rand, Kellock, Locke, Cartwright, Fauteux, Abbott and Nolan JJ.

**Nolan J. died before the delivery of judgment.

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the scope of the paramount power of Parliament. *Tennant v. The Union Bank of Canada,* [1894] A.C. 31, referred to. The section clearly binds the Canadian Pacific Railway Company, but its application to the Canadian National Railways is subject to different considerations, because of the varying statutory provisions applicable at different times to the railways now included in that system. All that can be said, in the circumstances of this appeal, is that in the case of such constituent companies as were subject to the *Railway Act* when they acquired land, between 1904 and 1919, and as between the railway company and the grantor of lands, the minerals did not pass to the grantee railway.

Per Locke and Abbott JJ.: The effect of ss. 197 to 201 inclusive of the *Railway Act* is to ensure that when a railway is carried over lands that contain mines or minerals there is adequate protection for the interest of the owner of the minerals, the travelling public, and the railway company. They are clearly legislation in relation to railways, and therefore within the competence of Parliament, under head 29 of s. 91 of the *British North America Act.* This being so, the fact that part of s. 198, limiting the manner in which railway companies to which the Act applies may acquire mines and minerals, conflicts with provincial legislation is of no moment. The whole subject-matter is removed from provincial competence. *Proprietary Articles Trade Association et al. v. Attorney- General for Canada et al.,* [1931] A.C. 310; *Tennant v. The Union Bank of Canada, supra*; *Grand Trunk Railway Company of Canada v. Attorney-General of Canada,* [1907] A.C. 65; *Attorney-General for Canada v. Attorney-General for Quebec,* [1947] A.C. 33, applied. The Manitoba statutes referred to are unquestionably within provincial powers, but they do not apply to transfers or conveyances made since s. 198 came into force in 1904 to railways that are subject to the *Railway Act.* That section accordingly applies to and governs the title to all lands acquired since 1904 by the Canadian Pacific Railway Company. Although at the time of its incorporation that company was subject to the *Consolidated Railway Act,* 1879, which contained no provision corresponding to s. 198, it is, by force of s. 20(*b*) of the *Interpretation Act,* subject to the *Railway Act* as it is in force from time to time. *Northern Counties Investment Trust Ltd. v. Canadian Pacific Railway Company* (1907), 13 B.C.R. 130, approved. The section also applies in respect of lands acquired between 1904 and June 6, 1919 (when the Canadian National Railway Company came into existence) by the Canadian Northern Railway Company, the two companies formerly operating in Manitoba that were amalgamated into it, and the Grand Trunk Railway Company. There is not sufficient material before the Court to enable it to deal with the matter as it affects lands acquired since 1919 by the Canadian National Railway Company or the other companies now included in the definition of "Canadian National Railways" in s. 2(*b*) of the *Canadian National Railways Act,* R.S.C. 1952, c. 40.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], on a reference by the Lieutenant-Governor in Council. Appeal allowed.

[1] (1956), 17 W.W.R. 415, 73 C.R.T.C. 254, 2 D.L.R. (2d) 93 (*sub nom. Reference re Validity of Section 198* of the Railway Act).

The following questions were asked and were answered as follows by the Court of Appeal:

1. Is Section 198 of the Railway Act *ultra vires* of the Parliament of Canada either in whole or in part, and if in part, in what particular or particulars and to what extent?

ANSWER: Section 198(1) and (2) is *ultra vires* of the Parliament of Canada except insofar as it prohibits a railway company from expropriating mines and minerals by compulsory proceedings.

2. When title to land without exception of mines and minerals is or was acquired by one of said railway companies without any proceedings being commenced under the compulsory powers given by the Railway Act but as a result of agreement made with the owner of such land who also owns or did own the mines and minerals therein and such mines and minerals are or were not excepted or expressly named in the transfer or deed or conveyance of land, does such railway company own such mines and minerals when that title is or was acquired

(*a*) pursuant to said The Real Property Act, or

(*b*) deed to which said The Law of Property Act applies?

ANSWER: No. 2(*a*): Yes.

No. 2(*b*): Yes.

3. When title to land without exception of mines and minerals is or was acquired by one of said railway companies by purchase after commencement but before completion of proceedings under the compulsory powers given by the Railway Act from the owner of such land who also owns or did own the mines and minerals therein and such mines and minerals are or were not excepted or expressly named in the transfer or deed or conveyance of the land, does such railway company own such mines and minerals when that title is or was acquired

(*a*) pursuant to said The Real Property Act, or

(*b*) by deed to which said The Law of Property Act applies?

ANSWER: No. 3(*a*): Yes.

No. 3(*b*): Yes.

4. When title to or ownership of land without exception of mines and minerals is or has been taken by one of said

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railway companies under the compulsory powers given by the Railway Act from the owner of such land who also owns or did own the mines and minerals therein and such mines and minerals are or were not excepted or expressly named in the conveyance of the land, does such railway company own such mines and minerals when that title or ownership is or was acquired

(*a*) under said The Real Property Act, or

(*b*) by virtue of the registration of a vesting order or other authorized evidence of the company acquiring ownership under The Registry Act, Revised Statutes of Manitoba, 1954, Chapter 223 or the Registry Act for the said Province heretofore from time to time in force within the Province?

ANSWER: No. 4(*a*): Yes.

No. 4(*b*): Yes.

A. E. Hoskin, Q.C., and *D. H. W. Henry, Q.C.,* for the appellant.

C. F. H. Carson, Q.C., Allan Findlay, Q.C., and *H. M. Pickard,* for the respondent Canadian Pacific Railway Company.

R. D. Guy, Q.C., and *E. B. MacDonald,* for the respondent Canadian National Railways.

John A. MacAulay, Q.C., A. A. Moffat, Q.C., and *R. K. Williams,* for Imperial Oil Limited, intervenant.

J. J. McKenna, for the Attorney-General for Ontario, intervenant.

The judgment of Kerwin C. J. and Taschereau, Rand, Cartwright and Fauteux JJ. was delivered by

RAND J.:—The first and the substantial question of law raised by this reference is whether s. 198 of the *Railway Act,* R.S.C. 1952, c. 234, is in whole or part *ultra vires.* The section is as follows:

(1) The company is not, unless the same have been expressly purchased, entitled to any mines, ores, metals, coal, slate, mineral oils, gas or other minerals in or under any lands purchased by it, or taken by it under any compulsory powers given it by this Act, except only such parts thereof as are necessary to be dug, carried away or used in the construction of the works.

(2) All such mines and minerals, except as aforesaid, shall be deemed to be excepted from the conveyance of such lands, unless they have been expressly named therein and conveyed thereby.

It appears within a fasciculus beginning with s. 192 under the heading "THE TAKING AND USING OF LANDS". First enacted as s. 132(2) of the *Railway Act*, 1903, c. 58, which came into force on February 1, 1904, it was continued in R.S.C. 1906, c. 37, as s. 170, in the *Railway Act*, 1919, c. 68, as s. 195, and in R.S.C. 1927, c. 170, as s. 195. The original language has undergone minor changes but in the syntax of the section only. The clause "unless the same have been expressly purchased" was in 1906 transferred from the end of the first sentence (as in the old s. 132) to its present position, and in the 1952 revision the word "is" was substituted for "shall" in the first line and the word "be" in the second line was elided. These changes do not seem to me to be significant and in the interpretation of the present section they may be disregarded.

The section distinguishes between lands "purchased" and lands "taken". In this its text is consistent with the words as used elsewhere in the Act; for example, s. 164(1)(*c*) clothes the company with power to "purchase, take and hold" lands; s. 202 speaks of land "that may be taken without the consent of the owner"; and ss. 207 and 218 exemplify the same distinction. Section 216 expressly contemplates the purchase by agreement of lands which the plan, profile and book of reference deposited in the office of the registrar of deeds and other publication give notice will be required for the purpose of the railway and it is only in case of disagreement between the parties that the compulsory proceedings are to be resorted to. The same procedure is envisaged by s. 236; and s. 213 provides for the case of purchase before the plans, etc., are deposited or before the lands required are set out or ascertained.

What s. 198 is designed to do is to prevent the acquisition of minerals unless they are expressly made the subject of agreement with the owner. Among other possible or likely purposes this seems intended to protect the interest of the owner: the minerals are to remain his unless they are made the subject of an express term in the agreement. "Purchase" would include every acquisition of land which the company could, if necessary, take by compulsory

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measures; that would embrace acquisition following the filing of plans, or under s. 213; but beyond these the form and purpose of acquisition might be of such variety and call for so many assumptions affecting private rights that, for the reasons expressed hereafter, no opinion should be ventured.

Is s. 198, then, so interpreted, beyond the authority of Parliament? Reading together the sections dealing with lands, the capacity given to the company to acquire them and the power of expropriating them, it is not seriously arguable—nor was it argued—that the prohibition against taking the minerals is *ultra vires*: what it represents is simply the curtailment of an extraordinary power itself created by Parliament which, being its creator, can modify it to whatever extent or in whatever manner may be considered advisable.

But it is contended that in providing in effect, as it is claimed subs. (2) does, for the interpretation of a provincial instrument of title, Parliament has stepped beyond its legislative boundary. It has, it is said, prescribed the terms of a conveyance which passes property under provincial law and that specifically subs. (2) conflicts with the statutory law of the Province embodied in *The Real Property Act,* R.S.M. 1954, c. 220, and *The Law of Property Act,* R.S.M. 1954, c. 138.

That Parliament, competent to provide for the acquisition of land for a railway and to limit by conditions the extent of acquisition, cannot also provide the reasonable means for ensuring that limitation, would, in the particular circumstances, expose the substantive power to virtual nullification. Powers in relation to matters normally within the provincial field, especially of property and civil rights, are inseparable from a number of the specific heads of s. 91 of the *British North America Act* under which scarcely a step could be taken that did not involve them. In each such case the question is primarily not how far Parliament can trench on s. 92 but rather to what extent property and civil rights are within the scope of the paramount power of Parliament. *Tennant v. The Union Bank of Canada*[1], in which a provision under the *Bank Act* for taking security for loans made by a bank in disregard of provincial forms

[1] [1894] A.C. 31, 5 Cart. 244.

of security and registration was upheld, is a characteristic example. Here the steps to be taken for expropriation, the payment of money into court with an authentic copy of the award or the conveyance, or an agreement under s. 213, each of which is declared by s. 236(2) to constitute the title of the company to the lands, are all within the field of railway legislation; and subs. (2) of s. 198 is simply a means for making effective the condition prescribed.

The law of Parliament declaring such a title is as much a law in force in the Province as an enactment of the Legislature. If the company avails itself of the local law of land titles and presents its conveyance or document of title to the registrar or other officer, the latter is chargeable with notice of the applicable law including, in the case of a conveyance to a Dominion railway, that provided by subs. (2). If that instrument does not expressly convey minerals, a certificate of title issuing on it should except them. If this entry were omitted by the registration officer and the minerals were subsequently sold by the company to an innocent purchaser, it might be that the original owner would be bound by that error in the certificate; that is a question to be decided when it arises; but so long as the minerals remain in the apparent ownership of the railway company, and assuming that they were not expressly purchased, the certificate remains subject to correction at the instance of the vendor or his transferee: as between these parties the statute is conclusive, subject to any right of reformation of the conveyance that may exist, or in the event of sale, to any trust that may arise.

That the Canadian Pacific Company, if the section is valid, is bound by it, is conceded; but the situation of the Canadian National Railways is somewhat different. Chapter 13 of the statutes of Canada, 1919, provided for the incorporation of Canadian National Railway Company, and by s. 13 the provisions of the *Expropriation Act,* now R.S.C. 1952, c. 106, relating to the taking and using of lands were, for the purposes of the company's undertaking, made applicable to the company, The latter was created to embody the ultimate amalgamation of all lines within the National system and the undertaking of the company would therefore depend upon either the absorption by

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amalgamation of existing lines or the construction by it of new lines. Section 13 in its original form remained in force until 1929, c. 10, s. 2, when, in an amendment of s. 17—which it had then become—the words "the taking and using of lands" were omitted. At the same time the company was authorized by subs. (3) of s. 17 to acquire lands required for any of the companies comprised in the National system, a schedule of which had been annexed to the original enactment. In 1955 the Act was revised as c. 29 and the sections dealing with the acquisition of lands were rearranged and modified. By s. 16 all of the provisions of the *Railway Act* were made applicable except certain named sections, including ss. 192 to 195 and 202 to 205, but omitting ss. 198, 199, 200 and 201, all having to do with minerals, and excepting

> (*b*) such other provisions [of the *Railway Act*] as are inconsistent with this Act or with the *Expropriation Act* as made applicable to the National Company by this Act.

Following this, by s. 17 the *Expropriation Act* was made to apply *mutatis mutandis* "subject as follows". What follows are four paragraphs, (*a*) authorizing the Minister of Transport to sign plans under the *Expropriation Act* and dispensing with the deposit of any description; (*b*) a declaration that upon the deposit of the plan the title vests in the company for such estate or interest as may be indicated on the plan; and (*c*) and (*d*) dealing with compensation.

Prior to 1929 each constituent company of the National system was subject to the *Railway Act* generally. Amalgamations proceeded somewhat slowly commencing with that between the National Company and the Grand Trunk Railway Company in 1923 and, so far, ending with that of the National Company, the Canadian Northern Railway Company and the Grand Trunk Pacific Railway Company in 1956.

The original s. 13 was before the Judicial Committee in *Boland v. Canadian National Railway Company*[1], at p. 205 of which Lord Dunedin remarked on its "very involved method of expression", and the distinction was pointed out between the function of the *Expropriation Act* in

[1] [1927] A.C. 198, 32 C.R.C. 128, [1926] 4 D.L.R. 193, [1926] 3 W.W.R. 100.

giving power to take lands and in furnishing machinery for taking them. As s. 17 it was again considered in *Bell Telephone Company of Canada v. Canadian National Railway*[1]. At p. 577 Lord Macmillan, referring to the comment in *Boland,* adds that the amended form "cannot be said to present a more happily inspired example of legislation".

A second proposition advanced by Mr. Guy can be dealt with shortly. Under the charters of many of the constituent companies in the National system power to acquire land for the purposes of the undertaking is conferred. His argument is that by virtue of s. 3 of the *Railway Act,* by para. (*b*), of which it is provided that

> where the provisions of this Act and of any Special Act passed by the Parliament of Canada relate to the same subject-matter, the provisions of the Special Act shall, in so far as is necessary to give effect to such Special Act, be taken to over-ride the provisions of this Act

the charter power is unaffected by the limitation of s. 198. With this I am unable to agree. The power given under the special Act goes to the capacity generally of the company to acquire and hold land; it does not embrace the taking of land without the owner's consent. Purchases in the course of construction are carried out under a code of sections in the general Act and are within the application of the special Act in no other sense than that of capacity. That code contains the element of coercion, in the background of which the purchases are made. To resort to or to take the benefit of the code and that element is action outside of the charter power. The authority under the special Act is admittedly subject to the provisions of the general Act which require plans to be submitted, approved and filed and to those dealing with compensation; but these, on Mr. Guy's contention, would, strictly speaking, seem to "relate to the same subject-matter" and to be restrictions of the charter power. Section 198 does not affect the capacity or the right of the company to acquire minerals, but it does prevent their acquisition directly or indirectly by compulsory action, including purchases that do not carry the express consent of the owner. These provisions, in short, serve to regulate the exercise of the

[1] [1933] A.C. 563, 41 C.R.C. 168, [1934] 1 D.L.R. 310.

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charter capacity as the company moves to construct its railway under the powers, procedures and limitations of the general Act.

The application of ss. 198 to 201 to the National company is thus seen to involve questions of the time of purchase, of special legislative enactments and of amalgamations of constituent companies, apart from the interpretation of the *Canadian National Railways Act* itself. In these circumstances, by answering questions 2, 3 and 4 we would be expressing an opinion that might seriously affect private rights in the absence of those claiming them, a step which would be contrary to the fundamental conception of due process, the application of which to opinions of this nature has long been recognized.

In *Attorney-General for Canada v. Attorneys-General for Ontario, Quebec, and Nova Scotia*[1], the Judicial Committee spoke of it in these words:

> Their Lordships must decline to answer the last question submitted as to the rights of riparian proprietors. These proprietors are not parties to this litigation or represented before their Lordships, and accordingly their Lordships do not think it proper when determining the respective rights and jurisdictions of the Dominion and Provincial Legislatures to express an opinion upon the extent of the rights possessed by riparian proprietors.

In *Attorney-General for Ontario v. Hamilton Street Railway Company et al.*[2]:

> With regard to the remaining questions, which it has been suggested should be reserved for further argument, their Lordships are of opinion that it would be inexpedient and contrary to the established practice of this Board to attempt to give any judicial opinion upon those questions. They are questions proper to be considered in concrete cases only; and opinions expressed upon the operation of the sections referred to, and the extent to which they are applicable, would be worthless for many reasons. They would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient, and inexpedient that opinions should be given upon such questions at all. When they arise, they must arise in concrete cases, involving private rights; and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down, and override the operation of particular words when the concrete case is not before it.

In *Attorney-General for Ontario et al. v. Attorney-General for Canada et al.*[3] (a reference in which the power of

[1] [1898] A.C. 700 at 717. [2] [1903] A.C. 524 at 529, 7 C.C.C. 326.
[3] [1912] A.C. 571 at 588-9, 3 D.L.R. 509.

Parliament and Legislature to put questions in this form was in issue):

If the questions to the Courts had been limited to such as are in practice put to the Judicial Committee (e.g., must justices of the peace and judges be resworn after a demise of the Crown?) no one would ever have thought of saying it was ultra vires. It is now suggested because the power conferred by the Canadian Act, which is not and could not be wider in its terms than that of William IV., applicable to the Judicial Committee, has resulted in asking questions affecting the provinces, or alleged to do so. But the answers are only advisory and will have no more effect than the opinions of the law officers. Perhaps another reason is that the Act has resulted in asking a series of searching questions very difficult to answer exhaustively and accurately without so many qualifications and reservations as to make the answers of little value. The Supreme Court itself can, however, either point out in its answer these or other considerations of a like kind, or can make the necessary representations to the Governor-General in Council when it thinks right so to treat any question that may be put. And the Parliament of Canada can control the action of the Executive.

In *Attorney-General for British Columbia v. Attorney-General for Canada*[1]:

The business of the Supreme Court of Canada is to do what is laid down as its duty by the Dominion Parliament, and the duty of the Judicial Committee, although not bound by any Canadian statute, is to give to it as a Court of review such assistance as is within its power. Nevertheless, under this procedure questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the question of future litigants be prejudiced by the Court laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied. It has therefore happened that in cases of the present class their Lordships have occasionally found themselves unable to answer all the questions put to them, and have found it advisable to limit and guard their replies. It will be seen that this is so to some extent in the present appeal.

And in *Attorney-General for Ontario et al. v. Attorney-General for Canada*[2]:

But, for reasons several times assigned in earlier judgments of the Judicial Committee, they feel the paramount importance of abstaining as far as possible from deciding questions such as those now stated until they come up in actual litigation about concrete disputes rather than on references of abstract propositions.

In *Reference re Waters and Water-Powers*[3], Duff J. (as he then was) reviewed the matter generally to the same effect.

[1] [1914] A.C. 153 at 162, 15 D.L.R. 308, 5 W.W.R. 878.
[2] [1916] 1 A.C. 598 at 602, 26 D.L.R. 293, 10 W.W.R. 410.
[3] [1929] S.C.R. 200 at 226-8, [1929] 2 D.L.R. 481.

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I would, therefore, allow the appeal and answer the questions as follows:

Question 1: No.

Question 2: Assuming that the question means when title to land on the face of the instrument conveying it is without exception of mines and minerals, and that there was no express agreement to purchase them, in the case of the Canadian Pacific Railway Company, subsequent to 1904, and in the case of such constituent companies of the National Railways as were at the time of the acquisition of the land subject to the *Railway Act*, between 1904 and 1919, and as between the railway company and the grantor of lands, the minerals did not pass to the grantee railway; in other cases of the Canadian National Railways, for the reasons given I abstain from answering.

Question 3: The same answer as to question 2.

Question 4: The same answer as to question 2.

KELLOCK J.*:—I agree with Rand J.

The judgment of Locke and Abbott JJ. was delivered by

LOCKE J.:—This is an appeal taken pursuant to the provisions of s. 37 of the *Supreme Court Act*, R.S.C. 1952, c. 259, from the opinion pronounced by the Court of Appeal of Manitoba[1] on four questions referred to that Court by the Lieutenant-Governor in council.

The first of these reads:

> Is section 198 of the Railway Act ultra vires of the Parliament of Canada either in whole or in part, and if in part, in what particular or particulars and to what extent?

Section 198 of the *Railway Act*, R.S.C. 1952, c. 23, reads:

> 198. (1) The company is not, unless the same have been expressly purchased, entitled to any mines, ores, metals, coal, slate, mineral oils, gas or other minerals in or under any lands purchased by it, or taken by it under any compulsory powers given it by this Act, except only such parts thereof as are necessary to be dug, carried away or used in the construction of the works.
>
> (2) All such mines and minerals, except as aforesaid, shall be deemed to be excepted from the conveyance of such lands, unless they have been expressly named therein and conveyed thereby.

[1] (1956), 17 W.W.R. 415, 73 C.R.T.C. 254, 2 D.L.R. (2d) 93 (*sub nom. Reference re Validity of Section 198 of the Railway Act*).

* Mr. Justice Kellock resigned his office as of January 15, 1958. His opinion was delivered in writing pursuant to s. 27 of the *Supreme Court Act*.

This question was answered as follows:

Section 198 (1) and (2) is ultra vires of the Parliament of Canada except insofar as it prohibits a railway company from expropriating mines and minerals by compulsory proceedings.

The Court further expressed the opinion that the section did not apply to land contracts and transactions by the respondent railway companies.

The order in council referring the questions to the Court of Appeal recited, *inter alia*, that each of the railway companies has from time to time acquired land by agreement with owners of land without any proceedings being commenced under the compulsory powers given by the *Railway Act*, by purchase after commencement of proceedings under the compulsory powers and before the completion of such proceedings, and also under the compulsory powers given by the *Railway Act*, and that each of them holds title to certain lands to which the provisions of *The Real Property Act*, R.S.M. 1954, c. 220, and *The Law of Property Act*, R.S.M. 1954, c. 138, apply, and that questions have arisen concerning the title to the mines and minerals underlying such lands.

It was apparently the fact that it was considered that there was a conflict between s. 198 and certain sections of the two statutes mentioned that led to the reference as to the first question.

The Real Property Act of Manitoba was first enacted in the year 1885 and introduced the Torrens system into Manitoba. While large areas of land in the Province have been brought under the Act, there are still considerable areas where the root of the title continues to be the original letters patent granted by the Crown in the right of Canada.

Section 2(*e*) of *The Real Property Act* defines land as including all estates or interests in land whether legal or equitable, and all mines, minerals and quarries, unless specially excepted.

Sections 63 and 67, to which reference will hereafter be made, declare the absolute and indefeasible nature of the titles evidenced by certificates of title issued under the Act, with defined exceptions.

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Section 91 reads:

> No words of limitation are necessary in a transfer of land in order to convey all or any title therein; but every transfer shall, when registered, operate as an absolute transfer of all such right and title as the transferor had therein at the time of its execution, unless a contrary intention is expressed in the transfer or instrument; but nothing in this section precludes a transfer from operating by way of estoppel.

Where the root of title to land continues to be letters patent issued prior to February 20, 1914, the provisions of *The Registry Act,* R.S.M. 1954, c. 223, apply, and conveyances are made by deed. The system of registration provided by this Act is known as "the Old System". Land is defined in this statute in the same terms as in *The Real Property Act.*

Section 4 of *The Law of Property Act* provides that no words of limitation shall be necesary in any conveyance of land in order to convey all or any title therein; but every grant, deed or instrument conveying land shall operate as an absolute conveyance of all such rights and title as the grantor has at the time of its execution, unless a contrary intention is expressed in the conveyance.

Title to lands acquired by purchase by the railway companies has apparently been taken in both manners: transfers under *The Real Property Act* and deeds of Old System lands to which the two last-mentioned statutes apply.

Section 198 first appeared in the *Railway Act* as subs. (2) of s. 132 of c. 58 of the statutes of 1903 in substantially its present form and affects lands acquired after the date that statute came into force on February 1, 1904. Its origin appears to have been s. 77 of the *Railway Clauses Consolidation Act,* 1845 (Imp.), c. 20. The section appears with a group of sections commencing with s. 192 under a subheading "THE TAKING AND USING OF LANDS". These follow a series of sections, commencing with s. 163, which are grouped under the heading "POWERS—CONSTRUCTION OF RAILWAYS" which deal generally with the powers which may be exercised by the company in acquiring the necessary lands for the construction, maintenance and operation of the railway, define the manner in which plans of the proposed railway are to be approved and declare the duty of registrars of deeds to receive and record such plans.

Section 203 and the following sections define the extent of lands that may be taken for the right-of-way and other purposes without the owner's consent, the manner in which leave may be obtained from the Board of Transport Commissioners to take more ample space than may be taken under s. 202, and the procedure for taking materials necessary for use in construction. The manner in which expropriations are to be carried on is defined in s. 218 and following sections.

Section 92 of the *British North America Act,* which defines the exclusive powers of provincial Legislatures, includes under head 10 local works and undertakings other than such as are of the enumerated classes, which include lines of railways connecting the Province with any other or others of the Provinces or extending beyond the limits of the Provinces. In relation to such railways, Parliament has the exclusive legislative authority under head 29 of s. 91. The only question to be determined in answering the first question is as to whether s. 198 is legislation falling within this category.

No dispute arises as to the power of Parliament to prohibit a railway company of the class mentioned to expropriate mines and minerals, except such as are necessary to be dug, carried away or used in the construction of the work. The exception made in the answer given by the Court of Appeal refers to the prohibition against expropriating mines and minerals as if it were absolute, but this is not entirely accurate. There is, however, no controversy in these proceedings as to this.

The real basis of the attack on the remaining provisions of s. 198 is that as both a transfer of land, the title to which is under *The Real Property Act,* and a deed of Old System lands, to which s. 4 of *The Law of Property Act* applies, convey the entire interest of the transferor or grantor unless a contrary intention is expressed in the instrument, to provide, as does s. 198, that, "unless the same have been expressly purchased" and unless they are expressly named in the conveyance, the railway is not entitled to any mines or minerals in or under any land purchased by it is to trespass upon the exclusive provincial power under s. 92 to make laws in relation to property and civil rights in the Province.

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In the reasons for judgment delivered by the learned Chief Justice of Manitoba, with which the other members of the Court concurred, after referring to the decisions of the Judicial Committee in *Canadian Pacific Railway Company v. The Parish of Notre Dame de Bonsecours*[1], *Bank of Toronto v. Lambe*[2], *The Citizens Insurance Company of Canada v. Parsons*[3], *John Deere Plow Company, Limited v. Wharton*[4], and *Great West Saddlery Company, Limited v. The King*[5], the following passage appears[6]:

> These cases hold and make it clear (1) that the land laws of the Province, i.e., *The Real Property Act, supra,* and *The Law of Property Act, supra,* are *intra vires;* (2) that companies incorporated by the Dominion Government are subject to valid provincial laws of general application, such as laws imposing taxes, relating to mortmain, and as to the forms of contracts, so long as such laws do not derogate from the status of such companies and their consequent capacities or as a result of their restriction prevent such companies from exercising the powers conferred on them by the Dominion Government.

I am unable, with great respect, to agree with this statement of the law. I think no question arises as to whether the provisions of *The Real Property Act* and *The Law of Property Act* to which reference has been made are within provincial powers. In my opinion, they unquestionably are, but they do not apply to transfers or conveyances of property to railway companies of the classes in question which are referred to in s. 198 since that section came into force. The matter appears to be stated as if to hold that the Dominion legislation is *intra vires,* as I think it is, is to say that the provincial legislation is *ultra vires.* Both are, in my opinion, valid laws in force in Manitoba and have been since they were enacted.

In *Toronto Corporation v. Canadian Pacific Railway Company*[7], Lord Collins, delivering the judgment of the Judicial Committee, said in part:

> The jurisdiction conferred over property and civil rights in the province is quite consistent with a jurisdiction specially reserved to the Dominion in respect of a subject-matter not within the jurisdiction of the province.

[1] [1899] A.C. 367.
[2] (1887), 12 App. Cas. 575, 4 Cart. 7.
[3] (1881), 7 App. Cas. 96, 1 Cart. 265.
[4] [1915] A.C. 330, 18 D.L.R. 353, 7 W.W.R. 706.
[5] [1921] 2 A.C. 91, 58 D.L.R. 1, [1921] 1 W.W.R. 1034.
[6] 17 W.W.R. at p. 425.
[7] [1908] A.C. 54 at 59, 7 C.R.C. 282.

In *Proprietary Articles Trade Association et al. v. Attorney-General for Canada et al.*[1], Lord Atkin pointed out at p. 316 that any matter coming within any of the particular classes of subjects enumerated in s. 91 as particular instances of the general powers assigned to the Dominion is not to be deemed to come within the classes of matters assigned to the provincial Legislatures. It had been said many times before but, in that case, it was again mentioned that most of the specific subjects in s. 91 do affect property and civil rights but, so far as the legislation of Parliament in pith and substance is operating within the enumerated powers, there is constitutional authority to interfere with such rights (p. 327).

The jurisdiction of Parliament in relation to railways such as the respondent companies is not less extensive than it is in relation to a telephone company such as the Bell Telephone Company of Canada, with telephone lines connecting various Provinces. The legislation granting powers to that company was considered in *The City of Toronto v. Bell Telephone Company of Canada*[2]. Lord Macnaghten, at p. 57, referring to the fact that s. 91 confers on Parliament exclusive legislative authority over all classes of subjects expressly excepted by head 10(*a*) of s. 92, such as railways, telegraphs and other works and undertakings connecting the Province with any other or others of the Provinces, said that it would seem to follow that the Bell Telephone Company acquired from the Legislature of Canada all that was necessary to enable it to carry on its business in every Province of the Dominion and that no provincial Legislature was or is competent to interfere with its operations as authorized by the Parliament of Canada.

It is said in the passage above quoted from the judgment of the Chief Justice of Manitoba that companies incorporated by the Dominion Government are subject to provincial laws of general application, such as those relating to mortmain. This was decided in the case of trading and certain other companies in *The Chaudière Gold Mining Company of Boston v. Desbarats et al.*[3], the company concerned in that matter being a foreign corporation but the statement apparently applying to both foreign and

[1] [1931] A.C. 310, [1931] 2 D.L.R. 1, 55 C.C.C. 241, [1931] 1 W.W.R. 552.
[2] [1905] A.C. 52.
[3] (1873), L.R. 5 P.C. 277.

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domestic corporations. In the judgment of Viscount Haldane in *Great West Saddlery Company, Limited v. The King, supra,* at p. 100, it is said that when a company has been incorporated with powers to trade in any Province it may be subject to provincial laws of general application, such as laws imposing taxes or relating to mortmain.

No one would dispute the fact that the railway companies in question are subject to municipal taxes levied under the powers vested in the Province by head 2 of s. 92 except where such right has been taken away, as in the case of the Canadian Pacific Railway, in respect of part of its operations under the section of the contract between the railway and the Dominion Government, considered by this Court in *Canadian Pacific Railway Company v. The Attorney General for Saskatchewan*[1]. I think, however, no one would contend that any provincial statute of mortmain would apply to lands purchased or taken by such a railway for the purposes of its undertaking in the Province under the powers conferred by its Act of incorporation or by the *Railway Act*. The reason, of course, is that the legislation authorizing the railway undertaking falling within the exclusive jurisdiction of Parliament, the provincial statute would have no application.

I do not think that the decision in *Canadian Pacific Railway Company v. The Parish of Notre Dame de Bonsecours,* above referred to, lends any support to the respondents' contention. In that case, Lord Watson, after pointing out that it was not a matter of dispute that, by virtue of the sections of the *British North America Act* that we are here considering, Parliament had the sole right of legislating with reference to the appellant's railway and that any attempt by the Legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant's authorized works would be *ultra vires,* said that the regulation under consideration was merely a piece of municipal legislation providing that in the event of the ditch becoming choked with silt or rubbish, so as to cause overflow

[1] [1951] S.C.R. 190, 67 C.R.T.C. 203, [1951] 1 D.L.R. 721, [1951] C.T.C. 26, affirmed *sub nom. Attorney-General of Saskatchewan v. Canadian Pacific Railway Company,* [1953] A.C. 594, [1953] 3 D.L.R. 785, [1953] C.T.C. 281, 10 W.W.R. (N.S.) 220.

and injury to other property in the parish, it should be cleaned out by the appellant company. In the same year, in *Madden et al.* v. *Nelson and Fort Sheppard Railway Company*[1], the Judicial Committee decided that legislation of the Province of British Columbia requiring a Dominion railway company to fence its right-of-way was *ultra vires*. These decisions, other than their reaffirmation of the jurisdiction of Parliament, do not appear to decide anything which affects the present question.

In *Bank of Toronto v. Lambe, supra,* the validity of the legislation imposing taxation upon the bank was upheld on the ground that it fell within head 2 of s. 92, being direct taxation within the Province in order to the raising of a revenue for provincial purposes.

In *The Citizens Insurance Company of Canada v. Parsons, supra,* the principal question to be determined was as to the right of the Province of Ontario to prescribe statutory conditions in contracts of insurance issued within the Province. There was, however, a general discussion of the scope of head 13 of s. 92 and of head 2 of s. 91, and it was in the course of this discussion that the passage from the judgment at p. 110, quoted in the judgment of the Court of Appeal, appears. It was there said that the expression "property and civil rights" was sufficiently large to embrace, in its fair and ordinary meaning, rights arising from contract, and that such rights are not included in express terms in any of the enumerated classes of subjects in s. 91. This, however, does not mean that the Province may prescribe the form of contract or the obligations arising from contracts of corporations, such as banks or railway companies, or the rights of persons under bills of exchange. These are subject-matters in relation to which the exclusive jurisdiction to legislate is vested in Parliament. If the affirmative of the contrary proposition could be sustained, *Tennant v. The Union Bank of Canada*[2], *Grand Trunk Railway Company of Canada v. Attorney-General of Canada*[3] (the "contracting-out" case), and *Attorney-General for Canada v. Attorney-General for Quebec*[4] (the "bank deposits" case) would have been otherwise decided. If it were true that as rights arising from contract are civil rights this was decisive in all cases, then

[1] [1899] A.C. 626.
[2] [1894] A.C. 31, 5 Cart. 244.
[3] [1907] A.C. 65, 7 C.R.C. 472.
[4] [1947] A.C. 33, [1947] 1 D.L.R. 81, [1946] 3 W.W.R. 659.

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many other sections of the *Railway Act,* such as s. 353 authorizing the Board of Transport Commissioners to approve contracts limiting the carriers' liability, and ss. 370 and 380 giving special powers in respect of contracts of express and telegraph companies, would be *ultra vires.*

The *John Deere Plow* and *Great West Saddlery* cases, *supra,* may be considered together, both dealing with the right of provincial Legislatures to require companies incorporated under the *Companies Act* of Canada (which does not apply to companies for the construction or working of railways) to obtain a licence as a condition precedent to carrying on business. Other than certain passages in the judgment delivered by Viscount Haldane in these matters, in which general statements are made as to the powers of Provinces to tax such companies and to subject them to provincial laws of general application, the subject-matter appears to me to bear no similarity to the one we are discussing. In the passage from the judgment in the *Great West Saddlery* case, it was said that companies so incorporated may be subject to provincial laws as to the forms of contract. The companies referred to were not railway companies or banks. It cannot surely be said that this statement was intended to qualify what had been decided by the Judicial Committee in *Tennant's* case and the "contracting-out" case.

In my opinion, the cases relied upon do not support the contention that s. 198 is *ultra vires* either in whole or in part.

The sole matter to be determined is as to whether the true nature and character of the enactment is in relation to railways of the nature referred to in head 10 of s. 92.

The effect of ss. 197 to 201, both inclusive, of the *Railway Act* is to ensure that when the railway is carried over lands which contain mines or minerals the interest of the owner of such minerals, the travelling public and the railway company are adequately protected. Section 197 provides that, without the authority of the Board of Transport Commissioners, the line may not be laid out in a manner calculated to obstruct or injuriously affect the operation of an existing mine. Section 198 defines the only manner in which a railway company may acquire title to the mines and minerals existing in lands either purchased or taken by

compulsion under the power of expropriation given by the Act, except such as are necessary to be dug, carried away or used in the construction of the works. The company is permitted to acquire such mines and minerals only by treaty with the owner and by a conveyance which expressly names them, with the exception above noted. The section in effect limits the power and capacity of the company to acquire mines and minerals, with this exception, in any other manner.

If the removal of the minerals lying under the railway or within 40 yards therefrom, which the railway has not acquired by express purchase, is proposed, the owner may apply to the Board for leave to do so and the Board, under the powers given to it by s. 199, may prescribe the measures to be taken for the protection and safety of the public. Section 200, dealing with cases where the owner of the minerals retains them, gives the Board power to direct the railway company, *inter alia,* to pay to such owner compensation by reason of the severance by the railway of the lands lying over the mines or because working them is prevented or interrupted. Where the railway company is apprehensive that the mine is being worked in a manner which may endanger the safety of the right-of-way, s. 201 enables the Board to direct that the premises may be examined by the railway company and use made of any apparatus in the mine to make such examination effective.

These sections deal with the same subject-matter as ss. 77 to 85, both inclusive, of the *Railway Clauses Consolidation Act,* 1845 (Imp.), c. 20, though the manner in which the matter is dealt with is not identical. This is, in my opinion, clearly legislation in relation to railways and, that being so, the fact that the portion of s. 198 limiting the manner in which railway companies to which the Act applies may acquire mines and minerals, conflicts with the sections of *The Real Property Act* and *The Law of Property Act* above referred to, is of no moment. The whole subject-matter is removed from the provincial jurisdiction, as pointed out by Lord Atkin in the *Proprietary Articles Trade Association* case above referred to.

The true view of the matter is, in my opinion, that the sections of the provincial statutes referred to have no application to conveyances made to the railways. If it

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could be said that the effect of the portion of s. 198 which is attacked is not merely to limit the capacity of the railway company to acquire mines and minerals except in a defined manner, but is rather legislation dealing with the manner in which titles to land may be conveyed to a railway company within Manitoba and the construction to be placed upon conveyances in the statutory form prescribed by *The Real Property Act* or complying with *The Law of Property Act,* the legislation could not, in my opinion, be successfully attacked. In *Tennant's* case, *supra,* it was asserted by the appellant that as the warehouse receipts taken by the Union Bank did not comply with the *Mercantile Amendment Act* of Ontario, the security taken as authorized by the *Bank Act* was unenforceable. Lord Watson, delivering the judgment of the Judicial Committee, said in part (p. 45):

> Statutory regulations with respect to the form and legal effect, in Ontario, of warehouse receipts and other negotiable documents, which pass the property of goods without delivery, unquestionably relate to property and civil rights in that province; and the objection taken by the appellant to the provisions of the Bank Act would be unanswerable if it could be shewn that, by the Act of 1867, the Parliament of Canada is absolutely debarred from trenching to any extent upon the matters assigned to the provincial legislature by sect. 92. But sect. 91 expressly declares that, "notwithstanding anything in this Act," the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority.

In the "contracting-out" case, a provision of the *Railway Act* which prohibited a railway from contracting out from the liability to pay damages for personal injury to its servants, was attacked as being legislation as to civil rights within head 13 of s. 92. It had been held in this Court, and that view was sustained in the Judicial Committee, that this was truly railway legislation and that it was beyond provincial powers to interfere. The case is merely an illustration of the power of Parliament to regulate the contracts of the railway companies, as has been done in the other sections of the present Act which I have drawn attention to above.

In *Attorney-General for Canada v. Attorney General for Quebec,* the "bank deposits" case, to which I have referred, a statute of the Province of Quebec which declared that deposits of money and securities which have not been for 30 years or more the subject of any operation or claim by

the persons entitled thereto are to be deemed vacant property and belonging to His Majesty in right of the Province, was held to be *ultra vires*. It was said in support of the legislation that it was simply one defining the obligation of the bank under its contract with its depositor and thus to be supported under head 13 as dealing with civil rights within the Province. This argument, which bears a close resemblance to the argument advanced by the respondents in the present case, was rejected. Lord Porter, who delivered the judgment of the Judicial Committee, after referring to what had been said by Lord Watson in *Tennant's* case in the passage which I have referred to, said that the main object and effect of the Provincial Act was to invade the field of banking and it was, accordingly, *ultra vires*.

On the argument before us, counsel appearing for the Canadian Pacific Railway Company did not seek to support the finding of the Court of Appeal that s. 198 did not apply to the land contracts and transactions of that company and confined their argument to the issue as to whether the section was *ultra vires*.

The ground upon which the Court proceeded in making this finding may be stated briefly. Section 17 of the letters patent incorporating the company, which constituted the charter referred to in s. 2 of the Act (44 Vict., c. 1), and which was declared to have force and effect as if it were an Act of Parliament, provided that the *Consolidated Railway Act*, 1879, in so far as the provisions of the same were applicable to the undertaking and not inconsistent with or contrary to its provisions, "is hereby incorporated herewith".

Sections 7, 8 and 9 of the *Consolidated Railway Act* referred to, contained provisions for the purchase, use and expropriation of lands required for the right-of-way and other railway uses and for determining the compensation payable, but the Act did not contain any provisions similar to s. 198. Considering that the charter of the railway company was constituted by the letters patent, the special Act and the *Railway Act* of 1879, and that the subject of purchasing and taking lands for the undertaking had been dealt with as indicated, the learned Chief Justice and the other members of the Court considered that the section in the present Act was inapplicable.

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In my opinion, the matter is decided adversely to this opinion by the provisions of s. 20(*b*) of the *Interpretation Act*, R.S.C. 1952, c. 158, which, so far as it need be considered, reads:

> 20. Whenever any Act or amendment is repealed, and other provisions are substituted by way of amendment, revision or consolidation, . . .
>
> (*b*) any reference in any unrepealed Act . . . to such repealed Act or enactment, shall, as regards any subsequent transaction, matter or thing, be held and construed to be a reference to the provisions of the substituted Act or enactment relating to the same subject-matter as such repealed Act or enactment; and, if there is no provision in the substituted Act or enactment relating to the same subject-matter, the repealed Act or enactment shall stand good, and be read and construed as unrepealed in so far, and in so far only, as is necessary to support, maintain or give effect to such unrepealed Act . . .

It is the *Railway Act* of Canada as it is in force from time to time that applies to the undertaking of the Canadian Pacific Railway Company. The exact point was considered by the full court of British Columbia in *Northern Counties Investment Trust Ltd. v. Canadian Pacific Railway Company*[1], and correctly decided, in my opinion. I refer to the judgment of Clement J. with whom Hunter C.J. agreed.

Counsel for the Canadian National Railways, however, supported the opinion of the Court of Appeal which, in the case of that railway, was based upon the ground that s. 16 of the *Canadian National Railways Act*, as it now appears as R.S.C. 1952, c. 40, excludes such provisions of the *Railway Act* as are inconsistent with that Act and such as are inconsistent with the provisions of the *Expropriation Act*, that lands expropriated by the railway are taken under the provisions of the *Expropriation Act* and that the latter Act contains no such restriction as is imposed by s. 198 of the *Railway Act*. It was pointed out that s. 3 of the *Railway Act* also provides that where its provisions and any special Act passed by Parliament relate to the same subject-matter, the provisions of the special Act, so far as it is necessary to give effect to it, shall govern.

The order in council referring the four questions to the Court of Appeal states that:

> . . . Canadian Pacific Railway Company and Canadian National Railways (including "National Railways" as defined in the Canadian National Railways Capital Revision Act, R.S.C. 1952, Chap. 311) are undertakings which as railway companies are within the legislative authority of the Parliament of Canada;

[1] (1907), 13 B.C.R. 130.

and that each of the said companies has from time to time acquired lands in the various manners heretofore mentioned. Whether by the expression "Canadian National Railways" the order in council intended to adopt the meaning assigned to that expression in s. 2(*b*) of the Act, as it appears in R.S.C. 1952, c. 40, is not made clear. If it was so intended, it includes not merely the Canadian National Railway Company which first was brought into existence by c. 13 of the statutes of 1919, but all companies mentioned or referred to in the schedule of the Act of 1952 and in the Act of incorporation. If this is the meaning intended, there is, in my opinion, no material before us to enable us to deal with the matter as it affects lands acquired since June 6, 1919, a situation, no doubt, attributable to the fact that the question as to the application of s. 198 to the two railway companies was not referred to the Court.

Counsel appearing on the argument before us have supplemented the information contained in the order in council by making available the Acts of incorporation of a large number of companies which have either been amalgamated with or whose operations are carried on or directed by the Canadian National Railway Company. A schedule to the Act of 1919 shows that there were 31 companies embraced in what was referred to as the Canadian Northern System and a number of other subsidiary companies and, in respect of these, it was provided by s. 11 that by order in council the management and operation of any of them might be entrusted to the Canadian National Railway Company or its properties vested in His Majesty.

We are concerned only with the companies operating in Manitoba which became part of that system and these appear to be the Canadian Northern Railway Company and the Grand Trunk Pacific Railway Company. The inquiry cannot stop there as the Canadian Northern Railway Company which was incorporated by c. 57 of the statutes of 1899 was by s. 1 of its Act of incorporation vested with all the corporate powers, assets and property of the Winnipeg Great Northern Railway Company and the Lake Manitoba Railway and Canal Company. These latter two companies had been incorporated by Acts of Parliament whose terms must be considered if, as I think we should assume, the

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Canadian Northern Railway Company is still in existence and entitled to exercise its corporate powers.

The Winnipeg Great Northern Railway Company, referred to in the schedule to the Act of incorporation of the Canadian Northern Railway Company, was incorporated by c. 59 of the statutes of Canada of 1880 under the name of "The Winnipeg and Hudson's Bay Railway and Steamship Company". By c. 81 of the statutes of 1887, its name was changed to "Winnipeg and Hudson Bay Railway Company" and its powers were further defined. By c. 94 of the statutes of 1894, the name was again changed to the "Winnipeg Great Northern Railway Company".

The Lake Manitoba Railway and Canal Company was incorporated by c. 41 of the statutes of Canada of 1892 and further powers, which need not be considered here, were vested in it by c. 52 of the statutes of 1895 and c. 70 of the statutes of 1898.

The Canadian Northern Railway Company, as declared by its statute of incorporation, is an "amalgamation" of these two companies. The Winnipeg Great Northern Railway Company was authorized by s. 3 of its Act, as amended in 1887, to build the railway authorized "under the provisions of *'The Railway Act'* ". The reference in s. 2 of the Act of 1880 was to the provisions of *"The Consolidated Railway Act,* 1879". The only express mention of the acquisition of land was in ss. 6 and 22 of the 1887 Act. The former authorized the company to take gravel, stone and other material required for construction from public land and to appropriate for the use of the company a greater extent of land for stations, workshops and other buildings than the breadth and quantity mentioned in the *Railway Act,* upon certain conditions. The latter authorized the company to receive, in aid of the construction and maintenance of the railway, grants of land and authorized the purchase of lands.

The only power given expressely to the Lake Manitoba Railway and Canal Company to acquire lands is for the erection of elevators, warehouses, docks and piers and other works designed for the use of the steam and other vessels plying upon the lakes, rivers and canals in the territory which the railway was designed to serve. The proposed railway was declared to be a work for the general advantage

of Canada and any powers of taking or purchasing lands were derived from the *Railway Act*.

The Grand Trunk Pacific Railway Company was incorporated by c. 122 of the statutes of 1903. Express power to purchase or otherwise acquire lands for docks, warehouses, offices and other buildings is to be found in s. 16 and, by subs. (2), ss. 107 to 111, inclusive, of the *Railway Act* were stated to apply to the subject-matter of the subsection. Otherwise, the power of the company to acquire and hold lands and to expropriate lands was to be found in the *Railway Act,* 1888, c. 29.

In my opinion, nothing to be found in the Acts incorporating the Winnipeg Great Northern Railway Company, the Lake Manitoba Railway and Canal Company, the Canadian Northern Railway Company or the Grand Trunk Pacific Railway Company, or in s. 3 of the *Railway Act*, excludes the application of that Act, as enacted from time to time, to the undertakings of those companies in so far as it relates to the subject-matter of s. 198. Section 20(*b*) of the *Interpretation Act,* in my opinion, declares this to be the law.

The Canadian National Railway Company was not in existence prior to June 6, 1919, and there is no evidence as to whether any of the lands acquired by the Grand Trunk Pacific Railway Company and the Canadian Northern Railway Company or by the amalgamated companies mentioned have been acquired by it. Different considerations apply to lands acquired by the Canadian National Railway Company by purchase or expropriation since, by s. 13 of its Act of incorporation, the provisions of the *Railway Act* as to the taking or using of lands were declared inapplicable and all of the provisions of the *Expropriation Act,* except where inconsistent with the Act of incorporation, were made to apply, *mutatis mutandis,* to the company and its undertakings. On the argument addressed to us on behalf of the Attorney General of Canada, it was conceded that between June 6, 1919, and June 14, 1929, when a change was made in what had been s. 13 of the Act of incorporation by s. 17 of c. 10 of the statutes of 1929, s. 198 did not apply to the Canadian National Railway Company.

In my opinion, we have not sufficient information to enable us to express any opinion upon the question as to

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whether s. 198 applies in respect of lands acquired by either the Canadian National Railway Company or any of the companies in the Canadian Northern Railway System since June 6, 1919.

In these circumstances, I feel that any opinion expressed might be construed to the detriment of persons not represented before us. I, accordingly, refrain from expressing any opinion in respect to lands acquired after that date.

Questions 2 and 3 may be conveniently considered together and read as follows:

2. When title to land without exception of mines and minerals is or was acquired by one of said railway companies without any proceedings being commenced under the compulsory powers given by the Railway Act but as a result of agreement made with the owner of such land who also owns or did own the mines and minerals therein and such mines and minerals are or were not excepted or expressly named in the transfer or deed or conveyance of the land, does such railway company own such mines and minerals when that title is or was acquired

(*a*) pursuant to said The Real Property Act, or

(*b*) by deed to which said The Law of Property Act applies?

3. When title to land without exception of mines and minerals is or was acquired by one of said railway companies by purchase after commencement but before completion of proceedings under the compulsory powers given by the Railway Act from the owner of such land who also owns or did own the mines and minerals therein and such mines and minerals are or were not excepted or expressly named in the transfer or deed or conveyance of the land, does such railway company own such mines and minerals when that title is or was acquired

(*a*) pursuant to said The Real Property Act, or

(*b*) by deed to which said The Law of Property Act applies?

While stated without limitation, the questions obviously refer to lands acquired on and after February 1, 1904, when s. 198 came into force.

Subject to the exception above noted of such mines or minerals as are "necessary to be dug, carried away or used in the construction of the works", the conveyances, whether by transfer or by deed, are, in my opinion, to be construed as excepting all such mines and minerals. I consider that the fact that the conveyance may be made after the commencement of expropriation proceedings does not affect the matter.

Question 4 reads:

4. When title to or ownership of land without exception of mines and minerals is or has been taken by one of said railway companies under the compulsory powers given by the Railway Act from the owner of such land who also owns or did own the mines and minerals therein and such

mines and minerals are or were not excepted or expressly named in the conveyance of the land, does such railway company own such mines and minerals when that title or ownership is or was acquired

(*a*) under said The Real Property Act, or

(*b*) by virtue of the registration of a vesting order or other authorized evidence of the company acquiring ownership under The Registry Act, Revised Statutes of Manitoba, 1954, Chapter 223 or the Registry Act for the said Province heretofore from time to time in force within the Province?

The meaning of part of this question is not entirely clear. Where lands are expropriated under the *Railway Act,* while a conveyance may be given by the owner after the compensation is determined and the award of the arbitrators made, he is not required by the Act to give one and none is necessary. Section 236 of the *Railway Act* provides for payment of the compensation into court with an authentic copy of the award of the arbitrators and, if there is no conveyance, such award is deemed to be the title of the company to the land taken. If, after the award, the owner of the land taken gives a conveyance, the position, in my opinion, is no different from that referred to in the third question. Clause (*b*) of question 4 refers to title acquired by virtue of the registration of a vesting order. There is no provision in the *Railway Act* or in *The Registry Act* for making such an order. I, accordingly, assume that the vesting order referred to is one made professedly in exercise of the powers vested in the Court of Queen's Bench by s. 53 of *The Queen's Bench Act,* R.S.M. 1954, c. 52, after an award of the arbitrators appointed under the *Railway Act* has become effective, though I think that section to be inapplicable in such circumstances. It can, however, scarcely be suggested that the refusal of the former owner to execute a conveyance would enable a railway company to acquire minerals which it could not obtain by expropriation or by a voluntary conveyance under either the old or the new system.

I would allow the appeal and answer the four questions as follows:

Question 1: No.

Question 2: As to the Canadian Pacific Railway: No. As to the Canadian National Railway Company, as to the properties acquired by the Canadian Northern Railway Company and the two amalgamated companies and the

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Grand Trunk Pacific Railway Company between February 1, 1904 and June 6, 1919: No.

Question 3: The same answer as to Question 2.

Question 4: The same answer as to Question 2.

Appeal allowed.

Solicitor for the appellant: F. P. Varcoe, Ottawa.

Solicitor for the respondent Canadian Pacific Railway Company: H. M. Pickard, Winnipeg.

Solicitor for the respondent Canadian National Railways: W. T. Patterson, Winnipeg.

Solicitor for the Attorney-General for Ontario, intervenant: C. R. Magone, Toronto.

Solicitors for Imperial Oil Limited, intervenant: Aikins, MacAulay & Company, Winnipeg.

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*Oct. 17, 18, 21

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Feb. 11

MIDCON OIL & GAS LIMITED (*Plaintiff*) APPELLANT;

AND

NEW BRITISH DOMINION OIL COMPANY LIMITED AND THOMAS L. BROOK (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Trusts and trustees—Constructive trust—Principal and agent—Whether agent has made profit resulting from relationship.

Agency—Whether relationship exists—Profit made by agent arising from relationship—Whether principal entitled to share in profit.

M. Co. and N.B. Co. entered into an agreement for the development of petroleum and allied rights beneficially owned by N.B. Co. The agreement provided that if oil or gas was found N.B. Co. should have the right to act as "operator". Natural gas in large quantities was found and N.B. Co. elected to exercise its right to act as operator.

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

In order to obtain a market for the natural gas found, N.B. Co., with other interests, caused to be incorporated a new company for the manufacture of chemical fertilizers. A large block of shares in this company was issued to N.B. Co. and the company, having built its plant, entered into a contract to buy a large part of the output of the field to which the agreement with M. Co. related. N.B. Co. and M. Co. together caused to be incorporated another company for the construction of a pipe-line for the conveyance of the gas from the field to the chemical company's plant and to the city of Medicine Hat, which had also agreed to buy part of the gas.

M. Co. claimed that it was entitled, on payment of its share of the cost, to one-half of the shares in the chemical company issued to N.B. Co.

Held (Rand and Cartwright JJ. dissenting): M. Co. could not succeed. The agreement expressly provided that it should not create any agency or partnership between the parties and nothing that was done pursuant to the agreement gave rise to any fiduciary relationship that would require N.B. Co. to account to M. Co. for the profit made by it from the shares of the chemical company. Its only duty was to act in good faith towards M. Co. in the negotiations for and in the sale of the gas developed from the field. *Keech v. Sandford* (1726), Sel. Cas. Ch. 61; *Ex parte James* (1803), 8 Ves. 337, distinguished.

Even if there was some fiduciary relationship in other respects, the trial judge had expressly accepted evidence that N.B. Co. obtained its shares in the chemical company simply because it was the primary promoter of that company and not by reason of the existence of the field or of the fact that it was the operator under the provisions of the agreement.

Per Rand and Cartwright JJ., *dissenting*: It was the making of the agreement between the two companies and the development of gas under that agreement that made it possible for N.B. Co. to seek a means of profiting from the sale of the gas. Without the interest in the gas, there would have been no opening for the production of fertilizer. In these circumstances, it must be held that N.B. Co. participated in the promotion of the chemical company in its capacity as operator under the agreement, and that it must therefore account to M. Co. for its resulting profit.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], affirming a judgment of Primrose J.[2] Appeal dismissed, Rand and Cartwright JJ. dissenting.

W. B. Williston, Q.C., and *H. C. Kerr*, for the appellant.

R. A. MacKimmie, Q.C., for the respondents.

[1] (1957), 21 W.W.R. 229, 8 D.L.R. (2d) 369.

[2] (1956), 19 W.W.R. 317.

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The judgment of Kerwin C.J. and Taschereau and Locke JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta[1] dismissing the appeal of the present appellant, the plaintiff in the action, from a judgment of Primrose J.[2] which dismissed the action.

The facts disclosed by the evidence are as follows: On May 22, 1950, the Department of Mines and Minerals of the Province of Alberta, by a document referred to as a "reservation of petroleum and natural gas rights", granted to British Dominion Drilling Company Limited the right, *inter alia*, to drill wells, subject to the provisions of *The Mines and Minerals Act* of the Province, now R.S.A. 1955, c. 204, and to the regulations respecting drilling and production operations of oil and natural gas wells in defined areas, of land situate in township 6, range 7; township 6, range 8; township 6, range 9, and township 7, range 9, all west of the fourth meridian. Such reservation was accepted and its terms were agreed to by the drilling company. By an instrument in writing dated July 31, 1950, British Dominion Drilling Company Limited acknowledged that it held the said reservation in trust for the respondent company and agreed to deal with it in such manner as might be directed by the latter company and to perform certain services as trustee, at its expense.

On March 1, 1951, the appellant and the respondent company entered into the agreement upon which the present action was brought. In view of the nature of the appellant's claim, it is necessary to examine its terms in detail. For the sake of brevity the parties were referred to as "Mid Continent"* and "New British", respectively. After reciting the reservation granted as aforesaid to British Dominion Drilling Company Limited and that it was held by that company upon terms that it would hold any and all leases from time to time issued pursuant thereto in trust for the respondent company, the agreement

[1] (1957), 21 W.W.R. 229, 8 D.L.R. (2d) 369.

[2] (1956), 19 W.W.R. 317.

*The name of the appellant company at the time of this agreement was "Mid Continent Oil & Gas Limited".—ED.

stated that the appellant

> desires to join with New British in the exploration of the Area of Joint Operations for petroleum and natural gas and related hydrocarbons, and in the event the same are discovered, to join in the development and production of any or all of said substances

upon the terms thereinafter defined. After defining the "area of joint operations" by reference to an attached map, the agreement provided that the appellant should drill or cause to be drilled at its expense one test well in lsd. 4, section 25, township 6, range 8, such well to be drilled to "contract depth" as defined, provided that if a show of oil or gas should be encountered at a lesser depth the drilling might, by mutual consent, be discontinued and the well completed at a lesser depth as agreed upon. In such event, all well-sinking costs and production-completion costs were to be borne in equal proportions by the parties and the appellant was required forthwith to commence the drilling of another well to contract depth.

The appellant further agreed to enter into a contract for the drilling of the test well with a responsible drilling contractor and to assume all responsibility for providing, as required, drilling equipment and drilling casing, and the respondent agreed to act as the "operating party", as thereinafter defined, during the drilling of the test well at an agreed fee for supervision and management. Upon completion of the test well, the respondent was obligated to cause to be assigned to the appellant an undivided half interest of the rights of New British in the reservation. A further term required both parties, in the event of their acquiring any further petroleum and natural gas rights in any lands within the area of joint operations in which the other party had not an interest, to offer to the other an undivided half interest upon payment of one-half the cost of acquisition.

It was further provided that after the completion of the test well the respondent company should have the right to act as operator and to continue as such from year to year until it should give the appellant 30 days' notice of its desire to relinquish such right. Upon failure of the respondent company to take over such duties or upon its relinquishing the same, the appellant was required to act

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as operator. After such completion, all development, production and operation costs, except as otherwise provided, were to be borne in equal proportions by the parties.

The duties of the operator were detailed at length in paras. 8 and 15 of the agreement. Of the many provisions dealing with the matter, the following, contained in para. 15, require consideration: subpara. (a) declared that the operator, though one of the parties to the agreement, should be deemed to act as an independent contractor and that all claims and liabilities arising out of the operations should be a joint responsibility of the parties unless otherwise expressly provided for: subpara. (b) provided that, subject to the approval of the other party with respect to the location and drilling of wells, the operator should have full charge and control of all leases and reservations and other petroleum and natural gas rights but should confer with the representative of the other party in all matters pertaining to the drilling of new wells, the depth to which they were to be dug, the abandonment of any such wells, and any other matters of "capital or serious consequence affecting the rights of the respective parties therein". By subpara. (g) the operator was required to keep at its offices in Calgary full and accurate records of its operations under the agreement and, by subpara. (h), to render to the other party a statement showing details of the expenditures made on behalf of the parties.

Paragraph 16 reads:

> On or before the twentieth (20th) day of each month Operator shall render to the Non-operator a full and complete accounting of all oil, gas, gasoline and other related hydrocarbons produced and saved during the preceding month after deducting royalties and oil and gas consumed in operations hereunder, and expenses. Non-operator hereto shall not be entitled to take in kind its share of production or make arrangements for the share of production or make arrangements for the disposal thereof.

Paragraph 20 declared that no agency or partnership relationship was created by or between the parties by the execution of the agreement or by its provisions.

By para. 21 it was declared that the term of the agreement should be from its date until entire abandonment by mutual consent or until one of the parties should wholly withdraw in the manner provided, or so long as commercial production of oil or gas was being obtained.

A schedule to the agreement, referred to as "Accounting Procedure", defined in precise detail the purposes for which expenditures might be made by the operator for the development and operation of the enterprise. The word "operator", as used in the schedule, was described as meaning the party designated to conduct the development and operation of the leased premises for the joint account. The expenditures authorized relate entirely to such as would be incurred for drilling and operating oil or gas wells in the area of joint operations and it contains no reference to outside operations looking to the sale of such oil or gas, if discovered.

As a result of the operations carried on by the parties under this agreement, natural gas in large quantities was found in the area of the joint operations and five wells were drilled. The evidence does not indicate that any oil or other mineral substance was recovered during the drilling of these wells or that any gas was sold until the contracts hereinafter mentioned were entered into. The field is situated some 45 miles southwest of Medicine Hat and became known as the Etzikom field.

While doubt upon the matter seems to have arisen at a later date, it was apparently assumed by the respondent that, as the operator under the agreement, it had power to sell the gas produced from the field upon terms to be agreed upon with the appellant.

The respondent Brook was at all relevant times the president of the respondent company, and the only evidence tendered on behalf of the appellant consisted of the documents and the admissions made by him upon an examination for discovery. According to Brook, he understood that under the agreement it was the duty of his company to endeavour to find a market for the gas. It was, of course, manifestly in his company's interest to do so. There was no market in the vicinity and he was unable to arrange for the sale of the gas to companies exporting gas to the United States or to the Canadian Western Natural Gas Company or Trans Canada Pipe Line Company Ltd. at a price which would be profitable. As a map of the oil and gas fields of Alberta filed in evidence shows, there were at the relevant times and now are many gas fields capable of large production in the Province of

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Alberta. The appellant did not call any evidence that suggests, and it is not suggested, that there was at the time in question or thereafter any profitable outlet for the large reserves of gas discovered in the Etzikom field, and the only offer received for the purchase of the rights of the parties in the leases obtained was in an insignificant amount. In these circumstances, Brook, in his own words, which were made part of the plaintiff's case, "promoted a chemical plant" which has since been established at Medicine Hat, thus creating a market for almost half of the estimated reserves of gas in the Etzikom field, and also enabling the negotiation of a profitable contract for the sale of gas to the City of Medicine Hat.

It appears that in January 1954 an officer of the Consolidated Mining and Smelting Co. Ltd., which manufactures nitrogenous fertilizer in Calgary and elsewhere, suggested to Brook that a fertilizer plant might be located in the southern part of the Province more readily available to the prairie markets and the northern and north-western markets in the United States. For the manufacture of ammonium nitrate and ammonium phosphate which was contemplated, and of anhydrous ammonia, a basic ingredient of these fertilizers, and the production of nitric and sulphuric acid, phosphate rock, sulphur and natural gas were required in large quantities. Phosphate rock was readily available from Idaho and sulphur from gas fields not far distant producing sour gas. The Etzikom field, as well as other fields closer to Medicine Hat, offered a supply of the required natural gas. Brook, apparently without reference to the appellant company, through Frank McMahon of Calgary was introduced to an engineering firm in New York, Ford, Bacon, Davis Inc., by whom he was brought into contact with an American company, Commercial Solvents Corporation, engaged in the production of fertilizer and other chemicals in the United States. In the result, in association with these parties and with a firm of American underwriters, Northwest Nitro-Chemicals Ltd. was incorporated under the provisions of *The Companies Act*, now R.S.A. 1955, c. 53, with the necessary powers for the establishment of a fertilizer plant upon a site to be purchased in Medicine Hat.

The company was incorporated with an authorized capital of 5,000,000 common shares of the par value of 1 c. and 10,000 preferred shares of the par value of $100. As the prospectus filed with the Registrar of Companies for the Province shows, very large sums of money were required for the acquisition of a site and the construction of the chemical plant at Medicine Hat. Part of the required capital was provided by the purchase by Commercial Solvents Corporation and the respondent company of preferred shares, the respondent company purchasing 3,330 of such shares at par. Of the common shares, 2,600,000 were allotted at par to Commercial Solvents Corporation, the underwriters Eastman, Dillon and Company, Ford, Bacon & Davis Inc., the respondent company and Frank McMahon who had taken part in the promotion of the company. Of these shares, the respondent company purchased 749,998.

The underwriters, following the filing of the prospectus, offered to the public $8,500,000 of debentures and 850,000 shares of common stock of the chemical company, and the company agreed to sell to a Canadian bank bonds of a par value of $12,000,000 secured by a first mortgage on the undertaking. With the funds so subscribed by the respondent company and others and the moneys raised in this manner, the chemical plant was established at Medicine Hat. It is apparent that, at the time of the public issue in August 1955, the prospects of the company were favourably regarded as the common shares were selling at an amount in excess of $1.50 and, at the time of the trial, were quoted on the market at a higher figure.

According to Brook, in order to justify the building of a gas pipe-line to convey the gas to the chemical company's plant, it was necessary to procure some other outlet for part of the available supply in the Etzikom field. There were other available gas-fields closer to Medicine Hat than the Etzikom field, and those promoting the Northwest Chemical company were approached by those controlling one of these fields with offers. Brook, both in the interest of his own company and of the plaintiff, wished to obtain a firm contract from the Northwest company and was able to do so at a price satisfactory to the plaintiff and to the respondent company, conditional upon the construction

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of the necessary pipe-line. After lengthy negotiations, he was successful in negotiating a contract for the sale of part of the gas from the Etzikom field to the City of Medicine Hat. With two contracts calling for the delivery of gas over a long period of years thus secured, the respondent company caused to be incorporated South Alberta Pipe Lines Ltd. under *The Companies Act of Alberta,* the shares of this company being subscribed equally by the plaintiff and the respondent company and, following this, the respondent company, with the approval and consent of the plaintiff, entered into an agreement with the South Alberta company defining the terms upon which it would transport natural gas from the Etzikom field to the premises of the chemical company at Medicine Hat and to the city. It is the only possible inference to be drawn from the evidence that it was due to the efforts of Brook and the fact that he was one of the promoters and his company a large shareholder of the chemical company that these contracts for the sale of the gas were obtained.

It is the case for the appellant that in selling or endeavouring to sell natural gas from the Etzikom field the respondent company stood in a fiduciary relationship to the appellant and that, as the control of the sale of the gas enabled the respondent company to obtain its share interest in the chemical company, that interest is held on behalf of the two contracting parties and, accordingly, on payment of one-half the cost of the purchase of the common and preferred shares, the appellant is entitled to a conveyance of one-half of the number subscribed for and allotted to the respondent company. As the statement of claim puts it,

> the corporate Defendant has gained advantage by availing itself of its character and position as operator and that the advantage gained is held by the corporate Defendant in part at least for the benefit of the Plaintiff.

While the provisions of the agreement are most explicit in defining the duties of the operator, they are not clear as to what they were in regard to the disposing of any oil or gas discovered. The position of the parties, following the discovery of natural gas in quantities, appears to be that of tenants in common of the leases obtained from the Province and of the minerals, including natural gas in and under the lands so leased. There is no fiduciary relationship

between tenants in common of real estate as such, a question which must be taken as settled by the judgment of the House of Lords in *Kennedy v. De Trafford et al.*[1] If, therefore, a fiduciary relationship existed between these parties, it resulted either from the terms of the agreement, or from what was done pursuant to its terms.

While para. 11 provides that after the completion of the test well the respondent company should have the right thereafter to act as operator, that clause by its concluding sentence refers to an operating program for the further exploration and development of the area of joint operations. Paragraph 15(b), however, declares that the operator shall have full charge and control of, *inter alia,* all leases and other petroleum and natural gas rights and para. 16 requires the operator to render an account of all gas produced and saved. Whatever meaning is to be attributed to the word "saved", this, at least, indicates that the respondent company was required to deal with the oil or gas produced for the joint account, and the reference in sched. B, defining the accountancy procedure, to the operator as the person designated to conduct the development and *operation* of the leased premises appears to me sufficient to cast upon the operator the duty of attempting to sell or otherwise turn to account any minerals discovered.

If this gave a right to sell the minerals, that right was not one which could be exercised by the operator otherwise than with the consent of the other party by reason of the further provisions of para. 15(b), which required it to confer with the designated representative of the other party regarding "any matters of capital or serious consequence affecting the rights of the respective parties therein", as to which agreement of both parties was required. It is also of importance to note, as declared by para 20, that the parties in terms provided that the relationship existing between them in carrying out the terms of the agreement was neither partnership nor that of principal and agent. Subparagraph (a), declaring that the operator was deemed to act as an independent contractor in discharging its duties, may have been intended to refer to the duties of superintending the drilling operations, purchasing equipment and discharging the obligations defined in such detail

[1] [1897] A.C. 180.

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other than the sale of any minerals discovered. If intended to extend to the last-named duty, it would appear to merely accentuate the fact that the parties did not intend that the operator was to act *qua* agent.

As the evidence shows, Brook understood the agreement to give to his company the right to negotiate for the sale of the gas in the Etzikom field. Obediently to its terms, he advised the appellant company of the endeavours made and of their failure. The appellant apparently had no suggestions to make as to marketing the gas and the only offer obtained for the sale of the rights of the parties in the field was a sum of $20,000, which was apparently regarded as too insignificant to require consideration.

I think there can be no doubt upon the evidence that the promotion of the chemical company by Brook was undertaken in the hope that such a plant would provide a possible market for the gas field in which his company held an undivided half interest. No one would have the hardihood to suggest that under the terms of the agreement there was any obligation resting upon the respondent company to provide a market or to venture its own money in an enterprise which might become a purchaser of gas from the field. The existence of natural gas in large quantities and of sulphur in southern Alberta and of the required phosphate rock in the adjoining State of Idaho obviously made possible, in the opinion of the experts consulted by Brook in New York, the establishment of a synthetic fertilizer plant in the area. It was, apparently, this state of affairs that enabled Brook, with the assistance of McMahon, to induce the engineering firm, Commercial Solvents Ltd., and the underwriters to join with them in forming the chemical company. That company was incorporated on August 9, 1954, but the location of the plant at Medicine Hat was not decided upon until other locations where natural gas was available had been considered by the Commercial Solvents corporation. Thus, as shown by Brook's evidence, a location near Okotoks, Alberta, was considered, there being near that place a field containing hydrogen-sulphide gas from which the sulphur required could be delivered at less expense than at a location such as Medicine Hat. A location at Lethbridge was also considered, the Solvents company spending in all over six

weeks in surveying suitable locations. Some ten miles distant from Medicine Hat, there was a much larger gas field containing gas suitable for the chemical company's operations which could have been obtained by the chemical company at a lesser cost than the terms ultimately agreed upon for gas from the Etzikom field. It was, in my opinion, the fact that the respondent company was one of the principal promoters of the enterprise and was willing to put a large amount of its own money into it, and the fact that by negotiating a contract for the sale of a substantial quantity of the gas in the field to the City of Medicine Hat it was possible to finance the building of a pipe-line, that made it possible to negotiate the favourable contract with the chemical company.

In the lengthy negotiations which resulted in the successful launching of the chemical company's undertaking, the appellant company took no part. At some unspecified time an official of the appellant company asked Brook if they could obtain some of the chemical company's stock at the price paid or to be paid by Brook, McMahon and the other promoters and was told that there was none available. Apparently the respondent company and the Commerical Solvents corporation had agreed long prior to the public offering of shares in August 1955 that they would subscribe for preferred shares in the amounts above mentioned. The actual share subscription by the respondent company was made on May 26, 1955, at which time it paid $333,000 in cash for the preferred shares and for the common shares 1 c. per share. It was only when this was done by the respondent company that the Commercial Solvents corporation purchased and paid for the preferred shares which it had agreed to take. The agreement for the sale of gas to the chemical company was made on June 3, 1955, and to the City of Medicine Hat on August 10, 1955, the latter being subject to compliance by the City with the requirements of *The City Act*, R.S.A. 1955, c. 42, both sales being approved by the appellant. It is of course, clear that the common shares issued to the promoters at the par value of 1 c. were saleable for very much more than this but, as I see the matter, that is an irrelevant consideration in determining the issues in the present case. The respondent company, McMahon, the engineering firm, the Solvents

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corporation and the underwriters who had formed the company, clearly had control of it and the decision to allot the common shares at this figure was, no doubt, regularly made. If anyone may complain of the allotment of these shares, it is not the appellant.

While the agreement expressly provided that the operator should not act *qua* agent, which I think should be taken to apply not merely to what was done regarding the development and operation of the property but in the sale or attempted sale of the minerals discovered, and while any such sale could be made only on terms approved by the other party, this does not mean that the respondent company did not owe to the appellant the duty to act in good faith in its efforts to sell. Thus, by way of illustration, had the respondent company, having in mind its own interest or prospective interest in the chemical company, negotiated a sale to that company at what was, to its knowledge, less than the fair value of the gas or less than could have been obtained, and without disclosing that fact induced the appellant to agree, I think an action for the resulting damage would lie. But nothing of that kind is suggested. On the contrary, the prices agreed to be paid by the chemical company and by the City were higher than could have been obtained elsewhere and the appellant, fully aware as to the facts, approved the making of the contracts.

The fact, however, that such a duty rested upon the respondent in its efforts to find a purchaser for the gas does not impose any liability, in my opinion, affecting the shares purchased by it under the above-mentioned circumstances. The principle upon which *Keech v. Sandford*[1] and *Ex parte James*[2] were decided has no application to a relationship such as here existed. The reason for the rule applied in these cases, as pointed out by Lord Redesdale L.C. in *Griffin* v. *Griffin*[3], is public policy. *Keech v. Sandford* was an infant's case and *Ex parte James* that of a purchase by a solicitor to the commission of a bankrupt's estate, where Lord Eldon, after stating the principle that had been applied in the earlier case, said in part (p. 345):

> This doctrine as to purchases by trustees, assignees, and persons having a confidential character, stands much more upon general principle than

[1] (1726), Sel. Cas. Ch. 61, 25 E.R. 223.
[2] (1803), 8 Ves. 337, 32 E.R. 385. [3] (1804), 1 Sch. & Lef. 352.

upon the circumstances of any individual case. It rests upon this; that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance; as no Court is equal to the examination and ascertainment of the truth in much the greater number of cases.

In the present case, however, the respondent was the owner of an undivided half interest as to which it was entitled to bargain on its own behalf, except to the extent that that right was limited by the agreement. The authority given to it by the appellant in respect of its interest was to bargain for a sale but not to make the sale without its approval and consent. I know of no principle, of either law or equity, which in these circumstances restricted in any manner the liberty of the respondent to take part in the promotion of a company and to acquire shares in that company, in the hope that it might become a possible purchaser of the gas or which could conceivably give any right to the appellant to participlate in the purchase or to recover damages, in the absence of bad faith on its part of the nature above suggested. It is impossible, in my opinion, to suggest that any reason of public policy requires the application of the rule in *Keech v. Sandford.*

The principle sought to be invoked on behalf of the appellant is stated in Bowstead on Agency, 11th ed. 1951, at p. 95 in these terms:

> Every agent must account to his principal for every benefit, and pay over to the principal every profit, acquired by him in the course of, or by means of, the agency,

without the principal's knowledge and consent.

It is this rule that was applied to the directors of a company in *Regal (Hastings), Ltd. v. Gulliver et al.*[1] There Lord Russell said in part (p. 389):

> . . . I am of opinion that the directors standing in a fiduciary relationship to Regal in regard to the exercise of their powers as directors, and having obtained these shares by reason and only by reason of the fact that they were directors of Regal and in the course of the execution of that office, are accountable for the profits which they have made out of them.

The authorities as to the liability of those acting in various fiduciary capacities were examined at length in the judgments delivered in that case. The above quotation, however, summarizes the ground upon which the judgment proceeded.

[1] [1942] 1 All E.R. 378.

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If, contrary to my opinion, it were the case that the duty cast upon the respondent company extended beyond that requiring it to act in good faith towards the appellant in the negotiations for and in the sale of the gas and was that of an agent or equivalent to that of a director of the company, I am nonetheless of the opinion that this action was properly dismissed.

At the trial, Brook swore that the respondent company did not get the shares in question in the chemical company by reason of the existence of the Etzikom field or of the fact that it was the operator under the provisions of the agreement, but obtained them simply due to the fact that it was the primary promoter of the chemical project. The learned trial judge said in terms that he accepted Brook's evidence. There is no evidence to the contrary. In the Appellate Division, Johnson J.A., with whom Ford J.A., now C.J.A., agreed, came to the same conclusion.

The evidence, in my opinion, clearly supports these findings of fact and I would dismiss this appeal with costs.

The judgment of Rand and Cartwright JJ. was delivered by

RAND J. (*dissenting*):—By an agreement dated March 1 and effective as of January 15, 1951, between the appellant and the respondent New British Dominion Oil Company, in these reasons to be called "Midcon" and "New British" respectively, the former undertook to bear the expense of drilling a test oil or gas well to a specified depth on lands the petroleum and allied rights in which, for the purposes here, may be taken as being then owned by the latter. On the completion of the well, regardless of its result, New British was to transfer to Midcon an undivided one-half interest in the rights and the subsequent development, in accordance with elaborately stated provisions, was to be on behalf of both. New British was entitled to elect to become "the operator" for such purposes and to continue so indefinitely, subject to relinquishment on notice. Generally speaking, to be operator meant having authority to proceed with the exploitation almost as if the property were one's own. Expenses and the profits were to be borne and shared equally, with the operator receiving a management fee based on specified monthly rates for each drilling

and producing well. Accounting was provided for; in limited cases action was to be taken after consultation with, and in some only with the consent of, the other party.

The test well was completed at least before July 1953, the exact date of which does not appear; gas in commercial quantities was tapped; and New British elected to take over as operator.

The scope of management included marketing the product. Some question of this was made and Mr. MacKimmie pointed out the absence of any express provision for it. But the matter is put beyond controversy by the supplementary agreement of July 15, 1953, which, in several references to "marketing" by the operator, necessarily assumes it; and that it is presupposed in the main agreement is to me beyond doubt.

That in fact was the view on which the operator, New British, acted. The respondent Brook, president and director, the leading spirit in the development, agreed that disposal rested solely with New British. As he put it:

> As operator, naturally our job both on our own account and the account of Mid Continent*, was to find a market for this gas, first, an obvious potential market. There were no actual markets. . . . We felt it was our duty to obtain a market for the gas production, the gas capable of production.

At the trial Primrose J. rejected the contention that the operator bore in any degree a fiduciary relation to Midcon and dismissed the action. In the Appellate Division the Court found that relation present. With this finding I agree; the operator, so developing, exploiting and marketing a jointly-owned product for a joint benefit, has reposed in him that reliance and confidence which constitute a trust relation. But notwithstanding that finding, the Court held the transaction attacked to be beyond the range of the trust and dismissed the appeal. It is that conclusion that gives rise to this appeal.

When the test well was completed and the reserves of gas were indicated, marketing became the immediate exigency. This would entail, among other things, a distributing trunk-line and heavy consumption agencies of which, from the evidence of Brook, there was little or

* The name of the appellant company at the time of this agreement was "Mid-Continent Oil & Gas Limited".—ED.

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nothing actually available at the time. A potential market depended on the geographical areas that could economically be served and on the scale of consumption. After much enquiry and examination and the rejection of a number of suggested means, such as a "tying-in" with the Calgary supply from Turner Valley by way of the Bow Island storage, export to Montana, and access to the Trans-Canada system, from a remark dropped to Brook, the idea arose that the situation might lend itself to the establishment of a chemical fertilizer plant, the gas requirements of which would be on a large scale. With that and the other primary constituents, sulphur and phosphate rock, as well as a market for the product, within economic reach, industrial success might be achieved which would at the same time meet the marketing problem. Preliminary investigation seemed to confirm this likelihood and the operator entered upon a promotion to that end. Contact was made with persons experienced in such matters in New York and in the course of 15 months or so data dealing with all aspects of such an undertaking were obtained, on the basis of which a scheme was formulated which ultimately materialized.

The plan involved the incorporation of a company, a substantial portion of the capital of which would be supplied by New York groups and New British. The plant was to be built at Medicine Hat and to it a pipe-line would be constructed from the gas field. The new company would enter into an agreement with the operator for the purchase of its gas supplies. At the same time discussions had been carried on with the council of Medicine Hat from which New British felt assured of a good market to supplement the City's own distribution supply.

The company was formed in August 1954 under the law of Alberta as Northwest Nitro-Chemicals Limited. Of the preferred shares 3,300 were, on or about May 30, 1955, purchased by the operator at the par value of $100 and the other groups as well bought a large block each. Common shares were at the same time allocated to the groups, of which New British received 749,998 at the price of 1c. each or $7,499.98. The common shares sold to these parties represented approximately 70 per cent. of the 3,750,000 ultimately issued. It is the ownership of that preferred and common stock issued to New British with which this

litigation is concerned. Midcon contends that the purchase was made by New British either as operator or in such circumstances as attached to it the right of Midcon as the beneficiary of a fiduciary relation to claim an interest in it; New British denies that the purchase touches or can be treated as touching that capacity, and claims that it was made by New British as a detached and independent purchaser free from any such responsibility toward Midcon.

In accordance with the arrangement, Brook became an officer and director of Northwest Chemicals. The original and chief interests, Commercial Solvents Corporation, Ford, Bacon, Davis Inc., Eastman, Dillon and Company, of New York, and New British entered into agreements with Northwest Chemicals by which they were reimbursed for their preliminary work and expenses and the first three severally engaged for future engineering, management, advisory and other services. New British received $50,000, a large part of which represented expenses that could have been brought into its accounts as operator. The contract for gas with Northwest dated June 3, 1955, provided, over a period of 20 years, for a supply up to a maximum of 19,500,000 cubic feet per diem, if the field could produce it. Without prejudice to the controversy which had then arisen between Midcon and New British, that contract was approved by Midcon on July 8, 1955. The pipe-line was built by a company jointly owned by Midcon and New British, and by agreement dated August 10, 1955, the net returns from the sale of gas were charged with the cost of the line until either payment in full of its cost or the conclusion of the contract with Medicine Hat. The latter event took place somewhat later but as of August 8, 1955, and 36.25 billion cubic feet of gas from the total reserves was "dedicated" to its fulfilment.

What, then, was the character of the part played in all this by the operator, and its bearing upon the share purchase? On February 4, 1954, the directors of the operator had passed a resolution which, after reciting:

WHEREAS it appears that in the interest of the Company an ammonium nitrate plant be established in or near the Etzikom gas field in which this Company has substantial interest and which would afford a market for large quantities of this Company's gas produced from such field; and

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WHEREAS it further appears that the operation of such a plant should be profitable and that it is desirable that the Company should be placed in a position to receive a share of the profits of the plant and also participate in its management and control;

declared that:

the President be, and he is hereby authorized, instructed and empowered to negotiate and, if possible, to conclude such agreements or arrangements with Commercial Solvents Corporation, and Ford, Bacon, Davis Inc., both of New York, as he may approve for the participation of this Company with them in the erection, equipment and operation of such plant in or near the Etzikom field and either as a direct participant therein or as a shareholder of a company formed for such purposes, within the following limits . . .

Among those limits were that the interest to be acquired by the company should be not less than 30 and not more than 40 per cent. of the venture and that the cash outlay should not exceed $750,000; and it authorized the president to arrange a loan secured by a charge on the company's interests in the Etzikom field up to that amount.

In a memorandum prepared on the following day, Brook sets forth an account of his inquiries, investigations and conferences in New York and the more or less definite understanding that had been reached, which on the previous day he had given the directors, and on the strength of which the resolution was passed. The opening paragraph is significant:

For the past several weeks our Company has been conducting an investigation of the possibilities of obtaining an additional market over and above the Montana Power market for our jointly held and wholly owned gas reserves in the Etzikom gas field.

It should be mentioned that the joint area comprised 31 sections of a total of 43 sections forming the total reserve: and the portion "wholly owned" by New British, 12 sections, was thus 28 per cent. of the entire area. The discussions were stated to have reached to the detail of the capacity of the ammonium plant, the estimated requirements of gas, and the price to be paid for it. The gas, "reformed" and treated chemically, was, as its principal use, for the manufacture of anhydrous ammonia, the basic product from which ammonium nitrate and phosphate were obtained. At that point Brook had requested time to obtain the necessary authority from his directors to close a "firm deal" in New York and to "explore the possibilities of the financing and be prepared and

authorized to pledge the company's net recoverable gas reserves at Etzikom for that purpose". These "net recoverable" reserves were the total reserves and included the 36 per cent. interest of Midcon.

It does not appear whether in these negotiations the joint ownership and relations between Midcon and New British were disclosed to the other parties although by August 1955 the interest of Midcon had become known apparently for the purposes of reference to the contract with Northwest Chemicals in the prospectus of the latter. New British had negotiated as owner or in absolute control of the entire gas resources, but it could do so for the joint interests only as operator.

That the entrance of Brook upon the search for a market and his participation in working out the scheme were under the authority given by the resolution of February 4 is indisputable; and that that authority was to act as operator—whether exclusively so or as both operator and owner is for the moment immaterial—is, in my opinion, equally so. The disposal of the gas was the instigation of the market quest; the operator would have violated its fundamental duty if it had not taken every reasonable step to complete the exploitation of what was discovered at the sole cost of Midcon. It could at any time have given up its role as operator and cast that responsibility on Midcon; in that event, the latter could not bind the exclusive interest of New British, and one can imagine the attitude of Brook had Midcon been the author of the scheme.

It is argued that location of the plant at Okotoks and at Lethbridge was seriously considered by the New York groups. Against this it was the duty of New British as operator to exert all its influence, which Brook, as its representative, did, and successfully; but even if the ultimate decision of those groups had divorced the scheme from the Etzikom gas field, the interest of Midcon in any stock of the new company taken by New British is not to be assumed to have been obliterated by that circumstance.

In the agreement with Northwest Chemicals, New British "dedicated", so far as required, 61 billion cubic feet of the estimate of 143 billion for the entire field to

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the fulfilment of its obligations. By that act it placed the property of Midcon under the bond of the contract, a contract which was an integral feature of the scheme. New British was dealt with as primarily concerned with furnishing gas; and in that capacity it became both a seller and an associate in the new enterprise. The acceptance of a share of the risks involved was bound up as an entirety with its agreement to supply that essential raw material. There is neither a syllable of evidence nor a tittle of inference that New British assumed or was looked upon by the other negotiators in two distinct aspects, as an independent promoter of Northwest Chemicals and as owner of the gas field; there was one role and one capacity.

In the development of the idea of an industry, participating in its organization undoubtedly suggested itself, but that is a far cry from its being the initial and basic purpose. The risk of an expensive drilling that might have produced nothing assumed by Midcon, on which New British received a supervision fee of $1,000, made it possible for Brook to go seeking a means of profit from the sale of gas; and the emergence of a possible benefit arising from those means became an incidental accretion to, a mere graft on, what, to the operator, was the central object. Without the interest in the gas, fertilizer production would have remained to him an unknown process and an unguessed-at industrial opportunity. It was the control of this vital ingredient that gave him a negotiating standing, and admitted him to the group of investigators; it was in that capacity that he was paid for his work and expense in promoting the scheme, that he became one of those furnishing the investment capital and accepting the risks involved, and that he entered upon the contracts that bound the gas reserves to the new organization and to Medicine Hat. In the face of all these matters of fact, the view that the promotion of the new enterprise was as a severed and disparate interest of New British, as if marketing the gas was an incidental feature, as if the Etzikom field indeed had not existed at all, becomes untenable.

To this it is answered that New British received the shares not because of its interest in the gas field but because it was one of the promoters of the scheme, and with this I can readily agree; but to base the implied conclusion on

that fact by itself misses entirely the contention made. The question to be answered is this: In what capacity did New British participate in the promotion? And the answer is, in its capacity as operator. That special capacity was a matter of indifference to the associates and was unknown to them; its significance was solely to Midcon.

Whatever the private thoughts of Brook, the matters mentioned make them irrelevant. The fiduciary relation is that of a trust in one who is to act in relation to the beneficial interest of another. It creates a standard of loyalty that calls for a refined sensibility to duty, the exclusion of all personal advantage and the total avoidance of any personal involvement in the interests being served or protected, a sense of obligation not always appreciated by those who enter upon it. That that duty towards Midcon by the operator was not adequately sensed—if sensed at all—seems to be clear; in his own words, what Brook was doing was "none of their business"; and he seems to have been somewhat astonished when advised that the gas agreement with Northwest Chemicals required the confirmation of Midcon.

In addition to embarking upon the promotion with the prestige and influence of the apparent ownership of the gas field, implicating that property in the risks of a new industry, and by that means playing its role in the scheme, New British, in entering into the gas contract, as part of the scheme, produced a situation in which its duty as operator and its interest as a large shareholder in and having common directors with Northwest Chemicals, came into conflict. The conflict was not limited to the mere price of the gas; in the business itself of Northwest Chemicals the joint owners had an interest: the exploitation of Etzikom, including the operation of the pipe-line, was, to a substantial degree, put in dependence on the success as well as the continued harmonious attitude of the new company. Decisions on policy of the latter might have consequences seriously prejudicial to the interests of New British as operator as contrasted with those as shareholder, in eventualities which it is not necessary to detail.

In that aspect and as between Midcon and New British the contract was of voidable character; but in the circumstances, including the time already elapsed, the difficulties

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associated with marketing on the scale called for, and the material reduction in potential means of consumption brought about by the promotion of the new company, there was the strongest busines coercion on Midcon to ratify. That ratification—accepted by the operator as reserving all rights of Midcon arising out of the scheme—made the conflict permanent. This, added to the employment in the negotiations and the scheme of the power of the joint property, accumulated conditions which contaminated the integrity of action required of a fiduciary.

It is said that Midcon stood by and awaited the issue of the risks involved and that only when success seemed assured was the claim raised; but this is to misconceive the facts. The real risk lay and lies not in the conclusion of the scheme but in the successful operation of the fertilizer plant. From the standpoint of the operator, the scheme could have been promoted apart from any stock acquisition by New British and in that case its confidential responsibility would have been respected. If that participation was required by the other interests, the significance of the operator's property to the industrial risks is demonstrated: if it was not, what remained was simply the preference by New British of its own interest to that of its joint duty. When in October 1955 the demand was made, the scheme existed only in contractual arrangement; the construction of the plant was in its first stage and it was completed only in October 1956, three months after the trial. Its success or failure even then was as problematical as when agreement upon the scheme had crystallised.

The law of such a situation has been laid down consistently for several centuries in the Courts of England, of this country, and of the United States, and it will be sufficient here to refer briefly to some of the more striking applications of the principle embodied. The imperative character of the obligation is exemplified in *Keech v. Sandford*[1]. There a lease was held by a trustee; shortly before its term would expire the trustee endeavoured to obtain a renewal for the benefit of the *cestui*, which was refused; the trustee thereupon took a renewal in his personal right.

[1] (1726), Sel. Cas. Ch. 61, 25 E.R. 223.

Lord Chancellor King held the new lease to be bound by a constructive trust. At p. 223 of 25 E.R., he says:

> I must consider this as a trust for the infant; but I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que* use; though I do not say there is a fraud in this case, yet he should rather have let it run out, than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to *cestui que* use.

In the notes to this case in White and Tudor's Leading Cases in Equity, 7th ed. 1897, vol. II, at p. 695, the scope of the rule so laid down is stated in these terms:

> Whenever a person clothed with a fiduciary or quasi fiduciary character or position gains some personal advantage by availing himself of such character or position, a constructive trust is raised by Courts of Equity, such person becomes a constructive trustee, and the advantage gained must be held by him for the benefit of his *cestui que trust*.

In *Regal (Hastings), Ltd. v. Gulliver et al.*[1], the directors of a parent company, which was endeavouring through a new company to acquire, by lease, two theatres, being required by the landlord to guarantee the covenants of the lease unless the paid-up capital of the new company amounted to £5,000—which the parent company was unable itself to effect beyond £2,000—agreed among themselves to take £3,000 of the stock individually. Ultimately the shares were sold at a profit which the parent company brought action against the directors to recover. The House of Lords, reversing the Court of Appeal, held the action well founded. Viscount Sankey, at p. 381, cited the language of Lord Eldon in *Ex parte James*[2]:

> The doctrine as to purchases by trustees, assignees, and persons having a confidential character, stands much more upon general principle than upon the circumstances of any individual case. It rests upon this; that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance; as no Court is equal to the examination and ascertainment of the truth in much the greater number of cases.

He reproduced also the headnote to *Hamilton v. Wright et al.*[3]:

> A Trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which can have

[1] [1942] 1 All E.R. 378.
[2] (1803), 8 Ves. 337 at 345, 32 E.R. 385 at 388.
[3] (1842), 9 Cl. & Fin. 111, 8 E.R. 110.

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a tendency to interfere with his duty in discharging it. Neither the trustee nor his representative can be allowed to retain an advantage acquired in violation of this rule.

In the Court of Appeal Lord Greene M.R., in upholding the directors, had based the question upon the good faith of the directors:

> That being so, the only way in which these directors could secure that benefit for their company was by putting up the money themselves. Once that decision is held to be a *bona fide* one, and fraud drops out of the case, it seems to me there is only one conclusion, namely, that the appeal must be dismissed with costs.

On this Lord Russell makes the following observation, at p. 386:

> My Lords, with all respect I think there is a misapprehension here. The rule of equity which insists on those, who by the use of a fiduciary position make a profit, being liable to account for that profit, in no case depends on fraud or absence of *bona fides*; or upon such questions or considerations as whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well-intentioned, cannot escape the risk of being called upon to account.

Lord Wright recites the words of James L.J. in *Parker v. McKenna*[1], as did also Lord Russell:

> [The] rule is an inflexible rule, and must be applied inexorably by this Court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; *for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that.*

(The italics are Lord Wright's.)

In *Zwicker v. Stanbury et al.*[2], the principle so formulated was applied where directors claimed shares in their company surrendered to them in their personal capacity in the course of negotiations entered upon by them as directors with a view to refinancing. A purchase of a second mortgage for one-half of its face value made in the same circumstances was declared to be limited to the sum paid for it.

In *Reading v. Attorney-General*[3], a member of His Majesty's forces was paid a large sum of money for accompanying, while dressed in uniform, loaded lorries carrying

[1] (1874), L.R. 10 Ch. 96 at 124.
[2] [1953] 2 S.C.R. 438, [1954] 1 D.L.R. 257.
[3] [1951] A.C. 507, [1951] 1 All E.R. 617.

whisky in and about Cairo and in that manner representing himself to be in the course of his military duties in order to avoid police inspection of the lorries. The money was seized on behalf of His Majesty and the proceeding was brought by Reading to recover it. It was held by the House of Lords that having obtained this money through the influence and under the cloak of his military service he must hold it for his principal. The right to recover the money and the right to keep it were distinguished by Lord Normand, but the remaining judgments go upon the equitable principle mentioned. In Lord Porter's words, at p. 514:

> . . . any official position, whether marked by a uniform or not, which enables the holder to earn money by its use gives his master a right to receive the money so earned even though it was earned by a criminal act.

A further exemplification is to be found in *Aberdeen Town Council v. Aberdeen University et al.*[1], where the town council as proprietor of lands for the benefit of the university was enabled as ostensible owner to acquire certain fishing-rights in relation to them, which were held to belong beneficially to the university.

In *Charles Baker Limited v. Baker and Baker*[2], an agent for leasing billboard sites, the practice followed by the company, who bought in his own right land which the owner had refused to lease, was held to be a constructive trustee for his principal.

In the United States the rule has been given a similarly strict application in a great variety of situations. In *Meinhard v. Salmon et al.*[3], a shop and office building on land held under a 20-year lease, was exploited as a joint venture by two persons, but managed exclusively by one of them to whom the lease had been granted. Three months before the term was to end, the landlord decided to combine the land with others adjacent on both sides and to place the whole under one lease. The managing tenant, without notice to his associate, took a lease for a term of 20 years renewable for 80 years. After seven years the existing building was to be demolished and a new structure erected at a cost of $3,000,000, with an average increase in annual rent of over $300,000. The new lease obtained through the *de facto* business access between the landlord and the tenant

[1] (1877), 2 App. Cas. 544.
[2] [1954] O.R. 418, [1954] 3 D.L.R. 432.
[3] (1928), 249 N.Y. 458.

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arising from the ostensible ownership of the lease was held to be subject to the joint interest at the election of the associate. The quantity of interest was determined by imposing a trust on shares in a new company to which the new lease was assigned, and by giving a majority of the shares to the managing tenant for the purpose of ensuring the continuance of the original arrangement that he should have the direction of the undertaking. In the course of his reasons, Cardozo Ch. J., speaking for the majority, uses language pertinent to the issue here. At p. 462:

> The two were coadventurers, subject to fiduciary duties akin to those of partners (*King v. Barnes*, 109 N.Y. 267). As to this we are all agreed. The heavier weight of duty rested, however, upon Salmon. He was a coadventurer with Meinhard, but he was manager as well.

At p. 464:

> The pre-emptive privilege, or, better, *the pre-emptive opportunity*, that was thus an incident of the enterprise, Salmon appropriated to himself in secrecy and silence.

The "pre-emptive opportunity" in the case before us is that advantage of New British attaching to its role as operator.

At p. 466:

> The very fact that Salmon was in control with exclusive powers of direction charged him the more obviously with the duty of disclosure, since only through disclosure could opportunity be equalized.

Featherstonhaugh v. Fenwick[1] is to the same effect. As Professor Austin Wakeman Scott, in his work on Trusts, 2nd ed. 1956, s. 504 (vol. 4, p. 3238), puts it:

> The principle, however, goes further than this and applies even where the interest purchased by the fiduciary for himself is not an interest in property of the beneficiary entrusted to him, or property which he has undertaken to purchase for the beneficiary, provided that the property which he purchases for himself is sufficiently connected with the scope of his duties as fiduciary so that it is improper for him to purchase it for himself.

The purchase of such an influential interest in the business to which the joint interest had been so largely committed, brings the present case within the range of that impropriety. Its complementary affinity to the joint interest is obvious; and the choice to be made by the operator was between self and fiduciary. New British was under no obligation to purchase and assume the risks of investment in such an enterprise, but having done so its capacity in so

[1] (1810), 17 Ves. 298, 34 E.R. 115.

doing, in the absence of consent by Midcon, was predetermined. To permit the operator to become, for example, by such means, the sole purchaser of the gas for its private benefit would destroy the essence of its duty: and the partial interest taken can be given no higher standing.

The loyalty of a fiduciary declared by these authorities means that he must divest himself of all thought of personal interest or advantage that impinges adversely on the interest of the beneficiary or that results from the use, in any manner or degree by the fiduciary, of the property, interest or influence of the beneficiary. Equity, in applying the rule as one of fundamental public policy, does so ruthlessly to prevent its corrosion by particular exceptions; by an absolute interdiction it puts temptation beyond reach of the fiduciary by appropriating its fruits.

The interest of the joint ownership on the acreage basis being approximately 72 per cent. of the total reserve, in the equitable adjustment of the interests of the parties that fact must be taken into account. To restore the balance of interest, 72 per cent. of the stock should be divided equally between them, giving to Midcon 36 per cent. of the shares now held by New British.

I would, therefore, allow the appeal, set aside the judgment at trial and declare that 36 per cent. of the preference and common shares of Northwest held by New British are under a constructive trust for Midcon, and that upon payment to New British of the price at which they were originally obtained a transfer to Midcon be made accordingly. The latter will have its costs throughout.

Appeal dismissed with costs, RAND *and* CARTWRIGHT JJ. *dissenting.*

Solicitors for the plaintiff, appellant: Macleod, McDermid, McColough, Love and Leitch, Calgary.

Solicitors for the defendant, respondent: Allen, MacKimmie, Matthews & Wood, Calgary.

1958

*Mar. 14
Apr. 1

OSCAR DESORMEAUX (*Plaintiff*) .....APPELLANT;

AND

LA CITE DE VERDUN (*Defendant*) ....RESPONDENT.

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

Municipal corporations—Negligence—Damages—Young girl stumbling over protruding water-plugs beside sidewalk—Civil Code, arts. 1053, 1054.

The plaintiff's young daughter was injured when she fell after stumbling over water-plugs protruding on a one-foot strip of ground beside a cement sidewalk. She had come out of a store, some 15 feet from the sidewalk, and was walking towards it. The plugs were part of the water-system of the defendant municipality, were located on its property, and were not visible at night when the accident occurred.

Held: The defendant municipality was liable in damages. It was negligence on its part to allow these plugs which were not visible at night to protrude on its property where the public had access when moving between the store and the sidewalk. These obstacles were the sole cause of the accident.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Coté J. Appeal allowed.

Bernard Bourdon, Q.C., for the plaintiff, appellant.

Maurice Fauteux, Q.C., for the defendant, respondent.

The judgment of Taschereau, Cartwright, Abbott and Judson JJ. was delivered by

TASCHEREAU J.:—La Cour supérieure a maintenu jusqu'à concurrence de $6,804.75, l'action intentée par le demandeur tant personnellement qu'en sa qualité de tuteur, contre la Cité de Verdun, pour dommages subis par sa fille mineure âgée de onze ans. Ce jugement a été infirmé par le Cour du banc de la reine[1] siégeant à Montréal, qui a unanimement rejeté l'action.

La preuve révèle que le 8 juin 1951, vers 9.30 heures du soir, alors qu'il faisait noir, dans une rue faiblement

*PRESENT: Taschereau, Locke, Cartwright, Abbott and Judson JJ.

[1] [1957] Que. Q.B. 769.

éclairée, la jeune enfant qui sortait d'une épicerie, située à environ quinze pieds du trottoir, a fait une chute alors qu'elle s'en approchait. Elle a alors trébuché sur trois tuyaux de l'aqueduc de la Cité intimée, qui sortent perpendiculairement du sol, et qui servent à discontinuer, si nécessaire, l'approvisionnement de l'eau.

Ces trois tuyaux, qu'on a appelées "trois castors", sont situés à environ un pied à l'intérieur du trottoir, mais sur la propriété de la ville.

Avec déférence, je crois que cet appel doit être maintenu car je suis d'opinion qu'il y a eu négligence de l'intimée, qui doit nécessairement entraîner sa responsabilité civile. C'est en effet une négligence qui doit être imputée à la Cité que de permettre ainsi sur sa propriété, où le public a accès pour circuler entre le magasin avoisinant et le trottoir, l'existence de ces "trois castors" qui excèdent le sol de plusieurs pouces, et qui le soir ne sont pas visibles. Ces obstacles ont été véritablement l'unique cause qui a déterminé ce malheureux accident.

Je ne crois pas qu'il y ait lieu d'intervenir dans l'appréciation des dommages tels que fixés par le juge au procès.

L'appel doit donc être maintenu, et le jugement de la Cour supérieure rétabli, avec dépens de toutes les Cours.

LOCKE J.:—I would allow this appeal and restore the judgment at the trial, with costs throughout.

Appeal allowed with costs.

Attorney for the plaintiff, appellant: L. Plante, Montreal.

Attorneys for the defendant, respondent: Fauteux, Blain & Fauteux, Montreal.

1958

*Mar. 13
Apr. 1

ROGER BELANGER AND LEOPOLD BELANGER ..... APPELLANTS;

AND

CHARLES BELANGER ..... RESPONDENT.

ROGER BELANGER AND LEOPOLD BELANGER ..... APPELLANTS;

AND

CHARLES BELANGER ..... RESPONDENT;

AND

LAURENT-H. BARIL *et al.* ..... MIS-EN-CAUSE.

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

Actions—Settlement out of court—Whether effected—Whether attorneys authorized—No proceedings en désaveu—Code of Civil Procedure, arts. 251 et seq.

By its two motions, the respondent moved to quash the present appeals to this Court on the ground that, subsequent to the judgments of the Court of Appeal, there had been an out of court settlement of the two actions involved: the first, brought by the appellants for an accounting, and transformed into a contestation of accounts, and the second, brought by the respondent *en passation de titre*. Both actions were maintained by the trial judge, and these judgments were affirmed by the Court of Appeal, but with modifications as to the action *en passation de titre*. The motions were heard with the appeals.

Held: The motions should be allowed and the appeals quashed, since both actions had been settled subsequent to the judgments of the Court of Appeal. The attorneys for both parties agreed, some 15 days after the judgments of the Court of Appeal, to settle the two actions by carrying out the judgments. Most of the formalities ordered by the judgments had been complied with. It was true that a consent signed by the appellants reserved certain rights, but this reserve did not detract from the effectiveness of the settlement. The contention that the attorneys were not authorized to effect the settlement was contradicted by the signatures on the documents, and, furthermore, proceedings *en désaveu* were not taken, which was essential when the existence of a mandate was not denied, but it was alleged that the mandatary had gone beyond his powers. *Boileau v. Procureur Général de la Province de Québec et al.*, [1957] S.C.R. 463, applied. The judgments below were substantially well founded, but they need not be further examined.

*PRESENT: Taschereau, Locke, Cartwright, Abbott and Judson JJ.

Accounts—Action for accounting transformed into contestation of accounts —Validity of proceedings.

If, in an action claiming an accounting alone, the defendant produces accounts but they are not accepted by the plaintiff, the proceedings are thereby validly transformed into a contestation of the accounts. *Cousineau v. Cousineau,* [1949] S.C.R. 694; *Racine v. Barry,* [1957] S.C.R. 92, applied.

APPEALS from two judgments of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming with modifications two judgments of Cousineau J. Appeals quashed on motions to quash.

L. P. Gagnon, Q.C., for the appellants.

J. A. Gosselin, for the respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—Il s'agit de deux appels de jugements rendus par la Cour du banc de la reine[1] dans la province de Québec.

Les demandeurs-appelants ont en premier lieu institué, dans le cours du mois de février 1951, une action contre le défendeur-intimé dans laquelle ils demandent que ce dernier soit condamné à leur rendre compte de l'administration des biens de certaines successions dont il était l'exécuteur, et réclament un reliquat de $2,500, augmenté plus tard.

La deuxième action, qui est intimement liée à la première, est une action en passation de titre. Dans ses conclusions, le demandeur Charles Bélanger, intimé dans la présente cause, a demandé que la première action soit réunie à la seconde, afin qu'elles soient instruites en même temps, ce qui a été accordé. Ses conclusions sont à l'effet que les défendeurs soient condamnés à lui consentir un titre, sur paiement de la somme de $12,000, suivant une promesse de vente accompagnée d'une contre-lettre, et il réclame aussi une déclaration que le jugement à intervenir équivaille au titre à la propriété, à défaut de signatures.

Dans la première action, l'intimé a produit une reddition de comptes des successions qui avaient été administrées, soit celle de Vitalien Bélanger son père, et d'Albani Bélanger son frère. Cette reddition de comptes n'a pas été

[1] [1957] Que. Q.B. *605, 606.*

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acceptée, et le débat s'est engagé. Les parties ont transformé cette action, qui demandait purement et simplement une reddition de comptes, en un véritable débat de comptes, ce qui rend les procédures légales: *Cousineau v. Cousineau*[1]; *Racine v. Barry*[2].

L'honorable juge de première instance devant qui cette cause s'est instruite a, par jugement, maintenu l'action des demandeurs, et a ordonné au défendeur de payer à sa nièce Jacqueline Bélanger, la somme de $3,838.91, et $189.48 aux demandeurs, chaque partie payant ses frais.

Dans la deuxième action, en passation de titre, l'action du demandeur a été maintenue, et le juge au procès a ordonné aux défendeurs-appelants Roger et Léopold Bélanger de passer titre au demandeur, suivant la promesse de vente, contre le paiement d'une somme de $6,905.93. Il a de plus ordonné au demandeur de verser la balance du prix de vente qui était de $12,000, soit $6,905.93, au compte de la succession mentionnée dans la cause précédente, et de déposer ce montant au greffe de la Cour supérieure, afin de payer le reliquat dû dans l'autre action. Il a permis au demandeur Charles Bélanger de retirer du dossier son chèque accepté qu'il avait déposé comme exhibit avec son action. Il a de plus ordonné au gérant de la Banque Canadienne Nationale de remettre au demandeur un chèque accepté, au montant de $300, payable aux défendeurs Roger et Léopold Bélanger. Il a enjoint au notaire J.A.H. Hébert de remettre audit demandeur deux billets promissoires, au montant chacun de $500, lors de la signature de l'acte de vente de la propriété. Il a ordonné aux défendeurs Roger et Léopold Bélanger de signer l'acte de vente de la propriété dans le délai d'un mois du jugement. Il a annulé certaines obligations hypothécaires enregistrées sur ladite propriété, et a enfin conclu que son jugement devait équivaloir à un titre au profit du demandeur Charles Bélanger, à toutes fins que de droit. Il a stipulé que chaque partie devait payer ses frais.

La Cour d'appel[3] a rejeté l'appel dans la première action logée par les appelants actuels, sans frais, et a rejeté l'appel des présents appelants sur l'action en passation de titre, avec dépens, mais après avoir fait quelques modifications

[1] [1949] S.C.R. 694. [2] [1957] S.C.R. 92.
[3] [1957] Que. Q.B. *605. 606.*

au jugement formel de la Cour supérieure. Il y a appel de ces deux jugements devant cette Cour.

Je crois ces deux jugements substantiellement bien fondés, quoiqu'il y aurait peut-être lieu d'y faire quelques légères modifications quant aux chiffres établis par la Cour du banc de la reine. Cependant, étant donné la conclusion à laquelle je suis arrivé, il est inutile de les examiner de nouveau, et ces deux jugements en conséquence devront déterminer définitivement les droits respectifs des parties, comme d'ailleurs les conventions ultérieures qui sont intervenues.

Lorsque les appelants ont logé les deux présents appels devant cette Cour, le procureur de l'intimé a présenté deux motions pour faire rejeter ces appels, alléguant que les deux causes avaient été réglées hors de cour après que les jugements de la Cour d'appel eussent été rendus. Lors de l'audition de ces motions le 6 mai 1957, la Cour a ordonné d'ajourner ces motions vu qu'elle désirait les entendre en même temps que les deux appels sur le fond, afin d'être en meilleure situation de juger avec plus d'informations si, véritablement, un réglement était intervenu entre les parties.

Ces motions ont été entendues de nouveau lors de l'audition, et je crois qu'elles doivent être maintenues. En effet, je n'ai pas de doute que les deux appels ont été effectivement réglés. Le 14 février 1957, soit environ quinze jours après que les jugements eurent été rendus par la Cour du banc de la reine, des négociations de règlement ont été entreprises, et il a été convenu entre les procureurs respectifs des parties, par lettre échangée entre eux, que ces deux actions, intimement liées l'une à l'autre, seraient réglées pour faire suite aux jugements rendus. Ainsi, il a été convenu que le jugement dans l'action en passation de titre serait enregistré pour tenir lieu de la signature des appelants, et pour transporter à l'intimé le titre à la propriété, que les dépôts effectués au greffe dans les deux causes, seraient retirés par les parties qui y avaient droit conformément aux ordonnances, que le chèque de $300 déposé à la Banque Canadienne Nationale serait remis à son titulaire, que les loyers, déposés pendant l'instance, seraient retirés par l'intimé qui devenait propriétaire de l'immeuble et qui, en conséquence, y avait droit, et que les

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Taschereau J.

frais dus par les appelants seraient payés. *Toutes ces formalités découlant des deux jugements ont été remplies.* Il est vrai que dans les consentements donnés et *signés de la main même des deux appelants,* ces derniers ont consenti au retrait des sommes déposées par les locataires au greffe de la Cour supérieure, et qu'on y mentionne que le tout est fait "sans préjudice aux droits des parties, quant aux intérêts quels qu'ils soient ou tout autre recours". Evidemment, cette réserve a été stipulée pour ne pas compromettre certains droits réservés, et sur lesquels les parties ne s'étaient pas entendues. Ceci se rapporte, d'après la correspondance au dossier, à l'intérêt sur les loyers, et à la production de titres clairs où les droits de certains mineurs décédés étaient en jeu. Mais cette réserve n'affecte nullement l'efficacité du règlement intervenu entre les parties.

On a mentionné que les procureurs du temps n'étaient pas autorisés à consentir au règlement qui constitue véritablement un acquiescement aux jugements. Je ne puis accepter cette prétention, qui est contredite *par les écrits signés de leur propre main.* Les procureurs des appelants avaient mandat d'agir en Cour supérieure et en Cour d'appel, et si par hasard des actes non autorisés ont été faits par eux, le recours des appelants était par désaveu, suivant les dispositions des arts. 251 et suivants du *Code de procédure civile: Boileau v. Procureur Général de la Province de Québec et al.*[1]

Je crois donc que les deux causes devant nous sont véritablement réglées, et que les motions pour rejet d'appels doivent être maintenues avec les frais de semblables motions, payables par les appelants.

Appeals quashed with costs of motions to quash.

Attorneys for the appellants: Sauvé, Gagnon & L'Heureux, Montreal.

Attorney for the respondent: J. A. Gosselin, Montreal.

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[1] [1957] S.C.R. 463, 8 D.L.R. (2d) 384.

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TRANS MOUNTAIN OIL PIPE LINE COMPANY (*Plaintiff*) .. APPELLANT;

*Feb. 4, 5
Apr. 22

AND

JASPER SCHOOL DISTRICT NO. 3063 (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Taxation—School taxes—School district within national park—Oil pipe line passing through district—The Assessment Act, R.S.A. 1955, c. 17, ss. 5(1)(p), 6(6)—The School Taxation Act, R.S.A. 1942, c. 176, s. 28(2)—The Pipe Line Taxation Act, R.S.A. 1955, c. 235, s. 3(1).

The respondent school district was situated entirely within the limits of a national park. The appellant company owned a pipe line which passed through a part of the district, and was assessed by the latter for school taxes. The company sought a declaration that it was not subject to assessment and taxation.

Held: The pipe line was properly assessed. Under s. 6(6) of *The Assessment Act,* the school district was "deemed to be a town" for purposes of the Act, and this made applicable to it the general machinery of assessment, taxation and collection, and also the subject-matter of taxation, available to towns incorporated under *The Town and Village Act.* The exemption of pipe lines by s. 3(1) of *The Pipe Line Taxation Act* extended only to pipe lines "situated outside of any city, town or village", and the pipe line here in question was within an area which, for assessment purposes, was considered to be a town; the word "town" in *The Pipe Line Taxation Act* was not limited to a town formally incorporated under *The Town and Village Act.* The pipe line was within the language of *The Assessment Act,* and the imposition of the taxation did not conflict with the tax rental agreement of September 22, 1952, between the Provincial and Dominion Governments.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], affirming a judgment of Johnson J.A.[2] Appeal dismissed.

L. D. Hyndman, Q.C., for the plaintiff, appellant.

G. A. C. Steer, for the defendant, respondent.

The judgment of the Court was delivered by

RAND J.:—The question raised in this appeal is that of the taxability for school purposes of the pipe line of the Trans Mountain Oil Pipe Line Company, the appellant, which is carried through a portion of the respondent school district.

*PRESENT: Kerwin C.J. and Rand, Locke, Fauteux and Abbott JJ.

[1] (1957), 20 W.W.R. 678. [2] (1956), 19 W.W.R. 273.

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TRANS MOUNTAIN OIL PIPE LINE CO. v. JASPER SCHOOL DISTRICT

Rand J.

The general scheme of the legislation dealing with taxation can be shortly stated. *The Assessment Act,* R.S.A. 1942, c. 147 (now R.S.A. 1955, c. 17), provides the machinery and the subject-matter for the entire Province. Other statutes provide for the creation of municipal bodies, such as cities, towns, villages and municipal districts, for the administrative expenses of which the taxes are required; and these special Acts are to be read as if the provisions of *The Assessment Act* were incorporated in each of them.

The issue in this case arises out of subs. (6) of s. 6 of that Act:

> Notwithstanding any other provision of this Act, every school district which is situate within any National Park shall for the purposes of this Act be deemed to be a town and all the provisions of this Act relating to assessment in towns, the holding of courts of revision and appeals from assessments, shall *mutatis mutandis* apply to every such school district.

The respondent is such a school district. That does not mean that for any purpose other than of taxation it ceases to be a school district; in all other respects, such as the scope of its activities and the money which it expends, it remains a school district; but its expenditure is looked upon as if it were for the ordinary administrative expenses of a town, to be raised as if the district were a town incorporated under *The Town and Village Act,* 1952 (Alta.), c. 97 (now R.S.A. 1955, c. 338).

The essential question is whether the "purposes of this Act" include not only the machinery of assessment, of taxation and of collection, but also the subject-matter of the taxation. When the assessor for the respondent district prepares to make up the roll, he must consult *The Assessment Act* as would a town assessor for the property which he is to include as assessable. He finds that, generally, all property within the territorial limits of the school district is liable, subject, among other exemptions not pertinent here, to the exemption of s. 5(1)(*p*), "Property assessable under . . . *The Pipe Line Taxation Act*". When that Act, R.S.A. 1942, c. 52 (now R.S.A. 1955, c. 235) is referred to, it is seen that by s. 3(1) all pipe lines "situated outside of any city, town or village" are to be taxed exclusively by the Province. Since the assessor is to assess all taxable property within the boundaries of the district, which, for that purpose, is "deemed

to be", *i.e.*, as if it were, a town incorporated by law, he must include the property in question; it is within an area which, in law, for assessment purposes, is considered to be within such a town.

The argument against this, forcibly presented by Mr. Hyndman, was that the language of *The Pipe Line Taxation Act*, when it refers to "town", means a town formally incorporated under *The Town and Village Act* and not one that for certain purposes only is so deemed to be a town.

Both these statutes deal with taxation; and when s. 3(1) of *The Pipe Line Taxation Act* refers to lines "situated outside of any . . . town" it is concerned with a subject-matter of tax related to physical boundary, a feature to which all taxation of corporeal property is related. The effect of s. 6(6) of *The Assessment Act* is that the property within a district "deemed" to be a town is that within its boundaries as if it were a town. A like case would be that of a school district which contains a town within its boundaries. Section 28(2) of *The School Taxation Act*, R.S.A. 1942, c. 176 (now embodied in *The School Act*, R.S.A. 1955, c. 297) provides that:

> For the purpose of taxation for school purposes and for the purposes of this section any portion of a town [school] district which is not within the limits of a city or town shall be deemed to be within the limits thereof . . .

What this does is to assimilate the subject-matter of assessment and taxation for school purposes to that of taxation for town purposes. The language in s. 6(6) "shall be deemed to be a town" has an equal if not greater effect in doing that than the language of s. 28. The only answer, apart from that already mentioned, is that the deeming "to be a town" or deeming to be "within the limits" attaches only the machinery of assessment and taxation and not subject-matter; but the language "for the purposes of this Act", *i.e.*, *The Assessment Act*, cannot be limited to a part only of its purposes.

Two other grounds taken by Mr. Hyndman remain. He questioned whether the property of the appellant was within the language of *The Assessment Act*. By s. 7, all lands not specifically declared exempt, together with buildings and improvements, are to be assessed. By

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TRANS MOUNTAIN OIL PIPE LINE CO. v. JASPER SCHOOL DISTRICT

Rand J.

s. 2(*j*), unless the context otherwise requires, land means "lands, tenements and hereditaments and any estate or interest therein", including minerals and growing timber. By s. 2(*i*) "buildings and improvements" include "all structures and fixtures erected upon, in, over, under or affixed to the parcel of land assessed". Section 12, dealing with a special situation, has application here:

> (1) In case there are upon, in, over, under or affixed to any land, which is exempt from assessment and taxation, any buildings, structures or erections, whether affixed to the land or not, which are the property of some person other than the owner of the land, then the owner of any such buildings, structures or erections shall be liable to assessment and taxation in respect thereof as if the same were land, and all such buildings, structures and erections shall be assessed at their fair actual value separately from the land forming the site thereof.

These provisions are sufficiently wide to embrace the property in question. The easement granted the company by the Dominion Government, with the property of the company set in the land, a "structure" within the meaning of s. 2(*i*) and s. 12, is an interest in land which, though related to Dominion Crown lands, is now, beyond dispute, a subject-matter of provincial taxation.

The second point was that the impost, being a corporation tax, conflicted with the tax rental agreement between the Provincial and Dominion Governments of September 22, 1952, by which certain provincial taxing powers were agreed not to be exercised during a stated period. The tax is on an interest in real property and that is expressly excepted from the operation of the agreement by the language of item 4 of Appendix B containing the Acts or parts of Acts imposing taxes declared not to be corporation taxes, "*The Assessment Act*, R.S.A. 1942, c. 157, Tax on real and personal property (except section 14)". Section 14 deals with railways.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Field, Hyndman, Field, Owen, Blakey and Bodner, Edmonton.

Solicitors for the defendant, respondent: Milner, Steer, Dyde, Martland and Layton, Edmonton.

MEMORIAL GARDENS ASSOCIATION (CANADA) LIMITED ..... APPELLANT;

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*Feb. 3, 4
Apr. 22

AND

COLWOOD CEMETERY COMPANY, BOARD OF CEMETERY TRUSTEES OF GREATER VICTORIA, CORPORATION OF THE DISTRICT OF SAANICH, THE CORPORATION OF THE CITY OF VICTORIA, EDWIN J. FREEMAN, HELEN J. FREEMAN, A. C. KINNERSLEY, LOLA KINNERSLEY, H. M. PALSSON, JEAN LABAN, C. J. LABAN, SHIRLEY R. CROCKETT, B. I. CROCKETT, F. A. KINNERSLEY, VERNICE ROCKWELL, PETER C. SHARP, L. H. SHARP AND ALEXANDER HORBATUK AND PUBLIC UTILITIES COMMISSION ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Public utilities—"Public convenience and necessity"—Meaning of phrase—Review of decision of Commission—The Public Utilities Act, R.S.B.C. 1948, c. 277, ss. 58, 72, 75, 100—The Cemeteries Act, R.S.B.C. 1948, c. 41, ss. 2, 3, as enacted by 1955, c. 7, s. 3.

Per Kerwin C.J. and Taschereau, Cartwright and Abbott JJ.: It is impracticable and undesirable to attempt a precise definition of the phrase "public convenience and necessity". It is clear from the American decisions that the word "necessity" as here used does not bear its strict dictionary meaning. Its meaning must be ascertained in each case by reference to the context and to the objects and purpose of the statute in which it is found; in particular, it has been held that the word is not restricted to present needs but includes provision for the future. *Wabash, C. & W. Ry. Co. v. Commerce Commission* (1923), 141 N.E. 212, referred to.

The Public Utilities Commission of British Columbia granted a certificate of public convenience and necessity to the appellant company for the operation, through a subsidiary company, of a cemetery on Vancouver Island. This certificate was set aside by the Court of Appeal.

Held: The judgment of the Court of Appeal should be set aside and the certificate should be restored.

Per Kerwin C.J. and Taschereau, Cartwright and Abbott JJ.: The Commission's decision that public convenience and necessity required the establishment of a new cemetery was not one of fact but was predominantly the formulation of an opinion based upon the facts established before the Commission. There was evidence to support

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright and Abbott JJ.

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MEM. GARDENS ASSN. LTD. v. COLWOOD CEMETERY Co. *et al.*

the findings of fact made by the Commission and its exercise of administrative discretion based on those findings should not be interfered with by the Courts. *Union Gas Company of Canada Limited v. Sydenham Gas and Petroleum Company Limited,* [1957] S.C.R. 185, applied.

Subsidiary grounds of attack on the Commission's decision should be disposed of as follows: (1) the fact that the appellant proposed to operate the cemetery by means of a subsidiary company to which the Commission agreed to grant a second certificate on incorporation was not an objection to the grant of the certificate to the appellant; (2) the fact that the appellant held only an option on the lands in question was not a ground for refusing the certificate, since the option, assuming it to be enforceable, made the appellant an "owner" within the meaning of the statute; (3) there was no ground, in the circumstances of the case, for saying that the Commission had unjustifiably received evidence without permitting the respondents to see it, thus preventing cross-examination and violating the rule *audi alteram partem. Toronto Newspaper Guild v. Globe Printing Company,* [1953] 2 S.C.R. 18, distinguished.

Per Locke J.: The option was produced for examination by the Commission with the express consent of counsel for the parties who now objected, and they should not now be heard to allege that the proceedings were invalidated by this circumstance. *Scott v. The Fernie Lumber Company, Limited* (1904), 11 B.C.R. 91 at 96, approved and applied. In other respects, the appeal failed for the reasons given by Sheppard J.A. in his dissenting judgment in the Court of Appeal.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], setting aside a certificate of public convenience and necessity granted by the Public Utilities Commission. Appeal allowed.

Alan B. MacFarlane and *E. A. Popham,* for the appellant.

D. M. Gordon, Q.C., for the respondents.

The judgment of Kerwin C.J. and Taschereau, Cartwright and Abbott JJ. was delivered by

ABBOTT J.:—The question raised on this appeal is whether a certificate of public convenience and necessity issued by the Public Utilities Commission of British Columbia, under the provisions of the *Public Utilities Act,* R.S.B.C. 1948, c. 277, as amended, was authorized in law.

By the *Cemeteries Act Amendment Act, 1955* (B.C.), c. 7, cemeteries in British Columbia were brought under the jurisdiction of the Public Utilities Commission as constituted under the *Public Utilities Act,* the relevant

[1] (1957), 22 W.W.R. 348, 9 D.L.R. (2d) 653, 75 C.R.T.C. 292.

sections of the *Cemeteries Act*, R.S.B.C. 1948, c. 41, as enacted by s. 3 of the 1955 statute, reading as follows:

Regulation of Cemeteries, Crematoria, and Columbaria.

2. A cemetery shall not be established or enlarged until the Minister of Health and Welfare has approved of the site of the cemetery as a fit and proper place for the interment of the dead and the owner thereof has obtained from the Commission a certificate of public convenience and necessity under the "Public Utilities Act."

3. (1) The Commission shall have jurisdiction over all cemeteries, columbaria, and crematoria, and the owners thereof, and shall exercise with respect thereto all the powers, duties, and functions relating to public utilities conferred or imposed by the "Public Utilities Act" on the Commission, to the extent to which such powers, duties, and functions are exercisable, and the provisions of the "Public Utilities Act" (other than Part IV thereof), so far as appropriate, shall aply to cemeteries, columbaria, crematoria, and the owners thereof.

(2) Without limiting the generality of subsection (1) and notwithstanding the provisions of the "Cemetery Companies Act," the "Cremation Act," or the "Municipal Cemeteries Act," the Commission may, with the approval of the Lieutenant-Governor in Council, make regulations:

(*a*) Respecting the burial, disinterment, removal, and disposal of the bodies or other remains of deceased persons;

(*b*) Respecting the plans, survey, arrangement, condition, care, sale, and conveyancing of lots, plots, and other cemetery grounds and property;

(*c*) Respecting the erection, arrangement, and removal of tombs, vaults, monuments, gravestones, markers, copings, fences, hedges, shrubs, plants, and trees in cemeteries;

(*d*) Respecting charges for the sale and care of lots and plots;

(*e*) Respecting the collection, amounts to be collected, and investment of funds for perpetual care and maintenance of cemeteries;

(*f*) Requiring the filing or registration of plans of cemeteries and prescribing the contents and details of such plans, and requiring that burials be made in accordance with such plans;

and such regulations may be general in their application or may be made applicable specially to any particular locality or cemetery.

(3) Every person who fails or refuses to obey a regulation of the Commission made under this section is guilty of an offence and liable, on summary conviction, to a penalty of not less than ten dollars and not more than five hundred dollars.

The appellant proposed to establish and operate a new cemetery in the vicinity of Victoria and, as required by the statute, applied to the Public Utilities Commission for a certificate of public convenience and necessity. There were at the time two cemeteries in the area, one, the Colwood Cemetery, operated by a privately-owned company, the other, the Royal Oak Cemetery, a municipally-operated cemetery controlled by the City of Victoria and the Municipality of Saanich. Appellant's application was

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opposed by those in control of the two existing cemeteries and by certain owners of property adjoining the site of the proposed new cemetery.

After a hearing at which evidence was taken as to the need for cemeteries in the Victoria area, both present and future, the Commission issued the certificate requested. Under s. 100 of the *Public Utilities Act* an appeal from a decision of the Commission lies to the Court of Appeal, by leave, only upon a question of law or as to the jurisdiction of the Commission. Appeal was taken to the Court of Appeal for British Columbia and by a majority decision the Court of Appeal[1] allowed the appeal and held that the certificate should be set aside. The present appeal is from that judgment. Sheppard J. A., while dissenting on the main issues raised, would have referred the matter back to the Commission for a rehearing on one matter.

The term "public convenience and necessity" appears to have been brought into the statute law in Canada from the United States and a great many decisions were cited to us indicating the meaning given to the term in that country. It is clear from these decisions that the word "necessity" as contained in these American statutes cannot be given its dictionary meaning in the strict sense: *Canton-East Liverpool Coach Co. et al. v. Public Utilities Commission of Ohio*[2]; *Wisconsin Telephone Co. v. Railroad Commission of Wisconsin et al.*[3]; *Wabash, C. & W. Ry. Co. v. Commerce Commission*[4]; *San Diego & Coronado Ferry Co. v. Railroad Commission of California et al.*[5] The meaning in a given case must be ascertained by reference to the context and to the objects and purposes of the statute in which it is found.

The term "necessity" has also been held to be not restricted to present needs but to include provision for the future: *Wabash, C. & W. Ry. Co. v. Commerce Commission, supra,* at p. 215, and this indeed would seem to follow from s. 12 of the *Public Utilities Act,* which provides that the certificate may issue where public convenience and necessity "require or *will require*" such construction or operation.

[1] (1957), 22 W.W.R. 348, 9 D.L.R. (2d) 653, 75 C.R.T.C. 292.
[2] (1930), 174 N.E. 244.
[3] (1916), 156 N.W. 615.
[4] (1923), 141 N.E. 212 at 214.
[5] (1930), 292 P. 640 at 643.

It is obvious I think, that the phrase "public convenience and necessity" when applied to cemeteries cannot be given precisely the same connotation as when it is applied to those operations more commonly looked upon as public utilities, such as electric power services, water-distribution systems, railway lines and the like, and this is borne out both by the terms of the statute which I have quoted and by the decisions of the American Courts to which we were referred.

The phrase also appears in *The Municipal Franchises Act,* R.S.O. 1950, c. 249 (considered by this Court in *Union Gas Company of Canada Limited v. Sydenham Gas and Petroleum Company Limited*[1]), in the *Aeronautics Act,* R.S.C. 1952, c. 2, and I have no doubt in other provincial and federal statutes, and it would, I think, be both impracticable and undesirable to attempt a precise definition of general application of what constitutes public convenience and necessity. As has been frequently pointed out in the American decisions, the meaning in a given case should be ascertained by reference to the context and to the objects and purposes of the statute in which it is found.

As this Court held in the *Union Gas* case, *supra,* the question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest, the need and desirability of additional cemetery facilities, and in reaching that decision the degree of need and of desirability is left to the discretion of the Commission.

The findings of fact made by the Commission have been concisely set forth by Sheppard J.A. in his reasons[2], and are in part as follows:

(1) That there are two established cemeteries in the district in question, namely, Royal Oak and Colwood, and these have vacant space adequate for immediate needs;

[1] [1957] S.C.R. 185, 7 D.L.R. (2d) 65, 75 C.R.T.C. 1.
[2] 22 W.W.R. at p. 362.

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(2) That the services proposed by the appellant company are similar to those now available at Royal Oak; that Colwood is not a modern, but an older, type of cemetery; that Colwood has proposed modernizing but that may be reconsidered if the respondent [now appellant] company is permitted to establish a cemetery;

(3) That the established cemeteries, Royal Oak and Colwood, are not adequate for the future; that the available space at Royal Oak will be filled in 10 to 15 years; that the need for the future is recognized by both these cemeteries in that both are presently negotiating for additional land;

(4) That vacant cemetery spaces will be needed for the future; that the modern-type cemetery may, by reducing the public demand for cremation, increase the rate at which the available space will be filled.

There was evidence before the Commission upon which it could make the findings of fact which it did. In my opinion the majority of the Court of Appeal in holding that in law the Commission could not find necessity upon the facts recited in its judgment was merely substituting its opinion for that of the Commission. As this Court held in the *Union Gas* case, *supra,* this is not a question of law upon which an appeal is given, and the Court below was therefore without jurisdiction. It would have been otherwise if it had been shown that the Commission had given a meaning to the words of the statute which as a matter of law they could not bear.

Three subsidiary points were raised by respondents. As set out in their factum these are as follows:

1. The Commission went beyond the authority given by the statute by granting the appellant a certificate, though the appellant was not meant to establish or operate the cemetery itself, but to form a subsidiary to do that, to which the Commission bound themselves to give a second certificate;

2. The appellant had no basis for its application for a certificate except an option to buy a site, and the statute required it to be an "owner";

3. The Commission unjustifiably received evidence of the option without permitting the respondents to see it, thus preventing cross-examination and infringing the *audi alteram partem* rule.

As to points 1 and 2, I agree with the views expressed by Sheppard J.A. that the certificate appears to be within the powers conferred by the statute and that the option held by appellant, assuming it to be enforceable, did enable appellant to obtain and assert a control sufficient to constitute appellant an owner within the meaning of the statute.

As to the third point, at the hearing before the Commission appellant called as witnesses the persons from whom the option referred to had been obtained, and the

option itself was filed with the Commission. Appellant was apparently unwilling to exhibit the document to respondents at that time since this would have involved disclosing the purchase-price and the transcript of evidence on this point reads in part as follows:

Mr. GORDON: Just one point, since the option itself has been the subject-matter of considerable discussion. I wonder if it might be produced for examination by the Commission? There have been certain representations regarding it as to detail, as to length of time and certain questions have now arisen. Could the Commission have it produced, merely to verify statements that have been made?

Mr. MACFARLANE: I am prepared to produce it to the Commission but not to my learned friends. Now, I state that that option has been executed by these people, Mr. and Mrs. Turner. These people have sworn under oath here to-day that they executed such an option. I state that the option is in favor of James H. Edwards, the President of Memorial Gardens Association of Canada Limited. They swear the property that it covers and they swear the expiry date. I have the option here but I am not going to tell my learned friends the price that Memorial Gardens Association Limited is paying for this property, which they would dearly like to know and which is Mr. and Mrs. Turner's private business. The company doesn't care if everybody knows but Mr. and Mrs. Turner are selling it for a price, it is up to them.

Mr. GORDON: It is essential to the jurisprudence to produce the document about which you are discussing. It is the document, the very basis of the matter which we are dealing with. Simply to make an oath on something when—

The CHAIRMAN: I think the document should be produced to the Commission, whose officers are under oath not to disclose confidential information, but if the document itself does contain certain information that is confidential, it needn't be disclosed to the public.

Mr. MACFARLANE: That is my point. I am quite happy to disclose the information to the Commission but I don't feel it is such that should be disclosed—

Mr. GORDON: May I just simply add this, that in respect to this option, certain statements were made as to when it was entered into, as to what period it was extended to, asking the Commission to make a hurried decision in order to meet with its requirements. If these things are all in the option, we know at least that is *bona fide* but having sworn statements made without the basic documents there at least to the Commission, is of little value.

The CHAIRMAN: The Commission will have the opportunity of comparing the statements with the document.

Mr. GORDON: Well, that is perfectly satisfactory to me.

It does not appear from the record that any person opposing the application other than Mr. Gordon asked for the production of the option and Mr. Gordon stated that he was satisfied with the procedure proposed by the Commission. These circumstances clearly distinguish this case

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from that of *Toronto Newspaper Guild v. Globe Printing Company*[1]. In these circumstances and in view of the provisions of ss. 58, 72 and 75 of the *Public Utilities Act* in my opinion this third point does not avail the respondents.

For the reasons which I have given, as well as for those of Sheppard J.A. as to the main issue, with which I am in substantial agreement, I would allow the appeal with costs here and below and restore the certificate.

LOCKE J.:—With the exception hereinafter mentioned, I agree with the reasons for judgment delivered by Mr. Justice Sheppard.

While the record does not disclose the fact, I assume that Mr. Gordon, who cross-examined certain of the witnesses on behalf of the Colwood Cemetery Company, is a member of the bar of British Columbia and that he acted in that capacity at the hearing before the Public Utilities Commission. We were informed at the hearing of this appeal that the person referred to was not Mr. D. M. Gordon, Q.C., who appeared for the respondents before us.

The passage from the transcript quoted in the reasons of my brother Abbott, which I have had the advantage of reading, shows that Mr. Gordon asked that the option might be produced for examination by the Commission "merely to verify statements that have been made". The chairman ruled that this should be done and counsel for the appellant at once agreed that the information should be disclosed to the Commission. When the chairman said that the Commission would have the opportunity of comparing the statements that had been made with the document, Mr. Gordon said that that was perfectly satisfactory. None of the other parties represented before the Commission appear to have evidenced any interest in the nature of the option. Having thus led the members of the Commission to understand that the course proposed was satisfactory to his clients, they should not now be heard to allege that the proceedings were invalidated by the

[1] [1953] 2 S.C.R. 18, [1953] 3 D.L.R. 561, 106 C.C.C. 225.

very course of conduct that they assented to: *Scott v. The Fernie Lumber Company, Limited*[1].

I would allow this appeal with costs in this Court and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellant: Clay, MacFarlane, Ellis & Popham, Victoria.

Solicitors for the respondent Colwood Cemetery Company: Crease & Co., Victoria.

Solicitors for the respondent cemetery trustees: Gregory, Grant, Cox & Harvey, Victoria.

Solicitors for the respondent District of Saanich: Manzer, Wootton & Drake, Victoria.

Solicitor for the respondent District of Victoria: T. P. O'Grady, Victoria.

Solicitor for the individual respondents: A. J. Patton, Victoria.

EARL F. WAKEFIELD COMPANY (*Plaintiff*) ..... APPELLANT;

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*Feb. 5, 6
Apr. 22

AND

OIL CITY PETROLEUMS (LEDUC) LTD., PONOKA-CALMAR OILS LTD., AMERICAN LEDUC PETROLEUMS LIMITED, HARRY SZPILAK, KASPER HALWA, ALVIN M. DAVIS, PETER MATVICHUK, ALVIN M. BERG, JACOB B. GAUFF AND ALEX JOHN PYRCH (*Defendants*) .....RESPONDENTS.

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

Mechanics' liens—Arising of lien—Drilling of oil well—Proceedings to enforce lien—Appointment of receiver—Charge on moneys in receiver's hands—Effect of failure to file renewal statement—The Mechanics' Lien Act, R.S.A. 1955, c. 197, ss. 2(g), 29(7), 49-55.

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*PRESENT: Kerwin C.J. and Rand, Locke, Fauteux and Abbott JJ.

[1] (1904), 11 B.C.R. 91 at 96.

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The plaintiff company, under an arrangement made with it by H. and M., commenced drilling an oil well on September 10, 1949. On September 19, O. Co. was incorporated, with H. and M. as the sole shareholders beneficially interested, and the company made a formal contract with the plaintiff for the drilling to commence on or before September 15, 1949. On September 24, O. Co. entered into an agreement with other companies (including the assignee of the oil lease in the property) and H. and M., therein described as "agents", wherein it was recited that the latter "have assisted in arranging for the drilling of the said wells" and O. Co. covenanted to "commence to drill or cause to be commenced to be drilled" the well which had in fact been commenced by the plaintiff. Drilling had been suspended by the plaintiff on September 23 because of non-payment by O. Co.; mechanics' liens were registered by the plaintiff in October 1949, and an action was brought within the time prescribed.

About three months after the cessation of work, arrangements were made with others under which the well was completed and brought into production. In June 1950, a receiver was appointed to sell the oil won, and, subject to stated deductions, to deposit the proceeds in a special trust account to the credit of the action. The plaintiff's action did not come to trial until more than six years had elapsed from the registration of the lien, and no renewal statement had been filed as required by what is now s. 29(7) of *The Mechanics' Lien Act*.

Held: (1) In these circumstances, a valid lien in favour of the plaintiff arose in 1949 for the value of the work actually done. It was clear that there was a lien for the work done after the making of the contract with O. Co. on September 19, and the lien should also extend to the work done before that agreement was made since it must be held that the original agreement with the plaintiff was made with the privity and consent of the lessees and the companies concerned, and under their implied authority.

(2) While the lien on the land ceased to exist because of the failure to file the necessary renewal statement before the expiration of six years, the transferred lien or charge on the moneys in the hands of the receiver was not affected by this failure, and the plaintiff was accordingly entitled to recover the value of its work out of these moneys.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Divison[1], reversing a judgment of McLaurin C.J.T.D. Appeal allowed.

J. V. H. Milvain, Q.C., and *R. A. MacKimmie, Q.C.*, for the plaintiff, appellant.

M. E. Manning, Q.C., for the defendant Oil City Petroleums (Leduc) Limited, respondent.

W. G. Morrow, Q.C., for the defendants Ponoka-Calmar Oils Limited, and American Leduc Petroleums Limited, respondents.

[1] 22 W.W.R. 267, 10 D.L.R. (2d) 36.

The judgment of Kerwin C.J. and Rand and Abbott JJ. was delivered by

RAND J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta holding the appellant, to be called "the Company", not to be the holder of a lien under *The Mechanics' Lien Act*, R.S.A. 1942, c. 236, now R.S.A. 1955, c. 197, on money held by a receiver to the credit of the action and representing the proceeds of the sale by the receiver of oil from a well, the drilling of which was in part done by the Company. The work commenced on September 10, 1949, under circumstances which will be dealt with later, and on or about September 23, after reaching a depth of 2,570 feet, operations were suspended until payment of remuneration was made according to the terms of the agreement. On September 26 a cheque on account was issued to the Company but was dishonoured: no further work was done and on October 22, under permission of the Natural Gas Conservation Board, the well was plugged and abandoned by the Company. Claims of lien were on October 12 and 18 registered against "Legal Subdivision 7 of Section 21, in Township 49, Range 26, West of the 4th Meridian . . . containing 80 acres more or less", and appropriate proceedings in court were commenced within the time specified by the Act. Three months or so after the cessation of work arrangements were made with others under which the well was completed and brought into production.

In June 1950 a receiver was appointed to sell the oil won, and, subject to the payment of operating expenses and a certain royalty to the owner of the fee, to deposit the proceeds in a special trust account to the credit of the action. The well's production was exhausted prior to trial, but before judgment was pronounced six years had elapsed from the registration of the claim and no statement had been filed in the land titles office of the amount still owing as required by s. 24(6) of the Act, enacted by 1947, c. 64, s. 1 (now s. 29(7)). It was not suggested that the six years had expired before the production ceased.

The trial proceeded on an agreed statement of facts. The lien of the Company was declared valid for the sum of $30,000 which, for the purposes of the action, by para. 13 of the agreement as to facts was admitted by all parties.

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to represent the fair value of the work done. At the hearing s. 24(6) was not raised; but on appeal the point was taken that by its effect the lien, including that on the money in the hands of the receiver, had ceased to exist. Porter J.A., speaking for the majority of the Court, held that no lien had arisen and the effect of s. 24(6) was not considered; but McBride J.A., with Johnson J.A. concurring, assuming a valid lien, based his opinion on that section which, operating before judgment, he viewed as nullifying the lien and the judgment based on it, including the same effect on the money in court. On this latter interpretation of the subsection, the appeal here must be dismissed, and the question of its soundness presents itself at the threshold of our consideration.

The end and object as well as the limitations of a mechanics' lien, a creation of statute, are, for the value of labour and materials, in the widest sense, applied to an improvement of land, to provide a security to those furnishing them in a legal charge upon the improvement and the land to which it has been added. Registration to bring that charge into harmony with the law affecting land titles is, for that reason, necessary and as a result s. 19 (now s. 23) provides for the making of a "claim for the registration of a lien" in the land titles office of the registration district in which the land is situated. The lien itself arises from the beginning of the work or the furnishing of materials and is an existing interest when registration is sought, upon which it becomes, by s. 19(8) (now s. 23 (10)), "an incumbrance against the land, or the estate or interest in the land therein described, as provided by *The Land Titles Act*".

A question was raised on the argument to which s. 19(8) is relevant: it was urged that the effect of s. 6 is to create a lien on the "land", *i.e.*, the land in its total interests or estates, in its fee simple. It was conceded that s. 10(1), which deals with the case of leased land, assumes the contrary, that what is bound is the estate or interest of the person or persons coming within the words of s. 6, "any owner", as the latter word is defined in s. 2(*g*). That what is suggested is not the true interpretation of s. 6 is confirmed not only by s. 10(1) and s. 19(8) but by the

forms of claim provided in the schedule to the Act. According to them the lien is to be claimed " upon the estate of" the owner in the land to be charged.

These considerations emphasize likewise the fact that the registration is essentially for the purpose of protecting the title to an interest in or against an estate in land; the lien becomes a legal encumbrance registered as such under the regime of land titles, and in that manner accommodated to the security of titles generally. That object becomes significant to the first issue.

The statutory scheme contemplates a sale of the owner's interest in the land with the improvement and the distribution of the proceeds among those whose liens at the time are then existing; but special situations are envisaged. By s. 26 (now s. 31) a judge may allow security for or payment into court of the amount of the claim and may thereupon vacate the registration by order. The effect of that is to bring to an end the lien on the land; the money paid into court takes the place of the property so discharged as if it had been realized by a sale under the Act. No reference is made in s. 26 to the effect of the discharge on the new "security" that may be given, but clearly that must be the same as in the case of money. By this provision the purpose of the registration is underlined: the act of vacating the registration is simply to clear the title. That done, the lien on the land ceases and a charge on personal property arises which is not a lien for which registration is required or possible.

This brings us to s. 24(6). The result of failure to comply with that section obviously cannot affect the new and non-registrable lien under s. 26; no land contemplated by s. 6 is affected by it and registration is impossible. Is there such effect on the new non-registrable lien created against the fund in court arising from the receivership?

The early exploitation of oil and gas resources in the Province raised questions of difficulty under the earlier provisions of the Act and special terms were enacted by the Legislature by 1943, c. 31, s. 12, in ss. 43 to 47 (now 49 to 55) inclusive. Section 43 expands the definition of "owner" to every person

having any estate, interest or right in the oil or gas in place or in the oil or gas when severed, notwithstanding that such person has not requested

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the contract work to be done, is only indirectly benefited thereby and has had no dealing or contractual relationship with the contractor or persons claiming the lien;

Provided, nevertheless, that where the oil or gas is held in fee simple, the holder of an interest in the first royalty in the oil or gas, up to twenty per cent thereof, shall not, by reason of this section, be deemed to be an owner.

Section 44 extends the lien to the oil and gas when severed. Section 45 declares all interests in the oil or gas under any lease, mortgage or agreement for sale relating to the oil or gas in excess of the first royalty up to 20 per cent. to be subject to the lien in all respects and excludes the application of ss. 10 and 11. Section 46 removes the necessity to set out in the claim for registration the name of the owner. Section 47 adds to the powers which may be conferred on a receiver appointed under s. 36 that of authorizing him either to operate the well or to take the oil and gas when produced, to sell it and pay into court the proceeds. These sections, because of the special character of the subject-matter, create additional and cumulative liens. Section 36 (now s. 42) provides generally for the appointment of a receiver to take charge of property bound by the lien and "rent" it—indicating the scope of the Act in its original form—and directs the net receipts to be applied "as directed by the judge". Finally, s. 37 (now s. 42) furnishes the order in which the distribution of "all moneys realized by proceedings under this Act" shall be made.

From a consideration of the foregoing provisions I am unable to agree that, in the case of an oil well, where the production has been converted into money and is held by a receiver in a manner equivalent to payment into court, the lien interests existing at the time of its receipt and deposit by the receiver are affected by the omission to file the statement required by s. 24(6). That requirement is in respect of "every registered lien" and that language must, I think, be restricted to the lien as it is an encumbrance on the land. The design of the subsection is clear, to bring an encumbrance on land to an end. It may have been made desirable, among other things, by either the protraction of lien actions against the land or neglect to remove the registration once the liens were satisfied. It is pertinent here to observe that the claim of lien can be

registered before the work begins. That the subsection was intended to extend to funds within the control of the Court is a view which has no support in any express language nor, in my opinon, in any warranted inference.

The argument assumes that these additional liens and charges, *i.e.*, on the oil itself after it has become severed and on its proceeds when paid into court, are conditioned upon the maintenance of the registration against the land. That that is a governing conception underlying the statute is refuted by s. 26. Whether subs. (2) of that section, which deals with money paid into court, is limited to payment under such an order may or may not be so. If it is, then there is nothing in the statute to cover the case of money in the hands of a receiver, as here, and the lien arises under the rules of the conversion of property implied by the statute; if not, the general considerations to be gathered from the Act apply. Section 26 in its use of the expression points the distinction between a "registered lien" and one not within the object of registration. The extent or scope of the lien on the severed oil is by no means clear. That purchasers in good faith and for value must ascertain the land from which oil comes and then search the title before they can safely purchase would present a most difficult situation; the confusion of the oil of many owners has become a commonplace; and that a succession of such purchasers would be bound by a legal encumbrance must surely be questionable. The lien undoubtedly exists while the oil remains in the possession of the owner where that possession is associated with the well or land from which it is produced: but there may be many oil areas and many collecting stations. For the extension of lien to the proceeds under the control of the Court, the purpose of registration is as completely irrelevant as in cases under s. 26. The liens being cumulative a defect in one is not to be attributed to another. Section 24(6) is given its full application here by holding the lien against the land and the oil in place to have come to an end but not the charge on the money in court. The existence of one is not the condition of the other and *vice versa*: no one would suggest that the loss of that on the oil severed would invalidate that on the land; they are several, independent and equal.

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It is not contended that the existence of the lien against the land or oil in place is not necessary to a lien arising on the oil severed or its proceeds: but that does not mean that it should at that moment be registered. Within 120 days from the completion of a well, which is the time for registering a lien on such an improvement, the entire production of the oil in place might be realized; and are we required to say that the lien attaching to the severed oil within that period would be destroyed by a failure to register? Whatever that may be, there cannot, in my opinion, be any doubt that on proceeds in court no such effect would follow.

There remains the question whether in the circumstances a lien ever arose. The facts are these. Some time prior to September 10, 1949, arrangements were made with the Company by two men, Harding and McMullen, which resulted in the commencement of drilling on or about that day. The work proceeded until September 23, when it was suspended as mentioned. On September 19 the respondent Oil City was incorporated with Harding and McMullen the only shareholders beneficially interested, and on the same day a formal contract for the drilling was entered into by that company with the appellant. The significant fact in the agreement is that it contemplates the work already to have begun:

> 3. The Contractor shall, subject to the provisions of clause two (2) hereof, commence drilling operations on or before the 15th day of September, A.D. 1949, and shall thereafter carry on the work hereby undertaken continuously . . .

Under date of September 24 (although in a notice by Ponoka-Calmar to Oil City of October 13, 1949, the date is stated to be that of September 21) an agreement was executed between the respondents American Leduc and Ponoka-Calmar, the assignees of the oil rights on legal subdivisions 1, 2, 7 and 8 of section 21, the respondent Oil City, Prudential Trust Company Limited and Harding and McMullen. By its terms the leases were assigned to the trust company; Oil City as operator, should the first well show commercial production, was, in certain contingencies, to drill one on each of the remaining subdivisions and such offsetting wells as were called for by the leases; for the cost of these American Leduc and Ponoka-Calmar were to furnish the trustee with $37,500 for each, the first to be

deducted by the trustee from their royalties of 30 per cent.; and finally, omitting terms immaterial here, the gross proceeds of production were to be paid to the trust company and by it applied as provided, which included the payment to Oil City of what remained after expenses and royalties, amounting to 72 per cent., were met. The preamble, among other things, recites an agreement between the first two parties to pool their rights in the four legal subdivisions, and it proceeds, "AND WHEREAS the Agents [meaning Harding and McMullen] have assisted in arranging for the drilling of the said wells". By para. 3:

> On or before the 20th day of September, A.D. 1949, the Operator [Oil City] shall at its sole expense commence to drill or cause to be commenced to be drilled one (1) well for the purpose of exploring, removing and producing petroleum and/or natural gas on Legal Subdivision Seven (7) of Section Twenty-one (21) . . .

The effect of the drilling agreement of September 19 was that Oil City adopted the work done up to that time as having been done under its provisions and no serious doubt can arise that as between the Company and Oil City, and as a result of the interest in the proceeds acquired by Oil City under the agreement of September 24, the lien covering the entire work then became effective: *Pittsburgh Steel Product Co. v. Huntington Masonic Temple Association*[1], in which, on the default of the first contractor, a second contractor was engaged by a surety to complete the work on the terms of the contract, and it was held that the lien of the second contractor covered the work from the beginning.

As to the respondents American Leduc and Ponoka-Calmar, they come clearly within s. 43 as being persons having an

> interest or right . . . in the oil or gas . . . when severed, notwithstanding that such person has not requested the contract work to be done, is only indirectly benefited thereby and has had no dealing or contractual relationship with the contractor or persons claiming the lien.

The drilling work prior to the date of the contract having been expressly contemplated in the agreement of September 24, these two companies *vis-à-vis* Oil City have ratified and bound themselves to the latter's recognition and inclusion of the work done previously to the 15th. Section 43 in its exceptional terms was undoubtedly passed to meet just such situations as are shown here, *i.e.*, conditions

[1] (1917), 81 W. Va. 222.

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brought about by the urgency to exploit the resource in which formal agreements could not keep pace with action and only by relation back were the rights of the parties intended to be determined.

The question remaining is the amount of the lien. The Company claims the sum of $50,000, the amount to be paid for the completion of the work; but that cannot represent the amount payable for part of it. It is admitted that the lien does not extend to damages for breach of contract and in the circumstances $30,000 becomes the amount due on a *quantum meruit*. Certain other sums were claimed as being within special provisions of the contract, but I agree with McLaurin C.J. that the latter are not in the circumstances applicable.

I would allow the appeal, set aside the judgment of the Appellate Division of the Supreme Court of Alberta and restore the judgment at trial, with the following modifications: by deleting therefrom the declaration that the appellant has a valid mechanics' lien against the mines and minerals within, upon or under the lands described; by adding thereto that the appellant recover against Oil City Petroleums (Leduc) Limited personal judgment in the sum of $51,670.62 with the costs of the action as awarded by the seventh paragraph of the judgment, together with costs of the appeal to the Appellate Division and to this Court; by amending the fourth paragraph thereof so as to declare and adjudge that the appellant is entitled to and has a charge on the funds held by the receiver to the extent of $30,000 principal sum, together with the total costs of the personal judgment; and by adding thereto that the appellant recover against the respondents Ponoka-Calmar Oils Ltd. and American Leduc Petroleums Limited personal judgment for the amount of costs in the Appellate Division and in this Court. As the question of costs was not argued, I would allow them to be spoken to.

The judgment of Kerwin C.J. and Locke and Fauteux JJ. was delivered by

LOCKE J.:—The judgment of the majority of the Appellate Division in this matter was delivered by Porter J.A. and decided that the evidence adduced did not disclose facts entitling the appellant to liens upon the moneys in the hands of the trustee, under the provisions of *The Mechanics'*

Lien Act, R.S.A. 1942, c. 263. The judgment of McBride and Johnson JJ.A., delivered by the former, held that if such liens did arise they had ceased to exist before the date of the trial of the action, by reason of the failure of the appellant to file a renewal statement as required by subs. (6) of s. 24 of the Act.

The action was tried by Chief Justice McLaurin at some date prior to November 2, 1955. The record does not disclose the nature of the evidence upon which the learned trial judge proceeded in deciding that the appellant was entitled to a lien, but it seems apparent that the parties had requested him to decide the matter upon oral admissions made before him and that these, or some of them, were incorporated in the agreed statement of facts which was filed on the above-mentioned date when judgment was delivered. The record shows that at the previous hearing, which had been adjourned, the Chief Justice had decided that the appellant was entitled to a lien and that the adjournment had been for the purpose of enabling the parties to put their admissions in writing and, if possible, agree among themselves on the amount for which the lien should be declared, reserving to the parties their right of appeal. On November 2, 1955, after the written admissions were filed, the learned Chief Justice said:

> I will accordingly find that the plaintiff has a valid lien and will give judgment in favor of the plaintiff for thirty thousand dollars, which sum shall be payable out of the receivership funds now held by the Toronto General Trusts Corporation.

The formal judgment was not entered until March 16 following. It declared that the appellant had a good, valid, binding and subsisting mechanics' lien in the sum of $30,000 against all mines and minerals within, upon or under legal subdivision 7 of section 21, hereinafter more particularly referred to, and further directed that the appellant recover the sum of $30,000

> from the funds held by the Toronto General Trusts Corporation, the receiver appointed herein pursuant to the Order of the Honourable Mr. Justice S. J. Shepherd dated the 22nd day of June, A.D. 1950.

The following sections of *The Mechanics' Lien Act* require consideration in dealing with the ground upon which the judgment of the majority has proceeded.

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Paragraph (*a*) of s. 2 defines the expression "contractor" as meaning

a person contracting with or employed directly by an owner or his agent, to do work or perform services upon or in respect of or to place or furnish materials to be used for, any improvement.

"Improvement" is defined by para. (*c*) as including a gas, oil or other well.

"Owner" is defined by para. (*g*) as follows:

"Owner" extends to every person, body corporate or politic (including a municipal corporation and a railway company), having any estate or interest in land, at whose request, express or implied, and,—

(i) upon whose credit; or

(ii) upon whose behalf; or

(iii) with whose privity and consent; or

(iv) for whose direct benefit,—

any contract work is done and all persons claiming under him or it whose rights are acquired after the commencement of the work.

This definition is extended by s. 43, enacted by 1943, c. 31, s. 12, which reads:

The definition of "owner" as set out in paragraph (*g*) of section 2 shall include, in addition to the persons therein set out, every person having any estate, interest or right in the oil or gas in place or in the oil or gas when severed, notwithstanding that such person has not requested the contract work to be done, is only indirectly benefited thereby and has had no dealing or contractual relationship with the contractor or person claiming the lien:

Provided, nevertheless, that where the oil or gas is held in fee simple, the holder of an interest in the first royalty in the oil or gas, up to twenty per cent thereof, shall not, by reason of this section, be deemed to be an owner.

Sections 6 and 7 of the Act read:

6. (1) [as re-enacted by 1943, c. 31, s. 1] Unless he signs an express agreement to the contrary and in that case, subject to the provisions of section 4, a person who performs any work or service upon or in respect of or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving, demolishing, or repairing of any improvement for any owner, contractor or sub-contractor, shall by virtue thereof have a lien for so much of the price of the work, service or materials as remains due to him in the improvement and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work or service is performed, or upon which the materials are to be used.

(2) Materials shall be considered to be furnished to be used within the meaning of this Act when they are delivered either upon the land upon which they are to be used or upon some other land in the vicinity thereof, designated by the owner.

(3) The lien given by subsection (1) in respect of materials shall attach to the land as therein set out where the materials delivered to be used are incorporated into any improvement on the land, notwithstanding that the materials may not have been delivered in strict accordance with the provisions of subsection (2).

7 [as amended by 1943, c. 31, s. 2]. The lien shall arise at the date of the commencement of the work or at the date of the first delivery of material.

Section 44, enacted in 1943, reads:

The lien provided by section 6 shall not only attach to the land, including the oil and gas therein, but also to the oil and gas when severed.

The facts upon which the claim to the lien is based, in the order of their occurrence, are as follows:

By an agreement and lease dated May 31, 1948, Harry Szpilak leased to Herbert Lee Miller, John H. Duitman and three other named persons, all his right, title and interest in the petroleum, natural gas and related hydrocarbons in the north half of the south-east quarter of section 21, township 49, range 26, west of the 4th meridian in Alberta. This area includes legal subdivision 7. Among the numerous covenants of the lessees they agreed to drill a well for petroleum and natural gas upon these lands within two years from that date.

On September 10, 1949, at the request and on the instructions of George Harding and James McMullen, the appellant moved a drilling rig on to the lands and, between that date and September 23, 1949, drilled an oil well to a depth of 2,570 feet. Before commencing the work, the appellant was given a drilling permit issued by the Petroleum and Natural Gas Conservation Board of the Province of Alberta in the name of Oil City Petroleums (Leduc) Ltd.

On September 19, 1949, the appellant signed an agreement with Oil City Petroleums (Leduc) Ltd. to drill a well to a depth not exceeding 5,400 feet upon legal subdivision 7. While dated the 19th of the month, the written agreement required the appellant to commence drilling operations on or before the 15th of the month. It is common ground that the well referred to was that which had been commenced on September 10, above mentioned.

The Oil City company, in whose name the permit to drill the well had been granted on or prior to September 10, was not incorporated until September 19 and, at the time of the incorporation, its officers and only shareholders were the said Harding and McMullen.

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On September 21, 1949, Miller, Duitman *et al.* assigned their interest under the lease from Harry Spilak to the defendant Ponoka-Calmar Oils Ltd.

On September 23, 1949, the appellant informed the Oil City company that it would drill no further until payments were received for work already done, as provided for in the agreement of September 19.

On September 24, the respondents American Leduc Petroleums Limited and Ponoka-Calmar Oils Ltd. of the first part, the Oil City company of the second part, Prudential Trust Company Limited of the third part and George Harding and James McMullen of the fourth part, entered into an agreement providing that the Oil City company, designated as "the operator", should drill a well on legal subdivision 7 to a depth specified, for the consideration mentioned in the agreement. While the agreement does not say so, the well to be drilled was that which had already been commenced and continued under the above-mentioned circumstances. The agreement provided for the drilling of further wells and for the consideration to be paid to the operator. The recitals to this agreement referred to the lease granted by Harry Szpilak to Miller, Duitman *et al.*, above referred to, and a lease from one Mary Chubocha, both of which were held by Ponoka-Calmar Oils Ltd., and a lease from one Mike Szpilak to American Leduc Petroleums Limited of the oil and gas rights in legal subdivision 2 of section 21, and stated that the companies holding the said leases had agreed to pool their rights and to assign the leases to the trust company for the purposes of carrying out the agreement. A further recital referred to Harding and McMullen, who were designated as agents, and read:

> AND WHEREAS the Agents have assisted in arranging for the drilling of the said wells.

The function of the trust company was to receive the gross proceeds of any production from wells drilled on the same lands under the terms of the agreement and, after payment of royalties and rentals to the lessors and the expenses of the operator, to divide the balance in stated proportions between the parties.

On June 22, 1950, the order of Shepherd J. appointing the Prudential Trust Company Limited as receiver was

made. By an order dated September 10, 1953, the Toronto General Trusts Corporation was substituted to act in that capacity.

The question is as to whether there was evidence upon which McLaurin C.J.T.D. could properly find that the appellant had performed the work of drilling the well in respect of which the lien is claimed for or on behalf of "any owner, contractor or sub-contractor" within the meaning of s. 6, or of any "person having any estate, interest or right in the oil or gas in place or in the oil or gas when severed" within the meaning of s. 43, or with the privity and consent of any such owner.

No question arises, in my opinion, as to the work done after September 19, 1949, under the contract with the Oil City company, since the respondents Ponoka-Calmar Oils Ltd. and American Leduc Petroleums Limited by the agreement of September 24 expressly authorized the Oil City company to drill the wells or to have them drilled. The agreement, while dated September 24, specified the date for the commencement of drilling as a date four days prior to that and, while it does not refer in terms to the agreement of September 19, it appears to me an irresistible inference that these parties knew of and intended to approve the arrangement theretofore made by the Oil City company with the appellant as work done under the contract.

The Oil City company had not, however, been incorporated on September 10, when the appellant went on legal subdivision 7 and commenced drilling operations at the request of Harding and McMullen, and much the greater part of the work for which the claim for lien is, in my opinion, entitled to succeed was done prior to September 19.

While I think it may properly be inferred that at the hearing before McLaurin C.J.T.D. prior to November 2, 1955, he had been informed that Harding and McMullen in making the arrangement with the appellant had acted either on behalf of Miller, Duitman *et al.*, the lessees from Harry Szpilak, or upon instructions from Ponoka-Calmar Oils Ltd. under an arrangement between the individual lessees and that company, since the question as to whether the appellant was entitled to a lien was raised by the pleadings, the agreed statement of facts does not say so. The agreement of September 24, however, does recite the fact

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that Harding and McMullen had "assisted in arranging for the drilling of the said wells", a statement which, since only the one well had been started, clearly referred to what they had done in arranging with the appellant to commence drilling on September 10, since they were not parties to the agreement of September 19, and indicates that these two men had been authorized to make the arrangements at that time with the appellant and to request that the drilling be commenced. It is further to be noted that the agreement of September 24 was signed on behalf of Ponoka-Calmar Oils Ltd. by Duitman and Morrisroe, two of the lessees named in the lease from Harry Szpilak, and that a subsequent letter dated October 13, addressed in the name of that company to the Oil City company, complaining of default, was signed on its behalf by Duitman.

From these circumstances, it is proper, in my opinion, to draw the inference that Harding and McMullen had been authorized, either by the individual lessees from Harry Szpilak or on behalf of the Ponoka-Calmar company, to request the appellant to do the work, and, further, that the drilling done by the appellant from September 10 onward was done with the privity and consent of the said lessees and of the said company. Accordingly, in my opinion, a claim for a mechanics' lien came into existence on September 10, 1949, the work was continued under the agreement of September 19, and the appellant is entitled to enforce such lien, not only for the work done between September 10 and September 19, but thereafter under the agreement with the Oil City company. The individual lessees from Harry Szpilak and the Ponoka-Calmar company were owners within the meaning of that term in ss. 6 and 43 of *The Mechanics' Lien Act*.

I have had the advantage of reading the reasons for judgment to be delivered by my brother Rand dealing with the question arising under subs. (6) of s. 24 of the Act and I agree with his opinion on this aspect of the matter and that judgment should be entered for the appellant in the terms of the concluding paragraph of his judgment.

Appeal allowed.

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Solicitors for the plaintiff, appellant: Chambers, Might, Saucier, Milvain, Jones & Black, Calgary.

Solicitors for the defendant Oil City Petroleums (Leduc) Ltd., respondent: Manning & Dimos, Edmonton.

Solicitors for the defendant Ponoka-Calmar Oils Ltd., respondent: Morrow, Morrow & Reynolds, Edmonton.

Solicitors for the defendant American Leduc Petroleums Limited, respondent: Milner, Steer, Dyde, Martland & Layton, Edmonton.

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*Feb. 6, 7
Apr. 22

ROBERT L. FAGNAN (*Defendant*) .....APPELLANT;

AND

MARION FRANCES URE, NEXT FRIEND OF THE INFANT JEAN MARIE URE, AND MARION FRANCES URE IN HER CAPACITY AS EXECUTRIX OF THE ESTATE OF DAVID ALTON URE, DECEASED (*Plaintiffs*) ..RESPONDENTS;

AND

HUME AND RUMBLE LIMITED (*Defendant*).

ROBERT L. FAGNAN (*Defendant*) .....APPELLANT;

AND

THE PUBLIC TRUSTEE, ADMINISTRATOR OF THE ESTATE OF JAMES MITCHELL, DECEASED (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Evidence—"Opinion evidence"—What constitutes—Number of expert witnesses allowed to parties—The Alberta Evidence Act, R.S.A. 1955, c. 102, s. 11.

In an action arising out of an automobile accident the plaintiff pleaded that the defendant had been negligent, *inter alia,* in failing to have his motor vehicle (a truck) in proper and safe operating condition and in failing "to have the steering mechanism and tie-rods . . . checked and the defective conditions remedied". The plaintiff's counsel, in submitting his case, called two witnesses who gave opinion evidence,

*PRESENT: Taschereau, Rand, Locke, Cartwright and Fauteux JJ.

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and also one H, who had had many years' experience in garage operation and vehicle maintenance and who swore that the general and proper practice in the operation of a truck was to have a thorough inspection, including an examination of the "working linkage" and steering mechanism, at least every thousand miles. In reply, the plaintiff's counsel called another witness to give opinion evidence on a different matter and it was argued on appeal that this constituted a violation of s. 10 of *The Alberta Evidence Act*, 1942, which prohibited the calling of more than three witnesses "entitled according to the law or practice to give opinion evidence".

Held: The objection could not succeed. H's evidence was not opinion evidence within the meaning of s. 10, but was factual evidence of the existence of a practice, of which he had personal knowledge, followed by operators of similar vehicles. *Texas and Pacific Railway Company v. Behymer* (1903), 189 U.S. 468 at 470, quoted with approval. In any event, even if H's evidence was considered as opinion evidence, s. 10 properly interpreted permitted the calling of three witnesses to give such evidence upon each of the facts involved in the trial. *In re Scamen and Canadian Northern Railway Company* (1912), 5 Alta. L.R. 376, approved.

Statutes—Effect of re-enactment of statute in same words after judicial interpretation.

The rule at common law is that when words in a statute have been judicially construed by a superior Court and have been repeated without alteration in a subsequent statute, the legislature must be taken to have used them in the sense in which they have been construed by the Court. *Ex parte Campbell; In re Cathcart* (1870), L.R. 5 Ch. 703 at 706; *Barras v. Aberdeen Steam Trawling and Fishing Company, Limited,* [1933] A.C. 402; *MacMillan v. Brownlee,* [1937] S.C.R. 318 at 324-5, applied.

Damages—Award by trial judge—When interference on appeal justified.

An appellate Court will not interfere with the amount of damages awarded by a trial judge unless it is convinced either that the judge acted upon a wrong principle of law or a misapprehension of the evidence or that the amount awarded was so high or so low as to make it an entirely erroneous estimate. *Flint v. Lovell,* [1935] 1 K.B. 354 at 360; *Nance v. British Columbia Electric Railway Company Limited,* [1951] A.C. 601 at 613; *Pratt v. Beaman,* [1930] S.C.R. 284 at 287, applied. *A fortiori,* the Supreme Court of Canada will refuse to interfere with an award that has been affirmed by a provincial Court of Appeal, unless such circumstances exist.

Costs—Two actions consolidated—Plaintiffs represented by separate counsel.

Where two actions, both arising out of the same automobile accident, are consolidated but it is reasonable in the circumstances for the plaintiffs to be represented by separate counsel, it is a proper exercise of the trial judge's wide discretion under Rule 728 of the Alberta Rules of Court for him to award two sets of costs of the action throughout.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], affirming a judgment of Macdonald J. Appeal dismissed.

[1] (1957), 22 W.W.R. 289, 9 D.L.R. (2d) 480.

Arnold F. Moir, and *J. P. Brumlik,* for the defendant, appellant.

S. H. McCuaig, Q.C., for the plaintiff Ure, respondent.

K. L. Crockett, for the plaintiff The Public Trustee, respondent.

The judgment of Taschereau, Cartwright and Fauteux JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta[1], affirming a judgment of Macdonald J. awarding damages to the respondents.

On December 23, 1953, a truck driven by the appellant collided with an automobile driven by James Mitchell in which the Honourable David Alton Ure was a passenger. Both Mr. Mitchell and Mr. Ure were killed. The respondent Marion Frances Ure, who is the widow and executrix of the late David Alton Ure, brought action on behalf of herself and her five children. The respondent the Public Trustee, who is the administrator of the estate of the late James Mitchell, brought action on behalf of his widow and four children. These actions were consolidated before trial by an order of Johnson J.A.

The learned trial judge found that the collision was caused by the negligence of the appellant. He awarded to the respondent Marion Frances Ure $75,000, apportioned $50,000 to her personally and $25,000 to the five children. To the respondent the Public Trustee he awarded $31,000, apportioned $25,000 to the widow, $3,500 to the daughter Mona and $833.33 to each of the other three children. This judgment was affirmed by the Appellate Division.

In this Court, all but three of the grounds raised in support of the appeal were disposed of adversely to the appellant at the hearing. I shall state the points on which counsel for the respondents were heard and on which judgment was reserved in the order in which I propose to deal with them; they are (i) an alleged breach of the provisions of s. 10 of *The Alberta Evidence Act,* R.S.A. 1942, c. 106 (now R.S.A. 1955, c. 102, s. 11); (ii) the quantum of damages; and (iii) the propriety of the orders as to costs made in the Courts below.

[1] (1957), 22 W.W.R. 289, 9 D.L.R. (2d) 480.

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Section 10 of *The Alberta Evidence Act*, in force at the date of the trial read as follows:

10. Where it is intended by a party to examine as witnesses persons entitled according to the law or practice to give opinion evidence not more than three of such witnesses may be called upon either side.

The section was first enacted in 1910, 2nd sess., as s. 10 of 1 Geo. V, c. 3, and appeared unaltered in the Revised Statutes of 1922, c. 87, and 1942.

At the trial counsel for the plaintiff Marion Frances Ure called in reply a witness George Ford to give opinion evidence as to whether a break in a tie-rod forming part of the steering-apparatus of the appellant's truck had more probably been caused by the impact between the truck and the automobile than by other causes suggested on behalf of the appellant. Counsel for the appellant objected to the evidence being admitted on the ground that counsel for the plaintiff had already called and examined three other witnesses entitled to give, and who had given, opinion evidence. The objection was overruled and Mr. Ford gave opinion evidence. The three other witnesses referred to were Bate, Henne and Hare. It is conceded that the first two had given opinion evidence on the question whether the fact that the speedometer of the automobile, which was apparently broken in the collision, was registering 70 miles per hour showed that at the instant of impact the automobile was travelling at the indicated speed. The third witness Hare was the service manager and part-owner of a city garage. He had had years of experience in the operation of garages in Edmonton and in the last war had had four years' experience in vehicle maintenance and workshop duties with the Royal Canadian Electrical and Motor Engineers. His evidence which it is argued was opinion evidence reads as follows:

Q. Now, what would you regard as proper practice in connection with inspection of trucks which are used from day to day in various types of hauling with regard to inspection and keeping them in shape? A. The standard that I believe is general, I know it is applied very generally, is vehicle inspection with lubrication every thousand miles, some big units less than that I believe, but I am speaking across the board.

Q. Now, we have here a 1942, '43 Dodge truck, two-ton truck, what would you say with regard to inspection of tie-rods in a truck like that? How often would they be inspected? A. All that working linkage should be examined every thousand miles.

Q. What would you say with regard to steering? A. Same rule applies.

Q. Now, is that the practice followed by large operators? A. With fleets, yes.

This evidence was presumably tendered as being relevant to the allegations of the negligence of the appellant specified in subparas. (*j*) and (*k*) of para. 12 of the statement of claim of the respondent Marion Frances Ure, which read as follows:

(*j*) In failing to his knowledge to have the said motor vehicle in proper and safe operating condition at the time of the collision.

(*k*) In failing to have the steering mechanism and tie-rods in the said motor vehicle checked and the defective conditions remedied, when he knew or ought to have known of their disrepair.

The principle on which evidence of a practice of the sort deposed to by the witness is admitted is stated as follows in Phipson on Evidence, 9th ed. 1952, p. 116:

On questions involving negligence, reasonableness, and other qualities of conduct, when the criterion to be adopted is not clear, the acts or precautions proper to be taken under the circumstances, and even the general practice of the community, or in some cases of the particular individuals, are admissible as affording a measure by which the conduct in question may be gauged. Such evidence does not, of course, bind the jury as a fixed legal standard; it is merely one, amongst other circumstances, by which they may be guided.

In *Texas and Pacific Railway Company v. Behymer*[1], Holmes J., giving the opinion of the Court, said at p. 470:

What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.

In my view, the evidence of the witness Hare was not "opinion evidence" within the meaning of that phrase in s. 10. It was factual evidence of the existence of a practice as to periodical inspections followed by operators of trucks, of which practice the witness had personal knowledge. It is true that the second answer quoted above from his testimony was in form the expression of an opinion, but in reality it was simply the relation by the witness of the general practice to the circumstances of the particular case.

If, contrary to the view which I have expressed, it should be held that Hare was entitled to give and did give opinion evidence, I would none the less reject this ground of appeal.

[1] (1903), 189 U.S. 468.

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In 1912, in the case of *In re Scamen and Canadian Northern Railway Co.*[1], s. 10 was interpreted by the Supreme Court of Alberta *en banc*. The effect of the judgment of the Court, delivered by Harvey C.J., is accurately summarized in the second paragraph of the headnote in D.L.R. as follows:

> Upon the proper interpretation of section 10 of the Alberta Evidence Act, 1910, 2nd sess., ch. 3, in the event of a trial or inquiry involving several facts, upon which opinion evidence may be given, a party is entitled to call three witnesses to give such evidence upon each of such facts, and he is not limited to three of such witnesses for the whole trial.

As already mentioned s. 10 was re-enacted *ipsissimis verbis* in the Revised Statutes of 1922 and of 1942, and this re-enactment should be taken to have given legislative sanction to the construction placed upon that section in *In re Scamen*. The applicable rule was stated as follows by James L.J. in *Ex parte Campbell; In re Cathcart*[2]:

> Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them.

This statement was approved by the majority in the House of Lords in *Barras v. Aberdeen Steam Trawling and Fishing Company, Limited*[3], and was applied by this Court in construing an Alberta statute in *MacMillan v. Brownlee*[4]. It should be observed that while Parliament and the Legislatures of some of the Provinces have seen fit to modify this rule of construction (see for example, s. 21(4) of the *Interpretation Act*, R.S.C. 1952, c. 158) this has not been done in Alberta.

It has already been pointed out that no other witness called by the respondents gave opinion evidence upon the subject in regard to which the witness Ford was examined, and it follows that there was no breach of s. 10 as construed in *In re Scamen, supra.*

I turn now to the question of the quantum of damages. No objection is raised as to the apportionments amongst those entitled, but it is contended that the total amounts

[1] (1912), 5 Alta. L.R. 376, 2 W.W.R. 1006, 22 W.L.R. 105, 6 D.L.R. 142.

[2] (1870), L.R. 5 Ch. 703 at 706.

[3] [1933] A.C. 402.

[4] [1937] S.C.R. 318 at 324-5, [1937] 2 D.L.R. 273, 68 C.C.C. 7, affirmed [1940] A.C. 802, [1940] 3 All E.R. 384, [1940] 3 D.L.R. 353, [1940] 2 W.W.R. 455.

awarded in the case of each of the deceased are so inordinately high as to warrant interference by this Court.

It will be observed that the learned trial judge instructed himself that in assessing the damages he should follow the principles laid down by the Judicial Committee in *Nance v. British Columbia Electric Railway Company Limited*[1], at pp. 613 *et seq.* All the relevant facts as to the financial circumstances of the two deceased, and, so far as they could be estimated from the evidence, the probabilities for the future had they not been killed are detailed in the reasons of the learned trial judge and I do not propose to repeat them. It appears that he gave careful consideration to all the elements properly entering into the calculation of the amounts to be awarded which are dealt with in the *Nance* judgment. It is true that he did not refer expressly to the possibility of either widow remarrying in circumstances which would improve her financial position, but I see no reason for supposing that it was absent from his mind, and, in any event, as Viscount Simon pointed out, it is a possibility which in most cases is incapable of valuation.

In the Appellate Division, Johnson J.A., with whom Ford C.J.A., Primrose J. and Porter J.A. agreed, took a different approach to the assessment, employing a formula which has recently been used in a number of decisions in England, of which *Zinovieff v. British Transport Commission,* a decision of Lord Goddard (1954), reported in Kemp and Kemp on The Quantum of Damages (1956), vol. 2, p. 81, and *Roughead v. Railway Executive*[2], are examples. As a result of the application of this formula the learned justice of appeal reached the conclusion that the amounts awarded by the learned trial judge were not excessive. Boyd McBride J.A. wrote separate reasons at the conclusion of which he dealt with the question of damages as follows[3]:

> Having scrutinized and tested in various ways the amounts of the damages in the light of the various factors mentioned by the learned trial judge, in my opinion they are fair and proper and should not be disturbed.

The amount to be awarded in cases of fatal accident is not susceptible of precise arithmetical calculation, and, generally speaking, the Court of Appeal will not vary the

[1] [1951] A.C. 601, [1951] 2 All E.R. 448, [1951] 3 D.L.R. 705, 2 W.W.R. (N.S.) 665, 67 C.R.T.C. 340.
[2] (1949), 65 T.L.R. 435.
[3] 22 W.W.R. at p. 304.

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assessment made by the trial judge unless it appears that it has been arrived at on a wrong principle, or in disregard of some element that should have been taken into account, or under a misapprehension as to some feature of the evidence, or that it is so much too high or too low as to bear no reasonable proportion to the loss suffered; still less, unless one of the conditions mentioned is present, will this Court interfere when the assessment made at the trial has been affirmed by the Court of Appeal. In the case at bar, the Appellate Division have unanimously reached the conclusion that the amounts awarded by the learned trial judge were reasonable and I find no sufficient reason for differing from the result at which they have arrived. It follows that I would reject this ground of appeal.

There remains the submission of the appellant that the learned trial judge erred in awarding two sets of costs of the action to the respondents subsequent to the making of the consolidation order. In my opinion it was reasonable for the respondents to be represented by separate counsel and the order as to costs made by the learned trial judge was a proper exercise of the wide discretion conferred upon him by Rule 728 of the Alberta Rules of Court.

I would dismiss the appeal with costs.

RAND J.:—On the questions of the admission of expert evidence and the award of costs, and in the result, I agree with the reasons and the conclusion of my brother Cartwright. On the point of damages, the amount, ascertained as in *Nance v. British Columbia Electric Railway Company Limited*[1], is more than I would have allowed had I been estimating them at trial; but viewed in proportionment to the total circumstances I am unable to say that it is unreasonably high, *i.e.*, exceeding any reasonable estimation and calling for a reduction by this Court. On the propriety of employing the formula applied by Johnson J.A., I reserve my opinion.

I would, therefore, dismiss the appeal with costs.

[1] [1951] A.C. 601, [1951] 2 All E.R. 448, [1951] 3 D.L.R. 705, 2 W.W.R. (N.S.) 665, 67 C.R.T.C. 340.

LOCKE J.:—In this matter the issue of liability was decided, contrary to the contention of the appellant, during the hearing before us.

The findings of the learned trial judge as to the compensation to be awarded to the respondents have been approved by the unanimous judgment of the Appellate Division[1].

The rule applicable when the matter was before that Court is as it is stated by Greer L.J. in *Flint v. Lovell*[2], in the following terms:

> In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

That statement was approved by the House of Lords in *Davies et al. v. Powell Duffryn Associated Collieries, Limited*[3], and by the Judicial Committee in *Nance v. British Columbia Electric Railway Company Limited*[4].

I am unable to conclude from the judgments delivered in the Appellate Division that the learned judges of that Court failed to observe these principles, nor am I able to infer that the learned trial judge, in arriving at the amounts to be awarded, failed to consider any fact that was relevant.

In *Pratt v. Beaman*[5], Anglin C.J.C., delivering the judgment of the Court on an appeal from the Court of King's Bench of Quebec in an action for damages for personal injuries where the damages awarded at the trial had been reduced, said in part (p. 287):

> While, if we were the first appellate court, we might have been disposed not to interfere with the assessment of these damages by the Superior Court, it is the well established practice of this court not to interfere with an amount allowed for damages, such as these, by the court of last resort in a province. That court is, as a general rule, in a much better position than we can be to determine a proper allowance having regard to local environment.

[1] (1957), 22 W.W.R. 289, 9 D.L.R. (2d) 480.

[2] [1935] K.B. 354 at 360.

[3] [1942] A.C. 601 at 617, [1942] 1 All E.R. 657.

[4] [1951] A.C. 601 at 613, [1951] 2 All E.R. 448, [1951] 3 D.L.R. 705, 2 W.W.R. (N.S.) 665, 67 C.R.T.C. 340.

[5] [1930] S.C.R. 284, [1930] 2 D.L.R. 868.

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As it cannot, in my opinion, be said that the Appellate Division erred in principle in affirming the awards made at the trial, we should follow the practice above referred to.

I agree with my brother Cartwright that, if the evidence of the witness Hare was opinion evidence, it was none the less admissible for the reasons stated by him. I would not interfere with the order authorizing two sets of costs.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant Fagnan, appellant: Wood, Haddad, Moir, Hyde & Ross, Edmonton.

Solicitors for the plaintiff Ure, respondent: McCuaig, McCuaig, Desrochers & Beckingham, Edmonton.

Solicitors for the plaintiff The Public Trustee, respondent: Crockett, Crockett & Silverman, Edmonton.

HER MAJESTY THE QUEEN (*Respondent*) ..... APPELLANT;

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*Mar. 3
Apr. 22

AND

DAME ANTOINETTE HOULE (*Petitioner*), LOUIS-PHILIPPE LACROIX (*Third Party*), JOSEPH ALBERT ARCAND (*Third Party*) ....RESPONDENTS.

ALBERT JOSEPH ARCAND (*Third Party*) APPELLANT;

AND

HER MAJESTY THE QUEEN (*Respondent*), DAME ANTOINETTE HOULE (*Petitioner*), LOUIS-PHILIPPE LACROIX (*Third Party*) ..RESPONDENTS.

LOUIS-PHILIPPE LACROIX (*Third Party*) APPELLANT;

AND

HER MAJESTY THE QUEEN (*Respondent*), DAME ANTOINETTE HOULE (*Petitioner*), ALBERT JOSEPH ARCAND (*Third Party*) ...RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Liability for death or injury resulting from negligence of Crown servant—Pensionable Crown employee killed—Effect of statutory provisions—The Exchequer Court Act, R.S.C. 1927, c. 34, ss. 19(1)(c) (re-enacted by 1938, c. 28, s. 1), 50A (enacted by 1943-44, c. 25, s. 1)—The Pension Act, R.S.C. 1927, c. 38, ss. 18 (re-enacted by 1940-41, c. 23, s. 10), 69 (enacted by 1952, c. 47, s. 3)—The Pay and Allowance Regulations, para. 207(8).

There is nothing in s. 18 of the *Pension Act*, 1927, as amended, that precludes recovery by the dependants of a pensionable Crown servant injured by the negligence of a servant of the Crown. Section 18(1) clearly refers to a third person who has incurred a legal liability to pay damages for death or disability, and does not affect the liability of the Crown under ss. 19(1)(c) and 50A of the *Exchequer Court Act*, as amended. *The King v. Bender*, [1947] S.C.R. 172, applied; *Oakes v. The King*, [1951] Ex. C.R. 133, approved; *Meloche v. Le Roi*, [1948] Ex. C.R. 321, overruled. (This situation has been changed by an amendment made in 1952.)

Nor is there anything in para. 207 of the *Pay and Allowance Regulations* as in force in 1950 to preclude recovery under s. 19(1)(c) of the *Exchequer Court Act*, even when the deceased is killed in a privately-owned vehicle used on military business with proper authorization.

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*PRESENT: Kerwin C.J. and Locke, Cartwright, Fauteux and Judson JJ.

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Paragraph 207(8) applies only to regulate how the loss is to be borne as between the Crown and its servant who has been authorized to use his own vehicle on military business, and does not affect the liability of the Crown under s. 19(1)(*c*) of the *Exchequer Court Act*.

APPEALS from a judgment of Fournier J. of the Exchequer Court of Canada[1]. Appeals dismissed.

B. Nantel, Q.C., for Her Majesty the Queen.

C. Cannon, Q.C., for Dame Antoinette Houle.

A. J. MacDonald, for Louis-Philippe Lacroix.

J. Deschenes, for Albert Joseph Arcand.

The judgment of the Court was delivered by

JUDSON J.:—The suppliant's husband, Sergeant-Major Kenny, a member of the armed forces, was killed in a motor car accident while travelling in the course of duty. The driver of the motor car, Lt. Arcand, was using his own car and was also travelling in the course of duty. He was properly authorized pursuant to the regulations to use his own car on military business and to carry Kenny as a passenger. The learned trial judge found that Kenny was killed as a result of the negligence of Arcand and the driver of an oncoming car. Arcand was a servant of the Crown as defined by s. 50A of the *Exchequer Court Act*, R.S.C. 1927, c. 34, enacted by 1943-44, c. 25, s. 1 (now R.S.C. 1952, c. 98, s. 50). Unless deprived of this remedy by other legislation, Kenny's dependants, therefore, had a claim against the Crown under s. 19(1)(*c*) of the *Exchequer Court Act*, 1927 (since repealed by s. 25(2) of the *Crown Liability Act*, 1952-53, c. 30), which, as re-enacted by 1938, c. 28, s. 1, read:

> 19. (1) The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:
>
> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

Dame Houle-Kenny, both personally and as tutrix to her two children, filed a petition of right. She obtained a judgment for $20,000 and the question now is whether her right to maintain these proceedings is affected either by the *Pension Act*, R.S.C. 1927, c. 38, now R.S.C. 1952, c. 207, or by s. 207(8) of the *Pay and Allowance Regulations* in force at the time of the accident. The problem of supposed

[1] [1954] Ex. C.R. 457.

conflict between s. 19(1)(c) of the *Exchequer Court Act* and the provisions of the *Pension Act* is in this Court for the first time but it has arisen on two previous occasions in the Exchequer Court.

In *Meloche v. Le Roi*[1], Angers J. held that the dependants of a soldier killed in the course of duty had no claim against the Crown under ss. 19(1)(c) and 50A of the *Exchequer Court Act* since Parliament had created a special remedy by way of pension. In *Oakes v. The King*[2], Cameron J. stated that he would have reached the same conclusion but for the decision of this Court in *The King v. Bender*[3], where it was held that a servant of the Crown who was entitled to compensation pursuant to the *Government Employees Compensation Act*, R.S.C. 1927, c. 30, for injuries received in the course of his duty was not precluded from pursuing a claim for damages against the Crown under s. 19(1)(c) of the *Exchequer Court Act*. The learned trial judge in the case at bar was also of the opinion that the case was governed by the *Bender* case. I am of the same opinion.

The relevant section of the *Pension Act* in force at the time of the accident (re-enacted by 1940-41, c. 23, s. 10; now s. 20) was as follows:

> 18. (1) Where a death or disability for which pension is payable is caused under circumstances creating a legal liability upon some person to pay damages therefor, if any amount is recovered and collected in respect of such liability by or on behalf of the person to or on behalf of whom such pension may be paid, the Commission, for the purpose of determining the amount of pension to be awarded shall take into consideration any amount so recovered and collected in the manner hereinafter set out.
>
> (2) In any such case the Commission may require such person or anyone acting on his behalf as a condition to the payment of any pension, to take all or any steps which it deems necessary to enforce such liability and for such purpose shall agree to indemnify such person or anyone acting on his behalf from all or any costs incurred in connection therewith.

Who is the person referred to in s. 18(1) who has incurred a legal liability to pay damages for the death or disability? That person is clearly a third party wrongdoer and not the Crown. The Crown is not inviting or requiring proceedings to be taken against itself for the purpose of taking the recovery into account in fixing the amount of the pension.

[1] [1948] Ex. C.R. 321, [1948] 4 D.L.R. 828.

[2] [1951] Ex. C.R. 133, [1951] 3 D.L.R. 442.

[3] [1947] S.C.R. 172, [1947] 2 D.L.R. 161.

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Judson J.

The submission of the Crown and of Arcand, on this appeal, is that because the section does not contemplate proceedings against the Crown, it follows that a claimant for a pension cannot have a remedy under ss. 19(1)(*c*) and 50A of the *Exchequer Court Act*. It seems to me that the fallacy in this submission is the same as the one pointed out in the *Bender* case with regard to the interaction of the *Government Employees Compensation Act* and the remedy under the *Exchequer Court Act*, namely, that the section does not deal with and leaves untouched the remedy under the *Exchequer Court Act*. The section is confined entirely in its operation to what may be done about recovery from a third party wrongdoer when a person seeks a pension.

The obvious conclusion is that when the *Exchequer Court Act* was amended in 1943 by the addition of s. 50A, which made a member of the armed forces a servant of the Crown, the effect of the amendment on s. 18 of the *Pension Act*, which resulted to a certain extent in a duplication of remedies, was overlooked. The omission was dealt with by legislation in 1952 (after the date of the accident in question here) which provided that in cases where a pension was payable, there should be no other remedy against the Crown or a servant of the Crown (1952, c. 47, s. 3, enacting a new s. 69 of the Act). Similar legislation had already been enacted to deal with the result in the *Bender* case (1947, c. 18, s. 9).

I turn now to para. 207 of the *Pay and Allowance Regulations* in force at the time of the accident. The first seven subparagraphs deal with the cases in which an officer or soldier may be authorized to use his own vehicle on military business and the allowances which may be made for this use. Then the last subparagraph provides:

> (8) The Crown does not assume any liability or responsibility for any accident, injury or damage to any persons or property whatsoever which may occur while a private motor car or private motor cycle is being used by an officer or soldier, nor will any compensation be payable for, or in respect of, any wear and tear of the said private motor car or motor cycle or its equipment: Provided that nothing in this sub-paragraph shall be construed as limiting any right of the officer or soldier to pension, medical treatment or hospitalization.

The appellants submit that this regulation is a bar to any remedy under s. 19(1)(*c*) of the *Exchequer Court Act*. According to this submission the suppliant would have a remedy if her husband had been killed in a military vehicle

but not, as in this case, where he was killed in a privately-owned vehicle, even though its use on military business had been properly authorized by the regulations.

The apparent scope of the subparagraph is broad but the opinion of the learned trial judge was that, in the context in which it appears, it applies only to regulate how the loss is to be borne as between the Crown and its servant who has been authorized to use his own vehicle on military business, and it does not affect the liability of the Crown under s. 19(1)(*c*) of the *Exchequer Court Act*. I agree with this opinion. There is, according to this interpretation, no conflict between the regulation under consideration and the *Exchequer Court Act*. If there had been, it is difficult to see how a right clearly given by one Act could be whittled away by a regulation made under another and unrelated Act.

The working of the subparagraph is illustrated by the actual conduct of this case. The Crown joined Lt. Arcand and Louis-Philippe Lacroix as third parties in the proceedings and claimed over, not only against Lacroix but also against its servant Arcand. The judgment of the Court was that the suppliant was entitled to recover against the Crown the sum of $20,000 and that the Crown was entitled to recover 30 per cent. of this against Arcand and 70 per cent. against Lacroix. Merely by authorizing the use of the car and paying for it, the Crown, as between it and Arcand, did not accept responsibility for the consequences of negligent driving. That is the effect and meaning of the subsection as found by the learned trial judge.

There was ample evidence on which the learned trial judge found negligence against Arcand and Lacroix and his finding cannot be disturbed. Nor would I interfere with his division of the blame. I would dismiss all three appeals with costs.

Appeals dismissed with costs.

Attorneys for the suppliant: Taschereau, Cannon & Frémont, Quebec.

Attorney for Her Majesty the Queen: Paul Trepanier, Montreal.

Attorneys for Albert Joseph Arcand: Letourneau, Quinlan, Forest, Deschenes & Emery, Montreal.

Attorney for Louis-Philippe Lacroix: Archibald J. MacDonald, Montreal.

1958

*Feb. 11, 12
June 3

IN THE ESTATE OF MARY WINIFRED GRAY, DECEASED.

DOROTHY MARGARET BEATRICE BENNETT AND DOROTHY MARGARET BEATRICE BENNETT AND CHARLES PAUL BENNETT, AS PARENTS AND NATURAL GUARDIANS OF JUDITH ANN BENNETT, AN INFANT (*Applicants*) .....APPELLANTS;

AND

THE TORONTO GENERAL TRUSTS CORPORATION AS OFFICIAL GUARDIAN OF THE EASTERN JUDICIAL DISTRICT OF THE PROVINCE OF MANITOBA (*Respondents*) .....RESPONDENTS.

DOROTHY MARGARET BEATRICE BENNETT AND DOROTHY MARGARET BEATRICE BENNETT AND CHARLES PAUL BENNETT, AS PARENTS AND NATURAL GUARDIANS OF JUDITH ANN BENNETT, AN INFANT (*Applicants*) .....APPELLANTS;

AND

CARL EVERETT GRAY (*Respondent*) ..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Wills—Validity—Holograph will—Letter from deceased—Whether settled testamentary intention expressed—The Wills Act, R.S.M. 1954, c. 293, s. 6(2).

Although it is established under the authorities that a letter wholly written and signed by a deceased person may constitute a valid holograph will, it will not have that effect unless it contains a deliberate or fixed and final expression of intention as to the disposal of the writer's property upon his death. The burden is upon the party setting up such a paper as a will to show either by its contents or by extrinsic evidence that it is of that character and nature. *Whyte et al. v. Pollok* (1882), 7 App. Cas. 400; *Godman v. Godman*, [1920] P. 261, applied.

APPEALS from two judgments of the Court of Appeal for Manitoba[1], reversing a judgment of Philp Sur. Ct. J. Appeals dismissed.

Application was made for probate of a will of Mary Winifred Gray, deceased, dated January 6, 1949; at the same time, there was submitted for probate a letter dated

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*PRESENT: Kerwin C.J. and Rand, Cartwright, Fauteux and Abbott JJ.

[1] (1958), 65 Man. R. 178, 22 W.W.R. 241, 9 D.L.R. (2d) 371.

September 27, 1952, which the proponents contended constituted a valid holograph will or codicil. Appearances were filed by the parties interested under the two documents respectively, and the trial of an issue was directed. At the conclusion of this trial, the Surrogate Court judge held that the letter of September 27, 1952, was a valid holograph will and that it had revoked the will dated January 6, 1949. He accordingly ordered that it be admitted to probate.

Notices of appeal to the Court of Appeal were given by Carl Everett Gray, a son of the deceased and a beneficiary under the 1949 will, and by The Toronto General Trusts Corporation as official guardian on behalf of grandchildren of the deceased who would have benefited under the 1949 will. Both appeals were allowed by the Court of Appeal and the beneficiaries under the 1952 document appealed to the Supreme Court of Canada.

Philip C. Locke, Q.C., for the appellants.

E. B. Pitblado, Q.C., for The Toronto General Trusts Corporation as official guardian, respondent.

H. P. Clubine, for the executors under the 1949 will, respondents.

F. J. Sutton, Q.C., for C. E. Gray personally, respondent.

The judgment of Kerwin C.J. and Cartwright, Fauteux and Abbott JJ. was delivered by

FAUTEUX J.:—The crucial question to be determined in this case is whether, contrary to the views held by the majority of the Court of Appeal for Manitoba[1], but in accordance with those entertained by Tritschler J.A. and by the judge of the Surrogate Court, a letter, wholly written and signed by the late Mary Winifred Gray on September 27, 1952, and addressed to A. L. Dysart, Q.C., of Winnipeg, her solicitor and for years a close friend of the Gray family, does manifest on her part a *deliberate and final intention* as to the disposal of her property upon her death.

A recital, reduced to what is of substance, of certain events stated in chronological sequence, may first be given:

(i) On January 6, 1949, the deceased, Mary Winifred Gray, executed a formal will, admittedly valid under *The Wills Act,* R.S.M. 1940, c. 234 (now R.S.M. 1954, c. 293),

[1] (1958), 65 Man. R. 178, 22 W.W.R. 241, 9 D.L.R. (2d) 371.

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by the terms of which she left: (a) a life interest in her estate to her husband J. J. Gray, and (b) upon his death, after payment of certain legacies, the residue of her estate to her four children in the proportion of 30 per cent. to each of her two sons and 20 per cent. to each of her two daughters, Dorothy (Dixie) and Jacqueline.

(ii) J. J. Gray predeceased his wife, having died the same month, *i.e.*, in January 1949.

(iii) Three and one-half years later, *i.e.*, in August 1952, Mrs. Gray consulted Mr. Dysart with respect to her will, expressed dissatisfaction with it as well as the intention to make a new one. She informed him that she was leaving Winnipeg for Kenora, in the evening, and that she would write him to give him the particulars of what she wished her new will to contain.

(iv) About a month passed and on September 27, 1952, Mrs. Gray wrote Mr. Dysart the letter giving rise to the present controversy and which must be reproduced in its entirety:

KENRICIA HOTEL
in *The heart of the Lake of the Woods*
KENORA, ONTARIO
CANADA

Mr. A. L. Dysart,
211 Somerset Bldg.,
Winnipeg.

Sep 27/52
Hotel Kenricia

Dear Mr. Dysart

When I was in your offis about a month ago I Promised to let you know how I would like my will to be made out. I have no Ida at all about such matters so Ill leave all that to you, but I do know its Important to have such matters settled before its to late. I will try to outline the way I would like to leave the little I have. the two boys are provided for and do not expect any thing from me. to Dixie her real name is Margaret Dorothea Beautrick Gray Bennett Wife of Charls Paul Bennett the sum of thirty thousand dollars. (30,000) my house if I own a house at the time of my death Also all my furniture and my Car Also my Clothing and fur Coats.—to my daughter Jacquline Dinnia Gray wife of Victor Fregeau the sum of ten thousand dollars (10,000). and to my Grand daughter, Joyce Gray, I leave five thousand dollars. and I also want to leave to my dearly Beloved Grand daughter Judith Ann Bennett fifteen thousand dollars and my summer home on Coney Island in Kenora Ont and also the furnitur in the cottage my watch or any Jewelery and my diamond rings—To the Reverend A. X. MacAulay one thousand dollars to have holey Masses offered to God for the repose of my soul.

Dear Mr. Dysard I will be in Winnipeg in a few days I will call you. thanks for your trouble and for all your kindness to us.

Very sincerely,
Mary W. Gray

This letter was received by Mr. Dysart who waited for the announced visit of Mrs. Gray.

(v) Again several weeks passed and eventually Mrs. Gray came to see Mr. Dysart. Of this interview, Mr. Dysart took no notes. Speaking from memory, he testified that Mrs. Gray told him of her opposition to the appointment of a trust company as executor. She did not want to appoint her sons, nor could she decide to appoint her daughters. She asked Mr. Dysart to accept the appointment, which he declined to do, fearing, as he told her, that the sons might hold him responsible for their being excluded from the will as beneficiaries as well as executors. The matter was left in abeyance, Mrs. Gray telling Mr. Dysart she would come to see him again.

(vi) Several months later, *i.e.*, on May 29, 1953, Mrs. Gray saw Mr. Dysart. According to the notes he then made of the interview, amongst other matters, that of the will was considered. Mrs. Gray said that the guest house which, according to her letter of September 27, 1952, was intended for her granddaughter Judith Ann Bennett, was to go to her daughter Dorothy. Except for this difference, what she then said she wanted in the will was, on the evidence of Mr. Dysart, *"almost"* the same as in the letter of September 27, 1952. Evidently, it would appear that all the details of the will were not settled, for on the evidence of Mr. Dysart, the question of residue had never been discussed and, in the words of Mr. Dysart, "the *main* obstacle was still the question of the executors".

(vii) From then on, *i.e.*, from May 29, 1953, up to the death of Mrs. Gray, which took place nearly three years afterwards, Mrs. Gray met Mr. Dysart, both professionally and socially, but according to the latter's recollection, at none of these meetings was the matter of the will of Mrs. Gray brought up.

(viii) During the period just mentioned, Mrs. Gray, about April 1954, paid into the office of Mr. Dysart the sum of $10,000, to purchase a real property in the name of Mrs. Bennett (Dorothy) and her husband. This payment was in the nature of a gift *inter vivos* from Mrs. Gray to her daughter, as a gift tax was paid.

(ix) Mrs. Gray died in the city of Winnipeg—where she appears to have had her residence and domicile—on April 5,

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1956, consequently three and one-half years after writing the letter of September 27, 1952, without a formal will, other than the one of January 6, 1949, having been made by her or prepared by Mr. Dysart, or the latter having been instructed to do so.

Under s. 6(2) of *The Wills Act, supra,* a will in the holographic form, *i.e.,* a will "wholly in the handwriting of the testator and signed by him" constitutes a valid will.

That the letter of September 27, 1952, satisfies the requirement, as to form, is beyond question; the point in issue being whether, as to substance, this holographic paper is testamentary.

There is no controversy, either in the reasons for judgment in the Courts below, or between the parties, that under the authorities, a holographic paper is not testamentary unless it contains a *deliberate or fixed and final expression of intention* as to the disposal of property upon death, and that it is incumbent upon the party setting up the paper as testamentary to show, by the contents of the paper itself or by extrinsic evidence, that the paper is of that character and nature: *Whyte et al. v. Pollok*[1]; *Godman v. Godman*[2]; *Theakston v. Marson*[3].

Whether the letter of September 27, 1952, contains *per se* a deliberate or fixed and final expression of intention must be determined by the phrases immediately preceding and following the intermediate part of the letter where the wishes of Mrs. Gray are expressed; for, read as a whole, the letter has one single subject-matter, indicated as follows by Mrs. Gray: "I Promised to let you know how I would like my will to be made out."

In the opening and closing phrases of the letter, Mrs. Gray conveys to Mr. Dysart sentiments of unreserved trust, reliance and dependence. Born, as admittedly shown by extrinsic evidence, out of an intimate relationship of many years between Mr. Dysart, on the one hand, and Mr. and Mrs. Gray and their children, on the other, these sentiments were those accompanying the mind of Mrs. Gray when, after expressing them, she wrote: "I will try to outline the way I would like to leave the little I have." And having

[1] (1882), 7 App. Cas. 400. [2] [1920] P. 261.
[3] (1832), 4 Hag. Ecc. 290, 162 E.R. 1452.

done so, she closed the letter by informing Mr. Dysart that she would be in Winnipeg in a few days and that she would call him.

I am unable to dismiss the view I formed that, read as a whole and according to its ordinary and natural sense, this letter amounts to nothing more than what is a preliminary to a will. While Mrs. Gray indicated to Mr. Dysart the legacies she then contemplated her will to contain, it is clear, in my view, that she did not want that letter to operate as a will. Indeed, by her letter, she is committing to future consultation with Mr. Dysart both the finality of her decisions, if not of her deliberations, and that of the form in which they should eventually be expressed in a regular will, the preparation of which is entrusted to Mr. Dysart himself. If this interpretation properly attends the document, the letter has not *per se,* and cannot acquire without more, a testamentary nature, and the proposition stated in *Godman v. Godman, supra,* at p. 271, "that a document which is in terms an instruction for a more formal document may be admitted to probate if it is clear that it contains a record of the deliberate and final expression of the testator's wishes with regard to his property", as well as the proposition stated in *Milnes v. Foden*[1], that "It is not necessary that the testator should intend to perform or be aware that he has performed a testamentary act", are of no application in the present case.

What took place from the date of the letter, September 27, 1952, to the day of the death of Mrs. Gray, April 5, 1956, affords no evidence either that her letter contained a deliberate or fixed and final expression of intention or that it acquired such a testamentary character by subsequent and sufficient manifestation of intention on her part. Indeed the evidence shows that Mrs. Gray failed to pursue what she indicated in her letter she contemplated doing subject to consultation with Mr. Dysart, though there were, during this lengthy period of time, the fullest opportunities and facilities to do so, and that the most reasonable explanation for this failure is the abandonment of her original intention. No decision was ever reached as to the choice of an executor; nor was even the disposal of the residue of the estate ever considered; nor did she, at any time, decide to instruct

[1] (1890), 15 P.D. 105 at 107.

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Mr. Dysart to proceed with the preparation of the will, notwithstanding that both were perfectly aware that the formal will, executed by Mrs. Gray at the same time as that of her husband on January 6, 1949, was still in existence. There were, moreover, intervening facts affecting the contemplated apportionment of her estate. Thus there was, at a time unrevealed by the evidence, a change of mind as to the disposal of the guest-house, of which Mrs. Gray apprised Mr. Dysart on May 29, 1953, on the occasion of the second and last interview during which the matter of the will, amongst others, was considered. This change is cogent evidence of a still deliberating mind. There was also subsequently, in April 1954, the gift of $10,000 she made to her daughter Dorothy.

It was suggested that, at this interview of May 29, 1953, there was an affirmation of intention within the meaning of and with the effect indicated in *Bone et al. v. Spear*[1] and *In re Toole Estate*[2]. The circumstances of these cases differ entirely from those of the present; and these decisions cannot apply thereto. Furthermore, and whatever may have been her motives, Mrs. Gray did not then, any more than on the previous occasion, decide to instruct Mr. Dysart to proceed with the preparation of the will.

Having reached the view that the letter of September 27, 1952, was not written *animo testandi,* it becomes unnecessary to deal with the other points raised.

I would dismiss the appeals with all costs payable out of the estate, those of the executors and the Official Guardian to be as between solicitor and client.

RAND J.:—I am quite unable to say that the Court of Appeal[3] was wrong in holding the letter of September 27, 1952, by the deceased widow, not to be a holographic will. This letter was written almost three years after the death of her husband. Its tenor does not import finality either absolute or provisional; it admittedly enumerates items to be contained in a new will; and the conduct of the deceased in the discussion with her solicitor shortly after the receipt of the letter and later in May 1953 when she again visited him confirms the facts that she was fully aware of the existing will of 1949 and that there were still details to be settled

[1] (1811), 1 Phillim 345, 161 E.R. 1005. [2] (1952), 5 W.W.R. (N.S.) 416.
[3] (1958), 65 Man. R. 178, 22 W.W.R. 241, 9 D.L.R. (2d) 371.

for the new one. Some items included in the letter were not, on the latter occasion, mentioned—furniture, an automobile, and personal jewelry; and she did not make clear the identity of a house that was to go to a daughter. In 1954 she advanced $10,000 as a cash payment on the price of a house purchased in the name of the same daughter and her husband, the latter of whom was not mentioned in the will or in the discussion of 1953. Her death took place early in 1956 after apparently an illness of some months; but from May 1953 on there had been no further communication with the solicitor.

I would, therefore, dismiss the appeals with all costs payable out of the estate, those of the executors and the Official Guardian to be as between solicitor and client.

Appeals dismissed.

Solicitor for the appellants: Philip C. Locke, Winnipeg.

Solicitors for the respondent Gray: Leech, Leech & Sutton, Winnipeg.

Solicitors for the respondent corporation: Pitblado, Hoskin & Company, Winnipeg.

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*Feb. 12, 13
Jun. 3

THE UNION MARINE & GENERAL INSURANCE COMPANY LIMITED (*Defendant*) ..... APPELLANT;

AND

ALEX BODNORCHUK AND STEVE NAWAKOWSKY (*Plaintiffs*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Insurance—Termination of policy—Whether policy cancelled by mutual agreement—Conflicting evidence—Inferences from facts.

Insurance—Fire insurance—Statutory conditions—Relief against forfeiture—Failure to give immediate notice of loss—The Saskatchewan Insurance Act, R.S.S. 1953, c. 133, s. 157, stat. con. 15, s. 162.

The respondents, who owned and operated an hotel property, held a policy of fire insurance with the appellant company taken out through its local agent. The policy was for three years, but the premuim was payable in annual instalments. At the end of the first year of this policy they took out a policy with another insurer, and did not pay

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

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the second instalment of premium on the appellant's policy. A loss by fire occurred and the respondents did not at first notify the appellant, and told both the appellant's general agent and an adjuster sent by the other insurer that the appellant's policy had been cancelled. Two months later, however, they filed proofs of loss with the appellant and, when the claim was rejected, brought an action to recover under the policy. The trial judge held that the policy was still in force at the time of the fire and gave judgment for the respondents. This judgment was affirmed by a majority of the Court of Appeal.

Held (Kerwin C.J. and Abbott J. dissenting): The action must fail. The only reasonable inference from the facts established at the trial was that the appellant's policy had been cancelled by mutual agreement between the respondents and the appellant's local agent. The finding of the Courts below that the policy had not been cancelled was not based upon the credibility of witnesses but rather upon the proper conclusions from the evidence and the inferences to be drawn from the conduct of the parties. In this respect, this Court was in an equally good position as the trial judge and the Court of Appeal.

In view of this finding, it was unnecessary to decide whether the power to relieve against forfeiture under s. 162 of *The Saskatchewan Insurance Act* was wide enough to empower the Court to relieve the insured from the consequences of his failure to give notice in writing of the fire to the insurer forthwith after the loss. If the section did give that power, this was not a case where relief should be given, since the failure to give the notice required by stat. con. 15 was deliberate.

Per Kerwin C.J. and Abbott J., *dissenting*: There was no evidence that warranted a finding that the policy was cancelled by mutual agreement. The words in s. 162 "as to the proof of loss to be given by the insured" should be read as including a failure to give notice of the loss under stat. con. 15, and in the circumstances of this case, relief should be given under that section.

Courts—Jurisdiction in appeal—Review of findings of fact—Findings based on credibility.

Where the findings of fact in Courts below are based upon conclusions from the evidence and what inferences should be drawn from the conduct of the parties, an appellate Court is in as good a position as the trial judge and has not only a right but a duty to form its own opinion upon the facts. *Jones et al. v. Hough et al.* (1879), 5 Ex. D. 115; *The North British & Mercantile Insurance Company v. Tourville et al.* (1895), 25 S.C.R. 177 at 197, applied.

Even where a trial judge's finding is based upon the credibility of a witness, an appellate Court may reject that finding if it considers that he has failed to use the advantage afforded to him of seeing the witness and observing his demeanour in the witness-box. *S.S. Hontestroom v. S.S. Sagaporack*, [1927] A.C. 37 at 47, applied.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], affirming a judgment of Doiron J.[2] in favour of the plaintiffs. Appeal allowed, Kerwin C.J. and Abbott J. dissenting.

[1] 22 W.W.R. 389, [1957] I.L.R. 1-267, 9 D.L.R. (2d) 179.
[2] (1956), 20 W.W.R. 36.

A. J. Campbell, Q.C., for the defendant, appellant.

W. H. Morrison, for the plaintiffs, respondents.

The judgment of Kerwin C.J. and Abbott J. was delivered by

THE CHIEF JUSTICE (*dissenting*):—Having considered the record I find myself in agreement with the trial judge and the majority of the Court of Appeal that, assuming that the agent Bell had authority to agree to cancellation of the policy on behalf of the defendant company, he did not do so; he did nothing, and in my view there is no evidence which warrants a finding that the policy was cancelled by mutual agreement.

The words "as to the proof of loss to be given by the insured" in s. 162 of *The Saskatchewan Insurance Act*, R.S.S. 1953, c. 133, should be read as including a failure to "forthwith after loss give notice to the insurer", as required by stat. con. 15, and I, therefore, also agree with the construction of that section, when read with the statutory condition. Section 162 reads as follows:

> 162. In any case where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured and a consequent forfeiture or avoidance of the insurance, in whole or in part, and the court deems it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as may seem just.

Under the circumstances the Court should deem it inequitable that the insurance should be forfeited or avoided.

I would dismiss the appeal with costs.

The judgment of Taschereau, Rand and Locke JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for Saskatchewan[1] dismissing the appeal of the present appellant, the defendant in the action, from a judgment of Doiron J.[2]

The action was brought upon a policy of fire insurance issued by the appellant company to the respondents upon a building known as the Lunn Hotel, and its contents, situate at Canora, Saskatchewan. The policy was described in the statement of claim as having insured the respondents

[1] 22 W.W.R. 389, [1957] I.L.R. 1-267, 9 D.L.R. (2d) 179.
[2] (1956), 20 W.W.R. 36.

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against loss by fire on the building in the amount of $26,000, on the hotel and household furniture, supplies and personal effects $16,000, and on liquors as might be permitted by law, tobacco and smokers' sundries $2,000, the term being from December 3, 1953, to December 3, 1956. The policy was delivered to the assured with a letter dated December 24, 1953, from A. D. McNally, who carried on business as an insurance agent under the name of Williams Agencies at Canora, and who was at that time the agent of the appellant company at that place. The amount of the premium was $867 which McNally had agreed to accept by annual instalments over a period of three years, and the first instalment of $346.80 was paid to him by the assured on February 19, 1954. The second instalment was to be $260.10 and this was to be paid on December 3, 1954.

At some unspecified date in 1953 the respondents obtained a further policy of fire insurance for $12,000 upon the hotel building in the Merchants and Manufacturers Insurance Company.

On December 3, 1954, the Saskatchewan Government Insurance Office issued its policy of fire insurance to the respondents covering the same property for the total sum of $45,500 allocated: $25,000 to the building, $19,000 to the hotel and household furniture, and $1,500 to liquors, tobacco, etc. This policy was for a period of one year only. It was dated October 19, 1954, and signed on behalf of the Government Insurance Office by H. L. Hammond, the manager. It contained a co-insurance clause which required the assured to maintain insurance "concurrent in form with this policy on each and every item insured to the extent of at least 80% of the actual cash value thereof", and providing that failure to do so would render the assured a co-insurer "to the extent of an amount sufficient to make the aggregate insurance equal to 80%".

On December 16, 1954, the premises and contents were damaged by fire, the loss as determined by the adjuster hereinafter referred to being the sum of $18,699.18. It is the contention of the appellant that its policy was terminated by mutual consent on December 10, 1954. A second contention is that, even if the policy was in force on December 16, 1954, when the fire occurred, any claim under

it is barred, due to the failure of the assured to give to the company notice of the loss, as required by para. (*a*) of stat. con. 15.

There was a direct conflict in certain of the evidence given on behalf of the respective parties affecting the first of these questions and, as it is the contention of the appellant that the learned trial judge misdirected himself as to the nature of the evidence in making his finding that there had not been an agreement that the policy should be terminated, it is necessary to closely examine the evidence.

A. T. Brown of Regina, whose company was the general agent of the appellant, had heard of the fire at the hotel during the afternoon of December 16 and, on the following day, telephoned to Bodnorchuk to get particulars of the loss. Brown's evidence of that discussion is that, after he had identified himself to Bodnorchuk as the general agent of the appellant company, the latter told him that he wanted nothing to do with that policy, that it was cancelled. His further account of the conversation reads in part:

> I said: "What do you mean; it is cancelled?" because I had heard nothing of it being cancelled. He said: "I told Bell that I don't want it. It isn't being replaced [*sic*]."

In answer to a question from the trial judge as to what Bodnorchuk had said, the witness replied:

> He said: "I don't want your policy." He said: "I have told your agent he is to have it. We don't want it." I said: "What about your fire?" He said: "Oh, there is an adjuster here now. I have got insurance with the Government."

Brown said further:

> I said: "Well, I can't get hold of Mr. Bell and where is the policy?" He said: "I don't know,—but just a minute . . ." and goes away and comes back and says: "It is here. He is supposed to pick it up but it is still here" . . .
>
> I said: "That's fine. If you don't want the policy and have got other insurance covering, you will just hand it to Mr. Bell and it is all washed out." He said: "That's fine." . . .
>
> He said he would give the policy back. I said: "You will give the policy back to Mr. Bell?" He said: "Yes. As soon as he comes in, I will give the policy back."

Bell had succeeded to the interest of McNally in the business of the Williams Agencies at Canora. The reference to the adjuster was to L. M. Gonick, an insurance adjuster residing in Winnipeg who had been sent to adjust the loss by the Saskatchewan Government Insurance Office and

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the Merchants and Manufacturers Insurance Company. Referring to Brown's evidence, the learned trial judge said[1]:

> Bodnorchuk is rather evasive in his evidence with regard to this conversation when he says he believed he informed Mr. Brown that the policy had been cancelled but was not sure. I have no reason to disbelieve Brown's evidence, but if Brown had known that the policy was cancelled he would not have contacted Bodnorchuk.

According to Gonick, he got to Canora on the morning following the fire and registered at the hotel. After taking particulars as to how the fire had occurred, he asked Bodnorchuk to produce his insurance policies for his inspection. The latter produced the Saskatchewan Government Insurance Office policy, that of the Merchants and Manufacturers Company and the policy issued by the appellant. Gonick said he took the policies and, in Bodnorchuk's presence, started to take particulars and that when he came to the policy issued by the appellant, Bodnorchuk told him not to list or include that policy as it had been cancelled. His further account of what then took place between them reads:

> I asked him for an explanation, and what he said was that the Union—what Mr. Bodnorchuk said was this; that the Union Marine Insurance Company policy was written for a term of three years on the basis of a partial payment plan; that is, 40 per cent. of the premium was to be paid the first year, 30 per cent. the second year and 30 per cent. the third; that the first year's premium was paid and that the second year instalment of 30 per cent. was coming due—or due; that he had obtained a better rate from the Saskatchewan Government Insurance Office than what he was paying to the Union Marine Insurance Company, and therefore he decided —he instructed the Saskatchewan Government Insurance agent to issue a policy to them to replace the one that is with the Union Marine Insurance Company. He said that an agent by the name of Bell came to see him on the first week in December and asked him for the second year premium. Bodnorchuk told Bell that he had replaced the Union Marine policy with the Saskatchewan Government Insurance policy on account of the rate being lower, that he wasn't going to retain it. He wanted it cancelled. He went on to tell me that Mr. Bell, who had just recently purchased the insurance business in Canora, had talked him into keeping the policy—or tried to talk him into keeping the policy—as he didn't want to lose the commission. So he told Mr. Bell that he would think it over, he would discuss it with his partner and think it over, and Bell should return to see him in a few days. He told me that Bell did return to see him in a few days, and at this time he again told him that he definitely decided not to retain the Union Marine Insurance Company policy, and that Bell told him he would return and pick the policy up.

[1] 20 W.W.R. at p. 38.

On the day following, Gonick said that he saw Bell who at the time produced the original policy issued by the appellant to the respondents and there was a discussion regarding it. As neither of the respondents was present, evidence as to what Bell said at that time was inadmissible. Gonick left Canora that day.

According to Bodnorchuk and Bell, they had had discussions on December 4 and December 10 at which the cancellation of the appellant's policy had been discussed. I will deal with this evidence later in some detail. Bell had, according to his own account, been called away from Canora on December 13 and, before going, had written and signed a letter addressed to A. T. Brown & Co. Ltd. returning the policy that had been issued to the respondents and had asked McNally to get the policy from Bodnorchuk and enclose it with the letter and mail it. McNally had not done this and the letter had not been sent. He said that, so far as he could remember, it read:

> We are enclosing the above numbered policy for cancellation, as the Lunn Hotel is insured elsewhere—as the insured had placed his business elsewhere.

It is not suggested that Bell had seen or had any further discussion with Bodnorchuk between December 10 and 13.

While this demonstrates that Bell understood—as did Bodnorchuk—that the policy had been terminated on December 10, on December 20, four days after the fire and after Gonick had left Canora, he went to Bodnorchuk and, according to the latter, assured him that the policy was in full force and induced him to pay $260 as the instalment which had become due on December 3. Bell admits that he had not been instructed by the company to do this and the payment was refused by it and the money paid back to Bodnorchuk.

On January 25, 1955, Mr. W. B. O'Regan, Q.C., went to Canora and interviewed Bodnorchuk on behalf of the appellant company and made a memorandum of that discussion at the time. Mr. O'Regan says that Bodnorchuk told him that Bell had called upon him on December 4 to collect a premium that was due on the Union Marine policy and that he (Bodnorchuk) had then told him that he had applied for a policy with the Saskatchewan Government Insurance Office and would let Bell know definitely if he

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intended to replace the appellant's policy with the Saskatchewan Government policy. Bodnorchuk said further that on December 10 he had again seen Bell and told him that he intended to replace the Union Marine policy with that of the Saskatchewan Government Insurance Office, that he understood that at that time the Union Marine policy was cancelled on being replaced by the Saskatchewan Government policy and that there was no intention of keeping the two policies. Mr. O'Regan had asked Bodnorchuk if he would sign a written statement but this the latter refused to do. He then took a statutory declaration from Bell dealing with the matter.

No claim was made by the respondents upon the appellant company and no notice given to them of the occurrence of the fire until nearly two months after that event had occurred. Notice had been given at once to the Saskatchewan Government Insurance Office and to the Merchants and Manufacturers Insurance Company. On February 5, Bodnorchuk went to Winnipeg and saw Gonick at his office regarding the adjustment of the loss, at which time Gonick told him that, under a co-insurance clause in the Saskatchewan Government policy, the respondents would have to contribute as co-insurers in an amount betwen $5,000 and $6,000.

On February 22, 1955, the respondents executed a proof of loss and made a statutory declaration as to the truth of the claims and statements made in it before their solicitor, Mr. Walker, Q.C., of Canora, for their claim against the Saskatchewan Government Insurance Office. This showed the cash value of the hotel and household furniture, as distinct from the building, as being $15,614.32 and claimed an amount of $7,743.90. The proof was on a printed form which required the assured to furnish the names of other insuring companies and, under this heading, there appeared only the words "Merchants & Manufacturers $12,000.00".

On the same day Bodnorchuk wrote to the appellant at Winnipeg asking that settlement be made under its policy. The claim was promptly rejected and the action ensued.

Both the respondents gave evidence at the trial. Bell was called as a witness for the defence and gave evidence which, the learned counsel who appeared for the company at the trial said, was not in accordance with the

declaration he had sworn to at the request of Mr. O'Regan. Counsel's request to cross-examine Bell as a hostile witness was refused by the learned trial judge.

The evidence given by Bodnorchuk is impossible to reconcile with the statements made by him to Brown, Gonick and O'Regan and with his own conduct between the date of the fire and February 22. According to him, he had applied for the insurance with the Saskatchewan Government Insurance Office prior to December 4, 1954, and he had already accepted the policy which was dated the previous October and which insured the property from December 3. He, however, said that when Bell came to him on December 4 to collect the premium on the Union Marine policy which had become due the previous day, he had told him that they might pay it but they might cancel the policy, and that he had placed an application with the Saskatchewan Government Insurance Office for a policy for about the same amount. As to the interview on December 10, he says that he then told Bell that they were still undecided about the Union Marine policy and did not know what they were going to do with it, and that matters remained in this state until after the fire when Bell came to see him and said that the policy was in full force. He denies that he had told Brown on the telephone that the Union Marine had nothing to do with the loss since their policy was cancelled or that he had told Brown to forget about the matter.

When asked if Brown had asked him if the policy was still in his possession and if after looking for it he had told Brown that he still had it, he said he could not remember. When asked if he had said to Brown that he would give the policy back to Bell when the latter came back, he said at first that he did not think he had said that but then denied it. As to the conversation with Gonick, Bodnorchuk swore that he did not tell the adjuster that the Union Marine policy was cancelled but told him they were going to cancel it. He also said that he had not told Gonick not to list the Union Marine policy as that policy was cancelled. As to the statements made to Mr. O'Regan, he said he did not think that he had told him that his understanding was that the Union Marine policy had been cancelled on December 10 and did not deny that he had told him that he had no intention of keeping both the Union Marine and the Saskatchewan Government policies. When cross-examined upon

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a number of answers that he had made on discovery, which were inconsistent with his evidence at the trial, his attempted explanations failed to explain the variance. In many cases his evidence at the trial and that given on discovery were contradictory. Thus at the trial he was asked if he had told Bell on December 4 that if they took the Saskatchewan Government policy they would not want to continue the Union Marine policy and he denied it but, on discovery, he had admitted it. Asked if he had told Bell on December 4 that they had no intention of carrying both policies, he swore he had not and that he had not told Bell that he and his partner had decided to take the Saskatchewan Government insurance to replace the Union Marine policy. He had been asked about this on discovery and said that he did not deny having said this to Bell but could not remember whether he had. He had been asked on discovery if on December 4 he had told Bell that they were thinking of replacing the Union Marine policy with the Saskatchewan Government policy and had said that that was right, but at the trial he said this was a mistake and they were not considering replacing it.

Upon this aspect of the matter it is to be remembered that the appellant's policy insured the hotel and household furniture for an amount of $16,000 and the policy of the Saskatchewan Government for the amount of $19,000 while the value of the property, agreed to by Bodnorchuk with Gonick on February 5, 1954, was only $15,614.32. When cross-examined as to this at the trial, he said the hotel and household furniture "could have been" worth $35,000.

Bell, on his own evidence, failed to fulfil his duty as agent to act in good faith for the protection of the interest of his principal. His evidence may be summarized by saying that he agreed with Bodnorchuk that the latter had said on December 4 that they were not prepared to pay the premium at that time because Bodnorchuk did not know whether they were going to continue the Union Marine policy or not and that on December 10 they were still undecided and were going to leave the matter for a few days. He admitted that he had not received any instructions from the appellant company to collect the premium

or to tell Bodnorchuk that the policy was then in force. The following passage from his evidence is illuminating:

Q. Isn't it a fact that your main concern at that time was to keep friendly with these people, the insured? A. Yes. They are still friends of mine.

Q. You wanted to be friendly? A. Yes.

THE COURT TO WITNESS: Q. You wanted his [*sic*] commission? A. Yes, I think everyone would do.

MR. BASTEDO CONTINUING: Q. You wanted your commission and wanted to keep friendly with them? A. Yes.

Q. Was that why you let him pay the insurance? THE COURT: That is a double-barrelled question.

MR. BASTEDO: How can I prove he is hostile without having some cross-examination of the matter?

THE COURT: He wanted the cheque because he wanted his commission on it.

WITNESS: That is not entirely true.

It is manifestly impossible to reconcile Bell's evidence as to what had occurred between him and Bodnorchuk on December 10 with his conduct following that date. It will be remembered that Bodnorchuk told Brown on December 17 that he had told Bell he did not want the policy, that it was cancelled and that he had told Bell to "pick the policy up". Bodnorchuk was, according to Brown, not sure that he still had the policy but, after looking among his papers, found that he had it and said that Bell had not yet picked it up. That it had been arranged that the policy be surrendered to Bell is confirmed by the arrangement he made with McNally above referred to and the letter he wrote to A. T. Brown & Co. Ltd. on December 13.

For some reason that I cannot understand, the original policy of insurance issued by the appellant was not put in evidence at the trial. It had been produced and marked on the examination for discovery of Bodnorchuk as ex. D-1. When the respondent Bodnorchuk was giving his evidence in chief at the trial his counsel produced a document which, he said, was a duplicate original of the policy and it is this document which appears in the case filed in this court. It is not a policy of insurance at all and does not purport to be. It consists of the usual memorandum kept by fire insurance agents of policies issued through their agency, giving the name of the insuring company, the name of the insured, particulars as to the person to whom the loss is payable, the amount of the insurance, the rate, the premium and

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the term and the dates of commencement and expiry. The original of this document which I have examined bears at the foot of it these words "A. T. Brown & Co. Ltd. A. D. McNally". Pasted on the face of this memorandum are the usual particulars endorsed upon fire insurance policies showing the amount of the cover upon the various things insured, some other clauses defining certain terms used in the endorsement such as the word "building" and particulars of the persons to whom the loss was payable. This bears the same signature as the memorandum. There is also attached a printed form describing additional perils covered by the policy. Counsel for the respondents at the trial said it was a duplicate original but in this he was completely mistaken. There is no covenant to insure contained in the document so described. It does not contain the statutory conditions that must be included in every fire insurance policy in Saskatchewan. Fire insurance companies do not issue policies in duplicate, so far as I am aware, and there is not the slightest evidence to support the statement that a duplicate of the original policy, which is not before us, was ever issued by the appellant.

I am also unable to understand how it is that the copy of this document, which was made ex. P-3 at the trial, as it appears at p. 89 of the case, contains at the foot of one of the endorsements the words "A. T. Brown & Co. Ltd. A. T. Brown" as no such signature appears on the original document and five of the various sheets which compose it are signed "A. T. Brown & Co. Ltd. A. D. McNally".

At the trial, while counsel for the present appellant was putting in portions of the examination for discovery of Bodnorchuk, including the questions and answers where the original policy had been produced and marked as ex. D-1, counsel for the present appellant said:

> I will ask my learned friend where the original is, because I thought we were referring to the original this morning. I am quite prepared to take a certified copy, but I don't want my learned friend to comment on the fact that one of the witnesses got confused between the original and a certified copy.

The answer made by counsel for the respondent was:

> Sorry, that is the only one I have got.

It is regrettable that the original policy of insurance does not form part of the evidence. It is upon that document that the respondents' claim is based. Any claim based on

the document P-3 could not succeed since there is no covenant to insure. The matter, however, has some further significance and bears upon the veracity of both Bell and Bodnorchuk.

Gonick had sworn before Bell gave his evidence that the original policy was in Bell's possession and exhibited by him to Gonick on the morning of December 18. It had been in Bodnorchuk's possession on the previous day. That Bodnorchuk, who had already told Gonick that the policy had been cancelled, would hand it back to Bell when the latter returned to Canora would be entirely in accord with what he had told Brown he would do. The significance of the possession of the original policy by Bell at that time apparently did not escape the attention of both Bell and Bodnorchuk and Bell denied that he had shown the policy to Gonick, and Bodnorchuk that he had ever given the policy to Bell. The learned trial judge and the judgment of the majority of the Court of Appeal refer to the fact that Bodnorchuk had the original policy in his possession when examined for discovery, apparently regarding this as showing that it had never left his possession. But that does not follow. On the contrary, it indicates to me that after Gonick left Canora on December 18 Bell gave the policy back to Bodnorchuk on or before December 20, when he collected the second instalment of the premium and assured Bodnorchuk, according to the latter and to Nawakowsky, that the policy was in force.

Gonick was shown the document P-3 at the trial and asked if that was what he had seen in Bell's possession and replied that it was not, but that he had seen the original policy. It is suggested in the judgment of the trial judge that Gonick may have been mistaken and that what he saw was a copy. As to this, Gonick is an insurance adjuster who has had 30 years' experience and, apart from the fact that there is no evidence that there ever was any copy of the policy in existence, it is quite impossible to believe that this experienced adjuster would not recognize an original when he saw it.

Why the original policy was not put in at the trial and why the letter written by Bell to A. T. Brown & Co. Ltd. was not produced is merely a matter for speculation upon the present record. The exhibit P-3 was not really admissible in evidence at all in the absence of evidence that the

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original policy had been either lost or destroyed. I think to have been able to examine both of these documents might have been of assistance in arriving at the truth in this matter.

While Nawakowsky gave evidence at the trial, his evidence was restricted to saying that he had seen Bodnorchuk pay Bell the $260 on December 20 and that Bell had said that the policy was then in force.

The learned trial judge has found that no agreement to terminate the policy was made out at the trial. In coming to this conclusion, he said in part[1]:

> It emerges from the whole of the evidence that Bodnorchuk *thought* it was cancelled and that it is only after he found out that he was a co-insurer in the Saskatchewan Government Insurance Office policy that he sought to enforce his rights under the defendant's policy.

And again[2]:

> It is rather difficult to close one's eyes to the repeated assertions by the plaintiff Bodnorchuk that the defendant's policy was cancelled or replaced. On the other hand, Bell says it was definitely not cancelled on December 4 or 10. In my opinion there must be more than an intention to cancel—there must be mutuality of the minds . . .

Earlier in the judgment the learned judge had said that there was substantially no difference as to the matter of cancellation in the evidence given by Bodnorchuk or Bell.

The learned Chief Justice of Saskatchewan who delivered the judgment of the majority of the Court of Appeal has said that he agreed with Doiron J. that there was no mutual agreement to cancel the policy and found no evidence of any such agreement. No reference is made to his finding that Bodnorchuk had repeatedly said that the policy was cancelled or replaced, or the significance of that finding as to the credibility of Bell. I must assume that this was not considered. There was, indeed, in the face of the evidence of these two men no direct evidence of an agreement, but the Court is not thereby relieved of the obligation of drawing the proper inferences of fact from what they said and did.

The finding that Bodnorchuk asserted at various times that the policy had been cancelled and replaced and that he thought until February 1954 that the appellant's policy had been cancelled is a plain rejection of the evidence of both Bodnorchuk and Bell at the trial as to what happened

[1] 20 W.W.R. at p. 39. [2] *Ibid.* at p. 45.

between them on December 10 and of Bodnorchuk's repeated denials of having said this to any one. If, as they both swore, all that there occurred was that Bodnorchuk then indicated an intention to cancel the policy but nothing more, it is, of course, quite impossible that thereafter he would have thought that the policy was at an end or that Bell would have written the letter to the insurance company and instructed McNally to get the policy and return it to the Regina office. As the learned judge did not believe Bodnorchuk it necessarily follows that he did not believe Bell. With this finding I am in complete agreement. For the reasons above stated, I think the evidence of these witnesses on the vital point in this case was demonstrated to be false.

While thus not believing Bell's account as to what had occurred on December 10, the learned trial judge appears to base his conclusion that it had not been agreed to terminate the policy on that day on his evidence. I am unable, with great respect, to follow this reasoning or to agree with his conclusion.

If this were a matter involving on this point the credibility of a witness, I would not hesitate to disagree with the learned trial judge as I would consider that he had failed to use the advantage afforded to him of having seen the witness and observed his demeanour in the witness-box in coming to his conclusion: *S.S. Hontestroom v. S.S. Sagaporack; S.S. Hontestroom v. S.S. Durham Castle*[1], *per* Lord Sumner at p. 47. However, that is not this case since he obviously did not believe the evidence of Bodnorchuk and Bell that all that was done on December 10 was that Bodnorchuk said that he was considering cancelling the policies. The proper conclusions from the other evidence and the question as to what inferences are to be drawn from the conduct of the parties are matters upon which this Court is in an equally good position as the learned trial judge and the learned judges of the Court of Appeal.

In these circumstances, it is not only our right but, as expressed by Bramwell L.J. in *Jones et al. v. Hough et al.*[2], our duty to form our own opinion upon the facts. In *The North British & Mercantile Insurance Company v. Tourville et al.*[3], an action brought upon an insurance policy

[1] [1927] A.C. 37.
[2] (1879), 5 Ex. D. 115.
[3] (1895), 25 S.C.R. 177.

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which the defendant sought to avoid on the ground of fraud and where there had been concurrent findings in the Courts below, Taschereau J., delivering the judgment of the Court, referred to what had been said by Bramwell L.J. in *Jones et al. v. Hough et al.*, and said (p. 195):

> We do not fail to take into consideration, I need hardly say, that the fact of the two provincial courts having come to the same conclusion enhances the gravity of our duties, and imposes upon us, more than might perhaps be required under other circumstances, the strict obligation not to allow the appeal without being thoroughly convinced that there is error in the judgment. But, at the same time, we would unquestionably be forgetful of our duties if we did not form an independent opinion of the evidence, and give the benefit of it to the appellants if they are entitled to it.

It is, I think, unnecessary to repeat the evidence which points irresistibly to the conclusion that the policy issued by the appellant had been replaced by that of the Saskatchewan Government Insurance Office and that on December 10 it was agreed between these two men that the policy was terminated and should be surrendered. It was apparently at Bell's request that Bodnorchuk had deferred his decision to terminate the policy on December 4 and, if not expressed, I would infer that it was an implied condition of the arrangement that the appellant would not ask for payment of the earned premium between December 3 and 10. No one, I think, would seriously suggest that after what transpired the appellant could have sued for the premium due on December 3. While the word "cancellation" has been used throughout these proceedings, I think it would be more accurate to refer to what was agreed to as a termination of the policy. A policy of fire insurance may, of course, be terminated by mutual agreement and, as all experienced lawyers and businessmen in western Canada know, this is constantly done by simply surrendering the policy and, if not already paid, paying the premium earned up to the time of surrender. An arrangement of this kind has nothing to do with the cancellation of the policy under stat. con. 10.

We do not know whether the original policy was signed in the name of the Brown company or by McNally, but it is the latter whose signature appears upon the document P-3, and a letter put in at the trial shows that he was authorized to agree to accept the three-year premium by instalments. It is not suggested that his successor Bell did not have the

same power or authority to agree to the termination of the policy and the waiver of the premium earned after December 3. In cases such as this where the oral evidence is as obviously unreliable as that given by Bodnorchuk and Bell, the truth can best be ascertained by inferences to be drawn from their conduct. I think no other reasonable inference can be drawn than that which I have above stated.

In view of my conclusion that the policy was terminated on December 10, 1954, it is unnecessary to deal with the question discussed by Mr. Justice Gordon as to whether s. 162 of *The Saskatchewan Insurance Act,* R.S.S. 1953, c. 133, is wide enough to empower the Court to relieve the respondent from the necessity of giving notice in writing of the fire to the company forthwith after the loss. If there is such power, I agree completely with that learned judge who dissented from the judgment of the majority that this is not a case where relief should be given. The failure to give the notice required by the statutory condition was deliberate. The case for the respondents, in my opinion, is entirely devoid of merit.

I would allow this appeal with costs throughout and direct that the action be dismissed.

Appeal allowed and action dismissed with costs throughout, KERWIN C.J. *and* ABBOTT J. *dissenting.*

Solicitors for the defendant, appellant: Thom, Bastedo, McDougall & Ready, Regina.

Solicitor for the plaintiffs, respondents: W. H. Morrison, Yorkton.

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*Mar. 17, 18
Jun. 3

RAINVILLE AUTOMOBILE LIMITED (*Defendant*) ..... APPELLANT;

AND

DAME ANGELANTONIA PRIMIANO ET AL. (*Plaintiffs*) ..... RESPONDENTS.

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

Negligence—Fatal accidents—Whether contributory negligence of victim can be invoked in action under art. 1056 C.C.

In an action under art. 1056 C.C., contributory negligence on the part of the victim can be set up against the claimants and to limit the defendant's liability. Since the victim has not incurred any liability towards the persons entitled to claim under the article, there is no joint and several liability between the victim and the defendant, the other author of the quasi-delict. Consequently, the latter is only responsible for the share of the damages attributable to his own fault, and is entitled to invoke the contributory negligence of the victim to limit that share. Otherwise, the liability under art. 1056 would not be the same, in its principle and measure, as that under art. 1053 where the general theory of the law of obligations arising out of delicts and quasi-delicts is to be found. *Price v. Roy* (1899), 29 S.C.R. 494; *Conlin v. Fontaine,* [1952] Que. Q.B. *407*; *Cullen v. Rawdon Pine Lodge Limited,* [1953] Que. R.L. 365; *La Madeleine ès qualité v. Thibault,* [1955] Que. Q.B. *251*; *Vineberg v. Larocque,* [1950] Que. Q.B. 1, approved. *Ryan v. Bardonnex* (1941), 79 Que. S.C. 266; *Lair v. Laporte,* [1947] Que. R.L. 286, overruled.

APPEAL and CROSS-APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing the judgment of Lalonde J. Appeal and cross-appeal dismissed.

H. Lizotte, for the defendant, appellant.

A. Malouf, for the plaintiffs, respondents.

The judgment of the Court was delivered by

TASCHEREAU J.:—La demanderesse-intimée a poursuivi la défenderesse-appelante conjointement et solidairement avec Albert Rainville et Lucien Normandin, et leur a réclamé, tant personnellement qu'en sa qualité de tutrice à ses enfants mineurs, la somme de $46,085.55.

PRESENT: Kerwin C.J. and Taschereau, Cartwright, Abbott and Martland JJ.

[1] [1957] Que. Q.B. *163*.

Elle allègue dans son action que, le 25 octobre 1951, son époux Michaelangelo Vaccaro a été fatalement frappé par un camion sur le Boulevard St-Michel à Montréal, vers 4.30 heures p.m. Elle invoque les dispositions de l'art. 1056 C.C. qui édicte que le conjoint, ses ascendants et ses descendants ont, pendant l'année à compter du décès, droit de poursuivre celui qui en est l'auteur ou ses représentants, pour les dommages-intérêts résultant de tel décès, dans tous les cas où la partie contre qui le délit ou le quasi-délit a été commis, décède sans avoir obtenu indemnité ou satisfaction.

L'honorable juge de première instance a rejeté l'action de la demanderesse contre les défendeurs Albert Rainville et Rainville Automobile Limitée, avec dépens. Il n'a pas adjugé sur le cas de Normandin, vu qu'on s'est désisté de toute réclamation contre ce dernier.

La Cour du banc de la reine[1] a fait droit à l'appel, a infirmé le jugement de la Cour supérieure, et a condamné l'intimée, Rainville Automobile Limitée, à payer à l'appelante, en sa qualité personnelle, la somme de $5,065.06, à l'appelante ès-qualité le somme de $2,292.94, à Carmela et Michelantonio, demandeurs en reprise d'instance, la somme conjointe de $1,000, avec les dépens dans les deux Cours. La Cour a cependant confirmé le jugement qui a débouté l'appelante de son recours contre Albert Rainville personnellement, et a confirmé sur ce point le jugement de première instance avec dépens.

La Cour[1] en est venue à la conclusion que cet accident était le résultat d'une faute contributive. Elle a été d'opinion que la victime a commis une grave imprudence en s'aventurant sur la chaussée comme elle l'a fait, et que le conducteur du camion devait être également tenu responsable parce qu'il n'avait pas établi n'avoir commis aucun acte de négligence. Il n'a pas réussi à repousser complètement la présomption imposée par la *Loi des véhicules automobiles*, S.R.Q. 1941, c. 142, s. 53. La Cour a statué que la faute de la victime était la plus considérable, et lui en a attribué les deux-tiers, et un tiers au conducteur du camion.

La preuve révèle qu'un nommé Papineau a acheté de Rainville Automobile Limitée, un camion de trois tonnes, et qu'au moment de l'accident Papineau était en conséquence propriétaire du camion en question. Comme

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Papineau ne pouvait rencontrer ses paiements à échéance, il remit le camion en question à Rainville Automobile Limitée, avec mission de le vendre. Quelque temps plus tard, M. Albert Rainville, président de la compagnie défenderesse, entra en négociation avec Lucien Normandin, l'un des défendeurs originaires, afin de vendre le camion de Papineau à Normandin.

Au début d'octobre 1951, Albert Rainville rencontra Papineau et Lucien Normandin, en présence d'un nommé St-Hilaire, et le défendeur Normandin prit possession du camion de Papineau, avec l'entente que Normandin devait se servir du camion quelques jours pour en faire l'essai. Si le camion était satisfaisant, Normandin devait l'acheter, vu qu'il avait un contrat de charroyage de pierre dans la ville de Montréal. Normandin partit donc avec le camion, rencontra la Duluth Transport Company de Ville St-Michel, avec qui il fit une entente pour le transport de la pierre pour cette compagnie. Il avait été convenu cependant que les revenus provenant de ce transport seraient payés par chèques à Albert Rainville, tel que ce dernier l'avait exigé lors de l'entrevue de ces quatre messieurs.

Pour donner effet à ce contrat de charroyage, Normandin fit plusieurs voyages de pierre pour le compte de Duluth Transport Company, et suivant l'entente, cette dernière compagnie fit parvenir les paiements à Rainville, soit la totalité de l'argent gagné par Lucien Normandin avec le camion en question. Il fut aussi convenu que durant cette période d'essai, Normandin recevrait de Rainville, sur les argents gagnés avec le camion, une somme de $50 par semaine à titre de salaire, et la preuve a en outre révélé qu'effectivement Normandin a reçu durant le temps où il a travaillé pour Duluth Transport Company, ce salaire qui avait été préalablement convenu.

Or, le 25 octobre, vers 4.45 heures, alors que Normandin conduisait le camion sur le Boulevard St-Michel, dans la ville de St-Michel, près de la ville de Montréal, il frappa Michaelangelo Vaccaro, le mari de la demanderesse-intimée, avec les conséquences fatales que l'on sait, et qui ont donné naissance au présent litige.

L'action, lors de la première journée de l'enquête, a été discontinuée contre Lucien Normandin, de sorte que les seuls défendeurs sont restés Albert Rainville et Rainville Automobile Limitée.

Cette action, tel que nous l'avons signalé, a été maintenue en partie contre Rainville Automobile Limitée, mais rejetée contre Albert Rainville personnellement. La Cour d'Appel en est venue à la conclusion que la victime a été frappée au milieu de la rue, ce qui indique que Vaccaro a parcouru environ dix pieds sur le pavé et environ quelque quarante pieds dans la rue. La Cour a conclu qu'en raison des imprécisions et des incertitudes de la preuve, il subsistait un doute sur l'imputabilité totale de la cause de l'accident, et qu'en conséquence la présomption créée par l'art. 53 de la *Loi des véhicules automobiles* devenait un élément de preuve prépondérant. Elle a statué que même l'application de cette présomption n'a pas un effet décisif et absolu au point d'affranchir la victime d'un acte d'imprudence qui a contribué à l'accident. L'imprudence de la victime aurait été de ne pas s'assurer qu'elle pouvait s'aventurer sur la chaussée sans danger, et c'est la raison pour laquelle la responsabilité a été partagée dans la proportion de deux-tiers à un tiers.

Sur ce premier point, je suis d'opinion qu'il y a eu une faute de la part du conducteur de la voiture, et faute également de la part du piéton, et que le jugement de la Cour du banc de la reine[1] est bien fondé.

Il me semble également bien établi que Normandin était le préposé et l'employé de l'intimée Rainville Automobile Limitée au moment de l'accident. Papineau avait en effet remis l'automobile qu'il avait achetée à Rainville Automobile Limitée, et Normandin recevait de cette dernière compagnie un salaire de $50 par semaine, et tous les bénéfices du contrat de charroyage de pierre étaient payés directement par Duluth Transport Company à Rainville. Ceci établit clairement, il me semble, les relations d'employeur et préposé entre Normandin et Rainville Automobile Limitée, et justifie l'application de l'art. 1054 C.C. Normandin était donc dans l'exercice de ses fonctions lorsque ce malheureux accident s'est produit. La responsabilité de son patron a été légalement engagée.

Une question se pose sur le contre-appel qui a été logé dans la présente cause, car la demanderesse-intimée prétend faire augmenter le montant qui lui a été accordé par la Cour d'appel, tant à elle personnellement qu'en sa qualité de

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tutrice à ses enfants mineurs. Pour ces derniers, elle a demandé une permission spéciale d'appeler du jugement devant cette Cour, vu que les montants accordés ne justifiaient pas un appel *de plano*. Dans son factum, et à l'argument, elle a aussi soutenu, que lorsqu'il s'agit de l'application de l'art. 1056 C.C., il faut considérer que le recours accordé au conjoint, aux ascendants ou aux descendants, est un recours indépendant, personnel et individuel à chacune des personnes qui y sont mentionnées, qui réclament non pas comme héritiers légaux, mais parce que le droit leur est conféré en vertu de cet article. Il s'ensuivrait que même si la victime a contribué à l'accident qui lui a causé la mort, il n'y aurait pas lieu, comme l'a fait la Cour du banc de la reine, de diviser la responsabilité, et l'action aurait dû être maintenue pour la totalité des dommages établis.

Cette dernière question a déjà été considérée par les tribunaux, mais aucun jugement de cette Cour ne l'a définitivement déterminée. Dans *Ryan v. Bardonnex*[1], M. le Juge Errol McDougall exprimait les vues suivantes, mais elles ne constituent évidemment qu'un *obiter dictum* vu que l'action a été complètement rejetée:

> The plaintiff's action rests upon the provisions of art. 1056 C.C. and is entirely personal to her. It is thus inappropriate for the defendant to urge through counsel that, even if the defendant is to be held liable, the claim must be reduced because of the alleged contributory fault of the deceased, presumably in being intoxicated and unable to look after himself. It is a matter of indifference to the Court that the plaintiff's late husband may have contributed (though the fact is not proved) to the fault which brought about the accident, since the liability of joint tort feasors is joint and several (C.C. 1106) . . . and the plaintiff's action does not arise in a representative capacity but is independent of any claim which the deceased might have had.

Dans une autre cause de *Lair v. Laporte*[2], M. le Juge Loranger dit:

> *Faute de la victime*—Sans doute, vis-à-vis de la victime, le défendeur pourrait invoquer la faute totale ou partielle, si c'était la victime elle-même, ou ses héritiers, qui réclamaient des dommages-intérêts résultant du délit; mais dans le cas présent, l'action est intentée en vertu de l'art. 1056 C.C. par le conjoint et les enfants de la victime, pour des dommages résultant de la mort de la victime; peu importe la faute de la victime, les demandeurs ne la représentant pas, ne peuvent être responsables de la faute qu'elle aurait pu commettre. Ce serait chose à régler entre l'auteur du délit et les héritiers, et non pas entre l'auteur du délit et le conjoint et les enfants dont la réclamation est personnelle et résulte du dommage à eux causé par la mort de leur épouse et mère.

[1] (1941), 79 Que. S.C. 266 at 267. [2] [1944] Que. R.L. 286 at 288.

Mais il ajoute: "Quoi qu'il en soit, je ne vois pas de faute de la part de la victime", démontrant bien qu'il n'a pas eu à décider la question, et que comme dans la cause précédente, il ne s'agit que d'un *obiter dictum*.

Le Comité Judiciaire du Conseil Privé a considéré l'application de l'art. 1056 C.C. dans *Robinson v. Canadian Pacific Railway Company*[1], *Miller v. Grand Trunk Railway Company of Canada*[2] et dans *Canadian Pacific Railway Company v. Parent et al*[3]. Aucune de ces décisions cependant ne porte sur le point qui nous occupe. Que le droit d'action donné au bénéficiaire de la disposition soit un droit personnel et indépendant de celui qu'avait la victime, ainsi qu'on l'a dit dans la première de ces décisions, et répété dans les autres, il ne s'ensuit pas que la notion de responsabilité ait été changée, tel que nous allons le démontrer.

Dans un jugement de cette Cour, *Price v. Roy*[4], M. le Juge Girouard a eu à considérer le cas de faute contributive découlant de l'art. 1056 C.C., et il a dit ce qui suit à la page 497:

> Il a admis que l'ouvrage était dangereux, mais tout le monde connaissait le danger, le défunt comme les autres. L'appelant était certainement en faute d'autoriser un pareil ouvrage; le défunt l'était davantage en exposant sa vie. *C'est donc le cas de faute commune et de diviser le dommage souffert selon la jurisprudence hautement équitable de la province de Québec.*

(Les italiques sont miennes.)

La Cour du banc de la reine, dans *Conlin v. Fontaine*[5], a jugé que dans le cas d'une action par l'épouse de la victime, sous l'empire de l'art. 1056, la théorie de la faute contributive devait s'appliquer.

Dans un arrêt rendu par M. le Juge Archambault, *Cullen v. Rawdon Pine Lodge Limited*[6], le savant juge traite de cette question, et conclut qu'il faut tenir compte de la faute de la victime, dans l'octroi des dommages aux personnes lésées par sa mort.

Plus récemment, la Cour du banc de la reine de la Province de Québec dans une cause de *LaMadeleine ès qualité v. Thibault*[7], s'appuyant évidemment sur sa jurisprudence

[1] [1892] A.C. 481, 61 L.J.P.C. 79, 15 L.N. 259.
[2] [1906] A.C. 187, 15 Que. K.B. 118.
[3] [1917] A.C. 195, 20 C.R.C. 141, 33 D.L.R. 12.
[4] (1899), 29 S.C.R. 494.
[5] [1952] Que. Q.B. 407.
[6] [1953] Que. R.L. 365 at 376.
[7] [1955] Que. Q.B. 251.

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antérieure, a décidé que même lorsqu'il s'agit de l'application de l'art. 1056 C.C., la faute contributive de la victime doit entrer en ligne de compte pour déterminer le montant du dommage auquel peuvent avoir droit le conjoint, les ascendants ou les descendants.

Dans *Vineberg v. Larocque*[1], M. le Juge Surveyer, siégeant *ad hoc,* rejette la prétention que le conjoint, l'ascendant ou le descendant a droit de réclamer intégralement les dommages subis, sans égard à la faute de la victime. Dans son jugement, M. le Juge Surveyer cite l'opinion de Mazeaud, Responsabilité, 3e éd. 1939, t. 2, p. 470, Demolombe, Cours de Code Napoléon (1882), t. 31, p. 436, et reproduit également l'extrait suivant du jugement très au point de M. le Juge Laliberté dans *Gagné v. Godbout*[2], où le savant juge, commentant l'art. 1056, exprime les vues suivantes:

> C'est un recours qui ne doit pas donner à la mère ou aux enfants droit de réclamer plus que la personne décédée n'aurait pu le faire si le recours eût été exercé par lui de son vivant. Le Tribunal estime devoir suivre les nombreux arrêts des tribunaux de cette province où sur un recours étayé sur l'art. 1056 C.C. l'on a partagé les dommages à la suite de la faute contributive d'une victime décédée.

Il semble bien qu'à part les *obiter dicta* de MM. les Juges McDougall et Loranger (cités *supra*), la jurisprudence de la province ne supporte pas la prétention que la faute de la victime est étrangère au montant des dommages qui peuvent être accordés.

C'est évidemment ce que la Cour du banc de la reine, sans discuter la question, a décidé encore dans la présente cause, vu qu'elle a partagé les dommages.

Cette solution me paraît juste et découle bien, me semble-t-il, des principes fondamentaux du droit qui nous régit.

En effet, il importe de retenir en premier lieu qu'il ne faut pas confondre le quasi-délit auquel a contribué l'appelant avec les dommages qui en résultent, et en second lieu que l'obligation de réparer le préjudice causé repose sur l'auteur de ce quasi-délit. C'est bien le sens ordinaire et naturel découlant du texte de 1056 C.C. Dans *Robinson v. Canadian Pacific Railway Company, supra,* Lord Watson s'exprime ainsi à la page 488:

> The first paragraph of sect. 1056, read in its ordinary and natural sense, enacts that the widow and relations shall have a right to recover all

[1] [1950] Que. Q.B. 1 at 18. [2] [1946] Que. S.C. 16 at 19.

damages occasioned by the death *from the person liable for the offence or quasi-offence from which it resulted,* provided they can shew (1.) that death was due to that cause, and (2.) that the deceased did not, during his lifetime, obtain either indemnity or satisfaction for his injuries.

Il me semble évident qu'en raison de sa faute contributive, la victime dans la présente cause n'a encouru aucune obligation à l'endroit de son conjoint, ses ascendants ou ses descendants. L'appelant demeure donc le seul débiteur de l'obligation née de ce quasi-délit, et il ne saurait donc être question d'invoquer, en ce qui concerne l'appelant, la disposition de l'art. 1106 C.C. décrétant que l'obligation résultant d'un délit ou quasi-délit par deux personnes ou plus est solidaire. Il est bien évident que si l'appelant était tenu à payer la totalité des dommages, il ne pourrait subséquemment, en raison du fait ou de la faute contributive de la victime, exercer une action récursoire et recouvrer de la succession de cette dernière, partie de la somme payée par lui, puisque la victime, dans le cas qui nous occupe, n'a pas participé au délit ou au quasi-délit, au sens qui doit être attribué à ces termes par les arts. 1053 et suivants. En effet, on ne commet pas de délit ou de quasi-délit vis-à-vis soi-même. La solidarité ne peut exister en vertu de l'art. 1106 que s'il y a concours de faute. Ici, il n'y a aucune faute légale commise par la victime vis-à-vis ceux qui ont droit de réclamer en vertu de l'art. 1056.

Si l'auteur du quasi-délit ne pouvait invoquer contre la victime le fait que la faute de celle-ci a contribué, avec la sienne, à causer le fait dommageable, et qu'il soit contraint à payer la totalité des dommages en résultant pour les bénéficiaires de la disposition, la responsabilité qu'on lui imposerait ne serait plus, dans son principe et sa mesure, la même sous l'art. 1056 que sous l'art. 1053. Le législateur était libre de décréter qu'il devait en être ainsi, mais je ne crois pas que ce soit la portée qu'il ait donné à l'art. 1056.

Ce n'est pas à l'art. 1056, mais aux articles du *Code Civil* qui le précèdent et particulièrement à l'art. 1053, que se trouve exposée la théorie générale de la loi sur les obligations découlant de délits ou de quasi-délits. L'art. 1056, en effet, présuppose l'existence du fait de la commission d'un délit ou quasi-délit par une personne tenue légalement responsable de cette commission et pour laquelle naît, en conséquence, l'obligation de réparer le préjudice causé. C'est alors qu'il est décrété, et c'est là la substance de la

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disposition, que si cette obligation n'a pas été satisfaite du vivant de la victime quant à ses propres dommages, son conjoint, ses ascendants ou descendants en deviennent les créanciers, pour le recouvrement des dommages leur résultant du décès de celle-ci. Mais rien ne suggère que, pour le reste, la théorie générale de la loi sur les obligations soit changée. Bien au contraire, c'est précisément d'après cette théorie générale qu'il devra être déterminé, dans chaque cas, si la situation de fait et de droit présupposée comme condition de l'application de l'art. 1056, est présente.

La base première de la responsabilité de celui qui cause un événement productif de dommage, est donc, pour les fins de l'application de l'art. 1056, celle qui gouverne aux articles précédents. Ainsi, par exemple, celui qui est incapable de discerner le bien du mal n'est pas plus responsable de son acte, et n'encourt en conséquence pas plus d'obligation sous l'art. 1056 que sous l'art. 1053.

L'incidence de la faute contributive se situe au plan de l'imputabilité; alors que la question est de savoir à qui est imputable l'événement productif du dommage à autrui. Dans la considération et la solution d'un problème d'imputabilité, n'entrent aucunement le caractère particulier de l'événement productif du dommage, la nature ou l'étendue du dommage produit par cet événement, ni la qualité de celui ou ceux qui le subissent. Il est donc indifférent que les bénéficiaires de la disposition de l'art. 1056 soient constitués créanciers de l'obligation procédant du délit ou quasi-délit, par suite de la disposition elle-même, au lieu de le devenir à titre de représentants de la victime. L'obligation ne saurait être aggravée du fait que ce droit d'action sanctionné par l'art. 1056 soit à la fois un droit personnel et indépendant. La base de la responsabilié du fait productif du dommage et la base de l'obligation qui en découle n'en sont pas modifiées. Ce sont celles prévues aux articles précédant l'art. 1056, et particulièrement à l'art. 1053.

Il en résulte donc que si l'événement productif du dommage, et invoqué par les bénéficiaires de la disposition, est uniquement le fait de la victime, ceux-ci n'ont pas de recours; et que si cet événement productif de dommage résulte du concours de la faute de la victime et de la partie poursuivie, la partie poursuivie n'ayant que partiellement contribué à causer cet événement ne saurait, à cause de

l'absence de solidarité, pas plus sous l'art. 1056 que sous l'art. 1053, en avoir l'entière responsabilité et l'obligation de réparer la totalité du préjudice. Sans doute, l'art. 1056 donne aux bénéficiaires le droit de recouvrer "tous les dommages", mais ceci n'implique aucunement qu'on ait écarté, pour les fins de cet article, l'incidence de la faute contributive dans le problème de l'imputabilité. L'art. 1056 ne mentionne pas, il est vrai, la faute contributive, mais cette absence se retrouve également aux art. 1053 et 1054 et on ne saurait donc en tirer un argument.

Je crois donc que le jugement *a quo* est bien fondé, et je suis aussi d'opinion qu'il n'y a pas lieu d'intervenir dans l'appréciation des dommages, tels que déterminés par la Cour du banc de la reine, ni de changer le partage de la responsabilité.

L'appel doit donc être rejeté avec dépens. La motion pour permission d'appeler sera accordée sans frais, et le contre-appel sera rejeté également sans frais.

Appeal dismissed with costs; cross-appeal dismissed without costs.

Attorneys for the defendant, appellant: Lizotte, Marchessault, Villeneuve & Toth, Montreal.

Attorneys for the plaintiffs, respondents: Malouf & Shorteno, Montreal.

HER MAJESTY THE QUEEN (*Plaintiff*) APPELLANT;

AND

LABORATOIRES MAROIS LIMITEE (*Defendant*) ..... RESPONDENT.

1957
Dec. 4

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*Apr. 1, 22
Jun. 3

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Sales tax and old age security tax—Computation of amount on goods delivered by manufacturer to unlicensed wholesale branches and sold by branches to retailers—On what price tax to be calculated—The Excise Tax Act, R.S.C. 1927, c. 179, ss. 85, 86, 99, as amended—The Old Age Security Act, 1951, 2nd sess. (Can.), c. 18—Regulation 782-C.

Regulation 782-C made by the Minister of National Revenue under s. 99 of the *Excise Tax Act*, 1927, contained the following provision:

(*b*) Where manufacturers do not sell to independent wholesalers or where sales are not made in sufficient quantities to wholesalers to be representative sales, licensed manufacturers may

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

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transfer their products to their unlicensed wholesale branches at the regular list selling prices to ordinary retailers who do not obtain any preferred prices or special discount of any kind, less 20%, the sales tax at the current rate to apply on the remainder.

NOTE: Allowances for prepaid transportation charges and/or cash discounts or any other allowances may not be deducted in addition to the 20% discount.

The respondent, a manufacturer which distributed its products in the manner contemplated by this paragraph, computed the sales tax and old age security tax payable by it as follows: It first deducted from the regular sale price to ordinary retailers (which included the tax) an amount representing the tax, and then deducted 20 per cent. from this reduced amount, after which it computed and paid tax on the amount remaining after these deductions. The Crown contended that this method of computing the tax violated the "note" in the regulation and that the 20 per cent. must be deducted from the tax-inclusive selling price, since the tax was within the words "any other allowances" in the "note".

The Crown exhibited an information in the Exchequer Court, claiming the difference between the tax paid and the amount claimed by it. The information was dismissed and the Crown appealed. On the hearing of the appeal counsel filed a written agreement as to the amount for which judgment should be entered if the appellant succeeded.

Held (Kerwin C.J. dissenting): The appeal should be allowed and judgment should be entered for the amount agreed upon.

Per Taschereau and Fauteux JJ.: Regulation 782-C was *ultra vires* of the Minister since it changed the basis of computing the tax and therefore could not be called a regulation "for carrying out the provisions of" the Act. The appellant was therefore entitled to the full amount demanded by it, but since it had agreed to accept a lower amount judgment should go for that amount.

Per Rand J.: It was impossible to say that the method followed by the respondent produced the statutory tax-exclusive sales price or that the tax-inclusive sales price did not contain undisclosed allowances. When a seller introduced a tax-inclusive price and there was no means of determining independently the statutory sale price to which the tax was related, he made it impossible to ascertain whether any allowance was made in relation to the tax and the amount of that allowance, if any. The Crown was, therefore, entitled to tax in the full amount claimed and should have judgment for the amount agreed upon. It was unnecessary to determine whether the regulation was valid.

Per Locke J.: The regulation did not change the method of computing the tax and was within the powers of the Minister under s. 99, but the respondent's method of applying the regulation was wrong. The respondent should first have deducted 20 per cent. of the total tax-inclusive price to the retailers and computed tax at the statutory rate on the balance. The question was not as to the meaning of "sale price" as defined in the Act but rather as to the meaning of "regular list selling prices to ordinary retailers" in the regulation.

Per Kerwin C.J., *dissenting*: The regulation was valid and within the powers of the Minister, and the manner of computation adopted by the respondent was correct. It was never intended that sales tax was to be computed upon a price that already included sales tax.

APPEAL from a judgment of Fournier J.[1] in the Exchequer Court of Canada dismissing an information for an alleged balance of sales tax and statutory penalties. On the argument of the appeal, counsel for the parties filed a consent that

if Appellant's interpretation of the regulation contained in circular No. 782c as applicable to Respondent is correct, then Respondent for the period up to the date of the institution of Appellant's action herein has failed to pay sales tax in the amount of $1,577.83 and that accrued penalties owing by Respondent in this respect at such time totalled $395.77.

Appeal allowed, Kerwin C.J. dissenting.

A. Geoffrion and *P. Ollivier*, for the plaintiff, appellant.

B. Marchessault and *H. Quain*, for the defendant, respondent.

THE CHIEF JUSTICE (*dissenting*):—This is an appeal by Her Majesty the Queen against a judgment of the Exchequer Court[1], dated May 6, 1955, dismissing an information against Laboratoires Marois Limitée, for an alleged balance of sales tax and statutory penalties. The sales tax was payable from June 1, 1949, to April 11, 1951, under the provisions of ss. 85 to 98 inclusive of *The Excise Tax Act*, R.S.C. 1927, c. 179, as amended (now R.S.C. 1952, c. 100), and for the period from April 12, 1951, to January 31, 1952, under those sections and also under the *Old Age Security Act*, 15-16 Geo. VI, c. 18 (now R.S.C. 1952, c. 200). The appellant admits that during these two periods the respondent was a manufacturer of drugs, pharmaceutical preparations, proprietary and patent medicines and other similar products in the sense of certain regulations contained in circular no. 782-C (mentioned hereafter) and did not sell to independent wholesalers; and the respondent admits that it was subject from time to time to the statutory enactments referred to above. Subsection (1) of s. 86 of the *Excise Tax Act*, as amended by 1947, c. 60, s. 14(1), provides for the imposition of sales tax on the sale price of all goods

(*a*) produced or manufactured in Canada

(i) payable, . . .

by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier . . .

[1] [1955] Ex. C.R. 173, 55 D.T.C. 1115.

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By subs. 1(*b*) of s. 85, as re-enacted by 1951, c. 28, s. 5, "sale price", for the purpose of determining the tax, means:

> (i) the amount charged as price before any amount payable in respect of any other tax under this Act is added thereto . . .

The real dispute hinges upon the validity and effect of certain regulations established under the authority of s. 99 of the *Excise Tax Act*, which provides that the Minister "may make such regulations as he deems necessary or advisable for carrying out the provisions of this Act". These regulations are contained in circular no. 782-C, dated April 1, 1948, which reads in part:

Ottawa, April 1, 1948.

Re: Drugs, Pharmaceutical Preparations,
Proprietary and Patent Medicines, etc.

The Honourable, the Minister of National Revenue has been pleased to establish the following regulations, under authority of Section 99 of The Excise Tax Act:

(*a*) Where manufacturers of the above mentioned products sell them to independent wholesalers in representative quantities in the regular and ordinary course of their business, this will determine the value at which they may transfer these goods from their factories to their unlicensed wholesale branches, and the sales tax will apply on the value thus determined.

(*b*) Where manufacturers do not sell to independent wholesalers or where sales are not made in sufficient quantities to wholesalers to be representative sales, licensed manufacturers may transfer their products to their unlicensed wholesale branches at the regular list selling prices to ordinary retailers who do not obtain any preferred prices or special discount of any kind, less 20%, the sales tax at the current rate to apply on the remainder.

NOTE: Allowances for prepaid transportation charges and/or cash discounts or any other allowances may not be deducted in addition to the 20% discount.

Exhibit 1 at the trial is a statement, col. 2 of which is headed "Actual Selling price", and the figures below are tax-included prices. For the month of June 1949 the figure is $9,295.57 and the tax computed by the respondent as owing by it, and actually paid, is $559.13.

The respondent contends that when it transfers its products to its wholesale branches to the value of $100 at the regular list selling-prices to ordinary retailers, it is necessary, in order to ascertain the tax payable, first to deduct 20 per cent. from $100 in accordance with para. (*b*) of the circular. The rate applicable in June 1949 was 8 per cent., so that the tax on $80 would amount to $6.40. That sum added to the $100 made a total of $106.40, tax included. In

order to obtain the exact sale, or transfer, price of the goods, of which the selling-price in June 1949 to ordinary retailers, tax included, was $9,295.57, that amount must be divided by 1.064 and the answer, $8,736.44, subtracted from $9,295.57, leaving $559.13.

The appellant contends that the terms of the "note" forming part of para. (*b*) of the circular were not complied with by the respondent, since in contravention thereof the respondent deducted another "allowance" and is therefore not entitled to the 20 per cent. deduction. The argument is that, as the last part of the body of para. (*b*) states that the sales tax at the current rate is to apply "*on* the remainder", "remainder" must include the tax itself; that the respondent deducted that tax before calculating the amount of it and, therefore, because the tax is one of the "allowances", the deduction of which is prohibited by the "note", the respondent has not complied with the terms of the regulations. Hence it cannot claim the 20 per cent. and was, therefore, liable for 8/108 of $9,295.57, or $688.56. This would leave a balance owing for June 1949 which would attract the prescribed penalties; and similarly with reference to the other months in the two periods.

I agree with the trial judge that it was never intended that the sales tax should be included in an amount upon which the tax itself should be paid and it is, therefore, not one of the "other allowances" prohibited by the "note". I also agree with him that, while the Minister cannot make a regulation which would have the effect of changing the rate of tax or the meaning of the term "sale price", Regulation 782-C did neither of these things, but was merely a regulation "for carrying out the provisions of this Act" in accordance with s. 99 of the *Excise Tax Act*.

The appeal should be dismissed with costs.

The judgment of Taschereau and Fauteux JJ. was delivered by

TASCHEREAU J.:—Sa Majesté la Reine a poursuivi l'intimée devant la Cour de l'Échiquier, et lui a réclamé en vertu de la *Loi sur la taxe d'accise*, S.R.C. 1927, c. 179, tel qu'amendée, et de la *Loi sur la sécurité de la vieillesse*, une balance de $4,982.63, ainsi qu'une somme additionnelle de $1,211.99, représentant les pénalités dues à cause du défaut de payer le capital.

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En raison de ventes faites par l'intimée au Canada, durant la période du 1er juin 1949 au 31 janvier 1952 inclusivement, la défenderesse d'après la loi aurait dû payer un montant total de $27,911.61, mais il est resté un solde de $5,067.90, qui a cependant été réduit par des crédits subséquents à $4,982.63, qui est le montant réclamé par l'action, en outre des pénalités. Il a été originairement admis que les chiffres produits étaient exacts, que durant toute la période pour laquelle les taxes sont réclamées, la défenderesse était fabricante de drogues et de préparations pharmaceutiques, et qu'elle ne vendait pas à des grossistes indépendants. Les dispositions de la *Loi sur la taxe d'accise* et de la *Loi sur la sécurité de la vieillesse,* sur lesquelles la demanderesse base sa réclamation, se lisent ainsi:

Article 86 de la Loi de la taxe d'accise, tel qu'amendé par 1947, c. 60, art. 14(1):

(1) Il doit être imposé, prélevé et perçu une taxe de consommation ou de vente *de huit pour cent* sur le prix de vente de toutes marchandises,

a) produites ou fabriquées au Canada,

(i) payable, dans tout cas autre que celui qui est mentionné au sous-alinéa (ii) du présent alinéa, *par le producteur ou le fabricant* à l'époque où les marchandises sont livrées ou à l'époque où la propriété des marchandises est transmise, selon celle des deux dates qui est antérieure à l'autre . . .

(Les italiques sont miennes.)

L'article 10 de la *Loi sur la sécurité de la vieillesse* est conçu dans les termes suivants:

10. (1) Est établi, prélevé et perçu un impôt de sécurité de la vieillesse *de deux pour cent* sur le prix de vente de toutes marchandises à l'égard desquelles une taxe est payable d'après l'article quatre-vingt-six de la *Loi sur la taxe d'accise,* en même temps, par les mêmes personnes et sous réserve des mêmes conditions que la taxe payable en vertu dudit article.

(Les italiques sont miennes.)

En vertu de l'art. 99 de la *Loi de la taxe d'accise,* le Ministre des Finances, ou le Ministre du Revenu National, selon le cas, peut établir les règlements qu'il juge nécessaires ou utiles *"pour appliquer les dispositions de la présente loi".* Pour faire suite à cette prétendue autorisation, le Ministre du Revenu National a établi le règlement 782-C, et c'est particulièrement le para. (*b*) que la défenderesse-intimée invoque au soutien de sa défense:

(*b*) Lorsque les fabricants *ne vendent pas aux grossistes indépendants,* ou lorsque les ventes ne sont pas faites aux grossistes en quantités suffisantes pour constituer des ventes types, les fabricants portant licence

peuvent transférer leurs produits à leurs succursales de gros non munies de licence aux prix de ventes réguliers consentis aux détaillants ordinaires qui n'obtiennent aucun prix de faveur ou rabais spécial quelconque, *moins 20 pour cent*. La taxe de vente aux taux courants s'applique au reste.

(Les italiques sont miennes.)

Les Laboratoires Marois Limitée n'ont pas vendu à des grossistes indépendants, mais ont livré leurs produits à des succursales, dont celles-ci ont subséquemment disposé, et la compagnie, en conséquence, s'est appuyée sur ce règlement du Ministre du Revenu National, pour computer sa taxe sur le prix de vente régulier habituellement consenti aux détaillants ordinaires, *moins 20 pour cent*.

Comme l'honorable juge en chef de cette Cour, et M. le Juge Fournier de la Cour de l'Échiquier qui a rejeté l'action[1], je suis d'opinion qu'étant donné que l'intimée ne vend pas à des grossistes indépendants, elle a justement établi sa taxe, en déduisant le 20 pour cent autorisé par le règlement, et qu'en conséquence elle aurait payé la totalité du montant réclamé. Il s'ensuivrait logiquement si le règlement s'applique, que l'action a été rejetée tel qu'elle devait l'être, et que le présent appel devrait subir le même sort.

Cependant, la Couronne soutient avec raison que le 20 pour cent ne peut être enlevé que comme résultat de l'application du règlement cité plus haut, et elle ajoute que ce règlement, qu'elle a elle-même passé, dépasse l'autorité du Ministre du Revenu National, est *ultra vires,* et ne peut en conséquence justifier l'attitude de la compagnie intimée. Quelqu'étrange que cela puisse paraître, c'est bien l'attitude prise par l'appelante.

Le Ministre en effet peut établir les règlements qu'il juge nécessaires ou utiles, mais seulement *"pour appliquer les dispositions de la présente loi"*. Il me semble que, dans le cas qui nous occupe, ce règlement va bien au delà, car il autorise la computation de la taxe sur une base de *20 pour cent de moins* que sur le prix de vente régulier, qui est déterminé par la loi. Ceci a pour effet de réduire le montant payable, en calculant le montant de la taxe sur $80 au lieu de $100. Je crois que ceci dépasse l'autorité conférée au Ministre par le statut.

[1] [1955] Ex. C.R. 173, 55 D.T.C. 1115.

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Je suis clairement d'opinion que le Ministre, en vertu de la loi, n'est pas autorisé par règlement à changer, ou à modifier, une taxe imposée par le Parlement, et à affecter ainsi la déclaration positive d'un statut. Je m'accorde avec ce qui a été dit sur ce point dans les causes suivantes: *Attorney General of Canada v. Coleman Products Co.*[1]; *Attorney General of Canada v. Goldberg*[2]. Vide également *The King v. Dominion Press Co.*[3]; *The King v. Canada Rice Mills Limited*[4].

Si le règlement est *ultra vires* comme je le pense, et si la compagnie intimée ne peut pas déduire 20 pour cent du montant sur lequel la taxe doit être basée, il s'ensuit qu'elle devrait la totalité du montant réclamé, soit la somme de $4,982.63, tel que le veut l'art. 86 de la *Loi sur la taxe d'accise* et l'art. 10 de la *Loi sur la sécurité de la vieillesse,* sans tenir compte du règlement 782-C (*b*).

Cependant, lors d'une ré-audition, ordonnée par cette Cour, il a été établi par consentement mutuel des parties, que le montant véritablement dû n'est que de $1,577.85, plus une pénalité jusqu'à la date de l'action, s'élevant à $395.77, formant un total de $1,973.62.

Je crois donc que l'appel doit être accueilli, et l'action maintenue jusqu'à concurrence de ce montant, plus une pénalité additionnelle, tel que le veut la loi, au taux de deux-tiers de un pour cent par mois, sur le montant de taxes dû depuis le 1er janvier 1954, jusqu'à la date du paiement.

J'aurais été porté à n'imposer aucune pénalité, étant donné que l'intimée s'est basée, pour ne pas faire le paiement réclamé, sur un règlement du Ministre, que ce dernier répudie aujourd'hui, mais je crois que ceci m'est interdit comme conséquence du jugement du Comité Judiciaire du Conseil Privé, dans une cause de *Minister of National Revenue v. Trusts and Guarantee Company, Limited*[5]. J'ai, cependant, discrétion de n'accorder aucun frais. Dans cette cause, le Comité Judiciaire a décidé ce qui suit:

It is contended that this provision gives to the Court a discretion to determine whether interest shall or shall not be exacted from the taxpayer.

[1] [1929] 1 D.L.R. 658.
[2] [1929] 1 D.L.R. 711.
[3] [1928] Ex. C.R. 122 at 128.
[4] [1938] Ex. C.R. 257 at 262, [1939] 2 D.L.R. 45, affirmed [1939] S.C.R. 84, [1939] 2 D.L.R. 544; [1939] 3 All E.R. 991, [1939] 3 D.L.R. 577.
[5] [1940] A.C. 138 à 151, [1939] 4 All E.R. 149, [1939] 4 D.L.R. 417, [1940] 1 W.W.R. 402.

Their Lordships cannot accede to this contention. The powers given to the Court by the section are in terms given subject to the provisions of the Act, and therefore subject to the provisions of ss. 48 and 49. *The Court has no more power under the sections to waive the payment of the interest than it has to waive the payment of any tax imposed by the Act, or to impose a greater rate of interest or a larger amount of tax than the Act provides.* The section is merely an enactment conferring upon the Exchequer Court exclusively the jurisdiction of dealing with disputes arising in connection with assessments made under the Act; *and as regards tax, interest and penalties,* its powers are confined to seeing that they are only charged in strict accordance with the Act. *As regards costs, the Court has no doubt a complete discretion.*

(Les italiques sont miennes.)

De plus, lors de cette ré-audition que j'ai mentionnée plus haut, les parties ont également admis que la pénalité serait exigible, dans le cas où l'intimée ne justifierait pas son défaut de payer la taxe.

L'appel devrait donc être maintenu en partie, jusqu'à concurrence des montants ci-dessus mentionnés, mais sans frais devant la Cour de l'Échiquier ni devant cette Cour.

RAND J.:—The Crown appeals from a judgment of the Exchequer Court[1] dismissing an information brought to recover excise taxes imposed under the *Excise Tax Act,* R.S.C. 1927, c. 179, as amended. The goods sold were pharmaceutical products and they were transferred by the respondent to what the scanty material in the case leads me to infer was a wholly controlled subsidiary carrying on business as an unlicensed wholesaler, by which they were sold to retail dealers. The taxation period ran from June 1, 1949, to January 31, 1952; until April 11, 1951, the tax was 8 per cent., and from that date, 10 per cent. By regulation of the Minister under the authority of s. 99 of the Act it was provided:

> (*b*) Where manufacturers do not sell to independent wholesalers or where sales are not made in sufficient quantities to wholesalers to be representative sales, licensed manufacturers may transfer their products to their unlicensed wholesale branches at the regular list selling prices to ordinary retailers who do not obtain any preferred prices or special discount of any kind, less 20%, the sales tax at the current rate to apply on the remainder.
>
> NOTE: Allowances for prepaid transportation charges and/or cash discounts or any other allowances may not be deducted in addition to the 20% discount.

[1] [1955] Ex. C.R. 173, 55 D.T.C. 1115.

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Rand J.

The Crown assessed the tax in the following manner: It took the actual retail selling-price, a tax-inclusive price, and segregating the tax arrived at the taxable or sale price. This was done by taking the non-inclusive price at a unit of $100 which, at 8 per cent., produced a tax-inclusive price of $108; dividing that into the total sales brought a tax-exclusive price on which the tax was assessed. For example, the total sales for June 1949 at the tax-inclusive price were $9,295.57: dividing that by 108 gave a quotient of $8,607.19 and a tax of $688.56. This, it will be seen, brings in no deduction of 20 per cent. under the regulation.

The respondent, on the other hand, taking $100 as the unit of tax-exclusive price, deducted, first, the 20 per cent., and on the $80 remaining computed the tax at 8 per cent. The result, $6.40, represented the tax on $100 tax-exclusive price. Adding this amount to the $100 he divided the total, for example that of June, $9,295.57, by $106.40 to obtain the sale price, the difference between which and the total would represent the tax. For that total, the result was $559.13 which is 6.40 per cent. of the so-called sale price $8,736.44.

But as can be seen, the latter is that amount which plus the duty chargeable upon it at the rate prescribed, on this item, 8 per cent. of 80 per cent. of the tax-exclusive sales price, gives the total tax-inclusive sum. In the absence of evidence, how can it be assumed that any amount so ascertained is the actual tax-exclusive sale price? The tax-inclusive price may obviously contain elements of allowance which are quite undiscoverable. Even the basis put forward is not always borne out in the result. The total sales for July 1951, after the tax had been increased to 10 per cent., were $8,780.18 and the tax paid $650.38; for December the sales were $8,795.31 and the tax paid $645.93. Deducting the tax paid from the tax-inclusive sales, the former gives a tax-exclusive sale price of $8,129.80, and the latter $8,149.38. But the tax on the latter at the rate of 8 per cent. is $651.92; the tax-exclusive sales price producing a tax of $645.93 is $8,074.13. These latter two items together amount to a tax-inclusive sales price received of $8,720.06 against $8,795.31 shown on the statement. If the assumption is to be made, how could it result that, comparing the original items of July and December charged at the same tax rate, a lower tax-inclusive sales total would produce a higher amount of tax? Even if error is suggested in the

computation, the fact remains that it is impossible to affirm that the method followed produces the statutory tax-exclusive sales price or that the tax-inclusive price does not contain undisclosed allowances.

The "note" to the regulation assumes that there is an ascertainable retail sale price free from any such tax or basis of calculation and that, subject to s. 85(1)(*b*) of the statute, that amount is the price from which the deduction of 20 per cent. is to be made, the balance to be charged at the appropriate rate.

As a condition of the percentage deduction, in the resulting price no "allowances" are to be involved. What is an "allowance"? From the examples used I take it to be a certain charge or portion of charge ordinarily borne by the purchaser which is absorbed by the seller. For example, in the case of prepaid transportation it is assumed that the purchaser will normally be liable for the "sale price" plus the transportation cost, and the "sale price" is the price at the door of the factory. An allowance on the freight would mean that the actual cost to the purchaser would be something less than the sale price plus the transportation. The sale price would not, ordinarily, absorb the total transportation, but that is conceivable. At any rate, any amount so absorbed is not to be deducted in addition to the 20 per cent. Other deductions, such as cash discounts, are of the same nature and they represent fractional subtractions from the sale price as benefits to the purchaser.

When the seller introduces a tax-inclusive price and there are no means of determining independently the statutory sale price to which the tax is related, he makes it impossible to ascertain mathematically whether and what, if any, allowance is made in relation to the tax. Certainly there would be no purpose in adding to the sale price the amount of the tax and then showing the result merely as a single sum. That would be simply another form of collecting the tax as a separate and additional item and no imaginable competitive purpose, certainly we have no evidence of it, can justify the inference that that is normally the actual purpose.

I think it must be taken that in such a price some amount of tax is absorbed, that is, the sale price plus the tax has been reduced a certain amount and the balance is the tax-inclusive price. But what that amount is, where the point

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may be at which the sale price may end and where the added tax portion, to produce the total sales given us, begins, in the absence of an independently found sale price, which is not to be found in the material before us, is beyond determination.

In that situation, the Crown is entitled to say that as the seller has not shown what the taxable sales price is, the tax, apart from s. 85(1)(*b*), must be imposed upon the only price actually received, which in this case, for example, would, for the June 1949 sales, be 8 per cent. of $9,295.57, or the sum of $743.64. But the Crown interprets s. 85(1)(*b*) as excluding any portion of excise sales tax and has reduced the tax-inclusive total, as already illustrated, to $8,607.01, on which the rate of 8 per cent. has been charged producing a tax of $688.56.

If the deduction of 20 per cent. were applied to the sum of $8,607.01, it is impossible to say that the "note" to the regulation would be respected because it cannot be said that that sum does not include a tax allowance from the "sale price". The presumption is that it does; the condition of the regulation is, then, not fulfilled and the deduction of 20 per cent. becomes unavailable. This leaves the tax collectible to be on that sum $8,607.01 at 8 per cent. which is the amount claimed.

On this footing the validity of the regulation does not come into question.

I would, therefore, allow the appeal and direct judgment for the amount of the taxes agreed upon, $1,577.83, with accrued penalties of $395.77 together with additional penalties at the rate of two-thirds of 1 per cent. per month on the amount of taxes from January 1, 1954, until payment in full. There will be no costs in either Court.

LOCKE J.:—There are two questions to be determined: the first, as to the proper interpretation of the language of Regulation 782-C, and the second, whether the regulation was validly made under the powers vested in the Minister by s. 99 of the *Excise Tax Act,* R.S.C. 1927, c. 179, as amended.

The sales tax claimed is in respect of sales made between June 1, 1949, and January 31, 1952. The tax for the period up to June 21, 1951, was imposed by s. 86(1) of the *Special*

War Revenue Act, as it was enacted by 1947, c. 60, s. 14. So far as it affects the present matter, that section read:

> There shall be imposed, levied and collected a consumption or sales tax of eight per cent. on the sale price of all goods
>
> (*a*) produced or manufactured in Canada
>
> (i) payable in any case other than a case mentioned in subparagraph (ii) hereof, by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier . . .

The matters referred to in subpara. (ii) do not affect the matter. By s. 1 of 1947, c. 60, the name of the statute was changed to the *Excise Tax Act*.

In 1951, s. 86(1) was amended by changing the rate of tax to 10 per cent.

Section 15 of an Act to amend the *Special War Revenue Act*, 1932-33, c. 50, which remained in force until the amendment which became effective on June 20, 1951, read in part:

> (*a*) "sale price" for the purpose of calculating the amount of the consumption or sales tax, shall mean the price before any amount payable in respect of the consumption or sales tax is added thereto, and shall include the amount of other excise duties when the goods are sold in bond; and in the case of goods subject to the taxes imposed by Parts X and XII of this Act, shall include the amount of such taxes . . .

The taxes referred to in Parts X and XII were excise taxes on matches, cigarette papers, cigarette paper tubes, playing cards and wines.

By s. 3 of c. 15 of the statutes of 1950, "sale price" for the purpose of calculating the amount of the consumption or sales tax was declared to mean the price before any amount in respect of the consumpiton or sales tax was added. While the further terms of s. 3 differ in some respects from those of s. 15, the variation does not affect the present matter.

By s. 5 of c. 28 of the statutes of 1951, the definition of "sale price" in s. 85(1) was amended to read:

> (*b*) "sale price" for the purpose of determining the consumption or sales tax, means the aggregate of
>
> (i) the amount charged as price before any amount payable in respect of any other tax under this Act is added thereto,
>
> (ii) any amount that the purchaser is liable to pay to the vendor by reason of or in respect of the sale in addition to the amount charged as price (whether payable at the same or some

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other time) including, without limiting the generality of the foregoing, any amount charged for, or to make provision for, advertising, financing, servicing, warranty, commission or any other matter, and

(iii) the amount of excise duties payable under the *Excise Act* whether the goods are sold in bond or not,

and, in the case of imported goods, the sale price shall be deemed to be the duty paid value thereof.

The action was tried by Fournier J. upon admissions made by the parties, partly in writing and partly orally. Of the latter, no record was made at the trial but, after the appeal to this Court was launched, counsel for the parties filed a document dated February 21, 1957, setting out the admissions that had been made. From these it appears that the respondent was between June 1, 1949, and January 31, 1952, a manufacturer of drugs and pharmaceutical preparations. While the record contains no evidence of the fact, it is common ground that the goods thus manufactured were delivered to branches of the respondent company maintained presumably in the Province of Quebec and that the sales which give rise to the claim were made by these branches to retail dealers in such supplies.

Two exhibits were filed at the trial containing a set of figures the accuracy of which is admitted which, in a column under the heading "Actual Selling price", shows for the month of June 1949 the sum of $9,295.57. Since the respondent could not sell to itself, the delivery of the goods to its branches did not constitute a sale and no tax could be imposed in respect of it under either of the statutes. Liability to pay sales tax upon these transactions is, however, admitted and, accordingly, the figures stated as being the actual selling price in ex. 1 must be taken as being the price agreed to be paid by retail druggists to the branch of the respondent effecting the sale.

The regulation, so far as it need be considered in the present matter, reads:

(*b*) Where manufacturers do not sell to independent wholesalers . . . licensed manufacturers may transfer their products to their unlicensed wholesale branches at the regular list selling prices to ordinary retailers who do not obtain any preferred prices or special discount of any kind, less 20%, the sales tax at the current rate to apply on the remainder.

NOTE: Allowances for prepaid transportation charges and/or cash discounts or any other allowances may not be deducted in addition to the 20% discount.

Upon the record as it stands, it must be taken as established that in the month of June 1949 the selling price to the retailers was the amount above mentioned and, there having been a sale, sales tax at the appropriate rates became payable by the respondent and, no doubt, the price agreed to be paid for each article included such tax.

I see no ambiguity in the words "the regular selling prices to ordinary retailers". That is the amount which the retailers agreed to pay and it is that amount, and not any lesser amount, which is subject to the deduction of 20 per cent. Therefore, treating June 1949 as a typical month, under the regulation as it reads 20 per cent. of $9,295.57, which amounts to $1,859.13 should have been deducted from the larger amount, leaving $7,436.44 on which the tax at the rate of 8 per cent. under the *Excise Tax Act* should have been computed and paid.

While it is clearly arguable that the change made in the definition of "sale price", for the purpose of computing the tax, effected by s. 5 of c. 28 of the statute of 1951 does not exclude the amount of the sales tax as part of the price since the reference is to "any other tax", the Crown in this litigation has taken the attitude that, in this sense, the definition does not differ from that contained in s. 86(1) of the Act as enacted in 1947. As the 1951 amendment affects only a small part of the claim, I do not in these circumstances deal with the matter.

The sale price in question here, for the purpose of the computation of the tax, however, is not the sale price defined in the statute. The question is not as to what "sale price" means in the sections of the Acts of 1932-33 and 1950, but rather what the expression "regular list selling prices to ordinary retailers" means in the regulation. While s. 85, which is the first section in Part XIII of the Act, says that in that part, unless the context otherwise requires, the words "sale price" are to be given the meaning above quoted and while under s. 2 of the Act, dealing with interpretation, this would apply in construing regulations made under the Act, in this regulation "the context otherwise requires". The statutory definition, in my opinion, has no application in construing the words "regular list selling prices to ordinary retailers". For these reasons, it is my opinion that if the

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respondent is entitled to rely upon the regulation, there can be no deduction for sales tax before the 20 per cent. deduction is made.

For the Crown, it is contended that Regulation 782-C was one which the Minister was without power to make. No such contention, it may be noted, was made in the pleadings, though it was obviously known that the respondent had relied upon the regulation in making payment of what it considered was due for sales tax. However, the matter was treated as open at the trial and argued before the learned trial judge who, in a carefully reasoned judgment[1], found against the Crown's contention. I agree with Fournier J. that the regulation does not assume to change the rate of sales tax, but rather to afford a means of establishing the sale price to which the prescribed rate is to be applied in a manner designed to place manufacturers who do not sell to independent wholesalers but market their goods to the retail trade through their own branches in a competitive position with those who sell to the wholesale trade. If the manufacturer sells to an independent wholesaler, the sale price is, of necessity, less than that when the goods are sold to a retailer, and to impose upon manufacturers, who incur the expense of maintaining branches through which sales are made, sales tax on the higher price charged to retailers would obviously place them at a competitive disadvantage. The 20 per cent. deduction from the price agreed to be paid by the retail dealer before computing the tax appears to me to be simply an endeavour to administer the Act fairly and to place the manufacturers on an equal footing. The power given by s. 99 is to "make such regulations as he deems necessary or advisable for carrying out the provisions of this Act", language which, in my opinion, is wide enough to include prescribing a manner of determining a sale price such as is done by this regulation.

In the factum filed on behalf of the Crown in this matter, as an alternative argument to the contention that Regulation 782-C was without validity it is said that in any event the respondent, on the proper construction of the regulation, was not entitled before making the deduction of 20 per cent. to deduct from the selling price any amount in respect of sales tax. With this contention I agree.

[1] [1955] Ex. C.R. 173, 55 D.T.C. 1115.

Following the further statement as to the facts made by counsel for the parties at the opening of the present term, a written consent signed on behalf of the parties has been filed agreeing that, if the Crown's interpretation of the regulation is correct, the respondent was indebted for sales tax in the amount of $1,577.83 and accrued penalties of $395.77 on the date of the institution of the action, and for additional penalties at the rate of two-thirds of 1 per cent. per month on the amount of the taxes from January 1, 1954, until full payment.

I would, therefore, allow this appeal and direct that judgment be entered for the above amounts and such penalties. In the circumstances, I agree that there should be no order as to costs either in this Court or the Exchequer Court.

Appeal allowed without costs, KERWIN C.J. *dissenting.*

Solicitor for the appellant: F. P. Varcoe, Ottawa.

Solicitors for the respondent: de Martigny & Marchessault, St. Jérôme.

R. N. CARRISS (*Defendant*) .....APPELLANT;

AND

EVELYN BUXTON (*Plaintiff*) .....RESPONDENT.

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*Jan. 30, 31
Jun. 3

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Dangerous premises—Liability as between invitor and invitee—Charge to jury.

Hotels and hotelkeepers—Duty of keeper to guest—Nature of duty to make premises safe—"Warranty"—Whether duty relevant on pleadings and charge to jury.

Municipal corporations—By-laws—Effect of by-law prescribing duties in respect of gas-burning appliances—Whether breach of by-law gives rise to civil liability.

The plaintiff's husband, while a lodger in the defendant's hotel, died of asphyxia caused by inhaling gas that escaped from a defective stove in the room occupied by him. The plaintiff sued for damages on her own behalf and on behalf of her infant children, and the trial judge charged the jury that the defendant owed two duties to his lodger: (1) his duty as invitor to invitee to use reasonable care to prevent

*PRESENT: Rand, Locke, Cartwright, Fauteux and Abbott JJ.

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damage from unusual danger of which the defendant knew or ought to have known, and (2) a duty under a municipal by-law requiring owners of buildings to "maintain all gas appliances installed therein and any safety devices attached to such appliances in safe working condition". The jury found that the defendant had been negligent in "not conforming with by-laws", and that the deceased had not been guilty of contributory negligence. Judgment was entered for the plaintiff and this judgment was affirmed by a majority of the Court of Appeal.

Held (Locke J. dissenting): The appeal should be dismissed.

Per Rand J.: Since the technical rules of pleading had been abolished, the claim here must be taken as the ordinary case of a person entering into the relation of a guest of an innkeeper at the usual charge and for the usual services. At the trial, however, all consideration of a "contractual relation" between the parties had been excluded, and no resort was permitted to the "warranty" of the fitness of the premises for the purposes for which they were taken, and it was assumed that the only duty available to the plaintiff was that of invitor to invitee, under *Indermaur v. Dames* (1866-7), L.R. 1 C.P. 274; L.R. 2 C.P. 311. *Maclenan v. Segar,* [1917] 2 K.B. 325, was distinguished as being an action in contract against an innkeeper. If the rule in the latter case had been applied, liability would have been indisputable, since the duty laid down by it was one of reasonable care in relation to the premises furnished to guests, exercised by every person concerned at any time in their construction, maintenance or operation. It was admitted here that the condition of the stove was most dangerous, and that condition could have been discovered by adequate inspection. The municipal by-law did not go beyond the requirement that reasonable care—in this case of the highest degree—be exercised by the proprietor and all persons under his direction. It was clear from the charge that the jury were not given to understand that there was an absolute duty under the by-law to maintain in all events a proper adjustment in the gas stove; the by-law was to be only evidence of negligence. In the light of this instruction, the jury's finding amounted to one of negligence, and the evidence to support that finding was overwhelming. The evidence not only justified but required a finding that the defendant should have known of a danger that was patent to any reasonable inspection and that, through his negligence, he was responsible for its consequences. It was not necessary, for the purposes of this case, to decide whether the duty of an innkeeper went beyond that.

Per Cartwright, Fauteux and Abbott JJ.: On the pleadings as they stood, the trial judge should have put the case to the jury as one governed by the principles stated in *Francis v. Cockrell* (1870), L.R. 5 Q.B. 184, 501. The rule in that case was stated in Winfield on Tort, 6th ed., at p. 672, as follows: "Where A enters B's structure under a contract entitling him to do so, *it is an implied term in the contract that the structure shall be reasonably fit for the purpose for which it is intended; but this does not extend to any unknown defect incapable of being discovered by reasonable means.*" This statement of the rule could be accepted for the purposes of this appeal as not unduly favourable to the plaintiff and it was not necessary to decide whether the judgment in *Maclenan v. Segar, supra,* should be accepted in its entirety. If the jury had been so charged they must inevitably have found for the

plaintiff, in view of the evidence as to the nature of the defect in the gas stove and the length of time that it had existed. Therefore, even assuming that the trial judge did not charge the jury correctly as to the effect of the by-law, the appeal should nevertheless be dismissed on the ground that there had been no substantial wrong or miscarriage of justice.

Per Locke J., *dissenting*: The trial judge's charge as to the duty owed by the defendant under the by-law amounted to misdirection which was not corrected by a subsequent statement by him that the jury were entitled to take a breach of the by-law into consideration "as a factor of negligence". What he stated as the duty under the by-law, if it existed, was an absolute one, and was much higher than that of invitor to invitee, under *Indermaur v. Dames, supra,* or that of innkeeper to guest, under *Francis v. Cockrell, supra,* and *Maclenan v. Segar, supra.* But a breach of the by-law could not give rise to liability in a civil action since (1) it was passed for the protection of the public generally, and prescribed penalties for infractions, and (2) the enabling sections of the city charter, under which it was passed, did not empower the city council to create duties a breach of one of which would be a private wrong conferring a right of action for damages resulting from the breach. *Tompkins v. The Brockville Rink Company* (1899), 31 O.R. 124; *Orpen v. Roberts et al.,* [1925] S.C.R. 364 at 370-1, applied. The jury should have been told that the by-law was admissible in evidence only to show that in the opinion of the city council certain standards of care were considered necessary to prevent injury from escaping gas. Their findings, in the circumstances, amounted to no more than a finding that the gas stove had not been maintained in the state required by the by-law, and this was not sufficient to support a verdict in favour of the plaintiff. No question could arise on this appeal as to the sufficiency of the plaintiff's pleadings to support a cause of action on the implied warranty of innkeeper to guest since that issue, with the consent of plaintiff's counsel at the trial, was not submitted to the jury and the plaintiff must be bound by the way in which her case had been conducted at the trial. *Scott v. The Fernie Lumber Company, Limited* (1904), 11 B.C.R. 91 at 96; *David Spencer Limited v. Field,* [1939] S.C.R. 36 at 42, applied. This was not a case of applying the rule laid down in *Andreas v. The Canadian Pacific Railway Company* (1905), 37 S.C.R. 1 at 10, that the jury, having found negligence under only one of the heads submitted to them, must be taken to have negatived all others, because here the jury's attention had been focused on the by-law. There should be a new trial.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Clyne J. entered on the findings of a jury. Appeal dismissed, Locke J. dissenting.

William Leonard Buxton, the plaintiff's husband, a logger at that time unemployed, rented a housekeeping room in the Lincoln Hotel in Vancouver, of which the defendant Carriss was lessee and manager. He paid a week's rent in advance on the morning of Saturday, June 5, 1954, and was

[1] (1957), 24 W.W.R. 263, 11 D.L.R. (2d) 766.

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assigned a room that had been vacant for about a week and had previously been occupied by one Knutson. The room was equipped with a two-burner gas stove working off a coin meter. Attached to the stove was a safety device installed in March 1954 in compliance with a municipal by-law. This device was intended to prevent the flow of gas to the burner if the pilot light on the stove was not burning.

When the plaintiff and her husband were taken to the room on the Saturday morning, Carriss showed them how to operate the stove. The plaintiff swore in her evidence that there was difficulty at that time in lighting the right-hand burner, and that it "popped out". Mr. and Mrs. Buxton left the hotel and did not return until the middle of the night, at which time Mrs. Buxton turned on the stove, with difficulty, and left it burning for about 45 minutes. She spent the night at the hotel with her husband and left early the following morning to be with her children, who were staying with friends in Vancouver.

On the Sunday night Buxton returned to his room accompanied by one Dawson, and Dawson gave evidence at the trial as to the difficulty Buxton had in lighting the stove. He said that it would "flare up, just pop around and dance and go out". He also said that Buxton complained to persons in the hotel office about this difficulty. Knutson swore that during his occupancy of the room he had never used the right-hand burner.

On Tuesday morning, June 8, Carriss noticed a smell of gas in the corridor outside Buxton's room. He opened the room with the housekeeper's key and found Buxton lying dead on the bed, fully clothed. The room was filled with gas, the right-hand burner of the stove was turned on, but no gas was then coming from the stove. The stove was inspected that afternoon by the city police and the same difficulty was experienced in lighting the right-hand burner. The adjustable port which controlled the mixture of air and gas was found to be out of its proper position, and there was expert evidence to the effect that an incorrect mixture of air and gas would interfere with the combustibility, and further uncontradicted evidence that the condition of the port must have existed for a considerable time. The medical evidence was to the effect that Buxton died of asphyxia due to carbon monoxide poisoning.

The plaintiff sued on her own behalf and on behalf of her three infant children under the *Families' Compensation Act*, R.S.B.C. 1948, c. 116. The action was originally brought against Carriss and two other defendants but was discontinued against the other defendants at the trial. The jury awarded damages amounting in all to $39,865.

A. W. Johnson, for the defendant, appellant.

D. McK. Brown, and *T. Griffiths*, for the plaintiff, respondent.

RAND J.:—This is an appeal from a judgment[1] finding the appellant Carriss, as keeper of an inn, liable in damages for the death of the respondent's husband while a guest. Involved in the question of the degree of care chargeable against an innkeeper and the effect of a by-law of the City of Vancouver, was a matter of pleading on which much argument was made differentiating such a claim in contract from that in tort, and this should be dealt with first.

It should be recalled that the *Judicature Act*, for the purposes of determining the substantive rights of parties, abolished the technical rules of pleading at common law and under the various common law procedure statutes, and prescribed, among other things, that what must be alleged in a statement of claim are those matters of fact upon which liability is predicated. It may be that for special or subsidiary purposes a distinction is called for in the aspect of liability on which a plaintiff puts his claim; but to say that, on a statement of all the facts from which a contract appears and from which at the same time a common law duty arises, it would be fatal to omit such an allegation as, for example here, that the deceased was a guest "for reward" when that was one of the first matters proved, and in fact admitted, is to restore the evil which it was the primary object of the *Judicature Act* to banish. I take the claim to be that of the ordinary case of a person entering into the relation of a guest of an innkeeper at the usual charge and for the usual services.

The result of the exclusion, at the trial, of all consideration of a "contractual relation" between the parties was that no resort was permitted to be made to what is called a "warranty" of the fitness of the premises for the purposes

[1] (1957), 24 W.W.R. 263, 11 D.L.R. (2d) 766.

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for which they were taken. From this it was assumed that only the duty between an invitor and an invitee was available to the plaintiff, under the rule of *Indermaur v. Dames*[1], a case of an open shaft in a sugar refinery into which had fallen a gas-fitter representing the seller of a gas-regulator who was on the premises for the purpose of testing the device and whose employer was to be paid according to the economy effected in gas-consumption. *Maclenan v. Segar*[2] was distinguished as being an action against an innkeeper in contract.

This distinction takes us back to the early forms of action in which a claim was made against one who had "undertaken" to do some act affecting the person or property of another in the course of which the performance was alleged to have miscarried. The action for the generality of such claims was in assumpsit, a special form of case, which, in the course of time, became also the form for breach of a promise purely as well as breach in performance. In actions against persons engaged in common employment the form seems to have been limited to case as distinguished from assumpsit.

The legal relation of guest to innkeeper arose out of the historical conditions of England and the extent of liability is that imposed by the common law. Innkeepers, generally, are insurers of the goods of travellers who come to their inns; and they are responsible to some degree short of insurers for their care and safety. That early history is sketched in the introduction to Beale on Innkeepers and Hotels, 1906, and the development of the duty toward guests put up in a common room in which all slept on the floor to that in the accommodation of a modern hotel has brought with it aspects of liability which were not then encountered. It remains only to add that the cause of action against an innkeeper was for breach of duty arising from "the custom of the realm" which meant simply the general custom, *i.e.*, the common law: the duty was the creation of that custom and law.

Another element which must be kept in mind is that the innkeeper, subject to certain exemptions, is bound to accept all travellers without distinction and that obligation

[1] (1866), L.R. 1 C.P. 274, affirmed (1867), L.R. 2 C.P. 311.
[2] [1917] 2 K.B. 325.

becomes a material element in the aspect of contract. Strictly speaking, a contract is entered into by both of two persons freely and voluntarily, but an innkeeper has not that liberty of action, nor are the terms of the ordinary engagement agreed upon; once the relation is established, the liability arises by law. Since it is so prescribed, the action should, strictly speaking, be classified as in tort; but early in the 19th century *Bretherton et al. v. Wood*[1], a case of common carrier, recognized that the action could be laid in either tort or contract. The point of significance there was in the joinder of parties; in contract, all must have been made parties, in tort that was not necessary. But it was never suggested that the duty in the one case was different in scope from that in the other. Alternative claims can now be included in an action and these points of dispute of the past are, for purposes of substance, buried.

What is called a "warranty", certainly in ordinary usage, is appropriately so called only as an express or implied term or assurance in contract where a result or condition rather than a service is paid for, and when dealing with the basic duties imposed by law on a common employment, that word does no more than define the scope of liability which the law imposes. No doubt that scope can be modified by terms that give a contractual colour to the relation. Whether we should view the transaction as a contract incorporating the common duty as part of its terms is doubtful, if for no other reason than the cases of infants or others incapable of contracting, and those of furnishing gratuitous services. But this does not affect collateral agreements providing for, among other things, special times, places or facilities, which create duties preliminary to entering upon the undertaking. I can see no objection to treating modifying terms as themselves merged in the legal incidents. In contracts involving a duty of care, as, for example, in *Francis v. Cockrell*[2], the implied terms are to be deduced from the total circumstances of each situation. But the duty of an innkeeper toward his guest in a personal aspect, whatever its relation in scope to that of a common carrier to a passenger is, at least, not less than that of an invitor to an invitee and, for the purposes here, that is sufficient.

[1] (1821), 3 Brod. & Bing. 54, 129 E.R. 1203. [2] (1870), L.R. 5 Q.B. 501.

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If we were to apply the rule of *Maclenan v. Segar, supra,* reasonable care exercised in relation to the premises furnished to guests, that is, exercised by every person at any time concerned in their construction, maintenance or operation but excluding latent defects not discoverable by any reasonable means or caused by unauthorized action of third persons, then liability would be indisputable. The condition of the port admitting air to the gas flow just before it entered the burner was conceded to be most dangerous; the aperture was so far opened that the quantity of air admitted was sufficient to destroy the combustibility of the mixture; the gas, in effect, was drowned out, and the flame, at best a partial combustion at times obtainable only by matches, was so weak and separated from the burner as to be extinguishable by a wave of the hand. It tended to go out when the gas supply was running low, a supply controlled by a meter operated by the deposit of 25c pieces. That the defective condition was brought about by an intermeddler is excluded.

Nor is there any question of latency or technical complication. The port consists simply of an enlarged rounded metal attachment, with a disc face, screwed into the short pipe leading to the burner a few inches from the manual valve admitting the gas. The disc face has small arc-shaped slots through which air passes into the pipe and the apertures are opened or closed by means of a small circular plate movable through the arc; and the plate is held in position by a set-screw.

The room had been occupied by a previous guest for about seven months ending May 31, 1954. As a witness for the defendant, he stated that at no time during his occupancy had he used the right-hand, the defective, burner. In March 1954 a safety device had been installed which stopped the flow of gas to the stove unless an attached pilot light was burning and part of the operation of which was that the pilot light would keep the burners alight. But even if working perfectly, the pilot light could not function as intended unless the gas-air mixture was in the appropriate proportions.

In this background also was the by-law which required the gas stove to be "maintained in safe working condition". Its enactment resulted from a series of deaths from monoxide in the city which in 1953 reached 86 and in 1954, 67.

With such a record before them, all users of gas and particularly those in charge of public sleeping quarters were made conscious of the deadliness of free gas. Carriss knew this, but it is a commentary on his sensitiveness to it that the introduction of the devices required by the by-law was made by him only just before the expiration of the period allowed, when he "beat the deadline" as he expressed it.

The by-law does not, as I interpret it, go beyond the requirement that reasonable care—in this case of highest degree—be exercised by the proprietor and all persons under his direction in all respects of maintenance and operation, excluding independent contractors in relation to work that requires high technical skill and excluding defects in appliances or devices which are not discoverable by ordinary means. As is evident, the adjustment here was not one for a highly skilled technician; any interested owner making a modicum of examination of the air-port and seeing its function could adjust it himself. Its operation is immediately reflected in the flame produced. All it needs is some attention and at the most a few words from a gas-fitter to see its purpose and the means of bringing about what is required. To one concerned to maintain its safety, though ignorant of its mechanism, the improper adjustment as "something wrong" would appear in a testing by the resulting combustion: the flame would "pop out" and it would have to be lighted and relighted before the "popping out" ceased for any length of time. This, to any proprietor, would be a demonstration of a condition of danger. To be informed on this adjustment by a gas-fitter would be part of the instruction which every such proprietor, or some one for him, should have sought and obtained unless a periodic inspection was provided for which was not the case here.

On Saturday morning when the room was engaged, such a condition was, by the evidence of Mrs. Buxton, disclosed: the flame would "pop out"; the same thing was said by her to have happened early Sunday morning about 2.15 o'clock; the same by Dawson on Sunday evening; and the same admittedly on Tuesday afternoon when the inspection was made by the police and the gas inspector. On Saturday morning the deceased is said to have remarked to Carriss that something appeared wrong, evidence which the latter denies; on Sunday night the deceased, according to Dawson,

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complained to two persons apparently in charge of the office; but Carriss, admitting that a man and wife, employed as night housekeepers, would properly have been in the office, denied having been notified of any complaint.

Dawson spent most of Sunday with the deceased. He had, over a period of two years, been a visitor of a guest of the hotel and had frequently seen a man and wife, the housekeepers, in the office. On Sunday evening, in the course of leaving the house with the deceased, the latter stepped to the office window and made the complaint. Dawson stood aside. Although he heard the conversation, he did not actually see the persons within and his belief that, from their voices, they were the former housekeepers was erroneous. The latter had in fact left the hotel two years before and had been succeeded by another man and wife. Counsel declined to cross-examine Dawson and reserved his objection that the evidence was inadmissible because Dawson had not seen the two persons, and that it had not been shown that they were employed by Carriss: on the truth or falsity of the alleged statement by the deceased no questions were ventured. That the statements if made were to persons apparently in charge is not now challenged. The defence to the jury, based on the general circumstances and the fact that the persons whose voices they were thought by Dawson to be were not in fact theirs but others, was that the testimony of both the respondent and Dawson was fabricated. The caretakers were not called, although Carriss, urging his ignorance of the complaint, had looked for their names in the telephone directory but gave it up on account of there being so many "Johnsons". But he made no enquiry of the plasterers' union to which Johnson belonged or the taxi-drivers' union to which Mrs. Johnson belonged: nor did he advertise for information of their address. Moreover the trial judge, on admitting the evidence—under a particular of negligence alleging that the defendant failed to take "adequate or any precautions to protect the users thereof from death or injury from asphyxia from cooking gas"—assured counsel that he would be given opportunity, if necessary, to furnish evidence in reply. This took place on Thursday: on Friday, after an argument of law, the Court adjourned until Monday for the addresses and the charge; no request was made for further time nor is it stated that any effort was made to

produce the Johnsons. Neither the respondent nor Dawson had been present at the examination of the stove on Tuesday afternoon, June 8, and their description of how the gas in the right burner behaved is almost in the same words as that of detective Mackay, that is, that matches were required to set it aflame, that the flame would flicker and then "pop out".

The trial judge left the question of liability on the footing of two duties, one as invitor and the other, that created by the by-law. The former was stated as follows:

> At common law the duty which the invitor, that is to say, Carriss, owed to the invitee is this: Buxton, using reasonable care for his own safety, was entitled to expect that Carriss would use reasonable care to prevent damage from unusual danger which he, Carriss, knew or ought to have known about. Now let me repeat that again in different words. Carriss owed Buxton a duty to use reasonable care to make the room safe from any unusual danger, which Carriss knew, or ought to have known about. Now that is the duty which Carriss owed to Buxton at common law.

Then he dealt with the by-law:

> He also owed him another duty under the by-law. The by-law, which was passed by the City of Vancouver, imposed on Carriss a further duty, and you will see this clause in exhibit 16, By-law 3406, on page 2 of that by-law, and I am reading from clause 9:
>
> > The owner of a building shall maintain all gas appliances installed therein and all safety devices attached to such appliances in safe working condition.

At the conclusion of the charge, Mr. Johnson, for Carriss, drew attention to the fact that no reference to any difference in the degree of care required by these duties had been made, but the answer of the trial judge was that he thought

> the clearest way in which I can detail that to you, gentlemen, is that you are entitled to take a breach of the by-law—if you find that such a breach did occur, you are entitled to take that into consideration as a factor of negligence.

and with this the matter ended.

Previously in the charge the trial judge had pointed out the defence of Carriss that he knew nothing of the defective adjustment, and on this he remarked:

> . . . and you must ask yourselves, did he know about it or should he have known about it. He says he never received any complaint about the burner at any time. He says that Knutson occupied the room, and that Knutson said he never made any complaint and there was no reason to complain about the efficiency of the gas stove. Knutson said, of course, that he never used the right burner, that he always used the left. You must ask yourselves, was the right-hand burner in a defective condition when Buxton and his wife rented the room, or did it become defective by reason of Buxton or his wife tampering with it.

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The jury acquitted Buxton of coming to his death by his own act and of contributory negligence. They found Carriss guilty of negligence in "not conforming with by-laws of the City of Vancouver".

From these excerpts it is quite apparent that the jury was not given to understand that there was an absolute duty under the by-law to maintain in all events a proper adjustment in the gas stove. If that had been so, apart from the question of Buxton's own act, deliberate or negligent, now excluded, the issue of negligence would have been superseded; in the absolute sense, there was unquestionably a default, and there would have been left only the issue of suicide or contributory negligence; but the by-law was to be only evidence of negligence. In the light of those last words to the jury the finding is that of negligence, and the evidence of it is overwhelming.

Carriss had taken over the hotel in 1947, and at that time the stove was in the room. From then until June 8, 1954, so far as the evidence shows, he had given not the slightest examination of the working of the stove or of any adjustment connected with it. Apparently there had been no complaints and, as he thought, no occasion to examine it. Not until March 1954, when the safety device was installed, was any kind of work related to it. That device had nothing directly to do with the air adjustment. The evidence of the gas-fitter who installed it was, at the highest, that the defective burner had then been lighted by the pilot flame. That the screw had not been touched at that time is indicated by its condition on June 8 when it was loosened by using a screwdriver only with difficulty in a surrounding of hardened grease which broke off in flakes. The evidence of the previous inmate was to the effect that when the gas was at its highest pressure the left burner could be lighted by the pilot flame but as the pressure got low even that was uncertain. It should be mentioned also that in March the gas-fitter had been called back for a faulty installation of the device or adjustment in another room. In the presence of all these facts, the failure of Carriss for several years to make any examination of such a dangerous agency and the continued existence, over an undetermined period, of the condition found, one which does not lend itself to explanation or excuse, and for which none was offered, not only

justified but required a finding that, within the direction given, he should have known of a danger that was patent to any reasonable inspection, and, through his negligence, was responsible for the consequences. For the purposes of this case, that sufficiently states the standard of duty of, or the warranty by, an innkeeper toward his guest. Whether the duty goes beyond that is a question upon which it is unnecessary to enter; it is at least not less than that.

The appeal extended also to the amount of damages awarded: but I am quite unable to say that the Court of Appeal was wrong in holding them not to be unreasonably high.

I would dismiss the appeal with costs.

LOCKE J. (*dissenting*):—I agree with Mr. Justice Davey, who dissented from the judgment of the majority of the Court of Appeal[1], that there should be a new trial of this action. In these circumstances, I refrain from discussing the evidence given at the trial except to the extent that it is necessary to explain my reasons for reaching this conclusion.

It is necessary in view of what occurred at the trial to examine the pleadings with some care. The action was brought by the widow of the deceased William Buxton on behalf of herself and the infant children of the marriage, under the provisions of the *Families' Compensation Act*, R.S.B.C. 1948, c. 116. Under s. 5 of that statute such actions must be commenced within twelve calendar months after the death of the deceased person, a circumstance that had a bearing upon what took place at the conclusion of the plaintiff's case.

The action was started within one year of the death and by the endorsement on the writ the plaintiff claimed

> damages caused by the negligence of the Defendants, their servants and agents whereby the said William Buxton, deceased, met his death on the 8th day of June, A.D. 1954.

[1] (1957), 24 W.W.R. 263, 11 D.L.R. (2d) 766.

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The statement of claim alleged that the defendant Carriss was "the occupier and manager of the hotel premises known as the 'Lincoln Hotel', at 106 West Hastings Street, in the City of Vancouver", and further that:

> On or about the 8th day of June, A.D. 1954, one, William Leonard Buxton, the lawful husband of the Plaintiff herein, was the occupant and the tenant of Room 214 at the aforesaid premises

when he met his death in the said room, due to asphyxia.

These allegations were followed by paragraphs in which the plaintiff said that she pleaded By-law 2483 and various amendments to that by-law and gave lengthy particulars of the negligence of the defendant upon which the claim was based against him. While the statement of claim did not say so, the by-law referred to was a by-law of the City of Vancouver, which was put in evidence at the trial.

The case was tried before Clyne J. and a common jury. The City by-laws referred to in the statement of claim were put in evidence, though their admission was objected to by counsel for the defence. In my opinion, they were properly admitted for the limited purpose hereinafter referred to.

Before the conclusion of the plaintiff's case and during a rather lengthy discussion as to the admissibility of the by-laws, the learned judge observed that the action was founded in tort and not in contract upon an implied warranty, counsel for the plaintiff taking the attitude that *Francis v. Cockrell*[1] did not apply. He had understood from counsel for the plaintiff that the plaintiff's case was one as to which the principle in *Indermaur v. Dames*[2] applied.

Later in the proceedings, however, and before the case went to the jury, counsel asked leave to amend the statement of claim by adding a paragraph reading:

> Alternatively, the plaintiff claims damages for the breach of the implied warranty of the safety of the hotel premises for the use thereof by the deceased as the occupant or tenant thereof.

and a further paragraph reading:

> Alternatively, the plaintiff says that at all material times the said deceased was the lawful occupant for hire of the said room No. 214 in the said hotel premises and that the said defendant Carriss was in breach of the implied warranty that the said premises and the gas appliances therein, and all modifications thereto, were in a safe working condition for use by the said deceased for the purpose for which they were installed.

[1] (1870), L.R. 5 Q.B. 184, affirmed *ibid.*, 501.

[2] (1866), L.R. 1 C.P. 274, affirmed (1867), L.R. 2 C.P. 311.

In *Francis v. Cockrell, supra,* Kelly C.B. in the Exchequer Chamber said in part (p. 508):

> First, there is the principle which I hold to be well established by all the authorities, that one who lets for hire, or engages for the supply of any article or thing, whether it be a carriage to be ridden in, or a bridge to be passed over, or a stand from which to view a steeplechase, or a place to be sat in by anybody who is to witness a spectacle, for a pecuniary consideration, does warrant, and does impliedly contract, that the article or thing is reasonably fit for the purpose to which it is to be applied; but, secondly, he does not contract against any unseen and unknown defect which cannot be discovered, or which may be said to be undiscoverable by any ordinary or reasonable means of inquiry and examination.

Montague Smith J. said (p. 513):

> . . . the proper mode of stating it is, the defendant promised that due care and skill had been used in the construction of the building; or the obligation may be put in the other form, that the building was reasonably fit for the use for which it was let, so far as the exercise of reasonable care and skill could make it so.

In *Maclenan v. Segar*[1], where the action was against an innkeeper by a guest of the hotel, McCardie J. followed *Francis v. Cockrell* and distinguished *Indermaur v. Dames.* The headnote accurately summarizes the decision and reads:

> By reason of the contractual relationship existing between an innkeeper and a guest in the inn there is an implied warranty by the innkeeper that the inn premises are, for the purpose of personal use by the guest, as safe as reasonable care and skill on the part of any one can make them, but the innkeeper is not responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair, or maintenance of the premises.

Any difficulty in dealing with the application to amend arose from the fact that the limitation period of one year had long since expired. During the discussion the learned judge said in part:

> You have to plead a contract and if liability is contractual there must be a contract before the Court which the Court can deal with. If the liability is in negligence then, of course, it is a different cause of action.

and expressed the view that the proposed amendments set up a new cause of action. In the result, the application to amend was refused. The learned judge pointed out that in opening the case to the jury counsel for the plaintiff had stated that the claim was in negligence and the relationship one to which the principle in *Indermaur v. Dames, supra,*

[1] [1917] 2 K.B. 325.

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applied, and that he proposed to put the matter to the jury on that footing. Counsel for the plaintiff said that he was content with this.

In the charge to the jury the learned trial judge said in part:

> At common law the duty which the invitor, that is to say Carriss, owed to the invitee is this: Buxton, using reasonable care for his own safety, was entitled to expect that Carriss would use reasonable care to prevent damage from unusual danger which he, Carriss, knew or ought to have known about.

This clearly was based upon the principle stated by Willes J. in *Indermaur v. Dames* at p. 287.

The charge then continued:

> He also owed him another duty under the by-law. The by-law, which was passed by the City of Vancouver, imposed on Carriss a further duty, and you will see this clause in exhibit 16, By-law 3406, on page 2 of that by-law, and I am reading from clause 9:
>
> > The owner of a building shall maintain all gas appliances installed therein and any safety devices attached to such appliances in safe working condition.
>
> The by-law applies not only to the owner, but it applies to the occupier; in other words, the by-law applies to Carriss.
>
> Now Carriss was obliged by law to maintain all gas appliances in the room, including both the stove and the safety device, in safe working condition.
>
> Now those are the two duties which Carriss owed to Buxton. In order to succeed in this case the plaintiff must prove that the defendant failed in one or both of those duties, and that the failure in such duty caused the death of her husband. If his death was caused by failure of duty by Carriss in this way, under the Families Compensation Act the widow and children are entitled to damages.

After reviewing the evidence at some length, the learned judge continued:

> But on these facts, gentlemen, and on the law as I have given it to you, it is for you to say whether the plaintiff has proved her case, that is to say, that her husband met his death by reason of the failure on the part of Carriss to perform his duty to maintain those premises in a safe condition against any danger which he knew, or ought to have known, as whether, having a regard to the by-law, *the failure on his part to keep the appliance in a safe working condition resulted in Buxton's death.*

(The italics are mine.)

Of the five questions submitted to the jury, only the first two need be considered. These read:

1. Was the defendant, Carriss, guilty of negligence which caused or contributed to the death of Buxton?
2. If so, what was such negligence?

The form of these questions had been agreed upon by counsel for the parties. Before the jury went out, the learned trial judge asked if there were any objections to his charge. Counsel for the defendant said that he was not sure whether the jury had been instructed as to whether

there is any difference between the obligation under the by-law and the common law obligation which your Lordship has pointed to.

To this, Clyne J. replied:

Well no, I think the clearest way in which I can detail that to you, gentlemen, is that you are entitled to take a breach of the by-law—if you find that such a breach did occur, you are entitled to take that into consideration as a factor of negligence. Now I think that is the most general way in which I can put it.

Counsel for the plaintiff said nothing as to this aspect of the matter.

The answer made by the jury to the first question was in the affirmative. To the second question the answer was:

Not conforming with by-laws of the City of Vancouver.

Other answers found that Buxton had not come to his death by his own deliberate act, acquitted him of contributory negligence and assessed the damages.

When these answers were read, counsel for the defendant asked that the answer to question 2 be clarified. As to this, the foreman of the jury said:

. . . we discussed that and he didn't conform to the City by-laws in respect to that, in respect to the stove and the safety device.

and continued:

Further, my Lord, the by-law called for it to be maintained, which he didn't do.

The learned judge then said:

I take it you mean in a safe working condition.

to which the foreman replied:

In safe repair, yes, my Lord.

Judgment was then directed to be entered for the damages found by the jury.

On appeal[1], O'Halloran J.A., with whom Bird J.A. agreed, did not discuss the question as to the sufficiency of the pleadings to enable the plaintiff to claim damages upon the implied contract and, as the matter was not mentioned in the dissenting judgment of Davey J.A., we have not the

[1] (1957), 24 W.W.R. 263, 11 D.L.R. (2d) 766.

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benefit of the opinion of the Court of Appeal on the subject. After saying that, in his opinion, the jury's verdict was supported by the evidence, O'Halloran J.A. said that it was contended by the appellant's counsel that the breach of the duty imposed by the by-law did not give rise to a cause of action for damages and that a breach of the by-law rendered the appellant only liable to a penalty. As to this, the learned judge said[1]:

> In my judgment the by-law did no more than repeat the duty at common law. It would be a different matter of course if the duty relied on by the jury was something outside of the common law and created only by by-law. This distinction is to be appreciated in reading the leading decisions.
>
> It is true in answering the specific question the jury mentioned the by-law as such, but the jury was answering the question as laymen and not as lawyers. The reference to the by-law was, in fact, superfluous, since as already stated, the jury defined the negligence as failure to maintain the stove and safety device in safe repair. That, as I see it, was non-compliance with the common-law duty.

With great respect, I am unable to agree with this. If, as it was contended on behalf of the plaintiff in the action and as the jury had been instructed in the charge, the obligation imposed by clause 9 of By-law 3406 was to

> maintain all gas appliances installed therein and any safety devices attached to such appliances in safe working condition

that duty differed materially from that of an invitor, as stated by Willes J. in *Indermaur v. Dames, supra,* and by Kelly C.B. and Montague Smith J. in *Francis v. Cockrell, supra,* and by McCardie J. in *Maclenan v. Segar, supra,* as to the duty of an innkeeper.

As between invitor and invitee, the latter was entitled to insist upon the exercise of reasonable care by the former to prevent damage from unusual danger of which the occupier knew or ought to have known.

As between innkeeper and guest, there is an implied warranty that the inn premises are as safe as reasonable care and skill can make them and, as pointed out by Chief Baron Kelly in *Francis v. Cockrell* at p. 508, the warranty does not extend to any unseen or unknown danger which could not be discovered by any ordinary or reasonable means of enquiry and examination.

[1] 24 W.W.R. at pp. 264-5.

The duty under the by-law if it existed was, as it was explained to the jury, absolute and the innkeeper would not be excused by the fact that the danger was one of which he neither knew nor ought to have known, or that the defect was one which reasonable enquiry and examination would not have revealed: *Galashiels Gas Co. Ltd. v. O'Donnell or Millar*[1]. Unless in the present matter Buxton had deliberately turned on the gas without lighting it and allowed it to escape into the room with the intention of destroying himself, or unless he was guilty of contributory negligence, if the breach of the by-law gave rise to a right of action there was no escape for the defendant upon the evidence in this case under the terms of the by-law unless, indeed, what was stated in absolute terms to them by the trial judge as to the nature of the duy imposed by the by-law was qualified by what was said by him after the questions had been submitted but before the jury went out, which I have quoted above.

In view of the positive terms in which the effect of the by-law had been stated in the earlier part of the charge, it is not my opinion that to say to them that they were entitled to take a breach of the by-law into consideration "as a factor of negligence" would explain to the jury what should in my opinion have been explained, that the by-law was only admissible in evidence to show that, in the opinion of the city council, certain standards of care were regarded as necessary to prevent injury from escaping gas. That the jury did not so understand is made perfectly clear by the answer made by the foreman of the jury after they had given their verdict, which I have quoted above.

Since in the opinion of the majority of the Court the duty under the by-law was the same as at common law, they did not consider it necessary to deal with the question as to whether a breach of the by-law gave rise to a right of action if damage resulted from non-compliance with it. Davey J.A., in his dissenting judgment, did so and was of the opinion that while it was admissible as evidence of the general character of the gas stove and as presenting a standard of reasonableness upon which the jury might act, the council was not empowered by the Vancouver charter to impose duties the breach of which would be a private

[1] [1949] A.C. 275, [1949] 1 All E.R. 319.

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wrong conferring a right of action for damages resulting from such breach. Being of the opinion that the effect of the charge to the jury was to instruct them that the liability under the by-law was absolute, he considered there should be a new trial.

By-law 3406 of the City of Vancouver was passed on October 19, 1953, and amended an earlier by-law, no. 2483, passed by the city council on December 28, 1937.

The earlier by-law was apparently passed by the city council under the powers vested in it by paras. 104 and 209 of s. 163 of the *Vancouver Incorporation Act 1921*, 2nd sess. (B.C.), c. 55. Paragraph 298 of s. 163 authorized the council to pass by-laws inflicting "reasonable fines and penalties not exceeding one hundred dollars and costs" for any breach of the by-laws of the City. Paragraph 300 authorized the council to inflict reasonable punishment by imprisonment for breach of any of the by-laws or for non-payment of the fine inflicted for any such breach.

The by-law contained, *inter alia*, regulations governing the installation of equipment designed for the use of gas, provided for periodical inspections and for the imposition of fines, upon conviction before the mayor, police magistrate or any two justices of the peace for any breach, and upon default in payment, imprisonment.

By c. 55 of the statutes of 1953 the Act of 1921 was repealed and the Act to be cited as the *Vancouver Charter* enacted. It was under the new Act that By-law 3406 was passed. Section 306(*o*) empowered the council to make by-laws:

> For regulating the installation and use of gas or oil ranges, gas or oil heaters, gas or oil furnaces, and other appliances using gas or oil for the production of heat, and the piping and other apparatus connected therewith.

Section 333 replaced s. 298 of the 1921 Act and empowered the council to inflict penalties not exceeding $100 and costs or imprisonment for any period not exceeding 2 months, for an offence against any by-law or for the non-payment of a fine, and further provided that, in cases where the offence was of a continuing nature, a fine not exceeding $50 for each day such offence was continued might be imposed.

A further section of the *Vancouver Charter*, s. 334, reads:

> Where an offence is committed against any by-law passed in the exercise of the powers of the Council, in addition to any other remedy provided or penalty inflicted, the continuance of such offence may be restrained by action at the instance of an owner-elector or of the city.

The question as to whether a breach of a by-law subjects the person committing such breach to an action for damages as well as making him liable to a fine or imprisonment, where the by-law is one passed by a municipal body, is not quite the same as the question as to whether the breach of a statutory duty gives such a right of action.

In the case of a municipal by-law, there is further the question to be determined as to whether upon the true construction of the Act constituting the municipality it is clear that it was intended to vest in it the power to create the cause of action.

Where the duty is created by statute and a penalty is imposed for any breach, the question as to whether a breach gives, in addition, a right of action to an individual suffering injury in consequence must depend upon the object and language of the particular statute.

In *Rex v. Robinson*[1], Lord Mansfield said:

> The rule is certain, "that where a statute creates a new offence, by prohibiting and making unlawful any thing which was lawful before; and appoints a specific remedy against such new offence, (not antecedently unlawful,) by a particular sanction and particular method of proceeding, that particular method of proceeding must be pursued, and no other." And this is the resolution in *Castle's case*, Cro. Jac. 643.

As pointed out in Beven on Negligence, 4th ed. 1928, at p. 397, Lord Tenterden C.J. was simply reiterating this when in *Doe dem. Murray v. Bridges*[2], he said:

> And where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.

In *Atkinson v. The Newcastle and Gateshead Waterworks Company*[3], the defendants were charged by the *Waterworks Clauses Act, 1847*, with an obligation to fix and maintain fire-plugs and to keep their pipes to which fire-plugs were fixed at all times charged with water at a certain pressure and to allow all persons to use the same for extinguishing fire without compensation. A monetary penalty recoverable summarily before two justices was imposed on the undertakers for neglect of each of these duties and they were further liable to forfeit to the town commissioners and "to every person having paid or

[1] (1759), 2 Burr. 800 at 803, 97 E.R. 568 at 570.
[2] (1831), 1 B. & Ad. 847 at 859, 109 E.R. 1001 at 1006.
[3] (1877), 2 Ex. D. 441.

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tendered the rate" a penalty of 40s. a day for each day during which such neglect continued. The plaintiff brought an action for damages against the company for not keeping its pipes charged as required by the Act, whereby his premises situate within the limits of the defendant's Act were burned down. It was held that the plaintiff had no right of action. The headnote to the report reads in part:

> The mere fact that the breach of a public statutory duty has caused damage does not vest a right of action in the person suffering the damage against the person guilty of the breach; whether the breach does or does not give such right of action must depend upon the object and language of the particular statute.

In *Clegg, Parkinson & Co. v. Earby Gas Company*[1], the action was brought against the company under the *Gasworks Clauses Act, 1871,* for damages sustained by a consumer by reason of the company's failure to give him a supply of gas sufficient in amount and in purity to satisfy the provisions of the Act. The Act provided penalties for failure to comply with the obligation of the gas company in this respect. Wills J., after saying that, in his opinion, the principle applied that where a duty is created by statute which affects the public as the public, the proper remedy if the duty is not performed is to indict or take the proceedings provided by the statute, said in part (pp. 594-5):

> . . . where there is an obligation created by statute to do something for the benefit of the public generally or of such a large body of persons that they can only be dealt with practically, en masse, as it were, and where the failure to comply with the statutory obligation is liable to affect all such persons in the like manner, though not necessarily in the same degree; there is no separate right of action to every person injured, by breach of the obligation, in no other manner than the rest of the public.

Wright J. said (p. 595):

> The general rule of law is that, where a general obligation is created by statute and a specific remedy is provided, that statutory remedy is the only remedy.

There are certain statutory duties, however, created for the protection of a particular class of persons where such an action lies.

In *Groves v. Wimborne (Lord)*[2], the Court of Appeal held that an action lay at the suit of a workman injured in a factory through a breach by his employer of the duty to maintain fencing for dangerous machinery imposed upon him by a section of the *Factory and Workshop Act, 1878.*

[1] [1896] 1 Q.B. 592.

[2] [1898] 2 Q.B. 402.

The basis of that decision was that the statute created a new duty for the protection from injury of a particular class of persons who came within the mischief which the Act was designed to prevent. While the Act provided also for the imposition of fines, it had held that this did not prevent the bringing of the action. It cannot, however, be said that the persons who may use gas ranges or come upon premises where they are used are members of a class such as the factory workers in *Groves' Case*. The power given by para. (*o*) of s. 306 of the *Vancouver Charter* is obviously given to enable the council to pass by-laws for the protection of the public generally.

In the case of a by-law of a municipal corporation, there is a further matter to be considered, namely, as to whether the Act of the Legislature, construed as a whole, shows clearly that it was intended to authorize the council not merely to impose penalties for breaches of the city by-law but also to vest rights of action in persons suffering from their breach.

I have examined with care the *Vancouver Incorporation Act, 1921,* and the *Vancouver Charter* of 1953 and, other than the right given by s. 334 to an owner-elector to bring an action to restrain a breach of a by-law, I can find no indication that it was intended to confer any such power upon the city.

As is pointed out by Mr. Justice Davey, s. 189 of the *Vancouver Charter* enacts that the council may provide for the good rule and government of the city, and it must be taken that the power to pass by-laws dealing with a vast number of activities is intended to be used for that purpose.

In *Tompkins v. The Brockville Rink Company*[1], a by-law of the Town of Brockville passed under the provisions of the *Consolidated Municipal Act, 1892,* set apart certain areas as fire-limits where no wooden buildings could be erected and provided that buildings erected in contravention thereof might be pulled down at the cost of the owner and a penalty of $50 imposed. The defendants were engaged in erecting a rink on their lands which the plaintiff alleged was a wooden building within the meaning of the by-law, that his property would be depreciated by its erection in contravention of the by-law and claimed an injunction

[1] (1899), 31 O.R. 124.

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and order for the removal of the building and damages. Meredith C.J. held that the action did not lie. That learned judge said in part (p. 130):

> When one looks at the number of acts lawful to be done at common law which municipal councils are by the Municipal Act permitted to prohibit or to regulate, and the number of duties which do not exist at common law which they are permitted to impose in respect of persons and property within their jurisdiction, one is startled by the proposition that in each case a duty is imposed for the failure to perform which an action lies by one who is injured owing to the nonperformance of it.
>
> The by-law in question seems to me not to have been designed primarily or at all to keep down the fire insurance rates which the owners of property whether adjacent or near to a building proposed to be erected should be required to pay upon their property, but to have had a broader and more public purpose in view, namely, to prevent the spread of a conflagration in the more thickly built up parts of the municipality, the danger of which would be increased by the erection of wooden buildings and buildings constructed of material easily ignited by contact with fire.
>
> Nor can it have been intended, I think, that one who had erected a building in contravention of the provisions of such a by-law, the erection of which had excited no apprehension of danger from fire, nor led to any steps being taken for its pulling down or removal, should be liable to compensate every one who should be injured by fire communicated to his property owing to the inflammable character of the building erected, involving, it may be, the loss of many thousands of dollars.

The judgment in *Tompkins' Case* was considered at length by Duff J. (as he then was) in delivering the judgment of the majority of this Court in *Orpen v. Roberts et al.*[1] After referring to the contention of the appellant that any person whose property might suffer in value, by reason of the failure of some other proprietor to observe the building restrictions, has a right to invoke the jurisdiction of the Courts to prevent by an injunction the obnoxious act in respect of any loss actually suffered, Duff J. said (pp. 370-1):

> It is legitimate to observe that this construction if it were to prevail, would be an unfortunate construction. As Meredith C.J. said, in *Tompkins v. The Brockville Rink Company,* when one considers the different kinds of acts and conduct which municipal councils in Ontario are by statute permitted to prohibit or to regulate, and the multiplicity of duties they have authority to impose upon property owners and others within their jurisdiction, one is rather "startled by the proposition that in each case a duty is imposed for the failure to perform which an action lies by one who is injured owing to the non-performance of it."

It should be noted that in *Orpen's Case* the section of *The Municipal Act* (s. 401) under which the by-law was passed authorized the imposition of penalties but provided that a

[1] [1925] S.C.R. 364, [1925] 1 D.L.R. 1101.

breach of the by-law might be restrained at the instance of the municipal corporation, in that respect differing from s. 334 of the *Vancouver Charter*. What was said, however, in relation to the claim for damages appears to me directly in point in the present matter.

Further support of this view is to be found in the judgment of the Court of Appeal in *Phillips v. Britannia Hyyienic Laundry Company, Limited*[1]. In that case, the effect of a regulation made by the Local Government Board under statutory powers was considered. The regulation provided that:

> The motor car and all the fittings thereof shall be in such a condition as not to cause, or to be likely to cause, danger to any person on the motor car or on any highway.

A motor lorry, through no fault of its owners, was in such a condition as to cause danger to persons on it, in that one of its axles was defective. The axle broke and a wheel came off and damaged another vehicle. In an action by the owner of the damaged vehicle against the owners for a breach of the regulation it was held that it was not intended by the Act or the order that everyone injured through a breach of the order should have a right of action for damages; but that the duty imposed by the order was a public duty only to be enforced by the penalty imposed for a breach of it, and not otherwise. Bankes L.J. referred to what had been said by Lord Tenterden in *Doe dem. Murray v. Bridges, supra,* and said (p. 840):

> The injury here was done to the appellant's van; and the appellant, a member of the public, claims a right of action as one of a class for whose benefit cl. 6 was introduced. He contends that the public using the highway is the class so favoured. I do not agree. In my view the public using the highway is not a class; it is itself the public and not a class of the public. The clause therefore was not passed for the benefit of a class or section of the public. It applies to the public generally, and it is one among many regulations for breach of which it cannot have been intended that a person aggrieved should have a civil remedy by way of action in addition to the more appropriate remedy provided, namely a fine.

Atkin L.J. said in part (p. 842):

> It is not likely that the Legislature, in empowering a department to make regulations for the use and construction of motor cars, permitted the department to impose new duties in favour of individuals and new causes of action for breach of them in addition to the obligations already well provided for and regulated by the common law of those who bring

[1] [1923] 2 K.B. 832.

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vehicles upon highways. In particular it is not likely that the Legislature intended by these means to impose on the owners of vehicles an absolute obligation to have them road-worthy in all events even in the absence of negligence.

In the present matter, Davey J.A. has said[1]:

> Clear and unambiguous language, wanting in respect of sec. 306(*o*), would, I think, be required to confer an extraordinary authority so far removed from the apparent purpose of the Act permitting the council to create new causes of action that would interfere with private rights and duties under general provincial law as between invitor and invitee, or in other well known legal relationships.

With this statement of the law I am in complete agreement and I agree with Mr. Justice Davey that the verdict in this matter should not be permitted to stand.

No question arises upon this appeal as to the sufficiency of the respondent's pleadings to support a cause of action on the implied warranty as between a guest and an innkeeper. That issue was not put to the jury, with the consent of counsel for the plaintiff at the trial, and was accordingly not dealt with by the jury. Parties must be bound by the manner in which their case is conducted at the trial and, having consented to the case going to the jury upon the two asserted causes of action, namely, as between invitor and invitee and upon what was contended to be the absolute duty imposed by the by-law, the respondent cannot now be heard to say that the verdict might have been sustained as a claim upon an implied warranty. The rule in *Scott v. The Fernie Lumber Company, Limited*[2], as stated by Duff J. (as he then was) applies. The passage in that judgment to which I refer reads:

> It is, perhaps, needless to say that in these circumstances, but for the legislation hereinafter referred to, the rule long established, which holds a litigant to a position deliberately assumed by his counsel at the trial, would preclude in this Court any discussion of the sufficiency of the findings to support the judgment. The rule is no mere technicality of practice; but the particular application of a sound and all-important maxim—that litigants shall not play fast and loose with the course of litigation—finding a place one should expect, in any enlightened system of forensic procedure.

The rule so stated was referred to and adopted in the judgment of Davis J. in delivering the judgment of the majority of this Court in *David Spencer Limited v. Field et al.*[3]

[1] 24 W.W.R. at p. 268. [2] (1904), 11 B.C.R. 91 at 96.
[3] [1939] S.C.R. 36 at 42, [1939] 1 D.L.R. 129.

In the present appeal, we are asked by counsel for the appellant to apply the rule stated by Taschereau C.J. in *Andreas v. The Canadian Pacific Railway Company*[1], where that learned judge said that the jury, having with clear instructions answered that the cause of the accident was the failure to reduce speed, must be considered as having negatived all the other charges of negligence. The rule is stated in similar terms by Davies J. in *Phelan v. The Grand Trunk Pacific Railway Company*[2], and was adopted by Anglin J. in that case and again in *The Canadian Pacific Railway Company v. Ouellette*[3]. It is, however, my opinion that the rule should not be applied in circumstances such as exist in the present case. It is quite true that the learned trial judge explained to the jury with perfect clarity the rule in *Indermaur v. Dames, supra,* but the charge was so precise on the duty under the by-law, which was said to be absolute, to maintain the gas range in safe working condition that it is apparent that the jury's attention was focused upon this aspect of the matter. As they found that Buxton had not committed suicide and had not been guilty of contributory negligence, they simply found that the gas stove had not been maintained in the state required by the by-law. That this is the case is demonstrated by the explanation made by the foreman of the jury in answer to a question put by the learned trial judge after they had returned with their answers.

In these circumstances, I think justice will be done between these parties by directing a new trial. I would allow the appellant his costs of the appeal to this Court and direct that the costs in the Court of Appeal and of the first trial be disposed of by the judge presiding at the new trial.

[1] (1905), 37 S.C.R. 1 at 10, 5 C.R.C. 450.

[2] (1915), 51 S.C.R. 113 at 116, 23 D.L.R. 90, 18 C.R.C. 233, 7 W.W.R. 1224.

[3] [1924] S.C.R. 426 at 432, [1924] 4 D.L.R. 234, 30 C.R.C. 200, reversed on other grounds [1925] A.C. 569, [1925] 2 D.L.R. 677, 30 C.R.C. 207, [1925] 2 W.W.R. 494, 39 Que. K.B. 208.

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The judgment of Cartwright, Fauteux and Abbott JJ. was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia[1] affirming, by a majority, a judgment of Clyne J. entered, pursuant to the answers of the jury, in favour of the respondent for damages for the death of her husband, William Leonard Buxton, hereinafter referred to as "the deceased". Davey J.A., dissenting, would have set aside the judgment and directed a new trial.

The pleadings, the relevant facts and the course followed at the trial are referred to in the reasons of my brothers Rand and Locke and I shall endeavour as far as possible to avoid repetition.

The action was brought against three defendants, but we are now concerned only with the claim against the appellant. The statement of claim is a lengthy document, but on this appeal the following portions only require consideration:

Paragraph 1 states on whose behalf the action is brought.

Paragraph 2 contains the statement:

> The Defendant Carriss is the occupier and manager of the hotel premises known as the "Lincoln Hotel", at 106 West Hastings Street, in the City of Vancouver.

Paragraph 3 is as follows:

> On or about the 8th day of June, A.D. 1954, one, William Leonard Buxton, the lawful husband of the Plaintiff herein, was the occupant and the tenant of room 214 at the aforesaid premises at 106 West Hastings Street, in the said City and Province, when the said William Leonard Buxton met his death in the said room in the said premises by asphyxia due to carbon monoxide poisoning.

Paragraph 5 is as follows:

> The said Deceased met his death solely by reason of the negligence of the Defendants and each of them and particulars thereof are hereinafter set out. And the Plaintiff pleads By-law 2483 and amendments thereto and the following words to be added, "and in particular amending By-laws No. 3406, 3432 and 3439 and in further particular By-law 3406(9).

Paragraph 7 reads in part:

> Particulars of the negligence of the Defendant Carriss are as follows:
>
> * * *
>
> (j) Providing or supplying housing accommodation without taking adequate or any precaution to protect the users thereof from death or injury by asphyxia from cooking gas.

[1] (1957), 24 W.W.R. 263, 11 D.L.R. (2d) 766.

The statement of claim concludes as follows:

9. As a consequence of the negligence of the Defendants and each of them as aforesaid, the Plaintiff and the said infant children have lost the care, maintenance and support that they and each of them may reasonably have expected from the said Deceased and further thereto the said Plaintiff has lost the comfort, solace and society of the said deceased.

WHEREFORE THE PLAINTIFF CLAIMS judgment on her own behalf and on behalf of and for the benefit of the aforementioned infant children for:

(a) Special damages;

(b) General damages;

(c) Costs;

(d) Such further and other relief as to this Honourable Court may seem just and meet.

In my opinion the statement of claim conformed to Order 19, r. 4 of the British Columbia Rules of Court which provides in part:

Every pleading shall contain, and contain only, a statement in summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved . . .

In the course of lengthy discussions between the Court and counsel at the conclusion of the plaintiff's case and again at the conclusion of the case for the defendant, counsel for the plaintiff took the position that the statement of claim, without the necessity of any amendment, stated facts which showed (i) that there existed the relationship of guest and hotelkeeper between the deceased and the appellant and, (ii) that the death of the deceased was caused by the failure of the appellant in supplying accommodation in the hotel to the deceased to take adequate, or any, precaution to protect the latter from death by asphyxia from cooking gas. In rejecting this contention the learned trial judge stressed the use of the present tense in the passage from para. 2 of the statement of claim quoted above, "The defendant Carriss *is* the occupier and manager of the hotel premises". No doubt it would have been preferable to use such words as "the defendant Carriss *was at all material times* the occupier", but when the statement of claim is read as a whole it is obvious that what is alleged is that the appellant was the hotelkeeper at the time of the fatality.

It was only after the learned trial judge had ruled that the statement of claim contained no allegation of the existence of a contract that counsel for the plaintiff asked for the

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amendment which was refused. It should not be held against him that thereafter he consented to the case being put to the jury as one to which the rule in *Indermaur v. Dames*[1] applied. He had made his position clear and the learned trial judge had ruled against him. In saying this I do not question the decision in *Scott v. The Fernie Lumber Company, Limited*[2], or "the rule long established, which holds a litigant to a position deliberately assumed by his counsel at the trial", referred to by Davis J. in *David Spencer Limited v. Field et al.*[3]; but that rule does not preclude counsel for the respondent from raising in this Court the very ground which he pressed vigorously, albeit unsuccessfully, at the trial.

In my opinion, on the pleadings as they stood, the learned trial judge should have put the case to the jury as one governed by the principles stated in *Francis v. Cockrell*[4].

The British Columbia practice is patterned on that of the Courts in England and the following expressions of opinion appear to me to be applicable to the circumstances of the case at bar.

In *Oakley v. Lyster*[5], Scrutton L.J. said at p. 151:

> Four or five hundred years ago if a person wanted justice from the King's Court he had to obtain a particular form of writ, and, if he chose the wrong one, his claim was not maintainable whatever the facts might be. Before the Common Law Procedure Act and the Judicature Act much the same thing happened. The plaintiff had to express his claim in a way that was legally accurate, and if he did not, a demurrer put an end to the action. Great injustice was thereby done. Now, the Courts find out the facts, and, having done so, endeavour to give the right legal judgment on those facts. So in this case I begin by ascertaining the facts in order to see whether the form in which the plaintiff is claiming is substantially right, or, if not substantially right, whether any injustice is done by giving him the real remedy which the facts justify.

In *United Australia, Limited v. Barclays Bank, Limited*[6], Lord Atkin, with whom Lord Thankerton and Lord Romer agreed, said at pp. 29-30:

> Concurrently with the decisions as to waiver of tort there is to be found a supposed application of election: and the allegation is sometimes to be found that the plaintiff elected to waive the tort. It seems to me that in this respect it is essential to bear in mind the distinction between

[1] (1866), L.R. 1 C.P. 274, affirmed (1867), L.R. 2 C.P. 311.
[2] (1904), 11 B.C.R. 91.
[3] [1939] S.C.R. 36 at 42, [1939] 1 D.L.R. 129.
[4] (1870) L.R. 5 Q.B. 184, affirmed *ibid.*, p. 501.
[5] [1931] 1 K.B. 148.
[6] [1941] A.C. 1, [1940] 4 All E.R. 20.

choosing one of two alternative remedies, and choosing one of two inconsistent rights. As far as remedies were concerned, from the oldest time the only restriction was on the choice between real and personal actions. If you chose the one you could not claim on the other. Real actions have long disappeared: and, subject to the difficulty of including two causes of action in one writ which has also now disappeared, there has not been and there certainly is not now any compulsion to choose between alternative remedies. You may put them in the same writ: or you may put one in first, and then amend and add or substitute another. I will cite one authority which has to deal with the question whether a claim for injury to a passenger was founded on contract or tort for the purposes of the County Courts Act. "At the present time a plaintiff may frame his claim in either way, but he is not bound by the pleadings, and if he puts his claim on one ground and proves it on another he is not now embarrassed by any rules as to departure" per Lord Esher in *Kelly v. Metropolitan Ry. Co.*, [1895] 1 Q.B. 944, 946.

The rule in *Francis v. Cockrell, supra*, is stated as follows in Winfield on Tort, 6th ed. 1954, at p. 672:

> Where A enters B's structure under a contract entitling him to do so, *it is an implied term in the contract that the structure shall be reasonably fit for the purpose for which it is intended; but this does not extend to any unknown defect incapable of being discovered by reasonable means.*

For the purposes of this appeal I accept this as stating the rule in terms not unduly favourable to the plaintiff, and I do not find it necessary to consider whether we should accept in its entirety the judgment of McCardie J. in *Maclenan v. Segar*[1].

The jury in their answers negatived the allegations of the defence that the deceased committed suicide or, alternatively, was guilty of contributory negligence. It appears to me that if they had been charged on the law as laid down in *Francis v. Cockrell*, as I think they should have been, the jury, having negatived the defences mentioned above, must inevitably have found for the plaintiff in view of the evidence as to the nature of the defect in the gas stove and the length of time that it had existed, which is summarized in the reasons of my brother Rand; and consequently, assuming for the purposes of this appeal that the learned trial judge did not charge the jury correctly as to the effect of the by-law, it is my opinion that the majority in the Court of Appeal were right in dismissing the appeal on the ground that there had been no substantial wrong or miscarriage of justice.

[1] [1917] 2 K.B. 325.

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I agree with my brother Rand that we cannot say that the Court of Appeal was wrong in holding the damages not to be unreasonably high.

Cartwright J.

Before parting with the matter I wish to mention the course followed at the trial after the jury had made their answers to the questions submitted to them. What occurred is set out in the reasons of my brother Locke. Counsel argued the appeal on the footing that what was said by the foreman formed part of the answers of the jury. For the reasons given by Meredith C.J.C.P. in delivering the judgment of the majority of the Appellate Division of the Supreme Court of Ontario in *Gray v. Wabash R.R. Co.*[1], it is my opinion that the proper course would have been for the learned trial judge to have instructed the jury as to the desirability of clarifying their answer to question 2 and to have sent them back to the jury-room to consider the matter further and to amplify their written answer if they saw fit to do so.

I would dismiss the appeal with costs.

Appeal dismissed with costs, LOCKE J. *dissenting.*

Solicitor for the defendant Carriss, appellant: A. W. Johnson, Vancouver.

Solicitors for the plaintiff, respondent: Griffiths & McLelland, Vancouver.

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[1] (1916), 35 O.L.R. 510.

VERN GLEN DENNIS .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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*May 7
Jun. 26

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Summary convictions—Parties to proceedings—Appeal—Service of notice of appeal—Who is "respondent"—Information laid by police officer—Service on informant's superior—The Criminal Code, 1953-54 (Can.), c. 51, s. 722.

The appellant was convicted by a magistrate on an information laid by a constable of the Royal Canadian Mounted Police. He served a notice of appeal from his conviction on the corporal in charge of the detachment to which the informant was attached. The County Court Judge dismissed the appeal for want of jurisdiction because the notice of appeal had not been served on the informant. This judgment was affirmed by the Court of Appeal. A further appeal was taken by leave.

Held (Kerwin C.J. and Martland J. dissenting): The appeal should be dismissed.

Per Taschereau, Locke and Fauteux JJ.: In proceedings under Part XXIV of the *Criminal Code*, at least if the Attorney General does not intervene, the parties to the proceedings are the informant and the accused. If the accused, having been convicted, appeals, the "respondent" on whom the notice of appeal must be served under s. 722(1)(*b*)(ii) is the informant. Section 722(3) makes it clear by implication that the informant may be a person other than one engaged in enforcement of the law, but it also makes it clear that, unless an order is obtained from the appeal Court, the notice of appeal must be served on the informant personally. The fact that the informant in laying the information describes himself as doing so "on behalf of Her Majesty the Queen" does not change the position, nor does the style given to the proceedings before the magistrate and the County Court Judge.

Per Kerwin C.J. and Martland J., *dissenting*: The "respondent" mentioned in s. 722(1)(*b*)(ii) is not necessarily in all cases the person who laid the information. Where, as in the present case, the information is laid by a police officer, the Crown is in name and substance the respondent, and service of the notice of appeal on the informant's superior officer is sufficient service within the meaning of the subsection.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from a judgment of Fraser Co. Ct. J. Appeal dismissed, Kerwin C.J. and Martland J. dissenting.

E. Patrick Hartt, for the appellant.

Lee A. Kelley, Q.C., for the respondent.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Fauteux and Martland JJ.

[1] (1957), 24 W.W.R. 88, 120 C.C.C. 39, 27 C.R. 231.

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DENNIS
v.
THE QUEEN

The judgment of Kerwin C.J. and Martland J. was delivered by

THE CHIEF JUSTICE (*dissenting*):—Vern Glen Dennis appeals by leave against the judgment of the Court of Appeal for British Columbia[1]. That Court had dismissed his appeal from a finding by Judge Fraser that his Honour had no jurisdiction to hear his appeal from his conviction by Magistrate Krell on a charge under s. 223 of the *Criminal Code* of driving a motor vehicle while his ability so to do was impaired by alcohol. The information was sworn to by Laurence Martin, a constable of the Royal Canadian Mounted Police stationed at Haney, "on behalf of Her Majesty the Queen". At the hearing before the magistrate, Corporal A. Calvert, in charge of the Haney detachment, appeared as prosecutor and Constable Martin testified. Notice of appeal from the magistrate's decision, which was given July 31, 1956, was duly served upon the magistrate and upon Corporal Calvert but not on Constable Martin. The reason given for this was that Constable Martin had left on his vacation for three or four weeks from August 1, 1956, and hence it was impracticable, if not impossible, to serve him.

The matter came before the learned County Judge on March 12, 1957, and, as we are advised, counsel appeared for the Crown and stated that the preliminary matters were in order. However, it appeared to the judge that this was not so and the hearing was adjourned to March 26, 1957, in order to enable counsel for Dennis to submit written argument. This was done on March 22, 1957, and on March 26, 1957, the judge indicated that he proposed to dismiss the appeal for reasons then given. Formal dismissal of the appeal was withheld until May 28, 1957, in order to permit Dennis to file a notice of appeal, perfect his appeal and apply for bail pending its disposition. The reasons of the judge and of the Court of Appeal proceed upon the basis that Constable Martin was the "respondent" and as he had not been served with notice of the appeal there was no jurisdiction.

The term "respondent" is not defined in Part XXIV of the *Criminal Code*, "Summary Convictions", with which we are concerned. By s. 719(*f*) "appeal court" means in

[1] (1957), 24 W.W.R. 88, 120 C.C.C. 39, 27 C.R. 231.

British Columbia the County Court of the county in which the cause of the proceedings arose and by s. 720 the defendant in proceedings under Part XXIV may appeal to the appeal court from a conviction made against him. Section 722 reads in part as follows:

722. (1) Where an appeal is taken under section 720, the appellant shall

(*a*) prepare a notice of appeal in writing setting forth
(i) with reasonable certainty the conviction or order appealed from or the sentence appealed against, and
(ii) the grounds of appeal;

(*b*) cause the notice of appeal to be served upon
(i) the summary conviction court that made the conviction or order or imposed the sentence, and
(ii) the respondent,

within thirty days after the conviction or order was made or the sentence was imposed; and

(*c*) file in the office of the clerk of the appeal court
(i) the notice of appeal referred to in paragraph (*a*), and
(ii) an affidavit of service of the notice of appeal,

not later than seven days after the last day for service of the notice of appeal upon the respondent and the summary conviction court. . . .

(3) Where the respondent is a person engaged in enforcement of the law under which the conviction or order was made or the sentence was imposed, the appeal court may direct that a copy of the notice of appeal referred to in subsection (1) be served upon a person other than the respondent, and where the appeal court so directs, that service shall, for the purposes of this section and section 723, be deemed to be service upon the respondent.

Under s. 727 the appellant would have the right to a trial *de novo* before the County Court Judge and by the orders under review he is deprived of that right. Undoubtedly the general rule is that there is no appeal unless expressly given by statute and that any conditions imposed thereby must be strictly complied with. An appeal is given by s. 720 and the sole question is whether the service of the notice thereof upon Corporal Calvert was service upon the "respondent". I have examined the numerous decisions upon the point referred to by counsel, most of which are mentioned in the decision of the Court of Appeal for Ontario in *Regina ex rel. Payne v. Feron*[1], and in the reasons for judgment delivered by Mr. Justice Bird on behalf of the Court of Appeal in the present matter[2]. To the list might be added the recent decision of the Ontario Court of Appeal in *Desaulnier v. Desaulnier*[3].

[1] [1955] O.R. 686, 112 C.C.C. 337, 22 C.R. 52.
[2] (1957), 24 W.W.R. 88, 120 C.C.C. 39, 27 C.R. 231.
[3] [1958] O.W.N. 205, 120 C.C.C. 161.

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It is quite true that some were decided before the enactment of the new Code, when subs. (3) of s. 722 was added, although it may be mentioned, as Mr. Justice Bird noted, that s. 750(*b*) of the old Code gave power to a judge of the Court appealed to to direct that service be made upon a person other than the respondent. It was argued on behalf of the Crown and so found in the Courts below that subs. (3) of s. 720 left no room for any decision other than that the informant was the respondent. With respect, my view is that the "respondent" mentioned in s. 722(1)(*b*)(ii) is not confined in all cases to the person who laid the information. In the present case we are not dealing with circumstances where a private individual laid an information or where at the latter's request a police officer did so, and the proceedings were carried on without the intervention of the Crown authorities. In such cases the subsection may have its operation to prevent an appeal being heard unless the informant is served with notice thereof or an order obtained. I agree with the submission of counsel for Dennis that the subsection does not apply where, as here, the Crown is in name and substance the respondent and it is a matter of public order. The charge was laid by Constable Martin "on behalf of Her Majesty the Queen" and the proceedings before the magistrate are intituled:

The reasons of the County Judge are headed:

REGINA

vs.

VERN GLEN DENNIS

His final order is headed:

REGINA

Complainant
(Respondent)

VERN GLEN DENNIS

Defendant
(Appellant)

and his report to the Court of Appeal:

HER MAJESTY THE QUEEN

Respondent

against

VERN GLEN DENNIS

Appellant

Corporal Calvert, the officer in charge of the Haney detachment, conducted the proceedings before the magistrate and counsel for the Crown appeared before the County Judge, before the Court of Appeal and before this Court. The notice of appeal to the County Court was headed:

REGINA

Complainant
(Respondent)

VERN GLEN DENNIS

Defendant
(Appellant)

The latter, by itself, might be taken as being self-serving but the others indicate that in the minds of all concerned the Queen was the real respondent. Service of the notice of appeal upon Corporal Calvert was, within the meaning of s. 722(1)(*b*)(ii), service upon the respondent.

The appeal should be allowed, the orders below set aside and the matter remitted to the County Court of New Westminster to be heard upon the merits.

The judgment of Taschereau, Locke and Fauteux JJ. was delivered by

FAUTEUX J.:—On the information of Constable Martin, of the Haney detachment of the Royal Canadian Mounted Police, in British Columbia, the appellant was tried by way of summary conviction and found guilty under s. 223 of the *Criminal Code*. An appeal lodged against this conviction, to the County Court of Westminster, was quashed for lack of jurisdiction, for the reason that the notice of appeal had not been served on the informant. In fact, the notice was served on Corporal A. Calvert, a superior officer at the detachment who had conducted the case at trial.

A further appeal to the Court of Appeal for British Columbia was likewise and for the same reason dismissed by a unanimous judgment[1].

Hence, pursuant to s. 41 of the *Supreme Court Act*, R.S.C. 1952, c. 259, the appellant sought and obtained leave to appeal to this Court on the following grounds of law:

(1) Was the Court of Appeal for British Columbia right in holding that "the respondent" mentioned in section 722(1)(*b*)(ii) of the *Criminal Code* means the informant in cases where the defendant is the Appellant.

[1] (1957), 24 W.W.R. 88, 120 C.C.C. 39, 27 C.R. 231.

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(2) Was the Court of Appeal for British Columbia right in holding that service on Corporal A. Calvert who conducted the prosecution before the convicting Court was not proper service on the Respondent within the meaning of section 722(1)(*b*)(ii) of the *Criminal Code*.

(3) Was the Court of Appeal for British Columbia right in holding that service must be made on the informant in all cases where an order for substitutional service has not been obtained pursuant to section 722(3) in order to perfect an appeal by the defendant pursuant to section 722 of the *Criminal Code*.

Reduced to proper dimensions, the real questions to be determined in this appeal are (i) whether, in the circumstances of this case, the informant Constable Martin was the respondent within the meaning of s. 722(1)(*b*)(ii) of the *Criminal Code*, upon whom notice of appeal should have been served and, if so, (ii) whether the failure to serve the notice of appeal upon him goes to the jurisdiction of the Court appealed to.

Dealing with the first question: As there is no definition of the term "respondent", it may be expedient to examine the status of the informant under Part XXIV, both in proceedings at first instance as well as on an appeal to the County Court.

Sections 701 to 719 of Part XXIV are related to proceedings at first instance. That the informant, whether a law-enforcement officer or not, is at that stage a party to the case, cannot be doubted. He is the person at whose initiative the proceedings are commenced by the laying of the information: ss. 692(*a*) and 695(1). For the conduct of the proceedings, he is also given the status of prosecutor and, as such, is entitled to conduct the case, examine and cross-examine witnesses, personally or by counsel or agent: ss. 692(*e*) and 709. While the Attorney General of the Province is also given a similar status, *i.e.*, the status of prosecutor, the latter is not, *qua* prosecutor and within the definition of the latter term, a party to the case. The failure of the informant or the Attorney General or their respective counsel or agents to appear for the trial permits the summary conviction Court to either dismiss the information or adjourn the trial to some other time: ss. 706 and 710(4). Upon adjudication of the case, the Court may, in its discretion, award and order costs to be paid to the *informant* by the defendant, in the case of a conviction or

an order against the latter, or to be paid by the *informant* to the respondent in the case of a dismissal of the information: s. 716.

Sections 719 to 733 deal with the appeal to the County Court from the conviction, order or sentence terminating the proceedings at first instance. That the informant may also be a party to this appeal is clear. Under s. 720, the right of appeal is given, namely, (i) to the defendant from the conviction or order made against him or the sentence passed upon him and (ii) to the *informant* or the Attorney General of the Province or, in certain cases, to the Attorney General of Canada, from an order dismissing the information or against the sentence passed upon the defendant.

In the case of an appeal entered by the defendant, as in the present instance, there is nothing, either expressed or implied, in these provisions, suggesting that the Attorney General of the Province, *qua* prosecutor, or the Attorney General of Canada, may be a party to the appeal as respondent; and if this is a true view of the provisions relating to such an appeal, it follows that the only possible respondent, for purposes of service of the notice of appeal, is the *informant* himself.

That this is the situation flows from the nature and the form of this appeal as well as from the provisions of s. 722.

Indeed, and under s. 727, the appeal is heard and determined as a trial *de novo* in conformity with ss. 701 to 716, in so far as they are not inconsistent with ss. 720 to 732. This so-called appeal is not really an appeal, but a trial; and in the case of an appeal by the defendant, the judge presiding over the Court appealed to must himself find him guilty before affirming the conviction. The *informant* and the defendant, the parties in first instance, are thus the parties in such proceedings and, for their purpose, are designated as respondent and appellant, respectively.

The conditions precedent to the exercise of this right of appeal are set forth in s. 722 enacting:

> 722. (1) Where an appeal is taken under section 720, the appellant shall
>
> (*a*) prepare a notice of appeal in writing setting forth
>
> (i) with reasonable certainty the conviction or order appealed from or the sentence appealed against, and
>
> (ii) the grounds of appeal;

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(b) cause the notice of appeal to be served upon

(i) the summary conviction court that made the conviction or order or imposed the sentence, and

(ii) the respondent,

within thirty days after the conviction or order was made or the sentence was imposed; and

(c) file in the office of the clerk of the appeal court

(i) the notice of appeal referred to in paragraph (a), and

(ii) an affidavit of service of the notice of appeal,

not later than seven days after the last day for service of the notice of appeal upon the respondent and the summary conviction court.

(2) In the Northwest Territories, the appeal court may fix, before or after the expiration of the periods fixed by paragraphs (b) and (c) of subsection (1), a further period not exceeding thirty days within which service and filing may be effected.

(3) Where the respondent is a person engaged in enforcement of the law under which the conviction or order was made or the sentence was imposed, the appeal court may direct that a copy of the notice of appeal referred to in subsection (1) be served upon a person other than the respondent, and where the appeal court so directs, that service shall, for the purposes of this section and section 723, be deemed to be service upon the respondent.

The provisions of the last subsection of this section are specially and exclusively applicable in the case of an appeal entered by the defendant, who then becomes the appellant. In express terms, these provisions show that the respondent in such an appeal may be a person engaged in enforcement of the law or, as they also show by necessary implication, a person other than one engaged in enforcement of the law. In either case, such respondent must of necessity be the informant himself for—with the exception of a party intervening in the first instance, if this be legally possible—who else but the informant could, under the provisions related to such an appeal, and at least in a case such as the present, be suggested as respondent? In the case under consideration, and this is all that needs to be decided, there is no doubt, in my view, that Constable Martin, the informant in this case, was the respondent and, as such, the person upon whom the notice of appeal had to be served.

The provisions of s. 722(3) are clear and call for no construction; they must be given effect to.

The fact that, in laying the information, Constable Martin alleged that he was doing so "on behalf of Her Majesty the Queen", adds nothing to the other allegation

that he was laying it as a constable of the Royal Canadian Mounted Police, *i.e.*, as a person engaged in enforcement of the law; as such, he was indeed acting on behalf of the Crown for the enforcement of criminal law; and the case, for the purpose of the service of the notice of appeal to the County Court, was clearly one to which the special provisions of subs. (3) were applicable.

Nor can the style given to the proceedings, before the Magistrate and the County Court Judge, to wit: "REGINA v. VERN GLEN DENNIS", affect the operation of the subsection, in this case.

With respect, I am unable to accept the submission that service on Corporal Calvert amounted to a substantial compliance with s. 722. The impossibility of serving the notice upon Constable Martin was precisely one of the grounds which would, had an application been made under subs. (3) of s. 722, have permitted the Court appealed to to direct copy of the notice of appeal to be served upon a person other than Constable Martin, such service, if so directed, then availing as service upon the latter. The provisions of subs. (3) would be absolutely nugatory were appellant's submission accepted. Furthermore, referring to the exceptional nature of a right of appeal, this Court in *Welch v. The King*[1], said at p. 428:

> That all the substantive and procedural provisions relating to it must be regarded as exhaustive and exclusive, need not be expressly stated in the statute. That necessarily flows from the exceptional nature of the right.

Dealing with the second question: I am also in respectful agreement with the unanimous conclusion of the Court of Appeal that the County Court Judge was right in deciding he had no jurisdiction in the matter, in view of the failure of appellant to comply with the requirements of s. 722, and I did not understand counsel for appellant to challenge the suggestion that non-compliance with the provisions of s. 722 fatally affected the jurisdiction of the County Court.

In *Wills & Sons v. McSherry et al.*[2], where circumstances as to facts and law were different, it was held that notwithstanding the want of service, the Court, in that particular case, had jurisdiction to hear the appeal. An examination

[1] [1950] S.C.R. 412, 97 C.C.C. 117, 10 C.R. 97, [1950] 3 D.L.R. 641.
[2] [1913] 1 K.B. 20.

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of this qualified decision shows that it rested on an application of the maxim *lex non cogit ad impossibilia aut inutilia.* The general principles were stated as follows by Channell J. at pp. 25-6:

> The statute gives this Court jurisdiction to hear appeals from justices by way of case stated subject to certain conditions. The law applicable to the point is clearly stated in Maxwell on the Interpretation of Statutes (5th ed.) at p. 621: "Enactments which impose duties on conditions are, when there are not conditions precedent to the exercise of a jurisdiction, subject to the maxim that lex non cogit ad impossibilia aut inutilia. They are understood as dispensing with the performance of what is prescribed, when performance is idle or impossible . . In such cases, the provision or condition is dispensed with, when compliance is impossible in the nature of things. It would seem to be sometimes equally so where compliance was, though not impossible in this sense, yet impracticable, without any default on the part of the person on whom the duty was thrown." The author then refers to *Morgan v. Edwards,* 5 H. & N. 415, *Woodhouse v. Woods,* 29 L.J.(M.C.) 149, and *Syred v. Carruthers,* E.B. & E. 469, and says: "If the respondent in an appeal kept out of the way to avoid service of the notice of appeal, or at all events could not be found after due diligence in searching for him, the service required by the statute would probably be dispensed with . . . Where, however, the act or thing required by the statute is a condition precedent *to the jurisdiction* of the tribunal, compliance cannot be dispensed with; and if it be impossible, the jurisdiction fails." That last passage shews that there is a difficulty in holding that the Court has power to dispense with the performance of the conditions precedent laid down in this statute. If the point is put in that way I think the Court clearly cannot do so. But that is not quite the question which we have to decide. *The question is whether the statute has been sufficiently complied with if the party has done everything in his power to effect service and it is clearly impossible for him to do so.*

(The last phrase has been italized by myself.)

The provisions of the *Summary Jurisdiction Act,* 1857, which were considered in the case just quoted, are, as well as the facts to which they were applied, different from those here under consideration. Under s. 723(1) of our Code, it is only "where an appellant has complied with section 722" that arises the duty of the Court appealed to to set down the appeal for hearing. Under s. 727(1), it is also only "where an appeal has been lodged in accordance with this Part" that there arises the duty of the Court appealed to, to hear and determine the appeal. These enactments impose duties on conditions which are precedent to the exercise of the jurisdiction and compliance cannot be dispensed with. It is, however, quite unnecessary to decide the case upon that basis, for even if the conditions prescribed in these enactments were not conditions precedent to the exercise of jurisdiction, the maxim *lex non cogit ad*

impossibilia aut inutilia could have no application in the circumstances of this case. Indeed, the record does not show, nor was it ever suggested at the hearing, that it was impossible for appellant to resort to the relief specially provided by Parliament under subs. (3) of s. 722. I find it impossible to ignore the latter provisions.

I would therefore dismiss the appeal.

Appeal dismissed, KERWIN C.J. *and* MARTLAND J. *dissenting.*

Solicitor for the appellant: E. P. Hartt, Toronto.

Solicitor for the respondent: A. Miles Nottingham, New Westminster.

FRANKLIN IRVINE MASON (*Defendant*) ..... APPELLANT;

AND

SIDNEY FREEDMAN (*Plaintiff*) ..... RESPONDENT.

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*Apr. 30
*May 1
Jun. 26

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Sale of land—Unconditional promise by vendor—Refusal of vendor's wife to bar dower—Rights of purchaser—Specific performance with compensation—Effect of clause in contract permitting rescission by vendor in case of objections to title.

One who has contracted to convey the legal title to land in fee simple cannot excuse himself from performance on the ground that he is unable to secure the necessary bar of dower from his wife. The purchaser cannot be forced to take such a title but he has the option of requiring the vendor to convey all the interest that he has without the bar of dower but with an appropriate provision for the payment into court of a sum of money out of the purchase-price as security against the claim for dower.

The usual clause in an agreement for sale entitling the vendor to treat the contract as null and void if the purchaser makes any valid objection to title "which the Vendor shall be unable or unwilling to remove and which the Purchaser will not waive" does not avail a vendor in such circumstances. It does not enable a person to repudiate a contract for a cause which he himself has brought about, nor does it enable a vendor to repudiate the contract "at his sweet will". *Hurley v. Roy* (1921), 50 O.L.R. 281 at 285, approved. His duty is at the very least to make a genuine effort to obtain what is necessary to carry out his contract, and if it is not established that he has made such an effort the purchaser will be entitled to specific performance.

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*PRESENT: Kerwin C.J. and Rand, Cartwright, Martland and Judson JJ.

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The judgment in such circumstances should provide for a reference to ascertain the amount to be paid into court as security against the widow's claim for dower, which should not exceed one-third of the purchase-price; the interest on these moneys should be paid to the vendor during his wife's lifetime; if the wife predeceases him, the fund in court is to be paid out to the vendor; if the vendor dies before his wife, and the wife then claims her dower in possession, the purchaser will be entitled to the interest on the fund until the wife's death, and on her death the fund will go to the vendor's estate. *Re Woods and Arthur* (1921), 49 O.L.R. 279, approved.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of McRuer C.J.H.C.[2] Appeal dismissed.

F. A. Brewin, Q.C., and *L. M. Freeman*, for the defendant, appellant.

John J. Robinette, Q.C., and *S. G. M. Grange*, for the plaintiff, respondent.

The judgment of Kerwin C.J. and Rand, Martland and Judson JJ. was delivered by

JUDSON J.:—The appellant was the owner in fee simple, free of encumbrance, of a farm in the township of Scarborough. He accepted an offer to purchase from the respondent's assignor for the sum of $136,000, of which $20,000 was to be paid in cash and the balance secured by a mortgage. At the time of closing, he asserted that he was unable to secure a bar of dower from his wife, tendered a deed without such a bar and claimed payment in accordance with the terms of the contract. The purchaser refused to close on these terms and also rejected a tender of the return of his deposit. His action for specific performance of the contract was dismissed at the trial but on appeal he was granted specific performance with compensation by providing for payment into court of a sum to be fixed by the Master to serve as security to the purchaser in case the wife's inchoate right to dower should ever become consummate. The vendor now appeals and seeks the restoration of the judgment as given at the trial and the dismissal of the action.

The contract contains the usual clause providing for requisitions on title and for the right of the vendor to declare the contract null and void if requisitions which he is

[1] [1957] O.R. 441, 9 D.L.R. (2d) 262.
[2] [1956] O.R. 849, 4 D.L.R. (2d) 576.

"unable or unwilling" to remove are made within a stated time. The appeal turns upon the effect that is to be given to this clause, for in its absence there can be no doubt of the purchaser's right to specific performance with compensation. A vendor who has contracted to convey the legal title in fee simple cannot excuse himself from performance on the ground of inability to secure a necessary bar of dower from his wife. The purchaser cannot be forced to take such a title (*Bowes v. Vaux*[1]), but he has the option of requiring the vendor to convey all the interest that he has, without the bar of dower, but with appropriate provision for the payment into court of a sum of money, out of the purchase-price, as security against the claim for dower. The doctrine of specific performance with compensation against a vendor who had contracted to sell an estate as his own and who had in fact only a partial interest was well settled in England by Lord Eldon's time and is clearly stated in *Mortlock v. Buller*[2]. It was followed in Ontario in *Kendrew v. Shewan*[3], and *VanNorman v. Beaupre*[4], both of them dower cases, where specific performance was granted with an abatement in the purchase-price for lack of a bar of dower. In *Skinner v. Ainsworth*[5], the order in *Wilson v. Williams*[6] was followed and instead of allowing an abatement, the remedy of payment into court as security was adopted. This principle was followed in *Re Woods and Arthur*[7], and by the Court of Appeal in the present case[8]. I will set out the precise form the order should take later.

To what extent is the right of the purchaser affected by the proviso just mentioned? In full it reads:

PROVIDED the title is good and free from all encumbrances except as aforesaid and except as to any registered restrictions or covenants that run with the land providing that such are complied with. The Purchaser is not to call for the production of any title deed, abstract or other evidence of title except such as are in the possession of the Vendor. The Purchaser is to be allowed 15 days from the date of acceptance hereof to examine the title at his own expense. If within that time any valid objection to

[1] (1918), 43 O.L.R. 521.
[2] (1804), 10 Ves. 292 at 315-6, 32 E.R. 857.
[3] (1854), 4 Gr. 578.
[4] (1856), 5 Gr. 599.
[5] (1876), 24 Gr. 148.
[6] (1857), 3 Jur. N.S. 810.
[7] (1921), 49 O.L.R. 279, 58 D.L.R. 620.
[8] [1957] O.R. 441, 9 D.L.R. (2d) 262.

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title is made in writing to the Vendor which the Vendor shall be unable or unwilling to remove and which the Purchaser will not waive this agreement shall, notwithstanding any intermediate acts or negotiations in respect of such objections, be null and void and the deposit shall be returned by the Vendor without interest and he and the Agent shall not be liable for any costs or damages. Save as to any valid objection so made within such time the Purchaser shall be conclusively deemed to have accepted the title of the Vendor to the real property.

This proviso does not apply to enable a person to repudiate a contract for a cause which he himself has brought about; *New Zealand Shipping Company, Limited v. Société des Ateliers et Chantiers de France*[1]. Nor does it justify a capricious or arbitrary repudiation. I am content to adopt the words of Middleton J. in *Hurley v. Roy*[2], that the provision "was not intended to make the contract one which the vendor can repudiate at his sweet will". By signing this contract the vendor undertook to deliver a deed containing a bar of dower. He tried to excuse himself by pleading inability to obtain such a bar. His duty was, at the very least, to make a genuine effort to obtain what was necessary to carry out his contract and there can be no doubt in this case that he made no such effort. Immediately after the acceptance of the offer by the husband—and the wife was present when he signed—they both regretted the bargain. They consulted a solicitor the same night and a little later the wife sought independent advice. The evidence of what they said and did is reviewed in detail in the reasons for judgment of the learned Chief Justice of the High Court[3] and of the Court of Appeal[4], and repetition here is unnecessary. The learned Chief Justice concluded that the husband was willing to carry out the contract as far as he could without the concurrence of his wife and that the wife, acting upon independent legal advice, had refused to bar dower as a result of her own conclusion and determination arrived at independently of her husband. The opinion of the Court of Appeal was that husband and wife were acting in concert to secure better terms or to avoid the contract if they could not get them. It seems to me to make no difference which view of their conduct one takes. The plain uncontradicted fact is that the husband

[1] [1919] A.C. 1 at 12.
[2] (1921), 50 O.L.R. 281 at 285, 64 D.L.R. 375.
[3] [1956] O.R. 849, 4 D.L.R. (2d) 576.
[4] [1957] O.R. 441, 9 D.L.R. (2d) 262.

made no genuine attempt to obtain a bar of dower. He cannot take advantage of his own default and use the clause to escape his obligation. His duty was, as stated by Esten V.C. in *Kendrew v. Shewan, supra,* at p. 580, "to ascertain, *bona fide,* whether his wife was willing to bar her dower, and to induce her by any reasonable sacrifice on his own part to do so".

I do not intend to review in detail the many cases in which the application of the clause has been discussed. The problem has arisen in a variety of situations. A vendor contracts to convey in fee simple and when he has no title to the mineral rights (*In re Jackson and Haden's Contract*[1]); or when he needs the concurrence of his trustee and has contracted without reasonable assurance that it will be forthcoming (*In re Des Reaux and Setchfield's Contract*[2]); or when he is owner in joint tenancy with his wife (*Hurley v. Roy, supra*; *Dubensky et al. v. Labadie*[3]); or when there is a representation of ability to give a non-existent right of way, as appurtenant to the lands contracted to be sold (*Lavine v. Independent Builders Ltd.*[4]); or when the vendor is unable to obtain a bar of dower (*Shuter v. Patten*[5]); or where there is a deficiency in the land contracted to be sold (*Bowes v. Vaux, supra*). In all these cases the purchaser was able to obtain specific performance with compensation.

When a vendor seeks to avoid a contract under this clause, which is obviously introduced for his relief, his conduct and his reasons for seeking to escape his obligations are matters of interest to the Court. There is a general principle to be deduced from the cases and it is the one I have already stated incidentally. A vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner. This measure of his duty is the minimum standard that may be expected of him, and there are cases where a cause which might otherwise be valid as justifying rescission will not be available to him if he has acted recklessly in entering into a contract to convey more than he is able.

[1] [1906] 1 Ch. 412.
[2] [1926] Ch. 178.
[3] [1944] O.R. 500, [1944] 4 D.L.R. 253, varied [1945] O.R. 430, [1945] 3 D.L.R. 262.
[4] [1932] O.R. 669, [1932] 4 D.L.R. 569.
[5] (1921), 51 O.L.R. 428, 67 D.L.R. 577.

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I would not characterize the conduct of the vendor in this case in entering into this contract as reckless, but his attempted rescission was arbitrary and capricious and there was complete and deliberate failure on his part to do what an ordinarily prudent man having regard to his contractual obligations would have done. I doubt whether it is possible to formulate in the abstract and apart from the actual conditions of a case the precise limits within which the clause may enable a vendor to rescind. In *Louch v. Pape Avenue Land Company Limited*[1], where the vendor's right to rescind was upheld, the judge in Weekly Court stated that there was no suggestion of bad faith on the part of the vendor. In *Ashburner v. Sewell*[2], which was followed in the *Louch* case, the existence of a latent right of way unknown to the vendor justified a rescission. The facts of the present case remove it entirely from the scope of these decisions.

I would dismiss the appeal with costs. The reference to the Master should provide that in ascertaining the amount to be paid into court, he should not exceed one-third of the purchase-price. The interest on these moneys will be paid to the vendor as long as his wife is alive. If the wife predeceases him, the fund in court is to be paid out to the vendor. If the vendor dies before his wife and the wife then claims her dower in possession, the purchaser will be entitled to the interest on the fund until the death of the wife and then the fund will go to the estate of the vendor.

CARTWRIGHT J.:—For the reasons given by my brother Judson I agree with his conclusion that a decree of specific performance should be granted on the terms which he proposes, unless the appellant is entitled to treat the agreement as null and void under the proviso which is quoted in full in the reasons of my brother.

I agree also that this proviso does not entitle the appellant to repudiate the contract capriciously and that it is a condition of its application that the objection to title which the purchaser will not waive must be one which the vendor is genuinely unable or unwilling to remove. In the case at bar what was relied upon by the appellant was a genuine inability to obtain a bar of dower from his wife;

[1] [1928] S.C.R. 518, [1928] 3 D.L.R. 620.
[2] [1891] 3 Ch. 405.

and it is unnecessary to consider in what circumstances the proviso would apply to an objection which a vendor was able but, for sufficient reasons, was unwilling to remove.

In my opinion the fact that a wife's inchoate right of dower in lands is outstanding is a matter of title and not a mere matter of conveyance; it was so held by Roach J.A., speaking for the Court of Appeal, in *Ungerman et al. v. Maroni*[1], and the same view is expressed, in the case at bar, by McRuer C.J.H.C.[2] and by MacKay J.A. who delivered the unanimous judgment of the Court of Appeal[3], although the latter was of opinion that, as a matter of construction, the proviso contemplated only such objections to title as would appear in the course of the usual searches made by a purchaser's solicitor.

The question to be decided is whether the appellant was, as he alleged, genuinely unable to obtain a bar of dower from his wife. If he was, in my opinion, the appeal should be allowed.

The learned Chief Justice of the High Court who had the advantage of seeing and hearing the witnesses has expressly absolved the appellant of the charge of bad faith and, after a careful consideration of the evidence, it is my view that that finding should not be disturbed. It is, however, clear from the appellant's own evidence that from the time when he and his wife first learned from the solicitor, whom they consulted at the wife's suggestion, that she was not compellable to bar her dower, the appellant made no effort to persuade her to do so. The learned Chief Justice has found that the appellant's wife was acting on independent advice in refusing to bar her dower and that "she was the sort of woman who would make up her own mind"; but neither expressly, nor, I think, by necessary implication has he found that a reasonable attempt at persuasion made by the appellant would have been unsuccessful. On all the evidence, I find myself unable to say that the Court of Appeal were wrong in reaching the conclusion that it had not been shown that the appellant was genuinely unable to obtain the bar of dower.

[1] [1956] O.W.N. 650 at 652.
[2] [1956] O.R. 849, 4 D.L.R. (2d) 576.
[3] [1957] O.R. 441, 9 D.L.R. (2d) 262.

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Cartwright J.

For these reasons I concur in the disposition of the appeal proposed by my brother Judson.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Freeman, Miller & Draper, Toronto.

Solicitors for the plaintiff, respondent: Freedman, Cohl, Murray & Osak, Toronto.

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*May 19
Jun. 26

MINERALS LIMITED .....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Dominion income tax—Sale of petroleum and natural gas leases—Whether proceeds taxable income or capital gain—The Income Tax Act, 1948 (Can.), c. 52, ss. 3, 4, 127(1)(e).

R, a promoter, organized a company, F.M. Co., to manage mineral rights on behalf of farmers in Saskatchewan. The scheme of operation was that a farmer who had given a petroleum and natural gas lease to a third person could transfer his mineral rights and assign his lessor's interest under the lease to the company, in return for stock and other benefits. R decided that no farmer who had not given such a lease should become a member of F.M. Co., but adopted a practice of personally leasing those rights under a form containing a one-year drilling commitment by the lessee which might be postponed from year to year by payment of 10¢ per acre "delay rental". The company appointed R its agent and promoter for 5 years. In 1950 R caused the appellant company to be incorporated and it became his "alter ego". R sold to the appellant his business as promoter of F.M. Co. and assigned to the appellant all the leases taken by him in his own name. The appellant continued the practice of taking leases in similar circumstances. R's evidence was that when these leases were taken "they did not know what they would do with them". In the spring of 1951 another company approached R with a view to acquiring the appellant's interest in some of the leases held by it. R refused this proposal but offered to sell the appellant's interest in all the leases held by it at a flat price of $2 an acre. This offer was accepted and, with a few minor exceptions, all the appellant's leases were assigned to the other company, at a substantial profit over the original cost.

Held: This profit was taxable income rather than a capital gain from realizing an investment. The test to be applied was that laid down in *Californian Copper Syndicate (Limited and Reduced) v. Harris* (1904), 5 Tax Cas. 159 at 165-6.

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*PRESENT: Kerwin C.J. and Locke, Fauteux, Martland and Judson JJ.

The fact that the appellant's objects, as set forth in its memorandum of association, included the acquiring and selling of mineral claims and trading and dealing in leases was not of itself conclusive. *Sutton Lumber and Trading Company Limited v. The Minister of National Revenue*, [1953] 2 S.C.R. 77 at 83; *Salisbury House Estate, Ltd. v. Fry* (1930), 15 Tax Cas. 287 at 316, quoted and applied. On the facts, however, it must be held that the acquisition and sale by the appellant of the leases in question was part of the carrying on or carrying out of its business. *Glasgow Heritable Trust Company, Ltd. v. Commissioners of Inland Revenue* (1954), 35 Tax Cas. 196, distinguished.

The fact that the transaction was an isolated one and that the leases were sold as a group rather than individually did not in itself prevent the profit from being taxable. *Edwards v. Bairstow et al.*, [1956] A.C. 14; *McIntosh v. The Minister of National Revenue*, [1958] S.C.R. 119, applied. Having acquired the leases as a part of its business, the appellant never intended to retain them, either for purposes of development or as an investment, but did intend to sell them if and when a suitable price could be obtained. Consequently, the profit realized on their sale was not in the nature of a capital gain but was a profit made in the operation of the appellant's business.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], dismissing an appeal from a decision of the Income Tax Appeal Board[2], which affirmed an assessment for income tax. Appeal dismissed.

R. A. MacKimmie, Q.C., for the appellant.

J. L. McDougall, Q.C., and A. L. DeWolf, for the respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of Thurlow J. in the Exchequer Court[1], dismissing the appellant's appeal from the Income Tax Appeal Board[2], which had dismissed an appeal from the income tax assessment of the appellant for the year 1951. The only question in issue was as to the inclusion by the respondent, as part of the appellant's income for that year, of an amount of $140,084.89 realized by it on the sale of certain petroleum and natural gas leases.

The facts are not in dispute. William Harrison Riddle, an American citizen and a promoter with considerable experience in the oil industry, in 1949 organized a scheme whereby farmers in Saskatchewan, owning mines and minerals in their lands subject to lease to other parties, could pool their interests in their mineral rights and under

[1] [1957] Ex. C.R. 43, [1957] C.T.C. 64, 57 D.T.C. 1063.

[2] 13 Tax A.B.C. 365, 55 D.T.C. 492.

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such leases. For this purpose he caused to be incorporated, under *The Companies Act* of Saskatchewan, on December 1, 1949, Farmers Mutual Petroleums Ltd. (hereinafter referred to as "Farmers Mutual"), with an authorized capital of 1,000,000 shares without nominal or par value.

The scheme of operation of Farmers Mutual was that a farmer wishing to become a member would transfer his mineral rights and assign his lessor's interest under his petroleum and natural gas leases to Farmers Mutual. That company would issue, in return, one share of its capital stock for each acre of mineral rights transferred to it and would agree to hold in trust for such member an undivided one-fifth interest in those mineral rights transferred to it by him.

By an agreement dated December 13, 1949, Farmers Mutual appointed Riddle as its promoter and organizer for a period of 5 years. He had the sole and exclusive right to solicit memberships in that company and to sell and promote the sale of its shares. He agreed to pay all expenses incurred in connection with the incorporation of the company and the sale of its shares and also agreed to pay for such clerical, bookkeeping and office facilities as it might require for its ordinary business. Farmers Mutual agreed to compensate Riddle by giving him an undivided one-fifth interest in all mineral rights acquired by Farmers Mutual and in all rents, profits and advantages accrued or to accrue therefrom, including rental payments under existing gas and oil leases held by Farmers Mutual.

Riddle employed a number of agents to solicit memberships in Farmers Mutual. He had initially assumed that all the farmers solicited would already have made leases of their petroleum and natural gas rights. He discovered that this was not always the case. While there was no legal impediment to preclude a farmer who had not leased his petroleum and natural gas rights from becoming a member of Farmers Mutual, Riddle adopted a policy of not admitting to its membership anyone who had not made such a lease. However, in the case of persons who had not so leased their petroleum and natural gas rights, he notified his agents that he, personally, was agreeable to leasing those rights. A form of petroleum and natural gas lease was used by his agents for this purpose, which provided for a 10-year

lease with a cash payment of 10¢ per acre of land leased, with a 1-year drilling commitment by the lessee, which commitment might be postponed from year to year by a payment of 10¢ per acre in each year. Such leases, when obtained, were assigned to Farmers Mutual in the same way as were members' leases to other lessees.

On May 30, 1950, Riddle caused to be incorporated, under *The Companies Act* of Saskatchewan, Minerals Ltd., the present appellant, with an authorized capital of $20,000, divided into 20,000 shares of a par value of $1 each. At the outset, all the issued shares in the appellant company were owned by Riddle and his wife. The appellant became his "alter ego". Accordingly, by agreement dated June 1, 1950, and made between Riddle and the appellant, Riddle sold to the appellant his business as promoter and organizer of Farmers Mutual, including his rights under the agreement of December 13, 1949, made between himself and Farmers Mutual. The consideration paid to Riddle was $10,000.

Another agreement was also made on June 1, 1950, by Riddle, the appellant and Farmers Mutual, whereby Riddle assigned to the appellant all his rights under the agreement of December 13, 1949. The appellant agreed to carry out all Riddle's obligations under that agreement and Farmers Mutual accepted the assignment.

Following the making of these agreements, the operation of Farmers Mutual was carried on by the appellant. Agents of the appellant solicited memberships in Farmers Mutual and continued the practice of taking leases of petroleum and natural gas rights from farmers in its own name in cases where they had not already made leases of their petroleum and natural gas rights. The appellant used a printed form of lease bearing its own name as lessee, similar in terms to the leases which Riddle had taken in his own name. The leases previously taken by him were assigned, in respect of his lessee's interest, to the appellant. Commissions were paid by the appellant to its agents in connection with the obtaining of these leases in the same way as they were paid for the obtaining of memberships in Farmers Mutual.

Farmers Mutual, through the efforts of Riddle and of the appellant, acquired mineral rights in approximately 750,000 acres of land in Saskatchewan. Petroleum and natural gas

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leases made to Riddle as lessee (and assigned by him to the appellant) and to the appellant as lessee totalled some 81,000 acres.

Funds were advanced from time to time to the appellant equally by Central Leduc Oils Limited and Del Rio Producers Ltd., two oil companies which were under the direction of Neil McQueen and Arthur Mewburn. In consideration of these advances, and in partial payment of them, one-half of the capital stock of the appellant was issued to these two companies in November 1950.

In his evidence Riddle, when asked as to the intention of the appellant regarding the petroleum and natural gas leases taken by it from farmers, stated that they did not know what they would do with them. He said that he tried to get McQueen and Mewburn to take them and that they did not want them.

He, himself, was approached at one time by a representative of British American Oil Company Limited, who suggested that Riddle should work as a broker for that company in obtaining leases for it and that that company would, as part of the arrangement, take over the leases held by the appellant. This offer was not accepted.

In the spring of 1951 Amigo Petroleums Ltd. approached Riddle, with a view to acquiring the interest of the appellant in some of the leases held by it. Riddle refused this proposal, but offered to sell the appellant's interest in all the leases which it held at a flat price of $2 per acre. This offer was accepted and a letter agreement was made between the appellant and Amigo Petroleums Ltd., dated May 5, 1951, respecting this sale, subject to the right of the Amigo company to refuse any lands in respect of which it was not satisfied as to title. All of the appellant's leases were assigned, pursuant to this agreement, to Amigo Petroleums Ltd., save only those relating to a small portion of the lands in respect of which there was some question as to title. The profit realized by the appellant upon this sale was $140,084.89.

The sole question in issue is as to whether this sum represents taxable income of the appellant or is a capital gain.

The relevant sections of the *Income Tax Act*, 1948 (Can.), c. 52, applicable in respect of this question are as follows:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

127. (1) In this Act, . . .

(*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment.

For the appellant it was contended that the sale of the petroleum and natural gas leases was an isolated transaction, whereby the appellant disposed of all its leases at a uniform price, and constituted the sale of a capital asset. The respondent took the position that the sale of the leases was a gain from a trade or business carried on by the appellant.

The test to be applied in resolving this issue is the frequently-cited statement of the Lord Justice Clerk in *Californian Copper Syndicate (Limited and Reduced) v. Harris*[1]:

It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.

What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts;

[1] (1904), 5 Tax Cas. 159 at 165-6.

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the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

The respondent has made reference to the objects of the appellant as set forth in its memorandum of association, which include the acquiring and selling of mineral claims and trading and dealing in leases. The existence of these objects and powers, however, does not determine the question in issue here. Locke J., delivering the judgment of this Court in *Sutton Lumber and Trading Company Limited v. The Minister of National Revenue*[1], states:

> The question to be decided is not as to what business or trade the company might have carried on under its memorandum, but rather what was in truth the business it did engage in. To determine this, it is necessary to examine the facts with care.

Similarly, Lord Warrington of Clyffe, in *Salisbury House Estate, Ltd. v. Fry*[2], says:

> But the Crown contends that the fact that the taxpayer is a limited company may distinguish its operations from those of an individual. Assuming the Memorandum of Association allows it, and in this case it unquestionably does, a Company is just as capable as an individual of being a landowner, and as such deriving rents and profits from its land, without thereby becoming a trader, and in my opinion it is the nature of its operations, and not its own capacity, which must determine whether it is carrying on a trade or not. Nor do I see any reason why, as in the present case, some of its operations under the wide powers conferred by the Memorandum should not be operations of trade, whereas others are not.

It is, therefore, necessary to determine from other evidence whether in fact the acquisition and sale by the appellant of the leases in question were merely the realization of an ordinary investment or were a part of the carrying on or carrying out of the appellant's business.

The principal business of the appellant was the sale and the promotion of the sale of shares in Farmers Mutual and the organization of that company. As previously pointed out, Riddle, and, in turn, the appellant, decided, as a matter of policy, that they would take petroleum and natural gas leases from farmers who had not previously leased those rights, so as to make it possible for them to become members of Farmers Mutual. This was not a matter of legal

[1] [1953] 2 S.C.R. 77 at 83, [1953] C.T.C. 237, [1953] D.T.C. 1158, [1953] 4 D.L.R. 801.

[2] (1930), 15 Tax Cas. 287 at 316.

necessity to enable such farmers to become members of Farmers Mutual. It was not incumbent on the appellant to take such leases. It did so as a matter of business judgment and as a part of its business in relation to the sale of shares of Farmers Mutual.

Having acquired those leases, what disposition was to be made of them by the appellant? The leases involved drilling commitments or, alternatively, payments for postponement of those drilling obligations. It has already been mentioned that in his evidence Riddle said, respecting his intention in connection with these leases, that they did not know what they would do with them, that he had tried to get McQueen and Mewburn to take them, but that they did not want them. He said that they talked about the leases several times and that they knew they would have to pay (*i.e.*, the delay rentals) if they kept them long enough. In the end a sale of the leases was made less than a year after their acquisition.

The appellant argued that the leases had been acquired unwillingly and not as a part of the appellant's business. It was contended that the situation was analogous to that in *Glasgow Heritable Trust, Ltd. v. Commissioners of Inland Revenue*[1].

In that case the appellant company was formed to acquire tenement properties previously owned by a partnership of builders. The shares of the company were mainly held by the former partners, or members of their families. Sales of flats took place from time to time either to sitting tenants or when flats were vacated by tenants. The evidence established that the operation of the appellant company was in the nature of a salvage proposition. It was pointed out in the judgment of the Lord President at p. 215 that:

> The purpose which informed the Company was to salve something from the wreck of a type of trading enterprise which when the Company was formed was not "dormant" but dead, by selling the separate flats in the only possible fashion for the benefit of the firm's creditors and of the beneficiaries on the estates of the deceased partners.

The circumstances of that case are not at all similar to those in the present one. In this case the leases were deliberately acquired by the appellant as a part of its business in operating Farmers Mutual. There is no evidence

[1] (1954), 35 Tax Cas. 196.

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whatever of any intention either to work them or to retain them as an investment. The appellant was aware of the payments which would be required if they were retained and the leased lands were not drilled. It elected to sell them.

The fact that the leases were sold as a group rather than individually or in separate portions does not affect the result. The appellant contended that this was an isolated transaction, but that does not, in itself, prevent the profit from being taxable, as is pointed out in *Edwards v. Bairstow et al.*[1], and in *McIntosh v. The Minister of National Revenue*[2].

In my view, having acquired the leases as a part of its business, the appellant never intended to retain them, either for purposes of development or as an investment, but did intend to sell them if and when a suitable price could be obtained. Consequently the profit realized on their sale is not in the nature of a capital gain, but is a profit made in the operation of the appellant's business.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Allen, MacKimmie, Matthews & Wood, Calgary.

Solicitor for the respondent: A. A. McGrory, Ottawa.

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[1] [1956] A.C. 14, [1955] 3 All E.R. 48.

[2] [1958] S.C.R. 119, [1958] C.T.C. 18, [1958] D.T.C. 1021, 12 D.L.R. (2d) 219.

THE TORONTO GENERAL TRUSTS CORPORATION, EXECUTOR AND TRUSTEE OF THE ESTATE OF HENRY HILDER, DECEASED ..... APPELLANT;

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*Apr. 28
Jun. 26

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Succession duties—Property comprised in "succession"—Legacy prevented from lapsing by The Wills Act, R.S.O. 1950, c. 426, s. 36(1)—The Dominion Succession Duty Act, R.S.C. 1952, c. 89, ss. 2(j), (m), (n), 3(1)(i), 6(13).

B died testate on February 2, 1949; his sister S died in 1950 having made a will in 1948 under which B was a beneficiary. By a judgment of the Supreme Court of Ontario, it was declared that the gift to B had not lapsed, and the benefits bequeathed to him were paid to his executor pursuant to s. 36(1) of *The Wills Act*. Succession duties were paid on both estates, including as part of B's estate the post-mortem accretion received from S's estate. The respondent, however, claimed a second duty on this accretion on the basis that there was a second succession from B or his executors to the beneficiaries of his estate.

Held (Martland J. dissenting): Only one succession duty was payable in respect of this post-mortem accretion and the "succession" was from S to the beneficiaries of B's estate. Even though s. 36(1) of *The Wills Act* did not operate to make a direct gift to B's beneficiary from S (*Johnson v. Johnson* (1843), 3 Hare 156, applied), the fiction of survival was not for all purposes but merely for the purpose of preventing a lapse and carrying the property into the estate of the deceased beneficiary. Re Perry, [1951] O.R. 153 at 161, approved. The only effect of the section in this case therefore was to carry the property into B's estate and to make it distributable according to his will. There was and could be no extension of his life by operation of law so as to make him a living person beneficially entitled to the property derived from S. The property so derived was accordingly not a "succession" as defined by s. 2(m) of the *Dominion Succession Duty Act*, and in particular, it was not "property of which the person dying was at the time of his death competent to dispose" within the terms of s. 3(1)(*i*). The "successors" in this case, *i.e.*, the persons who became beneficially entitled to the property on the death of S, were the beneficiaries under the will of B, and not B's executor, and there was only one succession. *In re Scott*, Deceased, [1901] 1 K.B. 228, disapproved and distinguished.

Per Martland J., *dissenting*: The property derived by B's executor from S's estate was, by virtue of s. 36(1) of *The Wills Act*, "property of which the person dying was at the time of his death competent to dispose". *In re Scott, Deceased, supra*, agreed with. The effect of s. 36(1) was to make the property in question part of B's estate and subject to be distributed according to his will. *The Lord Advocate v. Bogey et al.*, [1894] A.C. 83, distinguished.

*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Judson JJ.

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APPEAL from a judgment of Hyndman D.J. in the Exchequer Court of Canada[1], affirming an assessment for succession duties. Appeal allowed, Martland J. dissenting.

W. E. P. De Roche, Q.C., and *K. Wang*, for the appellant.

D. H. W. Henry, Q.C., and *A. L. DeWolf*, for the respondent.

The judgment of Kerwin C.J. and Locke, Cartwright and Judson JJ. was delivered by

JUDSON J.:—Henry Herbert Hilder died on February 2, 1949. He left his estate to his widow for life with remainder to his three children. His sister Henrietta, who died on September 4, 1950, had made a will on September 1, 1948, by which she left a legacy and one-half of the residue to her brother. She made no change in this will even though her brother had predeceased her. On a motion for advice and direction Barlow J. declared that the executor of Henry Hilder was entitled to receive the benefits bequeathed to the deceased brother under the will of Henrietta and that s. 36 of *The Wills Act*, R.S.O. 1950, c. 426, applied. No appeal was taken from this judgment. The executor of Henry received $62,992.68 from the executor of Henrietta and succession duties were duly assessed and paid on the successions derived from Henrietta, including the succession of $62,992.68 just referred to. No appeal was taken from this assessment. The Succession Duty Department then treated the $62,992.68 as a post-mortem accretion to the estate of Henry and claimed additional duties on the successions derived from Henry on the basis that such successions had been augmented by the amount derived from the estate of Henrietta. This claim was sustained on appeal to the Minister and to the Exchequer Court[1]. The executor of Henry now appeals to this Court against this double levy of duty and the questions for consideration in this appeal are, first, the nature of the devolution of property when s. 36 of *The Wills Act* comes into operation, and second, whether by the terms of the *Dominion Succession Duty Act*, R.S.C. 1952, c. 89, a double duty is possible even if the property disposed of by Henrietta in favour of her deceased brother does first go into the brother's estate.

[1] [1956] Ex. C.R. 373, [1956] C.T.C. 161, 56 D.T.C. 1096.

Section 36 was enacted to avoid lapse in certain cases. It provides:

> 36. (1) Where any person, being a child or other issue or the brother or sister of the testator to whom any real estate or personal estate is devised or bequeathed, for any estate or interest not determinable at or before the death of such person, dies in the life-time of the testator either before or after the making of the will, leaving issue, and any of the issue of such person are living at the time of the death of the testator, such devise or bequest shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will.

It is slightly wider in scope than the English section (*The Wills Act*, 1837, c. 26, s. 33) which is limited to a child or other issue. The English section has been the subject of much litigation which has raised many doubts and difficulties as to the precise limits of its application. But one clear principle does emerge and it is that the issue do not take by way of substitution. The section does not operate to make a direct gift to them from the testator. This was decided as early as 1843 in *Johnson v. Johnson*[1]. The object of the section being to prevent a lapse in a certain situation, one might have expected that it would have been drawn so as to carry the gift that would otherwise have lapsed, directly to the issue of the deceased beneficiary. But it is not so worded and its result is to put the property into the estate of the deceased beneficiary to be dealt with as part of his estate, either according to his will or as upon an intestacy. Thus it may not benefit his issue at all because of the claims of creditors: *In re Pearson; Smith v. Pearson*[2].

The difficult question is to determine how far the fiction of survival is to be carried. Is it for all purposes or merely for the purpose of avoiding a lapse and carrying the property into the deceased beneficiary's estate? One extreme application of the fiction is to be found in *Eager v. Furnivall*[3], where the husband of a deceased daughter of the testator was held to be entitled to an estate by the curtesy in property that came into the daughter's estate by way of post-mortem accretion. *In re Scott, Deceased*[4], where a double estate duty was held to be payable, is another extreme example. On the other hand, there are cases which illustrate what has sometimes been referred to

[1] (1843), 3 Hare 156, 67 E.R. 336.
[2] [1920] 1 Ch. 247.
[3] (1881), 17 Ch. D. 115.
[4] [1901] 1 K.B. 228.

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as the narrow view of the application of the section. *Pearce v. Graham*[1] was the case of a daughter who by her marriage contract was bound to settle property which came to her during coverture. She predeceased her father but a gift under his will was saved from lapse by the section. The property came into her estate but the fiction of survival was not applied so as to compel a settlement. *In re Hurd; In re Curry; Stott v. Stott*[2] and *In re Basioli; McGahey v. Depaoli et al.*[3] were two cases in which the child died intestate. How was the post-mortem accretion to be distributed—to those who were entitled according to the law of intestate succession as it was at the date of the actual death or at the date of the fictional death under the section? The judgment of the Court in both cases was that the actual date of death was the governing factor. The theory of a notional survival for all purposes was rejected and the only purpose of the section was held to be the prevention of lapse. According to Theobald on Wills, 11th ed. 1954, p. 672, Jarman on Wills, 8th ed. 1951, pp. 467-8, and a note in 69 L.Q.R. 447, this is the better view and it was the one adopted by the Ontario Court of Appeal in *Re Perry*[4], and in my opinion it is the one that should be adopted by this Court. The fiction should not be pushed beyond its purpose. There is the high authority of Lord Mansfield in *Morris v. Pugh et al.*[5] for caution of this kind.

My conclusion is that in this case the only effect of the section is to carry the property into the estate of the deceased brother and make it distributable according to his will to his wife and three sons. There is and can be no extension of his life by operation of law so as to make him as a living person beneficially entitled to the property derived from his sister.

Before I leave this branch of the case, I wish to point out that this problem cannot arise in those Provinces which have followed the wording suggested in the draft uniform *Wills Act*. These Provinces are Alberta,

[1] (1863), 32 L.J. Ch. 359.
[2] [1941] Ch. 196, [1941] 1 All E.R. 238.
[3] [1953] Ch. 367, [1953] 1 All E.R. 301.
[4] [1941] O.R. 153 at 161, [1941] 2 D.L.R. 690.
[5] (1761), 3 Burr. 1241 at 1243, 97 E.R. 811.

Saskatchewan, Manitoba and New Brunswick and their legislation provides that the gift that would otherwise have lapsed

> shall . . . take effect as if it had been made directly to the persons amongst whom and in the shares in which that person's estate would have been divisible if he had died intestate and without debts immediately after the death of the testator.

The Provinces of British Columbia, Ontario, Prince Edward Island, Nova Scotia and Newfoundland have legislation in the form of s. 33 of English *Wills Act,* 1837. The matter has some importance when a general taxing Act such as the *Dominion Succession Duty Act* has to be applied to the same problem of devolution and that problem has been dealt with in two different ways by various Provinces.

I turn now to a consideration of the terms of the *Dominion Succession Duty Act.* By s. 6 the duty is levied on a succession and by s. 13 the liability for the duty is on the successor in respect of the succession to him. "Succession", by s. 2(*m*) means

> every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property . . . and every devolution by law of any beneficial interest in property . . .

By s. 3(1)(*i*) a succession is deemed to include "property of which the person dying was at the time of his death competent to dispose". The submission of the Crown is that by virtue of the operation of s. 36 of *The Wills Act,* Henry Hilder was competent to dispose of the property that came from his sister's estate and that consequently there was a "succession" from Henry Hilder to his wife and children. This submission depends for its validity upon the assumption that the legal fiction of survival applies for all purposes because by the very definition of "succession" the successor must become beneficially entitled to property on death.

How could Henry Hilder, who died in 1949, become beneficially entitled to the property which was left to him by his sister's will in view of the fact that he predeceased his sister? A dead man cannot become beneficially entitled and s. 36 of *The Wills Act* does not mean that he must be deemed by law to be alive at the time of his sister's death so as to be deemed to be beneficially entitled. The successors in the case, the persons who became beneficially

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entitled to property on the death of Henrietta Hilder, are the wife and three children of Henry Hilder and there was only one succession. The executor of Henry Hilder, who received the property from the executor of Henrietta, was not the successor. He did not become beneficially entitled to the property. The Department contends that two successions are involved, one from Henrietta to Henry Hilder and the second from Henry Hilder to his wife and children. There is error here because it is based on the fallacious assumption that, for the purposes of the *Dominion Succession Duty Act,* Henry Hilder was still alive at the date of his sister's death, when in fact he was dead.

The judgment under appeal is founded upon the decision of the Court of Appeal in England in *In re Scott, Deceased, supra.* The problem in that case was one of estate duty under the *Finance Act, 1894,* 57 & 58 Vict., c. 30. A father devised real property to his son who had predeceased him and the devise took effect by virtue of the *Wills Act,* 1837, s. 33. The son had devised his residuary real estate to trustees. The Commissioners of Inland Revenue claimed an estate duty not only on property passing on the death of the father but also upon property deemed to pass on the death of the son, and both duties were held to be payable. Property deemed to pass on death under this legislation included "property of which the deceased was, at the time of his death, competent to dispose". Serious doubts have been expressed whether *In re Scott* was correctly decided. Hanson's Death Duties, 10th ed. 1956, p. 216, bases the doubt on the fact that at the time of his actual death the son had only a valueless *spes successionis* and that this was not an interest in expectancy capable of valuation at the time of death, as the statute required. The implication of this criticism is that the Court of Appeal was in error in taking the date of the notional death under s. 33 of the *Wills Act* as the date when the property was deemed to pass and to become the subject of valuation. The criticism, to the extent that it may be based upon the suggested failure to apply correctly the English taxing Act, is of no particular significance in the present case but to the extent that the

decision rests upon the fiction of survival for all purposes, I would reject it in favour of the view I have already expressed.

But there is a much more serious objection to the application of *In re Scott* to a case under the *Dominion Succession Duty Act*. The *Finance Act, 1894*, imposed an estate duty, not a succession duty. I have already stated that the Canadian Act taxes a successor who becomes beneficially entitled to property consequent upon a death. The English Act imposes a tax on property passing on death or property deemed to pass on death. The expression "passing on death" is not further defined by the Act but it has been held to mean "some actual change in the title or possession of the property as a whole which takes place at the death": *Attorney-General v. Milne et al.*[1] There is no possible analogy between a duty imposed upon a successor when there is a change of beneficial ownership and an estate duty imposed on property passing or deemed to pass on death. The two Acts differ so widely in structure and incidence of taxation that cases decided under one Act are of little assistance to the interpretation of the other and it is of no help that sections of one Act may have been copied from the other. The *Dominion Succession Duty Act* must be construed independently and the caution expressed in *Attorney-General for Ontario v. Perry*[2] against a consideration of statutory origins and evolution as an aid to interpretation is particularly appropriate here where the two Acts differ so fundamentally.

My conclusion is that there was no succession from Henry Hilder to his wife and children with respect to the property acquired from Henrietta Hilder. This is the only assessment under review. It was made in error and should be set aside. I would allow the appeal with costs throughout and set aside the judgment below and the decision of the Minister.

MARTLAND J. (*dissenting*):—This is an appeal against a judgment of the Exchequer Court[3] dismissing the appeal of the appellant from an assessment for succession duties

[1] [1914] A.C. 765 at 779, per Lord Parker of Waddington.
[2] [1934] A.C. 477, [1934] 4 D.L.R. 65, [1934] 3 W.W.R. 35.
[3] [1956] Ex. C.R. 373, [1956] C.T.C. 161, 56 D.T.C. 1096.

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made by the Minister of National Revenue. The only question is as to the liability for the payment of such duties.

The facts are not in dispute. Henry Herbert Hilder died on February 2, 1949. The appellant is the sole executor and trustee of his will, dated April 8, 1938. The beneficiaries named in this will were his widow and three sons, all of whom are alive.

Henrietta Hilder, his sister, died on September 4, 1950, having made a will dated September 1, 1948. It provided for the transfer of her interest in a furniture business, which she and her brother had previously operated, and of one-half of the residue of her estate to Henry Herbert Hilder. She knew of the death of her brother and of the provisions of his will before she died.

The bequest made by Henrietta Hilder to her brother did not lapse because of the provisions of s. 36(1) of *The Wills Act*, R.S.O. 1950, c. 426, which provides:

> 36. (1) Where any person, being a child or other issue or the brother or sister of the testator to whom any real estate or personal estate is devised or bequeathed, for any estate or interest not determinable at or before the death of such person, dies in the life-time of the testator either before or after the making of the will, leaving issue, and any of the issue of such person are living at the time of the death of the testator, such devise or bequest shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will.

Succession duties were assessed and paid in respect of the succession derived from Henrietta Hilder. Additional duties were also assessed upon the successions derived from Henry Herbert Hilder upon the basis that such successions included the additional property received by the estate of Henry Herbert Hilder from his sister's estate. The question in issue is as to whether there is liability for payment of these additional duties.

This issue depends upon whether there was a single succession from Henrietta Hilder to the widow and the three sons of Henry Herbert Hilder, or whether there were two successions, one from Henrietta Hilder to Henry Herbert Hilder and another from him to his beneficiaries.

Hyndman J., in the Exchequer Court[1], ruled that there were two successions and that accordingly the additional

[1] [1956] Ex. C.R. 373, [1956] C.T.C. 161, 56 D.T.C. 1096.

succession duties were payable upon the successions derived from Henry Herbert Hilder.

The *Dominion Succession Duty Act*, R.S.C. 1952, c. 89, provides for the assessment, levy and payment of duties upon or in respect of successions. Section 2 of the Act contains the following provisions:

2. In this Act,

* * *

(*j*) "predecessor" means the person dying after the 14th day of June, 1941, from whom the interest of a successor in any property is or shall be derived;

* * *

(*m*) "succession" means every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any deceased person, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any such deceased person, to any other person in possession or expectancy, and also includes any disposition of property deemed by this Act to be included in a succession;

(*n*) "successor" means the person entitled under a succession.

Section 3(1)(*i*) of this Act provides:

3. (1) A "succession" shall be deemed to include the following dispositions of property and the beneficiary and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to such property:

* * *

(*i*) property of which the person dying was at the time of his death competent to dispose.

Counsel for the appellant contends that there was only one taxable succession. He argues that Henry Herbert Hilder never was "beneficially entitled" to the property derived from his sister's estate, so that there was no succession to him within the meaning of s. 2(*m*) of the *Dominion Succession Duty Act*.

He submits that the only effect of s. 36(1) of *The Wills Act* was to delineate the devolution of the property and that the subsection served no other purpose. The subsection only made provision for the devolution of the property from the estate of Henrietta Hilder to the beneficiaries of the estate of Henry Herbert Hilder.

Counsel for the respondent relies upon the provision contained in s. 2(*m*) which says that a "succession" "also includes any disposition of property deemed by this Act

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to be included in a succession" and upon s. 3(1)(*i*) quoted above. He contends that by virtue of the provisions of s. 36(1) of *The Wills Act* the property derived from the estate of Henrietta Hilder was "property of which Henry Herbert Hilder was at the time of his death competent to dispose". Such property, he argues, is, therefore, deemed to constitute a succession.

The words contained in s. 3(1)(*i*) of the *Dominion Succession Duty Act* are derived from the wording of subs. (1) of s. 2 of the English *Finance Act, 1894,* 57 & 58 Vict., c. 30. It was pointed out in argument by the appellant that, while the words of the English statute were apt, in view of the fact that the English Act imposes a tax upon "property", the wording was not apt in the *Dominion Succession Duty Act* which, by its terms, imposes a tax upon a "succession". The wording of cl. (*i*) of s. 3(1) does not, by its specific terms, describe a disposition of property, but only describes property. However, while the wording might be improved, some meaning must be given to it and, in my view, it should be construed as referring to a disposition of property of which the person dying was at the time of his death competent to dispose.

At first glance it would appear that s. 3(1)(*i*) would only be applicable to property actually owned by the person dying at the time of his death. However, the effect of s. 33 of the English *Wills Act, 1837,* 7 Will. 4 & 1 Vict., c. 26, from which s. 36(1) of the Ontario statute is derived, coupled with the provisions of s. 2(1) of the *Finance Act, 1894,* was considered by the Court of Appeal in *In re Scott, Deceased*[1]. The facts of that case were similar to those in the present one. The Court in the *Scott* case held that the property in question there was, by virtue of s. 33 of the *Wills Act,* property of which the person dying was at the time of his death competent to dispose.

Dealing with this this point, A. L. Smith M.R., at pp. 233-4, says as follows:

> We find, by s. 33, that in a case like the present, although the son should die in the lifetime of his father, a bequest of the father to the son shall not lapse, but shall "take effect" as if the son had died immediately after the death of his father, unless the contrary intention should appear

[1] [1901] 1 K.B. 228.

by the will. As before stated, if the son in the present case had in fact died immediately after the death of his father, the second estate duty now claimed would clearly have been payable; and, if there had been no Wills Act, the son would have had nothing to dispose of. But the Wills Act enacts that the will of the father shall take effect as if the son had died immediately after his father—i.e., that, in the special circumstances to which the section applies, the son shall be competent to dispose of what is left to him by his father, although he may in fact die before his father. It is obvious that the Wills Act must be resorted to by the appellants to get rid of the lapse which otherwise would have taken place; and the same section of the Act by which the appellants get rid of the lapse enacts that the will of the father shall "take effect" as if the son had died immediately after his father; that is, that the son in this case was competent to dispose of the 80,000*l* of property, subject to his father revoking his will which he never did.

Similar conclusions were reached by the other members of the Court, Collins L.J. and Stirling L.J., quotations from whose judgments are contained in the judgment of the Exchequer Court[1].

We were invited to find that the *Scott* case had been improperly decided, or, in the alternative, that it was not applicable in the present instance in view of the fact that, whereas the English *Wills Act* and the *Finance Act, 1894,* were both enacted by the same legislative body, in the present case *The Wills Act* is an enactment of the Legislature of the Province of Ontario, while the *Dominion Succession Duty Act* is an enactment of the Parliament of Canada.

With respect to the first argument, I have reached the conclusion that the *Scott* case was correctly decided and its principle is applicable in the present case. The effect of s. 36(1) of *The Wills Act* of Ontario was to give to Henry Herbert Hilder power to dispose, by his will, of property which might become a part of his estate by virtue of the provisions of that subsection. It is the will of Henry Herbert Hilder which governs the disposition which is to be made of the property bequeathed to him by his sister. Section 36(1) does not delineate the persons who are ultimately to succeed. Its effect is to make the property in question a part of the estate of Henry Herbert Hilder, subject to the dispositions in his will.

[1] [1956] Ex. C.R. 373, [1956] C.T.C. 161, 56 D.T.C. 1096.

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It also would appear that s. 36(1) has this effect, whether one adopts what has been described as the "broad" interpretation of the subsection or the "narrow" interpretation of it. The difference between these two interpretations has been referred to in Theobald on Wills, 11th ed. 1954, p. 672, as follows:

> The question whether the effect of the section is limited to carrying the testator's property to the child's estate or whether the child is deemed to survive the testator for all purposes is one of some difficulty and the authorities are not consistent.

The cases which were cited in relation to the so-called "narrow" interpretation were cases which decided that, in the determination of the persons who would be entitled to succeed to the property in question, regard would be had to those beneficiaries entitled at the date of the actual death of the deceased beneficiary, rather than those who would have been entitled had his death occurred on the assumed date of death immediately after the death of the testator. It would appear to me that there is nothing in the so-called "narrow" interpretation which would have the effect of saying that the ultimate disposition of the property is not governed by the provisions of the will of the deceased beneficiary, or that the property which is in question is not property of which the person dying was at the time of his death competent to dispose.

Counsel for the appellant placed reliance upon *The Lord Advocate v. Bogie et al.*[1], and argued that the provisions contained in the will of Miss Scott, in that case, were similar in effect to the provisions of s. 36(1) of *The Wills Act*. I do not agree with that contention. In *The Lord Advocate v. Bogie et al.* the testatrix bequeathed a share of her estate to her nephew and, failing him, to his executors and representatives. He died in her lifetime, leaving a will, and the Crown claimed not only inventory duty and legacy duty on her estate, but also a second inventory duty and legacy duty from the nephew's executors. The latter

[1] [1894] A.C. 83.

duties were held not to be payable, as the property was neither part of the nephew's estate nor in his disposition. In effect, by virtue of the provisions of the will of the testatrix, there was a direct gift to the beneficiaries under his will.

This is not the case in respect of s. 36(1) of *The Wills Act,* which, by its terms, says that "such devise or bequest shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will". In the *Bogie* case the testatrix made specific provision as to what should occur in the event of the death of the named beneficiary. The provision in *The Wills Act* is such that for the purposes of the subsection the deceased beneficiary is deemed to have lived until immediately after the death of the testator.

With respect to the second point made by counsel for the appellant in relation to the *Scott* case, while it is obvious that a provincial Legislature cannot legislate in such a manner as to alter the provisions of the *Dominion Succession Duty Act,* nevertheless, in applying the provisions of that Act, it is necessary to look to relevant provincial legislation to determine what property may be included in a succession. It is quite proper to look to the effect of provincial legislation in determining, for the purposes of s. 3(1)(*i*), what is "property of which the person dying was at the time of his death competent to dispose". The effect of s. 36(1) of *The Wills Act* was to make the property bequeathed by Henrietta Hilder to her brother property of which he was competent to dispose by the provisions of his will, notwithstanding the fact that his death occurred before hers.

My conclusion is, therefore, that the property derived from the estate of Henrietta Hilder was property of which Henry Herbert Hilder was at the time of his death competent to dispose and that, therefore, the disposition

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of that property by his will constituted a succession by virtue of the provisions of s. 3(1), coupled with those of s. 2(*m*). This being so, there was a taxable succession in respect of the property which passed to the beneficiaries of Henry Herbert Hilder in accordance with the provisions of his will. This appeal should, therefore, be dismissed with costs payable out of the estate of Henry Herbert Hilder, deceased.

Appeal allowed with costs throughout, MARTLAND J. *dissenting.*

Solicitors for the appellant: Blake, Cassels & Graydon, Toronto.

Solicitor for the respondent: A. A. McGrory, Ottawa.

HER MAJESTY THE QUEEN .....APPELLANT; 1958

*May 6, 7
Jun. 26

AND

FRANK RAYMOND LARSON .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Summary convictions—Jurisdiction of magistrates—When waiver of jurisdiction required—"Commencement" of proceedings—The Criminal Code, 1952-53 (Can.), c. 51, ss. 695, 697, 698—The Municipalities Act, R.S.B.C. 1948, c. 232, ss. 417, 418.

The respondent was arrested without warrant on a charge of "driving while impaired". He was taken the following morning before P, a deputy magistrate appointed for the district under s. 418 of the *Municipalities Act* with power to act "only in the absence or during the illness of the salaried Police Magistrate". P took an information, released the accused on bail, and adjourned the hearing. The accused was subsequently tried and convicted by H, the regular magistrate for the district, who had returned in the meantime. The accused moved by way of *certiorari* and the conviction was quashed on the ground that H, in the circumstances, lacked jurisdiction. This judgment was affirmed by a majority of the Court of Appeal. The Crown appealed by leave.

Held: The appeal should be allowed.

Per Taschereau, Abbott and Martland JJ.: The word "trial", as used in ss. 697(4) and 698, is synonymous with the word "hearing", as used in s. 697(3). In enacting these provisions, Parliament has provided for three distinct periods of time during the course of proceedings under Part XXIV within which jurisdiction of an individual justice or justices may be different. These three periods are as follows: (1) after the laying of an information but prior to plea being taken, when no justice or summary conviction Court is vested with exclusive jurisdiction to hear and determine the matter; (2) after a plea is taken but before hearing has commenced, when the summary conviction Court that has received the plea is vested with exclusive jurisdiction to hear and determine the matter, but such jurisdiction may be waived under s. 697(4); (3) after the hearing has commenced, when no other justice has jurisdiction except in the circumstances set out in s. 698. Since no plea had been entered when H assumed to exercise jurisdiction, the proceedings had not been "commenced" and he had full jurisdiction to enter upon the hearing and to make the conviction.

Per Rand J.: The proceedings were "commenced" by the laying of the information before P and no other magistrate could then exercise jurisdiction under the provisions of the *Criminal Code* unless P signed the waiver under s. 697(4). P's jurisdiction, however, existed only in the absence of H, since he had not taken a plea. He was accordingly superseded when H returned to the district and H was fully clothed with jurisdiction.

*PRESENT: Taschereau, Rand, Locke, Abbott and Martland JJ.

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Per Locke J.: The proceedings were not "commenced" before P within the meaning of s. 697(4) and since no plea was taken by him he did not acquire exclusive jurisdiction to deal with the charge. In these circumstances, no question of waiver arose and the proceedings before H were regularly taken.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Whittaker J.[2] quashing a conviction. Appeal allowed.

John J. Urie, for the appellant.

J. S. P. Johnson, for the respondent.

The judgment of Taschereau, Abbott and Martland JJ. was delivered by

ABBOTT J.:—The respondent was convicted before Magistrate Harris of the District of Powell River in British Columbia, for "driving while impaired". The jurisdiction of the magistrate was questioned in *certiorari* proceedings issued in aid of a writ of *habeas corpus,* in which proceedings an order was made quashing the conviction, and that judgment was affirmed in the Court below, Davey J.A. dissenting.

The charge was laid before Magistrate W. L. Parkin, also of the District of Powell River, who took the information against the accused and later granted bail to the accused and adjourned the hearing. The trial was held on May 10, 1957, before Magistrate Harris. At that time respondent refused to plead and objected to the jurisdiction of the magistrate but his objection was overruled. The magistrate directed a plea of not guilty to be entered, and proceeded with the hearing.

Magistrate Harris was appointed as police magistrate for the Corporation of the District of Powell River by order in council dated April 17, 1956, "with power to exercise the jurisdiction conferred on a Magistrate by Part XVI of the Criminal Code". Magistrate Parkin was on the same date appointed police magistrate for the same district "to act only in the absence or during the illness of Magistrate Harris". Magistrate Harris was absent from the district when the information was laid and the other proceedings were taken as above set out. On his return to the district on May 3, Magistrate Harris assumed

[1] (1957), 24 W.W.R. 215, 120 C.C.C. 24, 27 C.R. 280.
[2] (1957), 23 W.W.R. 47, 119 C.C.C. 225, 26 C.R. 340.

jurisdiction over the proceedings and conducted the trial. Magistrate Parkin had not waived jurisdiction in favour of Magistrate Harris.

The question in issue in this appeal turns primarily upon the interpretation to be given to s. 697 of the *Criminal Code* and in arriving at such interpretation, it is necessary, I think, to consider as well the provisions of ss. 695 and 698.

These three sections are as follows:

695. (1) Proceedings under this Part shall be commenced by laying an information in Form 2.

(2) Notwithstanding any other law that requires an information to be laid before or to be tried by two or more justices, one justice may

(*a*) receive the information,

(*b*) issue a summons or warrant with respect to the information, and

(*c*) do all other things preliminary to the trial.

697. (1) Nothing in this Act or any other law shall be deemed to require a justice before whom proceedings are commenced or who issues process before or after the trial, to be the justice or one of the justices before whom the trial is held.

(2) Where two or more justices have jurisdiction with respect to proceedings they shall be present and act together at the trial, but one justice may thereafter do anything that is required or is authorized to be done in connection with the proceedings.

(3) Subject to section 698, in proceedings under this Part no summary conviction court other than the summary conviction court by which the plea of an accused is taken has jurisdiction for the purposes of the hearing and adjudication, but any justice may

(*a*) adjourn the proceedings at any time before the plea of the accused is taken, or

(*b*) adjourn the proceedings at any time after the plea of the accused is taken for the purpose of enabling the proceedings to be continued before the summary conviction court by which the plea was taken.

(4) A summary conviction court before which proceedings under this Part are commenced may, at any time before the trial, waive jurisdiction over the proceedings in favour of another summary conviction court that has jurisdiction to try the accused under this Part.

(5) A summary conviction court that waives jurisdiction in accordance with subsection (4) shall name the summary conviction court in favour of which jurisdiction is waived, except where, in the province of Quebec, the summary conviction court that waives jurisdiction is a judge of the sessions of the peace.

698.(1) Where a trial under this Part is commenced before a summary conviction court and a justice who is or is a member of that summary conviction court dies or is, for any reason, unable to continue the trial, another justice who is authorized to be, or to be a member of, a summary conviction court for the same territorial division may act in the place of the justice before whom the trial was commenced.

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(2) A justice who pursuant to subsection (1), acts in the place of a justice before whom a trial was commenced

(*a*) shall, if an adjudication has been made by the summary conviction court, impose the punishment or make the order that, in the circumstances, is authorized by law, or

(*b*) shall, if an adjudication has not been made by the summary conviction court, commence the trial again as a trial *de novo*.

I am of opinion that the word "trial" as used in s. 697(4) and in s. 698 is synonymous with the word "hearing" as used in s. 697(3) and that in enacting these sections Parliament has provided for three distinct periods of time during the course of proceedings taken under Part XXIV, within each of which periods the jurisdiction of an individual justice or justices may be different. These three periods are as follows: (1) after the laying of an information but prior to plea being taken; during which period no justice or summary conviction Court is vested with exclusive jurisdiction to hear and determine the matter; (2) after a plea is taken but before hearing has commenced; during which period the summary conviction Court which has received the plea is vested with exclusive jurisdiction to hear and determine the matter, but such jurisdiction may be waived under s. 697(4); (3) after the hearing has commenced, when s. 698 comes into play.

No plea had been entered when Magistrate Harris assumed to exercise jurisdiction and for the reasons which I have given, as well as for those of Davey J.A., with which I am in substantial agreement, I am of the opinion that Magistrate Harris had jurisdiction to enter upon the hearing.

I would therefore allow the appeal and restore the conviction.

RAND J:—In the face of the specific language of s. 697(4) of the *Criminal Code*, "A summary conviction court before which proceedings under this part are commenced", of s. 697(1), "Nothing in this Act . . . shall be deemed to require a justice before whom proceedings are commenced", and of s. 695, "Proceedings under this Part shall be commenced by laying an information", I am unable to agree that where the information, as here, has been taken by a police magistrate as such, the proceedings were not then "commenced" by a Court so as to require a waiver of jurisdiction under s. 697(4). The contrary

view involves a distinction between the jurisdiction contemplated by subs. (4) and that by subs. (3); it gives to the word "jurisdiction" in subs. (4) the meaning of "exclusive jurisdiction" as that is taken to be provided by subs. (3): in other words, that "commencing proceedings" within subs. (4) means taking the plea, that taking the plea vests the only jurisdiction that can be and is required to be waived, and that up to that point no jurisdiction as at common law is or can be acquired by any summary conviction Court. All acts preliminary to the plea are thus conceived to be merely authorized but not affecting or vesting jurisdiction. That may be the case where a single justice, as distinguished from a summary conviction Court, takes the information and some other act by a Court is required to attach jurisdiction. But once a Court is seized by taking the information or doing that further act, technical jurisdiction thereupon arises. If anything else was intended by Parliament the language used does not appear to me to be apt to the purpose.

The other view requires us to introduce a conclusive presumption that up to the taking of the plea, a magistrate acts in the capacity of a functionary with the jurisdiction of one justice only, a view which breaks down where a summary conviction Court is one with the jurisdiction of a single justice, and a presumption for which I find no warrant in the relevant sections of the Code.

On this ground I am against the Crown.

But a further submission by Mr. Urie remains to be examined. By s. 417 of the *Municipalities Act*, R.S.B.C. 1948, c. 232, police magistrates are appointed by the Lieutenant-Governor in council. Where an appointment carries a salary, s. 418 permits the appointment of another magistrate "who shall act only in the absence or during the illness of the salaried Police Magistrate". The magistrate was a salaried justice and the deputy was appointed under the power so given. Is the limitation of jurisdiction that he may act "only in the absence or during the illness" of the magistrate significant to the circumstances before us?

The Court of Appeal took the view that once the deputy entered upon a matter, his authority, unless waived under subs. (4), continued to the end notwithstanding that the

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regular magistrate had returned to the district. I am forced to disagree with this. The rule that a justice seized of jurisdiction retains it to the exclusion of others unless he voluntarily waives it, assumes that as between two or more justices there is equality of status, that the jurisdiction of each is independent of the presence or absence of the other; and to avoid the impropriety of an unseemly competition between them the rule was laid down. But that is not the relation between the two magistrates here. The intention is that primarily the regular magistrate shall act, and for that purpose a substantial salary is paid him. The deputy may or may not be paid and in this case the allowance to him was $12.50 a month. This indicates that the deputy acts for and in the stead of the regular magistrate; that, sitting in the same seat of justice, he maintains a continuity of authority; but that the primary jurisdiction, where a particular act undertaken by the deputy is finished, may at any time be resumed unless a statute forbids it. If the deputy had taken the plea he would be obliged, by s. 697(3), subject to waiver, to continue to the conclusion of the trial. Short of taking the plea I see nothing to limit the language of s. 418; the provisions the Code mentioned point to the propriety and desirability of preliminary action by justices up to the plea; and since the stage reached by the deputy did not go beyond the adjournment he could be and was, by the intervention of the regular magistrate, superseded.

That was evidently the understanding of the deputy. His adjournment to Friday, and his not being then available to continue the proceeding, indicates that he did not consider himself bound to do anything further. The adjudication was, therefore, by a magistrate who was authorized to make it.

I would allow the appeal and restore the conviction.

LOCKE J.:—For the reasons given by Mr. Justice Davey, it is my opinion that the proceedings in this matter were not "commenced" before Magistrate Parkin within the meaning of subs. (4) of s. 697 of the *Criminal Code* and as no plea was taken by him he did not acquire exclusive

jurisdiction to deal with the charge. In these circumstances, no question of waiver arises and the proceedings before Magistrate Harris were regularly taken.

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I would allow the appeal.

Appeal allowed.

Solicitors for the appellant: Paine, Edmonds, Mercer & Williams, Vancouver.

Solicitor for the respondent: J. S. P. Johnson, Powell River.

THE BROTHERHOODS OF RAILWAY EMPLOYEES, JAMES GUY McLEAN AND J. L. McGREGOR — APPELLANTS;

1958

*Mar. 24, 25
Jun. 26

AND

THE NEW YORK CENTRAL RAILROAD COMPANY ..... — RESPONDENT;

AND

CANADIAN PACIFIC RAILWAY COMPANY AND CANADIAN NATIONAL RAILWAY COMPANY — INTERVENANTS.

ON APPEAL FROM THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA

Railways—Abandonment of line with leave of Board—Whether compensation payable to employees—The Railway Act, R.S.C. 1952, c. 234, ss. 168, 182—History of legislation.

When a railway, with leave of the Board of Transport Commissioners under s. 168 of the *Railway Act*, abandons operation of a line and thereby necessarily closes stations and divisional points, it is not required to pay compensation under s. 182 to employees retained in its employ who are compelled to change their residence in consequence of the closing of the line. Section 182 applies only to a "change, alteration or diversion in the railway, or any portion thereof", and not to complete abandonment of a line. This is made clear by the history of the two sections.

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*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Abbott and Martland JJ.

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Per Cartwright J., *dissenting*: The words "remove", "close" and "abandon" are not defined in the Act, nor are they terms of art. In their ordinary sense, they include the closing or abandonment of a station due to the abandoning of a line and neither the arrangement of the sections in the Act nor the history of the legislation furnishes sufficient reason for failing to interpret the words of s. 182 in their plain and ordinary meaning. *Riches v. Westminster Bank Limited*, [1947] A.C. 390 at 405, quoted and applied.

APPEAL from an order of the Board of Transport Commissioners[1], dismissing an application for compensation. A motion to quash the appeal was made by the respondent and was argued at the same time as the appeal. Appeal and motion dismissed, Cartwright J. dissenting.

Hon. A. W. Roebuck, Q.C., and *D. R. Walkinshaw, Q.C.*, for the appellants.

C. F. H. Carson, Q.C., and *C. Scott, Q.C.*, for the respondent.

C. F. H. Carson, Q.C., and *J. G. W. MacDougall*, for Canadian National Railway Company, intervenant.

C. F. H. Carson, Q.C., and *G. F. Miller*, for Canadian Pacific Railway Company, intervenant.

R. Kerr, Q.C., for the Board of Transport Commissioners.

THE CHIEF JUSTICE:—An order was made by a member of this Court granting leave to the Brotherhoods of Railway Employees to appeal from a decision of the Board of Transport Commissioners for Canada, dated March 13, 1957[1]. Subsequently an order was made adding James Guy McLean as a party appellant and granting him leave to appeal. The respondent New York Central Railroad Company and the intervenants Canadian Pacific Railway Company and Canadian National Railway Company moved to dismiss the appeals, upon the ground that the Brotherhoods, being an unincorporated association, had no status to appeal, and that James Guy McLean was not a proper party. The Court directed that such questions stand over but that J. L. McGregor be added as a party appellant so that the point of substance might be determined. Mr. McGregor is admittedly a proper party appellant and I therefore express no opinion as to the position of the Brotherhoods or of James Guy McLean.

[1] (1957), 75 C.R.T.C. 22.

Previous to the application now under review the respondent New York Central Railroad Company as lessee of the Ottawa and New York Railway Company and the Ottawa and New York Railway Company had applied to the Board under s. 168 of the *Railway Act*, R.S.C. 1952, c. 234, and all other relevant statutory provisions, for an order authorizing the New York Central Railroad Company to abandon its operation of the line of railway of the Ottawa and New York Railway Company and authorizing the Ottawa and New York Railway Company to abandon its line of railway which extends from Ottawa to the United States-Canada boundary near Cornwall, Ontario. Section 168 reads as follows:

168. The company may abandon the operation of any line of railway with the approval of the Board, and no company shall abandon the operation of any line of railway without such approval.

That application was granted on January 10, 1957[1], but by para. 2 of the Board's order of that date the application on behalf of the employees of the New York Central Railroad Company in respect of compensation was reserved for further consideration and order of the Board.

Such an application was made and was heard by Mr. Wardrope, Assistant Chief Commissioner, Mr. Sylvestre, Deputy Chief Commissioner and Mr. Chase, Commissioner. In the opinion of the three Commissioners the question was one of law and therefore by virtue of subs. (2) of s. 12 of the *Railway Act* the opinion of Mr. Wardrope would prevail. The other two Commissioners would have granted the application, but as Mr. Wardrope's opinion was that the employees were not entitled to compensation the application was dismissed by order of the Board dated March 13, 1957[2]. It is from that order that the present appeal is taken.

The application on behalf of the employees was made under s. 182 of the *Railway Act*:

182. The company shall not, at any time, make any change, alteration or deviation in the railway, or any portion thereof, until the provisions of section 181 are fully complied with, nor remove, close, or abandon any station, or divisional point nor create a new divisional point that would involve the removal of employees, without leave of the Board; and where any such change is made the company shall compensate its employees as the Board deems proper for any financial loss caused to them by change of residence necessitated thereby.

[1] (1957), 74 C.R.T.C. 334 (*sub nom. Re New York Central Railroad Co.; Ottawa and New York Railway Co. Branch*).

[2] (1957), 75 C.R.T.C. 22.

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The Assistant Chief Commissioner has carefully examined the history of ss. 168 and 182 and I agree with him that in view of that history and of their proper construction the employees of the New York Central Railroad Company do not have a legal right under the *Railway Act* to compensation for financial loss caused to them by change of residence necessitated by the abandonment of operation of the line or consequential closing of stations and divisional points thereon authorized by the Board's order of January 10, 1957.

I desire to emphasize my agreement with Mr. Wardrope's view that the order of January 10 was properly made under s. 168 of the *Railway Act* and that to hold now that s. 182 applies to line abandonments authorized under s. 168 and involving closing of stations or divisional points, would in effect mean that the closing and abandonment of stations and divisional points which were part and parcel of line abandonments effected prior to 1933 were and have continued to be unlawful owing to non-compliance with s. 182 as it was from time to time. A comparison of ss. 168 and 182 with the provisions of the *Canadian National-Canadian Pacific Act, 1933,* 23-24 Geo. V, c. 33, as amended by 1939, c. 37, with respect to an "adjustment allowance" as compensation for loss of employment and a "displacement allowance" shows that when Parliament intended to secure certain rights to the employees of the Canadian National or Canadian Pacific lines it did so in terms entirely different from those applicable to other railways including the New York Central Railroad Company under the general provisions of the *Railway Act.* I also agree that the previous orders of the Board relied on by the appellant have no relevancy to the point under consideration.

The appeal should be dismissed but without costs.

TASCHEREAU J.:—I agree with the majority of my colleagues that this appeal should be dismissed without costs.

I think that the law does not provide for compensation to its employees, when a railway company with the approval of the Board, under the authority of s. 168 of the *Railway Act,* R.S.C. 1952, c. 234, abandons the operation of a line.

The compensation must be paid only when the company makes a change, alteration or deviation in the railway, or

when a station or divisional point is removed, closed or abandoned, or when a new divisional point is created that involves the removal of employees.

RAND J.:—By an order of the Board of Transport Commissioners for Canada dated January 10, 1957[1], made under s. 168 of the *Railway Act*, R.S.C. 1952, c. 234, leave was given the New York Central Railroad Company, as lessee of the owner, the Ottawa and New York Railway Company, and the latter company, to abandon operation of a line of railway between Ottawa and the international boundary near Cornwall, Ontario, a distance of some 57.9 miles. The order reserved "for further consideration and determination the application on behalf of the employees of the New York Central Railroad Company in respect of compensation" under s. 182 of the *Railway Act*.

At the international boundary, the line connected with the railway of the lessee within the United States. The New York company operates other lines in the eastern portion of that country and in Ontario between the Niagara peninsula and the south-western section of the Province, all of which comprise what is known as the New York Central System. But no portion of that system apart from the line abandoned touches the Ottawa area.

On March 13, 1957, on the question reserved, the Board, denying the claim, held as a matter of law that the circumstances of the abandonment did not come within the purview of s. 182[2]. In a careful judgment, Assistant Chief Commissioner Wardrope examined the history of the section in the light of the rule long acted upon by the Board prior to the enactment of s. 168 (originally as s. 165A, by 1932-33, c. 47, s. 1) that a railway could abandon a line at any time without reference to the Board; and he distinguished such an act from the closing or removal of a station or divisional point which contemplated the continued operation of the line.

The provisions of s. 182 appeared first as s. 168(2) of R.S.C. 1906, c. 37:

> 2. The company shall not make any change, alteration or deviation in the railway, or any portion thereof, until the provisions of the last preceding section are fully complied with. [The last preceding section provided for the filing and approval of plans, profiles and books of reference of deviations.]

1 (1957), 74 C.R.T.C. 334 (*sub nom. Re New York Central Railroad Co.; Ottawa and New York Railway Co. Branch*).

2 (1957), 75 C.R.T.C. 22.

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A new subsection was substituted in 1913 by c. 44, s. 2, of that year which read:

> 2. The company shall not, at any time, make any change, alteration or deviation in the railway, or any portion thereof, until the provisions of the last preceding section are fully complied with, or remove, close, or abandon any station or divisional point without leave of the Board; and where a change is made in the location of a divisional point the company shall compensate its employees as the Board deems proper for any financial loss caused to them by change of residence necessitated thereby.

In the *Railway Act*, 1919, c. 68, a further change was made in the replacement of s. 168 by s. 179:

> 179. The company shall not, at any time, make any change, alteration or deviation in the railway, or any portion thereof, until the provisions of the last preceding section are fully complied with, or remove, close, or abandon any station, or divisional point or create a new divisional point which would involve the removal of employees, without leave of the Board; and where any such change is made the company shall compensate its employees as the Board deems proper for any financial loss caused to them by change of residence necessitated thereby.

In the general revision of 1952, c. 234, this latter appears as s. 182:

> 182. The company shall not, at any time, make any change, alteration or deviation in the railway, or any portion thereof, until the provisions of section 181 are fully complied with, nor remove, close, or abandon any station, or divisional point nor create a new divisional point that would involve the removal of employees, without leave of the Board; and where any such change is made the company shall compensate its employees as the Board deems proper for any financial loss caused to them by change of residence necessitated thereby.

From this statutory evolution it is seen how experience gradually extended the subject-matter of compensation; but before considering the application of the section to the situation here the law of abandonment prior to 1933 and the assumption underlying s. 182 must be examined.

As the Assistant Chief Commissioner shows, in a series of decisions of the Board reaching back to 1922, it was consistently held that in the absence of any contractual or statutory duty to continue operations, a railway company was at liberty, without reference to and independently of the Board, to abandon the operation of the whole or any part of its line. That this, with only rare exceptions, would involve stations and divisional points is obvious. An exception existed in cases where spur-lines accommodating industries had been ordered by the Board under the facilities clauses, in which leave to abandon was required. But even under a contractual or statutory duty it is patent that if a

railway in its entirety is unable to pay its way the private individuals constituting the company are not obligated to furnish money to maintain operations.

This rule of the common law was not challenged on the argument and it is significant to the interpretation of s. 182. The latter, in requiring leave of the Board before a station or divisional point can be abandoned or removed, is dealing with operational facilities serving both the public and the railway's own interest. But, by the nature of the changes envisaged, the controlling consideration is the underlying assumption that operation generally is to continue; and that continued operation is the background against which the compensation provisions of s. 182 are to be interpreted. The result was that for cases of abandonment of a line no compensation was provided even though the closing of stations and divisional points was included; if that had not been so, for all practical purposes the enactment of s. 168 would have been unnecessary.

That being the interpretation up to the year 1933, has it been affected by the new section, 168, then 165A? The fact that abandonment of a line, which means the complete closing down of railway operations, the ceasing to be a railway, is dealt with separately itself carries some import. It recognizes the rule of the common law and restricts the liberty of action of the company under it. Considering the *Railway Act* alone, s. 168 is wholly consistent with the original limitations of s. 182; in the one case the railway is making operational changes, in the other it is ceasing so far to be a railway. Under s. 168 the proposed *abandonment,* and only that word is used, is to be approved by the Board; the considerations which the Board is to take into account concern the interests of the company and of the public; and in the light of the conditions existing in 1933, the former may be in fact features of the latter. Aspects of the results of abandonment are indicated by claims for compensation by industries which the proposed action will deprive of transportation, to which, as the Board has held, the *Railway Act* gives no right. Nor, in my opinion, is it possible to construe s. 168 so as to raise an implication that in some way it is brought within the effect of s. 182. In providing, on the footing that operation generally is to continue, that a station shall

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not be closed unless leave is obtained, that assumption of s. 182 would be contradicted by holding that the word "leave" had drawn within its scope the "approval" required by s. 168. The operation of s. 168 is distinct and disparate and I am unable by any interpretation to increase the content and meaning of s. 182. There may seem to be little, if any, distinction logically in fact or in policy between cases where employees are to be retained and transferred upon the closing of a station as a facility and upon its closing by the cessation of total operation; but in this as in every Court we are bound by the language of the statute as it is and not as in factual logic or policy it might be thought it should be. Abandonment under s. 168 may undoubtedly entail a change of residence by employees; but it may also and just as obviously entail the dismissal of employees and change of residence for others not caused by the closure of stations or divisional points, cases for which, as in that of industry, no compensatory allowance is provided. The omission of that for these virtually inevitable consequences of abandonment is of the same order as that of failure to enlarge the scope of s. 182 as it was prior to 1933.

Certain provisions of the *Canadian National-Canadian Pacific Act, 1933,* 23-24 Geo. V., c. 33, which is limited to measures, plans and arrangements entered into jointly between those two systems, were drawn into the discussion. By para. (*a*) of s. 2

> that part of section one hundred and seventy-nine of the *Railway Act* [now s. 182] which relates to compensation of employees for financial loss caused to them by removal, closing or abandonment of any railway station or divisional point . . . shall not be deemed to be inconsistent with the provisions of this Act or to be in any manner affected thereby.

I take this to mean simply that nothing in c. 33 in any manner affects s. 182. The latter, as it applies to the two major railways, is left as it was before the enactment of c. 33. It is conceivable that the draftsman doubtfully assumed the language of s. 182 to extend to the closing of a station involved in an abandonment which, by reason of the requirement of s. 182 for leave, might be brought within its terms. This is only speculation, but if it were the fact, the answer clearly is that an erroneous assumption of that sort by a draftsman can effect neither the legal rule nor the interpretation of another statute.

An amendment to c. 33 was made in 1939 by 3 Geo. VI, c. 37. Paragraph 6(*a*) of the schedule, substituted for para. (*a*) of s. 2, prescribes a code for compensation to "*any employee* who is continued in employment and who is required by the employing company to change his place of residence as a direct result of any *such measure, plan or arrangement*", *i.e.* between the National and Pacific systems. (The italics are mine.) Specific items of compensation follow: travelling and moving expenses of the employee and his family, working-time lost, financial loss in the sale of his home for less than its fair value, and damage suffered through holding an unexpired lease of the dwelling occupied by the employee as his home. This paragraph was introduced by the qualification:

> Notwithstanding the provisions of section one hundred and seventy-nine of the *Railway Act* which relate to compensation of employees for financial losses caused to them by removal, closing or abandonment of any railway station or divisional point . . .

The purpose and effect of this clause is the same as in para. (*a*) of s. 2: s. 182 of the *Railway Act* remains unaffected; and as in the earlier provision there is nothing that can be tortured into a necessary implication that s. 182 is, by the language used, to be deemed thereby to be enlarged.

Both in 1933 and in 1939 the question of compensation was present to the mind of the draftsman of the legislation and yet there is not a word in either statute or in the *Railway Act* by which compensation resulting from abandonment, apart from a "measure, plan or arrangement" between the two systems, is provided for. If that had been the intention in relation to either the Canadian National, the Canadian Pacific, or any other railway acting independently under s. 168, it would have been the simplest matter to provide so. It could have been done by the mere statement that the provisions of s. 182 should be deemed to apply, where the facts warrant it, to abandonments under s. 168; but that step was carefully avoided. The case is one in which a feature of compensation has not been brought within a statutory provision and this Court is powerless to supply it.

I would, therefore, dismiss both the appeal and the motion without costs to any party.

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The judgment of Locke, Abbott and Martland JJ. was delivered by

MARTLAND J.:—Under s. 168 of the *Railway Act*, R.S.C. 1952, c. 234, the Board of Transport Commissioners, on January 10, 1957[1], granted leave to the respondent, as lessee of the owner, the Ottawa and New York Railway Company, and to the said owner, to abandon operation of the line of railway between Ottawa and the international boundary, near Cornwall, Ontario. By its order, the Board reserved "for further consideration and determination the application on behalf of the employees of the New York Central Railroad Company in respect of compensation".

The application out of which this appeal arises, which was made under s. 182 of the *Railway Act*, was that the financial loss, if any, involved by the removal of New York Central employees from the Ottawa division to other portions of the New York Central Railroad be paid by the company. It was refused by the Board[2], which held, as a matter of law, that the respondent, having obtained approval of the Board to abandon operations pursuant to s. 168, was not bound by the requirements of s. 182 pertaining to compensation of employees.

The relevant sections of the *Railway Act*, ss. 168 and 182, provide as follows:

168. The company may abandon the operation of any line of railway with the approval of the Board, and no company shall abandon the operation of any line of railway without such approval.

182. The company shall not, at any time, make any change, alteration or deviation in the railway, or any portion thereof, until the provisions of section 181 are fully complied with, nor remove, close, or abandon any station, or divisional point nor create a new divisional point that would involve the removal of employees, without leave of the Board; and where any such change is made the company shall compensate its employees as the Board deems proper for any financial loss caused to them by change of residence necessitated thereby.

The contention of the appellants is that these two sections can be read together, the former being for the protection of the public and the latter for the protection of railway employees. It was argued that s. 182 is divided

[1] (1957), 74 C.R.T.C. 334 (*sub nom. Re New York Central Railroad Co.; Ottawa and New York Railway Co. Branch*).

[2] (1957), 75 C.R.T.C. 22.

into two parts, the first part dealing with any change, alteration or deviation in the railway, and the second part dealing with the removal, closing or abandoning of any station or divisional point. It was argued that if, as a result of the abandonment of a line, made pursuant to s. 168, any station or divisional point was removed, closed or abandoned, compensation became payable under s. 182.

The contention of the respondent is that the words "any such change," which follow the semicolon in s. 182, must relate back to the words "change, alteration or deviation" at the beginning of the section. It contends that compensation is payable under s. 182 only if there has been a change, alteration or deviation of the kind contemplated by s. 181, which section is specifically referred to in s. 182.

In the determination of this issue, the historical development of the section which is now s. 182 is of significance.

Section 120 of *The Railway Act,* 1888 (Can.), c. 29, made provision for a change of location of a line of railway in any particular part, for the purpose of lessening a curve, reducing a gradient or otherwise benefiting such line of railway, or for any other purpose of public advantage, with the approval of the Railway Committee. All provisions of the Act were to apply as fully to the part of the line so changed as to the original line.

In 1900, by c. 23, s. 4, s. 117 of the Act was repealed and re-enacted, to provide that:

> 117. Except in accordance with the provisions of section 120 or 130, no deviation shall be made from the located line of railway, or from the places assigned thereto in the map or plan and book of reference sanctioned by the Minister under the provisions of section 124.

Section 120 is the section of the Act previously mentioned. Section 130 required the submission, for the sanction of the Railway Committee, of a map or plan and profile of the section of railway proposed to be altered and a book of reference.

In 1903, by c. 58, the Act was repealed and re-enacted and it was provided in s. 131 as follows:

> 131. The company shall not commence the construction of the railway, or any section or portion thereof, until the provisions of sections 123 and 124 are fully complied with; and shall not make any change, alteration or deviation in the railway, or any portion thereof, until the provisions of the last preceding section are fully complied with.

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The "last preceding section," *i.e.*, s. 130, contained provisions similar to the present s. 181 of the Act, requiring the submission, for the sanction of the Board, of a plan, profile and book of reference of the portion of the railway proposed to be changed.

Changes, alterations or deviations of the railway were dealt with in a separate subsection (subs. (2) of s. 168) in the *Railway Act*, R.S.C. 1906, c. 37, which read:

2. The company shall not make any change, alteration or deviation in the railway, or any portion thereof, until the provisions of the last preceding section are fully complied with.

Again the reference to the "last preceding section" (s. 167) is to a section in terms similar to those of s. 181 of the present Act.

In 1913, by c. 44, s. 2, the following was substituted for subs. (2) of s. 168:

2. The company shall not, at any time, make any change, alteration or deviation in the railway, or any portion thereof, until the provisions of the last preceding section are fully complied with, or remove, close, or abandon any station or divisional point without leave of the Board; and where a change is made in the location of a divisional point the company shall compensate its employees as the Board deems proper for any financial loss caused to them by change of residence necessitated thereby.

In 1919, c. 68, the section in question became s. 179 and read as follows:

179. The company shall not, at any time, make any change, alteration or deviation in the railway, or any portion thereof, until the provisions of the last preceding section are fully complied with, or remove, close, or abandon any station, or divisional point or create a new divisional point which would involve the removal of employees, without leave of the Board; and where any such change is made the company shall compensate its employees as the Board deems proper for any financial loss caused to them by change of residence necessitated thereby.

The section in R.S.C. 1927, c. 170, read as follows, and substantially in the same form as s. 182 of the present Act:

179. The company shall not, at any time, make any change, alteration or deviation in the railway, or any portion thereof, until the provisions of the last preceding section are fully complied with, nor remove, close, or abandon any station, or divisional point nor create a new divisional point which would involve the removal of employees, without leave of the Board; and where any such change is made the company shall compensate its employees as the Board deems proper for any financial loss caused to them by change of residence necessitated thereby.

The significance of this historical development is that, initially, no reference is made in it to the subject of compensation. Later, compensation is referred to in the section, but as a part of that section. The 1913 amendment provided for compensation "where a change is made in the location of a divisional point". The 1919 amendment brought the section, substantially, into its present form and enlarged the scope of its provision as to compensation.

Section 168 was first enacted (then as s. 165A) by 1932-33, c. 47, s. 1.

Prior to that year railway companies could, unless there were a contractual or statutory duty to continue operations, abandon the operation of the whole or any part of their lines without the approval of the Board.

It should be noted that s. 168 appears in the Act as one of a group of sections headed *"General Powers"* under a main heading "POWERS—CONSTRUCTION OF RAILWAYS." Section 182, together with s. 181, is under the heading *"Deviations, Changes and Removal"* under a main heading "LOCATION OF LINE".

In the light of the foregoing, it appears to me that the compensation provisions of s. 182 were intended to provide for financial loss caused to employees by a change of residence necessitated by the decision of a railway company to make a change, alteration or deviation in its lines or to remove, close or abandon any station or divisional point or create a new divisional point on such lines. The first reference to compensation appears as an addition to a section dealing with change, alteration or deviation in a railway. The present compensation provisions appear in the section which deals with that subject-matter.

At the time the compensation provisions were being added to the sections which preceded s. 182, and were being increased, there was no provision requiring the approval of the Board to the abandonment of a line.

My conclusion is that the compensation provisions of s. 182 are a part of a section which deals only with change, alteration or deviation of an existing and continuing line and with the removal, closing or abandonment of any station or divisional point and the creation of a new divisional point upon such a line. Abandonment of a line, on

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the other hand, is dealt with as a separate matter under the Act. The line is discontinued. The approval of the Board is required under s. 168 but no compensation is payable.

I would, therefore, dismiss the appeal without costs.

CARTWRIGHT J. (*dissenting*):—Pursuant to an order of the Board of Transport Commissioners for Canada, dated January 10, 1957[1], giving it leave to do so, the respondent abandoned operation of a line of railway, to which I shall refer as "the abandoned line", 57.9 miles in length, running from Ottawa to a point on the international boundary near Cornwall where it connected with the system operated by the respondent in the United States. This, of course, involved the closing of any station or divisional point situate on the abandoned line, and the order of the Board provided that the application on behalf of the employees of the respondent in respect of compensation should be reserved for further consideration.

At the hearing of the application for compensation there arose the question whether on the true construction of the relevant provisions of the *Railway Act*, R.S.C. 1952, c. 234, employees who had been retained in the employment of the respondent and whose removal was involved in the closing or abandonment of any station or divisional point on the abandoned line were entitled to be compensated by the respondent for any financial loss caused to them by change of residence necessitated thereby. This question was properly regarded as one of law and consequently the opinion of the Assistant Chief Commissioner that it should be answered in the negative prevailed over those of the Deputy Chief Commissioner and Mr. Commissioner Chase both of whom would have answered it in the affirmative[2].

The claim to compensation is based upon s. 182 of the *Railway Act* which reads as follows:

182. The company shall not, at any time, make any change, alteration or deviation in the railway, or any portion thereof, until the provisions of section 181 are fully complied with, nor remove, close, or abandon any station, or divisional point nor create a new divisional point that would involve the removal of employees, without leave of the Board; and

[1](1957), 74 C.R.T.C. 334 (*sub nom. Re New York Central Railroad Co.; Ottawa and New York Railway Co. Branch*).

[2](1957), 75 C.R.T.C. 22.

where any such change is made the company shall compensate its employees as the Board deems proper for any financial loss caused to them by change of residence necessitated thereby.

The claim of the employees appears to me to fall within the words of the section construed in their ordinary meaning. The company has in fact removed, closed or abandoned every station and divisional point which was situate on the abandoned line. Those of its employees previously employed at any station or divisional point thereon who have been retained in its employment have been removed to other situations in its railway system and it has been necessary for them to change their residence. The section does not appear to have been drafted by a meticulous grammarian; but it is reasonably plain that what is conditionally forbidden by that part of the section commencing with the words "nor remove" in the fourth line, and, if permitted, gives rise to the right to compensation, is such a removal, closure or abandonment of a station or divisional point as would involve the removal of employees and necessitate a change of their residence.

The learned Assistant Chief Commissioner has held in effect that the words of s. 182, last referred to above, touch such removals, closures or abandonments as are consequent on deviations, changes or alterations made pursuant to s. 181 or occur in situations other than the abandonment of the operation of a line, but do not touch removals, closures or abandonments consequent on an abandonment made pursuant to s. 168. I am unable to find any sufficient reason for this differentiation. The words "remove", "close" and "abandon" are not defined in the Act nor are they terms of art. In their ordinary meaning they describe the action taken by the respondent in regard to the stations on the abandoned line. The effect upon the class for whose benefit the part of the section under consideration was passed, *i.e.*, employees retained in a company's service and moved by reason of the abandonment of a station, is the same whether the portion of the line on which the station was situate is continued in its existing location or is abandoned or is relocated. In one sense every relocation of part of a railway involves an abandonment of the part for which the relocated line is substituted and in principle there is little difference between on the

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one hand abandoning altogether a line which forms only a fraction of 1 per cent. of a company's total system and on the other hand removing it and substituting for it a line in a different location. In either case there is a change in "the railway" viewed as a whole.

In my opinion, neither the arrangement of the sections in the *Railway Act* nor the history of the legislation furnishes sufficient reason for failing to give to the words of the section what appears to me to be their plain and ordinary meaning.

In *Riches v. Westminster Bank Limited*[1], Lord Simonds says at p. 405:

> My Lords, while I am ever prepared to consider any statute in the light of pre-existing law, I must admit to a reluctance to be diverted by the shadow of the past from the plain meaning of plain words.

I would allow the appeal, set aside the order of the Board of March 13, 1957, and refer the matter back to the Board to determine, in accordance with these reasons, the compensation to which the employees are entitled. As, however, the majority of the Court are of opinion that the appeal fails, no useful purpose would be served by my considering what order should be made as to costs or as to the motion questioning the standing of the unincorporated Brotherhoods to be parties to the appeal.

Appeal and motion dismissed without costs, CARTWRIGHT J. *dissenting.*

Solicitors for the appellants: Roebuck, Walkinshaw & Trotter, Toronto.

Solicitors for the respondent: Aylen, Scott & Aylen, Ottawa.

Solicitor for Canadian National Railway Company, intervenant: J. W. G. MacDougall, Montreal.

Solicitor for Canadian Pacific Railway Company, intervenant: K. D. M. Spence, Montreal.

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1 [1947] A.C. 390, [1947] 1 All E.R. 469.

A. E. DUPONT AND EDWARD CHARLES MacLEOD ..... APPELLANTS;

1958
*Mar. 25, 26, 27
Jun. 26

AND

MERRILL OSBORNE INGLIS, WALTER BIRON AND FRANK MANN ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law—Creation of special tribunals—Jurisdiction of Ontario Mining Commissioner—The Mining Act, R.S.O. 1950, c. 236, as amended by 1956, c. 47, s. 7—The British North America Act, ss. 96, 99, 100.

The 1956 amendments to *The Mining Act* creating the office of Mining Commissioner and defining his jurisdiction are *intra vires*. The statute is primarily legislation providing for the administration of mining resources owned by the Province under the general direction of appointees of the Provincial Government. The Commissioner, who is appointed by the Lieutenant-Governor in council, has authority touching the entire administration of the Act; his decisions on disputes are only part of a general supervising function. This comprehensive administration, taken with the provisions expressly excluding resort to the ordinary Courts (except by appeal under s. 144), indicates that the determinations by statutory officers are integrated with and included in the rights dealt with by the Act, as conditions of their creation. *Florence Mining Co. Ltd. v. Cobalt Lake Mining Co. Ltd.* (1910), 43 O.L.R. 474 at 475, quoted and applied. The superior Courts had been excluded from any feature of this administration since before Confederation and determinations of fact, so far as they might be taken as possessing a judicial quality, were made by justices of the peace from the passing of the *Gold Mining Act* in 1864. They were clearly considered as matters to be decided by persons of experience and practical competence. *Labour Relations Board of Saskatchewan v. John East Iron Works, Limited et al.*, [1949] A.C. 134 at 151, quoted and applied. The fact that the Commissioner exercises a power of review of the decisions of the recorder and that there is a right of appeal from his decisions to the Court of Appeal does not affect the position. Since the Province can create and appoint justices of inferior Courts, there is no reason why it cannot establish an inferior appellate Court. *Shell Co. of Australia, Ltd. v. Federal Commissioner of Taxation*, [1931] A.C. 275 at 295, applied.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Ferguson J.[2] Appeal allowed.

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux, Abbott, Martland and Judson JJ.

[1] [1957] O.R. 377, 8 D.L.R. (2d) 193.
[2] [1957] O.R. 193, 8 D.L.R. (2d) 26.

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R. D. Poupore, for the appellants.

J. R. Stirrett, Q.C., and *H. T. McGovern,* for the respondents.

Hon. A. Kelso Roberts, Q.C., C. R. Magone, Q.C., and *Miss C. M. Wysocki,* for the Attorney-General for Ontario.

F. P. Varcoe, Q.C., and *E. R. Olson,* for the Attorney General of Canada.

The judgment of the Court was delivered by

RAND J.:—The issue here goes to the constitutional validity of a tribunal established under *The Mining Act,* R.S.O. 1950, c. 236, as amended by 1956, c. 47, s. 7. The attack is made on the ground that the tribunal is or, in the proceedings out of which this appeal arises, was attempting to exercise the jurisdiction of a Court within the meaning of s. 96 of the *British North America Act.*

The Mining Act is primarily legislation providing for the administration of mining resources owned by the Province in the way of promoting their development and exploitation in private ownership, according to provisions, rules and regulations contained in the Act or made by the Lieutenant-Governor in council. The administration is under the general direction of the Minister of Mines, with a deputy, a departmental organization and a number of statutory officers.

The Act specifies in detail the acts to be performed by licensees as conditions of rights reaching ultimately to a patent in fee simple or a renewable lease of either land including minerals or the latter alone. Licences are obtainable by any person over 18 years of age on payment of a fee. The initial step is the staking of a claim by means of posts set down in a prescribed manner on which certain information is inscribed. By s. 57: "Substantial compliance as nearly as circumstances will reasonably permit with the requirements of this Act as to the staking out of mining claims shall be sufficient." Within a fixed time the staking is to be recorded at the office of the recorder for the district within which the claim lies. A sketch or plan of the claim showing the posts and distances is forwarded with the application together with other information sufficient to enable the recorder to indicate the location of the claim

on the office map, and to record the day and hour when staked, the date of application and the inscriptions or markings made. Required also is a certificate, verified by affidavit, that there was nothing on the lands to indicate that they were not open for staking, such as buildings, clearings or improvements. Particulars of every application which the recorder "deems to be in accordance with this Act" are entered unless a prior application is already recorded and subsisting for the lands or "any substantial portion" of them. The application, with its accompanying documents, is filed with the office records; and the recording is to be deemed to be made as of the moment when the application is received in the office. Within 6 months, the licensee is required to affix to each of the corner-posts of the claim metal tags, supplied by the recorder, impressed with the numbers and letters of the claim. On a written report by an inspector that the tags have not been so attached, the recorder is to cancel the claim, and to notify the licensee accordingly.

In case of rejection, if the licensee desires it, the recorder, under s. 61(2), shall "file" the application pending adjudication of its sufficiency. For that purpose, the licensee must, within 60 days, bring the matter before the recorder or the Commissioner, but this step is not deemed a "dispute" of a recorded claim, to which particular reference appears later.

Up to this point the functions of the recorder are ministerial and administrative, that is, possessing some measure of discretion. But in the competition of licensees challenges to alleged stakings and other required acts are inevitable which must be settled without delay, more or less informally, in some proximity to the situs of the claims, and by persons made familiar by experience with the substance of those practical details. They are what the history and the exigencies of prospecting and mineral discovery have shown to be best suited to the orderly and efficient utilization of the resources, and in large measure are embodied in the statute. At the same time that experience has furnished a similar acquaintance with the practices, attitudes and tendencies of those who push discovery into these remote and difficult regions.

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Provision is therefore made for filing with the recorder a "dispute" alleging the invalidity of a recorded claim; if the disputant claims to be entitled to be recorded in whole or part, a note of the filing is entered on the record of the claim. Unless it is otherwise ordered by the Commissioner or a transfer is made to the Commissioner by the recorder, the controversy is, in the first instance, decided by the recorder, whose decision, unless an appeal is taken to the Commissioner, is, by s. 123(5), "final and binding". By s. 124, as re-enacted by 1956, c. 47, s. 6, the recorder

> may give directions for the . . . carrying on of proceedings before him, and in so doing he shall adopt the cheapest and simplest methods of determining the questions raised before him.

Section 63, as re-enacted by 1954, c. 53, s. 3, provides for a "certificate of record". This certificate is issued after a claim has been recorded for 60 days or more and the recorder, among other things, "is satisfied that the requirements of the Act have been met". In the absence of mistake or fraud, it is conclusive evidence that, except for work to be done on the claim, those requirements have been met, but it may be set aside by the Commissioner on the grounds mentioned. When a certificate of work has been granted the conditions of a right to obtain a title have been met. In cases of forfeiture, the Commissioner may give relief on such terms as he considers just.

The Commissioner is appointed by the Lieutenant-Governor in council and his authority touches the entire administration. He may decide any claim, question, dispute or other matter and so far supersede the recorder. On appeal from the latter, the Commissioner is to make "such order in the premises as he deems just". He may require or admit new evidence, or may retry the matter; he is to decide questions "without unnecessary formality", select the place deemed most convenient for the parties, and his decisions on subsidiary issues are final and not appealable. He may obtain the assistance of "engineers, surveyors or other scientific persons" to examine the property, and make such use of their opinions or reports as he thinks proper. He may view the property and make use of any special skill or knowledge he possesses, in which case he is to make a statement of the fact sufficiently full to enable a judgment to be made of the weight to be given

it. When the parties consent in writing, he may proceed wholly on a view and his decision so based is, again, final. The order made by him, with the evidence, exhibits, statements, reports and reasons, is filed in the Department or the office of the recorder, as he directs. Subject to the provisions for finality, by s. 144, as re-enacted in 1956, an appeal from a decision by him lies to the Court of Appeal.

In the issue before us, some months after the recording of an alleged staking by the respondents, an application to record for the same area was made by the appellants; but in view of the prior entry the application was "filed". Following an inspector's adverse report on the respondents' claims, an enquiry was held by the recorder, who found that the staking had not been made as alleged and expunged the record of it; at the same time he recorded the application of the appellants. On appeal to the "judge", as under the existing legislation the appeal functionary was called, the dispute was aired *de novo;* but before decision, the statute was amended and a Commissioner was substituted for the judge without affecting the appeal jurisdiction. Steps were then taken to reinstate the appeal before the Commissioner, upon which the respondents applied for a writ of prohibition. For the purposes of the issue of fact raised, Ferguson J.[1] held the appointment of the Commissioner to have been within the legislative authority of the Province and refused the writ. The Court of Appeal[2], speaking through Schroeder J.A., took the view that adjudication by the Commissioner infringed s. 96 of the *British North America Act,* a view based largely, if not exclusively, on the fact of the provision for appeal from the recorder to the Commissioner, and directed the writ to issue.

I think it desirable to enquire first into the real character and content of the rights which the statute creates and the means it furnishes to give them recognition. The statute is dealing primarily with Crown lands; it would, in my opinion, be within provincial power to dispose of such land, over which legislative jurisdiction is exclusive, on any terms or conditions to be determined by, or in the

[1] [1957] O.R. 193, 8 D.L.R. (2d) 26.
[2] [1957] O.R. 377, 8 D.L.R. (2d) 193.

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absolute judgment or discretion of, any functionary whatever; the award or adjudication, in that case, would itself be a constituent element in the rights created: does the Act here evidence such an intendment? Its language creates rights, but *sub modo*; consistently with equality of treatment, tribunals have been set up with officers, *ex officio* justices of the peace, to make determinations while the land still remains within the title of the Crown. The recorder is an officer of the Department; the Commissioner, although not declared a departmental officer, is a statutory officer. His decisions on disputes are only part of a general supervising function. This comprehensive administration taken with the provisions expressly excluding resort to the ordinary Courts, except by appeal under s. 144, indicates that the determinations by the statutory officers are integrated in the rights provided, that, including those given by the Court of Appeal, they inhere in the rights as conditions of their creation: *Florence Mining Co. Limited v. Cobalt Lake Mining Co. Limited*[1], where at p. 475 Lord Collins uses this language:

> They [the plaintiffs] have completely failed to establish their claim to have made a discovery within the provisions of the Mines Act to the satisfaction of the officer charged with the duty of seeing that the regulations are duly observed.

The first provincial mining statute was the *Gold Mining Act*, 27-28 Vict., c. 9. The machinery set up, though not so elaborate, was, for such an issue as that here, in substance what is now provided. By s. 3 the officers, likewise justices of the peace, had power to

> settle summarily all disputes as to the extent or boundary of claims, use of water, access thereto, damage by licensees to others, forfeitures of licenses, and generally to settle all difficulties, matters or questions which may arise under this Act,

and no case was to be removed into any Court by *certiorari*. The superior Courts, those mentioned in s. 96 of the *British North America Act*, were excluded from any feature of that administration. The determinations of fact, so far as they might be taken as possessing a judicial quality, were made by justices of the peace, inferior tribunals. The practical competence called for and, by experience, acquired

[1] (1910), 43 O.L.R. 474.

is of the character implied by Lord Simonds in *Labour Relations Board of Saskatchewan v. John East Iron Works, Limited et al.*[1], where he says:

> It is as good a test as another of "analogy" to ask whether the subject-matter of the assumed justiciable issue makes it desirable that the judges should have the same qualifications as those which distinguish the judges of superior or other courts.

The adjudications by the recorder and the Commissioner are not to be treated in isolation; the special elements of experienced judgment and discretion are so bound up with those of any judicial and ministerial character that they make up an inseverable entirety of administration in the execution of the statute. To introduce into the regular Courts with their more deliberate and formal procedures what has become summary routine in disputes of such detail would create not only an anomalous feature of their jurisdiction but one of inconvenience both to their normal proceedings and to the expeditious accomplishment of the statute's purpose.

By s. 129 of the *Confederation Act,* all laws, Courts and all "legal Commissions, Powers and Authorities, and all officers, Judicial, Administrative, and Ministerial" existing in Ontario at the union were continued subject to be repealed, abolished or altered by Parliament or Legislature according to the authority of each. Within this continuity was the *Gold Mining Act;* and the function of deciding the sufficiency of compliance with the statutory requirements, as, for example, of staking, by the officer, was either an integral part of the rights arising, or, if of a judicial character, of a type not then exercised by the superior Courts.

If judicial power was conferred and it is to be held to be of the type exercised by superior Courts, then either the officers under the Act, for all purposes of this administrative statute, would be required to be appointed by the Dominion, or the adjudicatory function notionally segregated and held to be beyond exercise by a provincial appointee. That question would arise on the death or cesser of tenure of the functionary so continued in office. In the latter alternative those sections of the statute providing for the determination of disputes would at that

[1] [1949] A.C. 134 at 151, [1948] 4 D.L.R. 673, [1948] 2 W.W.R. 1055.

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moment automatically cease to have force, and resort, if any were open, would be to the superior Courts: it would be a constitutional absurdity that the Dominion should appoint, in accordance with ss. 96, 99 and 100, the officer of such a tribunal for his role as adjudicator of incidental disputes and the Province appoint the same person for all other purposes. I cannot accept a view that produces such a result as the effect of s. 129.

The interpretation of s. 96 has been authoritatively given by this Court in *Re The Adoption Act and other Statutes*[1], and by the Judicial Committee in *O. Martineau and Sons, Limited v. City of Montreal et al.*[2], and in *Labour Relations Board v. John East Iron Works, Limited et al., supra.* The Province, under its authority over the administration of justice, including the establishment of Courts, may and is in duty bound to maintain judicial tribunals and define their jurisdiction. The restriction of s. 96, with ss. 99 and 100, provisions vital to the judicature of Canada, is confined to Courts endowed with jurisdiction conforming broadly to the type of that exercised in 1867 by the Courts mentioned in the section or tribunals analogous to them. A distinction is here necessary between the character of a tribunal and the type of judicial power, if any, exercised by it. If in essence an administrative organ is created as in *Toronto Corporation v. York Corporation*[3], there may be a question whether provincial legislation has purported to confer upon it judicial power belonging exclusively to Courts within s. 96. Judicial power not of that type, such as that exercised by inferior Courts, can be conferred on a provincial tribunal whatever its primary character; and where the administrative is intermixed with *ultra vires* judicial power, the further question arises of severability between what is valid and what invalid.

With the greatest respect to the Court of Appeal, I cannot take the fact of a right of appeal to have any significant bearing on the issue. The Commissioner, by the terms of the statute, is not strictly an appeal Court; his

[1] [1938] S.C.R. 398, [1938] 3 D.L.R. 497, 71 C.C.C. 110.

[2] [1932] A.C. 113, [1932] 1 D.L.R. 353, [1932] 1 W.W.R. 302, 52 Que. K.B. 542.

[3] [1938] A.C. 415, [1938] 1 All E.R. 601, [1938] 1 D.L.R. 593, [1938] 1 W.W.R. 452.

function in appeal is essentially the same as that of the recorder, but on a review level; and its purpose is obviously to furnish the confirmation of a superior and here a possibly more independent functionary. That confirmation lies behind the appeal to the Court of Appeal, the precise nature or scope of which may call for some consideration. Since the Province can create and appoint justices of inferior Courts, there is no reason in the nature of things why it cannot establish an inferior Court of review or appeal; it is the subject-matter rather than the apparatus of adjudication that is determinative. Appeals in criminal matters from justices of the peace to quarter sessions were established procedure prior to Confederation in Ontario, in which, also, an appeal was long provided to the Division Court, the judge of which was appointed by the Province. In *Shell Company of Australia, Limited v. Federal Commissioner of Taxation*[1], Lord Sankey L. C. quotes with approval the reasons of Starke J. in the High Court[2], from the judgment of which the appeal was taken:

> A right of appeal in itself does not establish the vesting of judicial power either in the Commissioner or in a Board of Review.

Equally it does not of itself show judicial power of a superior Court character within the meaning of s. 96. On the same page the Lord Chancellor quotes the definition of "judicial power" given by Griffith C.J. in *Huddart, Parker and Co. Proprietary Limited v. Moorehead; Appleton v. Moorehead*[3], in which it is said:

> The exercise of the power does not begin until some tribunal which has the power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

It was contended that several provisions of the Act purported to confer jurisdiction over matters affecting private rights beyond the administration of Crown lands, and ss. 115 and 119 were cited. In the former no action is to be taken in any Court on any "matter or thing concerning any right, privilege or interest conferred by or under the authority of this Act". Section 118 expressly removes from the jurisdiction of the Commissioner any "power or

[1] [1931] A.C. 275 at 295, [1931] 2 W.W.R. 231.
[2] (1926), 38 C.L.R. 153 at 212 (*sub nom. The Federal Commissioner of Taxation v. Munro; The British Imperial Oil Company Limited v. The Federal Commissioner of Taxation*).
[3] (1908), 8 C.L.R. 330 at 357.

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authority to declare forfeited and void or to cancel or annul any Crown patent issued for lands, mining lands, mining claims or mining rights". This limits the scope of s. 115 to rights, privileges or interests arising up to the issue of patent. Confirmatory of that is the declaration by s. 66 of the interest of a licensee prior to the issue of a certificate of record as that only of a "licensee of the Crown" in the ordinary sense of the word "licensee", and after the issue and until patent, "a tenant at will of the Crown". These are preceded by the declaration that:

> The staking out or the filing of an application for or the recording of a mining claim, or all or any of such acts, shall not confer upon a licensee any right, title, interest or claim in or to the mining claim, *other than the right to proceed,* as in this Act provided, to obtain a certificate of record and a patent from the Crown . . .

(The italics are mine.)

In *Clarkson and Forgie v. Wishart and Myers*[1], that "right to proceed" was held to be within the *Execution Act* and that a purchaser was entitled to be substituted as owner of that right; but as between the licensee and the Crown there is only the licence or tenancy.

Section 119 contemplates proceedings which involve private civil and property rights and provides that a party may apply for an order transferring the proceedings to the Supreme Court. I should say that once that situation appears an order should go unless the party applying is willing to accept the Commissioner as an arbitrator. By reason of its terms s. 119 is clearly a severable provision and would be so apart from the provision for transfer.

Other sections, by general suggestion, were said to be similarly tainted, but nothing was specifically pointed out which, if encroaching on the judicial power of superior Courts, was so bound up with valid jurisdiction as to drag the latter down with it. The precise issue raised in this proceeding, which alone is in question, is clearly within provincial power and, contained in an administration statute with the scope of valid action clearly ascertainable, the separation of other encroachments, if any, would present no difficulty.

It was urged that the issue was in reality between the respondents and the individual appellants, but that confuses the matter. The question is the validity of the alleged

[1] [1913] A.C. 828, 13 D.L.R. 730, 24 O.W.R. 937.

first staking, and that is a matter between the licensee and the Crown. Its adjudication may affect a subsequent staking by another licensee; but there is no *vinculum juris* and no *lis* between the two licensees, and the disputant is before the tribunal only as he is permitted by the statute to have the claim of another put in question before the recorder. In the enquiry the subsequent staking is irrelevant, and the decision should be the same as if no such action had taken place.

Under the statute immediately before the amendments in 1956, R.S.O. 1950, c. 236, the judge, before whom the appeal here was brought, had been appointed by the Lieutenant-Governor in council of Ontario. This was confirmed by a commission issued under an order of the Governor General in council. The purpose of the latter was to provide against the contingency that the appointment by the Province should be held to be *ultra vires*. The order of confirmation recites that in the view of His Excellency's Government the responsibility for the appointment did not rest with that Government and that the commission was to be for the purpose of confirming the appointment only so far as it was competent to His Excellency to do so. In my opinion the appointment by the Lieutenant-Governor was valid and the confirmatory action by the Governor General in council of no effect.

I would therefore allow the appeal, set aside the judgment of the Court of Appeal and restore the order of Ferguson J., modified by striking out the allowance of costs to the Attorney-General for Ontario. The respondents Merrill Osborne Inglis, Walter Biron and Frank Mann shall pay the appellants A. E. Dupont and Edward Charles MacLeod their costs in this Court and in the Court of Appeal but there shall be no costs to or against the Attorney General of Canada or the Attorney-General for Ontario in any Court.

Appeal allowed.

Solicitors for the appellants: Macdonald & Macintosh, Toronto.

Solicitor for the respondents: J. R. Stirrett, Toronto.

Solicitors for the Attorney General of Canada: Varcoe & Duncan, Toronto.

51483-6—3

1958

*Feb. 10, 11
Jun. 26

CANADIAN ACCEPTANCE CORPORATION LIMITED (*Plaintiff*) ..... APPELLANT;

AND

EUGENE W. FISHER, LIQUIDATOR OF CONTRACTORS SUPPLIES LIMITED (*Defendant*) ..... RESPONDENT.

On appeal from the Court of Appeal for Saskatchewan.

Conditional sales—Assignment of seller's interest—Remedies of assignee—Recourse against assignor—Failure of assignee to give notice of resale—The Conditional Sales Act, R.S.S. 1953, c. 358, s. 9(2)—Whether compliance with subsection waived.

C.S. Co. sold a road-building machine under a conditional sales contract dated April 10, 1953, which it subsequently assigned to the plaintiff company. In the assignment it undertook to repurchase "the paper" if the buyer made default extending over a stated period; and also unconditionally guaranteed the buyer's payments.

The buyer made no payments under his contract. On November 26, 1953, the plaintiff repossessed the machine, and on the following day it sent notice to the buyer and to C.S. Co. demanding payment of the balance due, and stating that unless payment was made within a stated time the machine would be sold and the plaintiff would look to the buyer and C.S. Co. for any deficiency. On December 2, 1953, the plaintiff wrote to C.S. Co. demanding payment.

In April 1954 the defendant was appointed liquidator of C.S. Co., and in the following month he held an auction sale of machinery, including the machine bought from C.S. Co. The plaintiff agreed to this inclusion but insisted that the machine be made subject to a reserve bid equal to the amount owing under the contract, plus a commission.

The machine was not sold at the sale and from that time on the defendant took the position that the plaintiff, by its conduct, had made the machine its own and relieved the defendant of any further liability, and that he was not concerned with any further dealings with the machine. The plaintiff, having received and rejected several offers of which it notified the defendant, sold the machine in April 1955 without notice to the defendant, and shortly afterwards commenced an action for the deficiency. The trial judge was unable to find that the sale was an improvident one.

Held (Rand and Fauteux JJ. dissenting): The action should be dismissed. The plaintiff's failure to give the defendant the notice expressly required by s. 9(2) of *The Conditional Sales Act* was fatal to its success. *Advance-Rumely Thresher Company v. Cotton* (1919), 12 Sask. L.R. 327 at 333-4; *The American Abell Engine and Threshing Company, Limited v. Weidenwilt et al.* (1911), 4 Sask. L.R. 388,

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux and Abbott JJ.

approved. Nothing in the evidence justified a finding that the defendant had waived his right to receive notice of sale. Waiver must be based on fresh contract or estoppel. There could be no question of a fresh contract in this case, and there was no representation by the defendant of any matter of fact that would give rise to an estoppel by matter in pais. 8 Halsbury, 3rd ed., s. 299; 15 Halsbury, 3rd ed., s. 338, quoted with approval. *Charles Rickards Ld. v. Oppenhaim*, [1950] 1 K.B. 616 at 623; *Plasticmoda Societa v. Davidsons (Manchester), Ltd.*, [1952] 1 Lloyd, L.R. 527 at 539, distinguished.

Per Rand and Fauteux JJ., *dissenting*: It was clear in the circumstances of this case that the defendant's conduct constituted a waiver of notice of sale as a condition precedent to the plaintiff's right to claim against the defendant for a deficiency. In the circumstances, to give notice of the sale would have been wholly useless and the law would not compel the doing of a useless act. The defendant's language in conversation with the plaintiff's officers justified the plaintiff in proceeding as it did to dispose of the property without further reference by notice or otherwise to him, and this waiver was in no way affected by s. 22 of *The Conditional Sales Act*.

Statutes—Interpretation—Effect of re-enactment of statute after judicial interpretation—The Interpretation Act, R.S.S. 1953, c. 1, s. 24(4).

Per Kerwin C.J. and Taschereau, Locke, Cartwright and Abbott JJ.: The effect of s. 24(4) of the Saskatchewan *Interpretation Act*, which provides that the Legislature shall not, by re-enacting a statute, be deemed to have adopted a construction placed upon the language by judicial decision or otherwise, is merely to remove the presumption that existed at common law. In a proper case, it will still be held that a legislature, in re-enacting a particular provision, did have in mind the construction that had already been placed upon it. *The Canadian Pacific Railway Company v. Albin* (1919), 59 S.C.R. 151; *Orpen v. Roberts et al.*, [1925] S.C.R. 364; *Studer et al. v. Cowper et al.*, [1951] S.C.R. 450 at 454, applied.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], reversing a judgment of Thomson J.[2] Appeal dismissed, Rand and Fauteux JJ. dissenting.

D. G. McLeod and *J. D. Johnstone*, for the plaintiff, appellant.

E. C. Leslie, Q.C., for the defendant, respondent.

W. R. Jackett, Q.C., and *H. A. Chalmers*, for the Attorney General of Canada, intervenant.

Roy S. Meldrum, Q.C., for the Attorney General for Saskatchewan, intervenant.

The judgment of Kerwin C.J. and Taschereau, Locke, Cartwright and Abbott JJ. was delivered by

[1] (1957), 21 W.W.R. 385, 10 D.L.R. (2d) 247.
[2] (1956), 20 W.W.R. 119.

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CAN. ACCEPTANCE CORPN. LTD. v. FISHER

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Saskatchewan[1], reversing a judgment of Thomson J.[2] and dismissing the appellant's action.

On April 10, 1953, one Roger Stevenot signed a document headed "Conditional Sale Contract" whereby he agreed to purchase from Contractors Supplies Limited a "Model D Roadster Tournapull" and a "Carryall Scraper", hereinafter together referred to as "the machine", for $17,500. The unpaid balance plus a finance charge all of which Stevenot agreed to pay amounted to $12,741. At the same time Stevenot signed and delivered to Contractors Supplies Limited a document, which formed part of the sheet of paper on which the conditional sale contract was written but which was divided from that contract by a line of perforations and was referred to throughout the proceedings as a promissory note for $12,741. As a matter of convenience I will refer to this last-mentioned document as "the promissory note".

On April 15, 1953, Contractors Supplies Limited accepted the conditional sale contract, assigned it and the promissory note to the appellant for valuable consideration and guaranteed payment of the amount payable under the promissory note.

The appellant contends that, because of unfavourable credit reports on Stevenot, it required an undertaking from Contractors Supplies Limited to repurchase "the paper" (*i.e.*, the conditional sale contract and promissory note) in the event of default by Stevenot in making the deferred payments, continued for 61 days, pursuant to the provisions of para. 5 of an agreement between the appellant and Contractors Supplies Limited (the name of which was at that time Construction Equipment Limited), dated April 20, 1949.

Stevenot paid nothing under the conditional sale contract or the promissory note. On November 26, 1953, the appellant repossessed the machine. A notice was mailed to Stevenot and to Contractors Supplies Limited on November 27, 1953, demanding payment of the balance due on or before December 15, 1953, and stating that unless

[1] (1957), 21 W.W.R. 385; 10 D.L.R. (2d) 247.
[2] (1956), 20 W.W.R. 119.

payment was made within the time mentioned the machine would be sold either at private sale or at public auction and that the appellant intended to look to Stevenot and to Contractors Supplies Limited for any deficiency in the amount realized.

On December 2, 1953, the plaintiff wrote to Contractors Supplies Limited demanding payment of the amount owing and offering on receipt of payment to reassign "the original covering document".

On April 26, 1954, the respondent was appointed liquidator of Contractors Supplies Limited.

On May 21, 1954, the respondent held an auction sale of other machinery and with the concurrence of the appellant the machine in question was offered for sale, but, at the insistence of the appellant, it was made subject to a reserve bid of $10,680.79 (which was the amount then owing under the conditional sale agreement and promissory note) plus auctioneer's commission and the machine remained unsold.

From this point on the respondent took the position that the appellant, by repossessing the machine and insisting on its being made subject to a reserve bid when offered for sale at auction, had made the machine its own and had relieved the respondent from any further liability, and that what the appellant might see fit to do with the machine thereafter was no concern of the respondent.

In July 1954, the appellant advertised the machine, which was then in its possession, for sale in newspapers published in Regina, Calgary and Edmonton. It received some offers, but all of them were for much less than the balance remaining unpaid. From time to time as these offers were received the appellant notified the respondent, but, on each occasion, the latter repeated his contention that he was no longer concerned. In September 1954, the appellant wrote to the respondent demanding payment of the balance which it claimed and in November 1954, this demand was repeated by its solicitors but these demands were ignored.

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On April 22, 1955, the appellant sold the machine to one Wengert for $4,000. A few months later the machine was sold by Wengert for $9,000 but the learned trial judge was not satisfied that the sale to Wengert was an improvident one. There was no counterclaim for damages for breach of the obligation to effect a provident sale and Mr. Leslie referred to the evidence on this branch of the matter only for the purpose of emphasizing the desirability and importance of the requirement as to giving notice of sale contained in s. 9(2) of *The Conditional Sales Act*, R.S.S. 1953, c. 358.

It is common ground that the appellant did not give to the respondent any notice of the sale to Wengert as required by s. 9(2) mentioned above.

On January 12, 1956, the appellant commenced this action claiming $8,286.52, the balance remaining unpaid after crediting the proceeds of the sale to Wengert and taking account of some other items. No question arises as to the computation of this amount.

In the statement of claim the appellant stated three alternative grounds of action, (i) the guarantee of payment of all sums required to be paid by Stevenot contained in the assignment of the conditional sale contract by Contractors Supplies Limited, (ii) the endorsement of the promissory note and the guarantee of payment thereof signed by Contractors Supplies Limited, and (iii) the alleged agreement by Contractors Supplies Limited to repurchase the conditional sale contract pursuant to the agreement of April 20, 1949, and the demand made upon it thereunder.

In the statement of defence a number of matters were pleaded but I find it necessary to deal only with that contained in para. 16, which reads as follows:

> 16. The defendant says further that on or about the 13th day of April, A.D. 1955, the plaintiff sold the said Tournapull Scraper to one Wengert for the sum of $4,000 in cash, and the plaintiff failed to give to the defendant eight days notice of such intended sale, as required by The Conditional Sales Act, R.S.S. 1953, Chapter 358, Section 9, but gave it no notice thereof, and the defendant says that as a result thereof the plaintiff is not entitled to recover from the defendant the amount claimed in the amended Statement of Claim, or any part thereof.

The appellant delivered a reply paras. 2, 4 and 5 of which are as follows:

2. Alternatively, in so far as the claim of the Plaintiff based upon the Equipment Plan Retail Agreement [*i.e.*, the agreement dated April 20, 1949, referred to above] is concerned the Plaintiff was not obliged or required to give any notice to the Defendant and is not precluded by any failure to give notice.

* * *

4. In the further alternative the Defendant having on divers occasions advised the Plaintiff that the Defendant had no further interest in the Tournapull Scraper, the Defendant is now precluded from asserting that the Defendant was entitled to notice of sale and is estopped.

5. In the further alternative, the Defendant consented to the sale or waived any right which the Defendant might have had to receive notice of the intended sale.

The learned trial judge was of opinion that the appellant's failure to give notice to the respondent of the sale to Wengert would have been a complete answer to the appellant's action but held that the respondent had waived the right to receive notice, and gave judgment for the appellant.

The Court of Appeal were unanimous in holding that there had been no waiver by the respondent of his right to receive notice of the sale to Wengert and that the appellant's failure to give that notice was fatal to its success. They accordingly allowed the appeal and dismissed the action.

The guarantee of payment contained in the assignment of the conditional sale contract reads as follows:

In consideration of your purchase of the within contract, the undersigned hereby unconditionally guarantees, jointly and severally with the Purchaser, payment of all deferred payments as specified therein, and covenants in default of payment of any instalment or performance of any requirement thereof by Purchaser, to pay to Canadian Acceptance Corporation Limited, upon demand, the full amount remaining unpaid. The undersigned further specially represents and warrants that the title to the said property was at the time of the sale, and is now vested in the undersigned, free of all taxes, encumbrances, charges, privileges, pledges and liens, and that the undersigned has the right to assign such title, and further warrants that the full amount of the cash payment and/or trade-in as represented, has actually been made by the Purchaser. The liability of the undersigned shall not be affected by any settlement, extension of credit, or variation of terms of the within contract effected with the Purchaser or any other person interested, nor by any act or omission of Canadian Acceptance Corporation Limited in relation to any security held to secure this debt including the lien herein, or in making collections, insurance adjustments, repossession or resales, or in effecting filing or

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recording of the documents or any renewals thereof and the undersigned shall remain liable even if the security and/or right of action against the principal debtor has ceased to exist or be available. The undersigned agrees to be bound by each and every clause contained in the said contract as if it were recited at full length in this assignment.

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The contract itself, by every clause of which the assignor agrees to be bound, contains terms which, on their face, appear to waive the notice of sale required by ss. 8 and 9 of *The Conditional Sales Act*, but, if that is their effect, those terms are rendered null and void by s. 22 of the Act which reads as follows:

22. Subject to subsection (2) of section 20 [which has no application in the case at bar], every agreement or bargain, verbal or written, express or implied, that this Act or any provision thereof shall not apply or that any benefit or remedy provided by it shall not be available, or which in any way limits, modifies or abrogates or in effect limits, modifies or abrogates any such benefit or remedy, shall be null and void.

It may also be observed that the contract itself provides:

. . . it is understood and agreed that any provision of this contract prohibited by law of any Province shall, as to that Province, be ineffective to the extent of such prohibition without invalidating the remaining provisions of the contract.

Sections 7, 8, and 9 of *The Conditional Sales Act* read as follows:

7. If the seller or bailor or his assignee retakes possession of the goods, he shall retain the same in his possession for at least twenty days and the buyer, bailee or any one claiming by or through or under the buyer or bailee, may redeem the same upon payment of the amount actually due thereon and the actual necessary expenses of taking possession.

8. The goods shall not be sold without eight days' notice of the intended sale being first given to the buyer or bailee or his successor in interest. The notice may be personally served or may, in the absence of such buyer, bailee or his successor in interest, be left at his residence or last place of abode or may be sent by registered letter deposited in the post office at least ten days before the time when the said eight days will elapse, addressed to the buyer or bailee or his successor in interest at his last known post office address in Canada. The said eight days or ten days may be part of the twenty days mentioned in section 7.

9. (1) Where the seller or bailor assigns his interest in the contract of sale or bailment and agrees with the assignee to be liable for any sums due under the contract in default of payment thereof by the buyer or bailee, and the assignee retakes possession of the goods, he shall, within forty-eight hours thereafter, give notice thereof to the assignor. The notice may be personally served or may, in the absence of the assignor, be left at his residence or last place of abode or may be sent by registered letter deposited in the post office within the said forty-eight hours addressed to the assignor at his last known post office address in Canada.

(2) The assignee shall not sell the goods without first having given eight days' notice of the intended sale to the assignor. The notice may be given in the same manner as the notice provided for by section 8 and the said eight days may be part of the twenty days mentioned in section 7.

I agree with the conclusion of the Court of Appeal that the action of the appellant in selling the machine without giving to the respondent the notice required by s. 9(2) destroyed the right of the former to recover from the latter the balance remaining unpaid under the terms of the contract. It was so held in the judgment of the Court of Appeal in *Advance Rumely Threshing Company v. Cotton*[1], which approved and followed the judgment of Lamont J. in *The American Abell Engine and Threshing Company, Limited v. Weidenwilt et al.*[2]. While these cases arose under s. 8 the reasoning on which they proceeded is equally applicable to s. 9(2). In my opinion, the law is accurately stated in the following passage from the reasons of Lamont J.A. in the *Advance-Rumely* case, concurred in by Haultain C.J.S. and Elwood J.A., which appears at pp. 333-4:

> The plaintiffs are suing for the balance of the price of the two machines which were purchased under two separate contracts. To be entitled to the purchase-price a vendor must, generally speaking be prepared to hand over the articles purchased on payment thereof. Here, the plaintiffs admit that they are not in a position to hand over to the defendants the machinery purchased, these being now the property of third persons. To be entitled to judgment for the balance of the purchase-money, therefore, the plaintiffs must show that, notwithstanding their inability to hand over the purchased articles, they are entitled to the purchase-price. This they can do by showing that the defendants agreed that under certain circumstances they could retake possession of the purchased machines and resell them, and that the defendants would be liable for the balance. If they establish such an agreement and the existence of the circumstances giving them the right to retain possession and to resell, and establish that the resale, which was in fact made, was the one they were empowered by the agreement to make, they would be entitled to recover the purchase-money still unpaid.
>
> * * *
>
> By failing to prove compliance with the Statute, the plaintiffs have failed to prove that they are entitled to the balance of the purchase-money.

Had I been doubtful of the correctness of these decisions I would have thought that we should follow them in view of the circumstances that they have for many years been treated as stating the law of Saskatchewan on this matter

[1] 12 Sask. L.R. 327, [1919] 2 W.W.R. 912, 47 D.L.R. 566.
[2] (1911), 4 Sask. L.R. 388, 1 W.W.R. 321, 19 W.L.R. 730.

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and that since they were decided s. 8 has been re-enacted without any material alteration in R.S.S. 1930, c. 243, R.S.S. 1940, c. 291, and R.S.S. 1953, c. 358. In this connection I have not overlooked s. 24(4) of *The Interpretation Act*, R.S.S. 1953, c. 1, which provides:

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

The effect of this subsection was considered by Kerwin J., as he then was, in *Studer et al. v. Cowper et al.*[1] After referring to *The Canadian Pacific Railway Company v. Albin*[2] and *Orpen v. Roberts et al.*[3], he continued at p. 454:

> In view of these decisions, it must now be taken that subsection 4 of s. 24 of the Saskatchewan Interpretation Act, 1943, c. 2, which is the same as the ones referred to in the two cases mentioned, merely removes the presumption that existed at common law and, in a proper case, it will be held that a legislature did have in mind the construction that had been placed upon a certain enactment when re-enacting it.

It has already been pointed out that the learned trial judge took the same view of the law on this point as did the Court of Appeal but differed from them as to whether the respondent had waived the right to receive notice.

I agree with the conclusions of the Court of Appeal that, on the facts disclosed in the evidence, there was no waiver by the respondent of his right to receive the notice of the sale to Wengert, and that consequently it is unnecessary to consider whether had there been such a waiver in fact its effect would have been nullified by s. 22 of *The Conditional Sales Act*.

Taking the view of the evidence most favourable to the appellant, it appears that on each occasion when the appellant communicated with the respondent with regard to the offers received in 1954 for the machine, the latter took the position that the former, by its conduct in repossessing the machine and insisting on its being made subject to a reserve bid when offered for sale, had made

[1] [1951] S.C.R. 450, [1951] 2 D.L.R. 81.
[2] 59 S.C.R. 151, 49 D.L.R. 618, [1919] 3 W.W.R. 873.
[3] [1925] S.C.R. 364, [1925] 1 D.L.R. 1101.

the machine its own and lost its right to recover the balance of the price from the respondent and that, consequently, the machine had become the appellant's "baby" and was no longer any concern of the respondent.

I agree with the statement in 8 Halsbury, 3rd ed. 1954, s. 299, p. 175, that waiver is based on fresh contract or estoppel and that compliance with a particular stipulation in a contract may be waived by agreement or conduct. In the case at bar there is no question of a fresh contract.

The general rule as to estoppel by matter in pais is satisfactorily stated in 15 Halsbury, 3rd ed. 1956, s. 338, p. 169, as follows:

> Where one has either by words or conduct made to another a representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable man, understand that a certain representation of fact was intended to be acted on, and that the other has acted on the representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be.

The conduct of the respondent relied on as creating an estoppel did not amount to a representation of any matter of fact. It was an assertion of the opinion of the respondent that the legal result flowing from the undisputed facts known to both parties was that the respondent was released from further liability under the contract in question. I incline to the view that the respondent's opinion was erroneous and it is clear that the appellant so regarded it. There seems to be no ground for the suggestion that the appellant was misled.

For the appellant reliance was placed on the following statement of Denning L.J., as he then was, in *Charles Rickards Ld. v. Oppenhaim*[1]:

> If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it.

[1] [1950] 1 K.B. 616 at 623, [1950] 1 All E.R. 420.

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In *Plasticmoda Societa per Azioni v. Davidsons (Manchester), Ltd.*[1], the same learned lord justice said:

> If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would be inequitable for him so to do.

It may be, as suggested in 15 Halsbury at p. 175, that the doctrine set out in these passages has been too widely stated; but if it is applied as stated to the facts of the case at bar it does not appear to me to assist the appellant. I can find nothing in the evidence to indicate that the respondent gave any promise or assurance or made any representation to the appellant that he, the respondent, would regard himself as continuing to be bound by the term of the contract requiring him to pay the balance of the purchase-price remaining unpaid after credit had been given for the proceeds of a sale of the repossessed machine even if the appellant should make a sale without giving the notice required by the statute. The respondent made it clear to the appellant that he was taking the position that any obligation which would otherwise have rested upon him to pay that balance had been brought to an end by the appellant's conduct. The appellant rejected this view and continued to assert its right to be paid any balance remaining unpaid after a sale. If it wished to maintain this position it was, in my opinion, bound to fulfil the statutory condition precedent of giving notice.

It was suggested during the argument that to hold that the appellant was bound to give the statutory notice would be contrary to the principle which is stated in the following terms in Williston on Contracts, rev. ed. (1936), vol. 3, s. 698A, pp. 2008-9:

> It is an old maxim of the law that it compels no man to do a useless act, and this principle was applied in the time of Coke, if not before, to the case of a conditional promise. If the promisor is not going to keep his promise in any event, it is useless to perform the condition and the promisor becomes liable without such performance. So if before the time for the performance of a condition by a promisee, the promisor leads the promisee to stop performance by himself manifesting an intention not to perform on his part, even though the condition is complied with, "it is not necessary for the first to go further and do the nugatory act."

[1] [1952] 1 Lloyd, L.R. 527 at 539.

In my opinion the passage cited does not assist the appellant in the circumstances of the case at bar. When the respondent made default in payment of the purchase-price the appellant no doubt became entitled to treat the respondent as having broken the contract and to pursue the remedies to which it was entitled thereunder. One of these was to repossess and sell the machine and, having done so, to enforce payment by the respondent of the balance of the price remaining unpaid. It was upon the exercise of this particular remedy, the right to which could arise only after breach of the contract by the respondent, that the statute imposed the duty of giving notice. I cannot assent to the proposition that the definite repudiation of a contract by one party enables the other not merely to proceed immediately to enforce the remedies to which he becomes entitled upon breach, but also to disregard in the pursuit of those remedies the conditions which the law imposes on their exercise. I have proceeded throughout on the assumption that the right to notice might be waived by the respondent, but, for the reasons I have endeavoured to state above, I am of opinion that his statements did not amount to a waiver of notice. While the analogy may not be complete, it would, I think, be a surprising doctrine that the unequivocal refusal by a mortgagor to pay the mortgage moneys should transform a power of sale with notice contained in the mortgage into a power of sale without notice.

In so far as the appellant's claim is based on the promissory note, it is clear that it took the note with full knowledge of the terms of the contract in pursuance of which it was given and that, as between the parties, the appellant having by its conduct lost its right to sue for the balance of the price under the contract is in no higher position by reason of holding the note. Indeed during the argument it was conceded that, in the circumstances of this case, the promissory note was bound up with the other dealings between the parties in regard to the machine. For these reasons it becomes unnecessary to decide whether the document to which I have referred throughout these reasons as "the promissory note" was indeed a promissory note, and the questions as to the interpretation and constitutionality of *The Limitation of Civil Rights Act*, R.S.S. 1953, c. 95,

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which counsel for the Attorney General of Canada and the Attorney General for Saskatchewan were prepared to argue do not require decision.

The term of the agreement of April 20, 1949, upon which the appellant relies reads as follows:

> 5. As to the paper which you [*i.e.*, the appellant] purchase from us [*i.e.*, Contractors Supplies Limited] on the basis of our agreeing to repurchase in event of default by the obligor, our obligation shall be to repurchase any such paper on your request made at any time after default by the obligor in the payment of any instalment continuing uncured for 61 days or more or if we breach any warranty herein or in the paper, assignment, endorsement, or any provision of any other agreement as to such paper, and we will pay you an amount equal to your original investment plus uncollected accrued interest and any expenses of collection incurred by you after default by us, less all payments received by you on said paper on account of principal.

The evidence as to whether this agreement of April 20, 1949 was made applicable to the purchase by the appellant of the conditional sale contract and promissory note with which we are concerned is conflicting. On the assumption that it was made applicable, it does not appear to me to assist the appellant. I agree with the view of Procter J.A., that the appellant's right of action on the failure of the respondent to perform this agreement would have been for specific performance or damages in lieu thereof, that the appellant as a condition of its right of recovery would have had to show that it was in a position to assign "paper" evidencing some valid and enforceable right and that as the appellant had parted with the machine and, as a result of its own acts, no longer had any enforceable rights under the contract against either Stevenot or the respondent it ceased to have any "paper", within the meaning of the agreement, to assign.

I would dismiss the appeal with costs. There should be no order as to costs for or against the intervenants.

The judgment of Rand and Fauteux JJ. was delivered by

RAND J. (*dissenting*):—The facts in this appeal have been stated by my brother Cartwright. On the guarantee of payments under the lien note agreement, I find the respondent liable subject to the point of waiver of the notice of sale on which I differ from his conclusion, and it becomes necessary to examine the law applicable to that matter in some detail.

Repudiation by one party to a contract is a declaration that he will not thereafter perform any part of what he has promised to do. That promise may include not only substantive acts which make up the material consideration of the bargain but also what may be called "procedural" acts such as provision for arbitration or the giving of a notice as in the present case, and the question may arise of what has or has not been repudiated. A repudiation may be accepted and the promisee may elect any one of three courses of action. He may, for example, rescind the agreement, that is, declare it dissolved *ab initio* and if in that situation there is a basis for a claim on a *quantum meruit* that action lies; or he may elect to treat the contract as terminated or determined as to all further performance and bring action at once for damages; or he may await the time for fulfilment and claim damages as for default of actual performance. In the last case the repudiation in turn furnishes to the promisee an excuse for not proceeding with his performance while the repudiation continues and this applies to any part of a performance, whether a condition precedent to or concurrent with performance by the promisor. In this the distinction must be taken between furnishing such an excuse and creating a cause of action against the repudiating promisor. The excuse from performance may be related to the duty of the innocent party to mitigate damages, immediate or prospective; if the promisee should proceed with his performance he would, in many if not most cases, violate that rule. But situations might occur when an immediate stoppage in performance would, on the other hand, augment damages and in that case the completion of what was undertaken may be called for.

That an individual intended to be benefited by a notice or other procedural act can waive it is affirmed by *Great Eastern Railway Company v. Goldsmid et al.*[1], in which at pp. 936-7 the Earl of Selborne L.C. states the principle thus:

> It [a royal grant] is a jus introductum for the particular benefit of the city of London, and it falls within the general principle of law, "Unusquisque potest renunciare juri pro se introducto;" a principle not only of ancient but also of modern application, applicable even where Acts of Parliament have been passed of a much more public character. In such cases, when the rights given have been only private rights, unless there

[1] (1884), 9 App. Cas. 927.

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has been also in the Act of Parliament a clause excluding a power of contract, it has been held that by contract or by voluntary renunciation such rights, as far as they are personal rights, may be parted with and renounced.

In *Selwyn v. Garfit*[1], Bowen L.J. at pp. 284-5 deals with "waiver":

> What is waiver? Delay is not waiver. Inaction is not waiver, though it may be evidence of waiver. Waiver is consent to dispense with the notice. If it could be shewn that the mortgagor had power to waive the notice, and that he knew that the notice had not been served, but said nothing before the sale and nothing after it, although this would not be conclusive, there would be a case which required to be answered.

In *The City of Toronto v. Russell*[2], the Judicial Committee dealt with the failure to give notice to the owner of the sale of land for taxes as required by *The Assessment Act* and at p. 500 it is dealt with:

> But the notice, by warning the owner of what is about to take place, can only serve the purpose of enabling him either (1.) to oppose the sale as illegal or improper; or (2.) to attend the sale and bid at it, and see that it is regularly conducted; or (3.) to redeem his land by payment of the taxes due. These being things entirely for his own benefit, he can undoubtedly waive the notice: *Great Eastern Ry. Co. v. Goldsmid* (1884), 9 App. Cas. 927, at p. 936. The question is, Has he waived it? In other words, is there evidence from which it may fairly be inferred that he consented to dispense with the notice?

Following this he adds the language of Bowen L.J. which I have quoted.

The ground for this legal precept is the futility, in the circumstances, of requiring performance. In the face of repudiation it would be a useless act and the Courts have universally accepted the dictate of common sense that an act that will have no consequence or significance is not to be required of any person.

The distinction between the waiver of a condition precedent and the giving rise to a cause of action is strikingly exemplified in *Ripley v. M'Clure*[3]. The plaintiff, a merchant of Liverpool, agreed to sell to the defendant, a merchant in Belfast, who agreed to buy, on arrival, a one-third interest in a cargo of tea. Before its arrival the defendant repudiated and in the result the tea was not tendered at Belfast. It was held that an anticipatory repudiation was not a breach of contract but that, unretracted, it evidenced a continuing refusal, which

[1] (1888), 38 Ch. D. 273. [2] [1908] A.C. 493.

[3] (1849), 4 Exch. 345, 154 E.R. 1245.

waived the condition precedent of delivery and created a liability in the defendant for damages. The judgment was delivered in 1849 which was prior to the rule now accepted that an anticipatory repudiation may be treated as an immediate breach, but that fact serves to emphasize the distinction here made between that and a waiver. At pp. 359-60 Parke B. uses this language:

> By an express refusal to comply with the conditions of the contract of purchase, the defendant must be understood to have said to the plaintiff, "You need not take the trouble to deliver the cargo to me, when it arrives at Belfast, *as purchaser,* for I never will become such;" and this would be a waiver, *at that time,* of the delivery, and, if unretracted, would dispense with the actual delivery after arrival.

Repudiation giving rise to the analogous suspension of performance by the promisee is illustrated in *Cort and Gee v. The Ambergate, Nottingham and Boston and Eastern Junction Railway Company*[1]. The contract was for the manufacture and supply of goods from time to time to be delivered, and the purchaser, having accepted and paid for a portion of them, gave notice to the vendor not to manufacture any more as he would not accept them; the vendor, without manufacturing and tendering, was held entitled to maintain proceedings for damages. On the allegation that the vendor was at all times ready and willing to perform his part, Lord Campbell at pp. 143-4 had the following to say:

> The defendants contend that, as the plaintiffs did not make and tender the residue of the chairs, they cannot be said to have been ready and willing to perform the contract . . . We are of opinion, however, that the jury were fully justified upon the evidence in finding that the plaintiffs were ready and willing to perform the contract, although they never made and tendered the residue of the chairs. In common sense the meaning of such an averment of readiness and willingness must be that the noncompletion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it if it had not been renounced by the defendants.

And on the extent of the repudiation:

> If they had said, "make no more for us for we will have nothing to do with them," was not that refusing to accept or receive even according to the contract?

The same rule was applied in *Braithwaite v. Foreign Hardwood Company*[2]. There the purchasers of rosewood to be delivered in two lots repudiated and declared their refusal to accept delivery. Tender of both lots was later

[1] (1851), 17 Q.B. 127, 117 E.R. 1229.
[2] [1905] 2 K.B. 543.

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made and refused. Subsequently it appeared that the first lot was in part of defective material, which would have justified a rejection. At trial Kennedy J. made an allowance in the damages for this deficiency in quality but held the repudiation to have dispensed with the condition of quality otherwise attaching to the tender, and this conclusion was affirmed on appeal. At pp. 551-2 Collins M.R. observes:

> In the present case, after there had been a general repudiation of the contract by the defendants, the plaintiff's agent informed them that he had received the bill of lading for the first instalment; but the defendants again wrote refusing to take the bill of lading on the ground that they had previously repudiated the whole contract and refused to be bound by it. In my opinion that act of the defendants amounted in fact to a waiver by them of the performance by the plaintiff of the conditions precedent which would otherwise have been necessary to the enforcement by him of the contract which I am assuming he had elected to keep alive against the defendants notwithstanding their prior repudiation, and it is not competent for the defendants now to hark back and say that the plaintiff was not ready and willing to perform the conditions precedent devolving upon him, and that if they had known the facts they might have rejected the instalment when tendered to them. One answer to such a contention on the part of the defendants is that, tested by the old form of pleadings, it would have been a good replication by the plaintiff to aver that the defendants had waived performance by him of the conditions precedent by adhering to their original repudiation of the whole contract, and would not accept any instalment if tendered to them.

In *Jureidini v. National British and Irish Millers Insurance Company, Limited*[1], an insurance company repudiated a fire policy *in toto* on the ground of fraud and arson, and it was held that the denunciation of the claim "on a ground going to the root of the contract" precluded the company from pleading an arbitration clause expressly made a condition precedent to any right of action on the policy. Viscount Haldane L.C. expressed himself at p. 505 in these words:

> Now, my Lords, speaking for myself, when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced.

Lord Dunedin, at p. 507, qualified his reasons:

> Personally I should rather like to reserve my opinion as to what would have been the effect if the respondents, instead of pleading as they did, had pled in this way: "We will allow this question to be disposed of at law by a jury as to whether there was fraud and arson or not," and had gone on to say, "but in the event of that being negatived we wish this ascertainment of actual damage to be ascertained by arbitration". I should like to reserve my opinion on whether they might have said so with effect.

[1] [1915] A.C. 499.

Lord Atkinson considered the arbitration clause, which went only to the amount of loss sustained, as not having application when a repudiation was made on the grounds taken. Lord Parker of Waddington concurred without reasons and Lord Parmoor, on the point that the respondents had raised an issue on which, if they had succeeded, the claimants would have forfeited all benefit under the policy.

This decision, with two others, was considered in *Heyman et al. v. Darwins Limited*[1], in which also an arbitration clause was involved. Its terms were, however, wider than in *Jureidini* and were held to include the dispute which had arisen. The various reasons dealt with questions of the extent generally of repudiation, whether it went merely to substantive performance or whether it embraced every promise to which the promisor had bound himself. In the latter case, with such a clause as was then being considered, the special characteristic is that we have the only specific performance of a contract enforced at law as distinguished from equity; that is, the plaintiff, in the discretion of the Court, will have his action suspended pending his resort to arbitration for a precedent determination. But such a remedy is obviously inapplicable to a provision for notice and the judgment does not in any manner or degree affect the waiver of a condition precedent other than that of an arbitration clause. The distinction between the *Heyman* case and that of *Jureidini* lies in the fact, pointed out by Viscount Simon, that there was no such repudiation as in the latter case, that repudiation was denied. If the denunciation embraces the entirety of the contract it is difficult to see on what ground the defendants can, in any event, insist on the arbitration clause; the innocent party would be entitled to have it enforced in his favour, but why, after the acceptance of a repudiation including the arbitration clause, a defendant can, after action brought, revoke it as to that clause but not others would seem to call for more justification than the dicta in the case furnish.

The rule of excuse from performance by repudiation is further illustrated by *British and Benningtons, Limited v. North Western Cachar Tea Company, Limited et al.*[2];

[1] [1942] A.C. 356, [1942] 1 All E.R. 337. [2] [1923] A.C. 48.

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and it is well summed up in Salmond & Winfield, Law of Contracts, 1927, at p. 273:

> The meaning of a repudiation is: "I do not intend to perform my part of the contract and therefore I do not require you to perform your part either, even though performance of your part is a condition precedent to my obligation to perform mine."

The same result would follow in the case of notice under the *Bills of Exchange Act*. In Chalmers' Bills of Exchange, 12th ed. 1952, at p. 156, among the examples given is this:

> (2) The drawer of a bill informs the holder that it will not be paid on presentment. This (probably) waives notice.

The authority given is *Brett v. Levett*[1], where evidence was admitted to show an intimation by the drawer that the bill would not be paid at maturity, even though the waiver took place after an act of bankruptcy had been committed.

The question has been given its fullest examination by Professor Williston in his work on Contracts. In vol. 3, rev. ed. 1936, s. 698A, pp. 2008-9, he gives the general statement:

> It is an old maxim of the law that it compels no man to do a useless act, and this principle was applied in the time of Coke, if not before, to the case of a conditional promise. If the promisor is not going to keep his promise in any event, it is useless to perform the condition and the promisor becomes liable without such performance. So if before the time for the performance of a condition by a promisee, the promisor leads the promisee to stop performance by himself manifesting an intention not to perform on his part, even though the condition is complied with, "it is not necessary for the first to go further and do the nugatory act". The principle finds application in a great variety of contracts. It applies to conditions, the performance of which is not the real exchange for the thing promised. For instance, if an insurance company indicates that it is not going to pay an insurance loss in any event, the insured is excused from compliance with a condition requiring proofs of loss or arbitration or other preliminary acts.

He proceeds to deal with the excuse for continuance of performance of substantive matter and in the course of a number of sections touches upon many aspects of waiver, excuse from performance, breach of contract and other analogous matters exhibited in a multiplicity of cases in the American Courts. The statement is supported by the overwhelming weight of judicial opinion in them to the degree that makes it unnecessary to cite particular authorities.

What, then, was the extent of the repudiation here? That, to me, is established beyond any doubt by the evidence of the respondent:

[1] (1811), 13 East 213 at 214, 104 E.R. 351.

A. I told him, after he said the machine could be repaired, he had the information that the machine could be repaired for $3,000 and sold for $2,000 more than they had against it, I told him I thought it was very good business to do that, that it would be much better for us to be quarrelling over $1,000 than over $10,600.

Q. Yes, and did you go further than that and say—was there any discussion about who would pay for the repairs? A. Well, I think he may have asked me to pay for these repairs but I said . . .

Q. You refused? A. I said the machine was "your baby", that is the words I used.

Q. And I would take it, Mr. Fisher, that a fair interpretation of the words "it is your baby" is that as far as you were concerned you had nothing further to do with that machine? A. It was out of my possession then, I had nothing to do with it, no.

Q. Well, that was the stand you were taking? A. That is right.

Q. You were taking the position that you had nothing more to do with the Stevenot machine or the Stevenot account?

BY THE COURT: Q. What is your answer to that question? A. Yes. I had nothing more to do with it; I wanted nothing more to do with it.

BY MR. MCLEOD: Q. And you made it perfectly clear to Mr. Hillis . . . A. Yes.

* * *

Q. And then Mr. Hillis in July got in touch with you again and you again told him you weren't interested in any way? A. That is right, July or August, in there some time.

* * *

Q. And you took again the same position as you had previously taken? A. That is right.

Q. That is to say, that you weren't in any way concerned about the matter at all? A. That is right.

* * *

Q. And what did they do with it, do you know? A. I don't know.

Q. Well, did you have anything more to do with this piece of equipment? A. I have never seen the equipment again.

Q. But that isn't what I asked you. A. No, I had nothing more to do with it. I might inject this: At one time Mr. Hillis phoned me subsequent to that July conversation that he had a bid of $7,000 on the machine. I told him, "Well, it is your baby; do what you like."

Q. What did you mean by that? A. Well, he owned it.

Q. And he could do with it as he pleased? A. Yes.

Q. That was your stand on that? A. Yes, that was my stand.

Q. In any event, can you answer this question: Did the fact that there was a $4,500 bid come to your attention at that time? A. I heard of that, yes.

Q. What did you do about that? A. I didn't do anything.

I cannot agree that a waiver in its widest sense is not declared by these statements, language which justified the appellant in proceeding as it did to dispose of the property without further reference, by notice or otherwise, to the respondent; and the waiver was in no way affected by s. 22 of *The Conditional Sales Act*, R.S.S. 1953, c. 358. What that section prohibits is, by agreement, excluding

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or purporting to exclude any provision of the Act from application to the contract; there was no such agreement here; waiver is not, in that sense, agreement; it is unilateral renunciation made by the party protected by the statute.

I would, therefore, allow the appeal and restore the trial judgment with costs in the Court of Appeal and in this Court.

Appeal dismissed with costs, RAND *and* FAUTEUX JJ. *dissenting.*

Solicitors for the plaintiff, appellant: Pedersen, Norman & McLeod, Regina.

Solicitors for the defendant, respondent: MacPherson, Leslie & Tyerman, Regina.

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*May 7, 8, 9
Jun. 26

GERALDINE EDITH LITTLE AND JOHN J. McDONALD ..... APPELLANTS;

AND

THOMAS MAYLON LITTLE .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Appeals—Findings of fact by trial judge sitting without jury—When Court of Appeal entitled to interfere.

Divorce—Sufficiency of evidence—Private detectives—Interference on appeal.

An action for divorce was dismissed by the trial judge, who found that the evidence of private detectives called by the petitioner was not worthy of belief and that apart from their evidence there was no evidence of adultery. This judgment was reversed by the Court of Appeal, which was of the opinion that the trial judge had failed to give sufficient weight to other circumstances disclosed in the evidence which supported, to some extent, the evidence of the detectives, and that the latter evidence should consequently have been accepted. The respondent and corespondent appealed.

Held (Rand and Judson JJ. dissenting): The appeal should be allowed and the judgment at trial should be restored. The record did not indicate that the trial judge failed to make full use of the advantage that he had in seeing the witnesses and observing their demeanour in the witness-box. With that advantage, he had formed an opinion as to the truthfulness of the evidence given by the private detectives. This finding should not have been interfered with on appeal, in the circumstances of the case. *Watt or Thomas v. Thomas,* [1947] A.C. 484 at 491-2, applied. Further, it should be borne in mind that Courts in

*PRESENT: Rand, Locke, Cartwright, Martland and Judson JJ.

matrimonial causes had, for a long time, very closely scrutinized the evidence of paid detectives. *Ciocci v. Ciocci* (1854), 18 Jur. 194 at 198; *Sopwith v. Sopwith* (1859), 4 Sw. & Tr. 245 at 246, referred to. Eliminating this evidence, there was nothing but suspicion in the record and no evidence to support a decree of divorce.

Per Rand and Judson JJ., *dissenting*: Bearing in mind the rules laid down in *Powell et ux. v. Streatham Manor Nursing Home*, [1935] A.C. 243; *Yuill v. Yuill*, [1945] P. 15; *Watt or Thomas v. Thomas, supra*, it still must be said that the judgment at trial was one that required interference by the Court of Appeal. The detailed review by that Court of the evidence showed convincingly that the judgment of the trial judge was ill-founded, (1) because of a failure to test his findings of credibility against the probabilities of the situation before the Court, and (2) because the evidence that was left after rejection of that of the private detectives led irresistibly to an inference of adultery. Unless the credibility and demeanour of witnesses were tested against the whole of the evidence, a finding of credibility could be no more than an unsupported and unwarranted, and consequently non-judicial, subjective determination of rights.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing a judgment of Sullivan J., who dismissed a petition for divorce. Appeal allowed, Rand and Judson JJ. dissenting.

T. P. O'Grady, for the appellants.

David G. Sloan, for the respondent.

The judgment of Rand and Judson JJ. was delivered by

JUDSON J. (*dissenting*):—The principles which must guide an appellate Court in reviewing a finding of fact which is based on a trial judge's impression of the demeanour of witnesses and of their credibility are not in doubt and have been set out in *Powell et ux. v. Streatham Manor Nursing Home*[2], *Yuill v. Yuill*[3], and *Watt or Thomas v. Thomas*[4], cases which have been repeatedly cited and approved in this and other appellate Courts. The difficulty is not in the statement of the rule but in its application. In the present case the British Columbia Court of Appeal came to a unanimous conclusion that they ought to reverse such a finding of fact. I am in respectful agreement with their decision and I think the judgment at trial was one that needed their interference. Their detailed review of the evidence convinces me, as it did them, that the trial

[1] (1957), 21 W.W.R. 193.
[2] [1935] A.C. 243.
[3] [1945] P. 15, [1945] 1 All E.R. 183.
[4] [1947] A.C. 484, [1947] 1 All E.R. 582.

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judgment was ill-founded for two reasons: first, because of a failure to test the finding of credibility against the probabilities of the situation before the Court, and second, because the evidence that was left after the rejection of the impugned evidence led irresistibly to an inference of adultery.

The judgments of the Court of Appeal review the evidence in great detail and I do not intend to repeat more than is necessary to explain my agreement with these judgments. When the investigators employed by the husband began their work in August of 1955 the wife had been living alone in a self-contained apartment in Victoria since the month of February 1955, when she had left her husband and three children in Halifax. The wife admits that from February to August the corespondent McDonald was visiting her at this apartment two or three times per week. She denies adultery and she denies that he ever stayed the whole night. Mrs. McDonald knew of this association and suspected what was going on. The wife knew of Mrs. McDonald's attitude and was quite indifferent to her feelings. Mrs. McDonald says that when Mrs. Little returned to Victoria, her husband began to stay out all night and gave her an explanation that he was sleeping at the store where he worked. This she did not believe.

It is against this background of undenied association and, to me, an association for which no satisfactory explanation was or could in the circumstances be given that the learned trial judge's assessment of the evidence of the two investigators should be considered. I am entirely unable to understand how this long and entirely private association between this man and this woman, both of whom were on bad terms with their spouses, can be dismissed in any off-hand way as an innocent association. The petitioner pleaded this association and alleged adultery on August 7, 10, 12, 14 and 15, 1955, at the apartment occupied by the wife. The investigators said that on the first three occasions they saw McDonald enter the apartment in the evening and that he had not come out when they left at 7 o'clock in the morning. On the last occasion they say that they saw him go in in the evening and that he did not come out until close to 8 o'clock the following

morning, when he came out in company with Mrs. Little. Mrs. Little denies that the corespondent had stayed with her the whole night. Her explanation of the fact that they came out together in the morning is that McDonald, although he had been with her the previous evening, had left at a reasonable hour and had come back in the morning to take her to work. The trial judge accepted this explanation. McDonald did not testify.

It was this evidence that the learned trial judge rejected *in toto,* basing his conclusion on discrepancies, which he did not enumerate or explain, between the accounts given by the two witnesses. The Court of Appeal did analyze this evidence in detail and could find no substantial difference between the two accounts. On all points their evidence was in accord with contemporaneous written notes of their observations kept by one of them. The Court of Appeal found confirmation for its view of the facts in the evidence of Mrs. McDonald, who said that her husband was absent all night on at least two occasions when these observations were being made. It is not disputed that McDonald did enter the apartment on the evening of August 14 and did come out on the morning of the 15th. To accept Mrs. Little's explanation that McDonald had merely called to take her to work in the morning was beyond the credulity of the Court of Appeal and it is beyond mine. How can negative testimony given by the landlord that McDonald's car was not outside when he left to go to work in the morning prevail against this weight? He admits that he had no particular reason to remember it. How can anyone testify to a fact of this kind unless his mind is directed at the time of the event to the importance and significance of the observation and to the need for taking accurate note of the date and time? This man's attitude to the matter is indicated by the following extract from his evidence when he was asked about a conversation with Mrs. Little about the presence of these investigators:

Q. Did she tell you why they were investigating? A. I didn't inquire. I had my suspicions only it is none of my business.

Q. What suspicions have you got, Mr. Haigh? A. Well, really I haven't got any.

Q. You just said you had. A. Well, what I meant, it was no business of mine, you see.

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I do not overlook the need for close and even suspicious scrutiny of the evidence of paid investigators in a case of this kind. Nevertheless, I think, as did the Court of Appeal, that there was no attempt in this case to test the credibility and demeanour of these witnesses against the whole of the evidence and that the criticism directed against them was unjustified and that their evidence was in accordance with the probabilities and the admitted facts of the situation. I have the greatest difficulty in understanding how a finding of fact can carry weight unless it is capable of being tested in this way. Unless it is so tested it seems to me to be no more than an unsupported and unwarranted, and consequently non-judicial, subjective determination of rights. The Court of Appeal was justified in reviewing this finding of fact and coming to a contrary conclusion.

I would dismiss the appeal with costs.

The judgment of Locke, Cartwright and Martland JJ. was delivered by

LOCKE J.:—This is an appeal by the respondent and by the corespondent in a divorce action from a judgment of the Court of Appeal for British Columbia[1], by which the judgment at the trial, delivered by Sullivan J., dismissing the petition, was set aside and a decree granted. By the judgment appealed from, the custody of the three children of the marriage was awarded to the husband, the respondent in the present appeal.

By the petition it was alleged that since the solemnization of the marriage between the parties the respondent had committed adultery with John J. McDonald, the corespondent, "on divers occasions from January, 1953, until August, 1955, and in particular on the 7th August, 1955, 10th August, 1955, 12th August, 1955, 14th August, 1955, and the 15th August, 1955, at 942 Balmoral Road, in the City of Victoria, Province of British Columbia". At the trial, counsel for the petitioner abandoned these charges, other than those asserted in respect of the dates August 7 to August 14, 1955, both inclusive.

[1] (1957), 21 W.W.R. 193.

In the reasons for judgment delivered by the learned trial judge, the evidence given at the trial is carefully reviewed and it need not be here repeated. The evidence upon which the petitioner relied, apart from some circumstances which, it has been argued, amounted to confirmation of their evidence, was that of two private investigators or detectives by name Dunnett and Fiddick. If the evidence of these two witnesses had been believed by the learned judge, I think there can be no doubt that he would have granted a decree. Mrs. Little lived in a small four-room suite at the address mentioned, which she rented from one Haigh. The latter occupied a lower or basement suite in the house. There was but one door giving entrance to the premises occupied by Mrs. Little from the outside. According to these two witnesses, they saw McDonald on the verandah of Mrs. Little's suite on the evening of August 7 and while they watched the premises at night he did not leave and his car remained standing outside the house until the following morning. While they did not see McDonald on the evening of August 10 or 12, when they swore that they watched the premises at night, they said that his car stood outside the premises during both nights. On the evening of August 14, they said that they saw McDonald enter the suite about 9.30 and that he did not leave the premises until the following morning.

It is clear from the record that the learned trial judge was very doubtful of the honesty of these paid investigators when their evidence was being given. He had the great advantage, which the Court of Appeal had not and we have not, of observing the demeanour of these men in the witness-box, with all the advantage that seeing and hearing a witness give evidence affords in coming to a conclusion as to his truthfulness. Having had this advantage, the learned trial judge said as to Dunnett:

> There is certainly nothing about this man to commend him as a reliable witness.

And again:

> Of the two of them I should say that Fiddick is the more reliable, but I shall also say, with emphasis, that any confidence in the sworn testimony of either of them would be misplaced in the circumstances disclosed by the evidence here . . . Without going into a detailed examination or account of the discrepancies in evidence of these respective key witnesses

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called by petitioner (which a transcript of their evidence will disclose) I shall say, simply, that at conclusion of petitioner's case I did not believe either of them and that had I been pressed for immediate decision upon the motion for nonsuit then made by learned counsel for the corespondent I should have granted it. Similarly, a motion for nonsuit if then made on behalf of the respondent would have succeeded.

Mrs. Little gave evidence on her own behalf and denied categorically that McDonald had spent the night in her suite at any of the times mentioned, or that there had ever been any marital misconduct with him. As to her evidence, the learned judge said:

I accept her evidence without qualification as against the evidence of her husband and as against the evidence of his paid "investigator" witnesses. There was nothing in her husband's evidence to refute in respect of the marital misconduct charged against her . . . My acceptance of her evidence as against that of the "investigators" Dunnett and Fiddick means that I have found confirmation therein of the opinion previously come to, namely, that both of these witnesses committed perjury before the Court.

As pointed out in the judgment at the trial, there were a number of discrepancies between the evidence of the two investigators who claimed that they had been together watching the premises throughout the four nights in question. In addition, their evidence was contradicted in a most material particular by the evidence of the landlord Haigh. This witness was by occupation a boilermaker's helper and left his home for work every morning at 7.30. According to Dunnett and Fiddick, the corespondent's car had been standing on the roadway in front of the premises throughout the four nights and when they discontinued their observation in the morning. Haigh, who could not possibly have avoided seeing the car if it was there, said that it was not there at any time during the week ending August 14 when he left for work or on the morning of August 15. According to him, the investigators had come to his suite at about midnight on August 14 and, representing that they were police officers, asked him to assist them in obtaining access to Mrs. Little's suite. He had come to the door of his apartment and refused their request and said, contrary to the evidence of the investigators, that McDonald's car was not parked outside the premises at that time.

There were, in addition, contradictions in the evidence given by the petitioner and the respondent at the trial. The latter had sworn that before moving from Victoria to

Halifax he and his wife had had a serious dispute and that he then accused her of infidelity with McDonald. Mrs. Little flatly denied this or that there had been any suggestion of this nature before they arrived in Halifax. The learned judge said in terms that he believed her evidence and disbelieved that of her husband.

It appears from the evidence that McDonald had an interest in an electrical supply business in Victoria and that, prior to the time when the present respondent and his family left for Halifax, McDonald had obtained for him part-time employment there. Mrs. Little said in describing the treatment to which she was subjected by her husband when they were in Halifax (which the learned trial judge found became unbearable and forced her to leave him as she finally did in February 1955), that he had made threats against McDonald, threatening to kill him or have him assaulted by friends of his in Victoria, at the same time saying that he intended in some way to get possession of McDonald's share in the electrical business. The husband was not called to give evidence in rebuttal, a circumstance which may have appeared significant to the learned trial judge.

In *Watt or Thomas v. Thomas*[1], an appeal to the House of Lords in a divorce action which had been dismissed at the trial by the Lord Ordinary, whose judgment had been set aside in the Court of Session, Lord Thankerton, in delivering one of the judgments which allowed the appeal and restored the judgment at the trial, said that an appellate Court in such cases may be satisfied that it unmistakably appears from the evidence that the trial judge has not taken proper advantage of his having seen and heard the witnesses and that then the matter would become at large. He said further that it could hardly be disputed that consistorial cases form a class in which it is generally most important to see and hear the witnesses, and particularly the spouses themselves, and quoted with approval what had been said by Lord Shaw of Dunfermline in *Clarke v. Edinburgh and District Tramways Com-*

[1] [1947] A.C. 484, [1947] 1 All E.R. 582.

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pany, Limited[1], which was quoted with approval by Viscount Sankey L.C. in *Powell et ux. v. Streatham Manor Nursing Home*[2], in part as follows (p. 488):

> In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

In the reasons delivered by Lord Simonds in *Watt's Case,* the following passage appears which I consider to be particularly applicable to cases such as the present one (pp. 491-2):

> My Lords, I must venture to say with all deference that they [the Court of Session] appear to me to have disregarded the principles laid down in this House for the guidance of courts of appellate jurisdiction, where the appeal is against a finding of fact by a lower court. Applying those principles to this case I am satisfied that an appellate court having none of those advantages which the trial judge enjoyed of hearing and observing the witnesses, was not justified in concluding that he was so clearly wrong that their judgment of fact should be substituted for his. Nor do I find in the judgment of Lord Mackay any real appreciation of the weight that should be given to the trial judge's own estimate of the value of testimony. I suppose that if ever there was a class of case, in which an overwhelming advantage lies with the judge who has the witnesses before him, it is in the area of connubial infelicity and discord. To me, as I read through those many pages of evidence, once and again the reflection occurred: would that I could have seen the witness and heard his voice as he said this or that. I do not think that with only the cold written word to guide me I should have come to a different conclusion from that of the Lord Ordinary. Much less do I think that there is any justification for doing so when he has enjoyed the important advantages denied to an appellate court.

The fact that the corespondent had elected not to give evidence at the trial is commented upon in the judgments delivered in the Court of Appeal[3]. The explanation of his failure to do so appears from the record to have been that, at the conclusion of the petitioner's case, counsel for the corespondent moved for a nonsuit and elected to rely upon this. As appears from the judgment at the trial, if this motion had been pressed the learned judge would have granted it. Judgment on the motion was, however, reserved. In my opinion, no inference adverse to the corespondent should be drawn from this occurrence.

[1] [1919] S.C. (H.L.) 35 at 37. [2] [1935] A.C. 243 at 250.
[3] (1957), 21 W.W.R. 193 at 197, 201.

Attention is also directed in the judgment of Sidney Smith J.A. to the fact that when the Littles had moved to Halifax Mrs. McDonald had found some letters which, she said, had been written to her husband by Mrs. Little and that when he found she had taken them he took them from her by force. No steps had been taken to obtain the production of these letters at the trial or to show that they had been either lost or destroyed, and secondary evidence of their contents was rejected. Mrs. McDonald had had a conversation with her husband at the time about the letters but claimed privilege from disclosing what he had said and the evidence was not given. Sidney Smith J.A. considered that it was a fair inference that these letters "disclosed the intrigue between the two". Significance was further attached to the fact that Mrs. McDonald, who gave evidence on behalf of the petitioner, had said that around the second week of August her husband had not come home on two nights. Mrs. Little said that McDonald had told her that he slept at his store fairly frequently. There was undoubtedly ill-feeling between McDonald and his wife as a result of his friendship with Mrs. Little and this may have been the explanation of his absences from home.

I have examined very carefully the evidence given in this case. There is no doubt that the learned judges of the Court of Appeal, even in cases where the issue depends upon the veracity of the witnesses, are not only empowered but that it is their duty to overrule the findings at the trial if, bearing in mind the principles to which I have above referred, they are satisfied that the trial judge has failed to use the advantage afforded to him of having seen the witnesses and observed their demeanour in the witness-box in coming to his conclusion and that it is clearly wrong. This has been done in this Court in the case of concurrent findings of such a nature in *The North British & Mercantile Insurance Company v. Tourville et al.*[1]

In the present case, with the greatest respect for the contrary opinion of the learned judges of the Court of Appeal, I can find no support for a contention that the learned and experienced trial judge who heard this case failed to utilize what Lord Simonds referred to as the

[1] (1895), 25 S.C.R. 177.

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overwhelming advantage which he had in seeing the witnesses and observing their demeanour in the witness-box in forming his estimate as to their truthfulness. In my opinion and with deference to contrary opinions, eliminating the evidence of the witnesses Dunnett and Fiddick, there was nothing but suspicion and no evidence to support a decree of divorce. As to these two witnesses it should be borne in mind that, for a very long time indeed, the Courts having jurisdiction in matrimonial cases have very closely scrutinized the evidence of paid detectives. As to this, I refer to the judgment of Dr. Lushington in *Ciocci v. Ciocci*[1], and of the Judge Ordinary in *Sopwith v. Sopwith*[2]. The effect of the authorities is summarized in Rayden on Divorce, 7th ed. 1958., p. 136, and in 12 Halsbury, 3rd ed. 1955, at p. 238.

Sullivan J. clearly scrutinized the evidence of these investigators with great care: there is no justification, in my opinion, for concluding that he overlooked any of the relevant evidence in the case, and to say that he was so clearly wrong that the judgment of the Court of Appeal on the facts should be substituted for his I consider to be error.

I would allow this appeal, set aside the judgment of the Court of Appeal and restore the judgment at the trial, with costs against the present respondent throughout.

Appeal allowed with costs throughout, RAND *and* JUDSON JJ. *dissenting.*

Solicitors for the respondent and corespondent, appellants: Straith, O'Grady, Buchan & Smith, Victoria.

Solicitors for the petitioner, respondent: Harman, Sloan, & McKenzie, Victoria.

[1] (1854), 18 Jur. 194 at 198.
[2] (1859), 4 Sw. & Tr. 245 at 246, 164 E.R. 1509.

REXAIR OF CANADA LIMITED (*Defendant*) ..... APPELLANT;

AND

HER MAJESTY THE QUEEN (*Plaintiff*) ..... RESPONDENT.

1958

*Apr. 29

Jun. 26

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Federal excise tax and sales tax—Manufacturer—Special arrangements between holder of patent rights and other company—The Excise Tax Act, R.S.C. 1952, c. 100, ss. 2(a)(ii), 23(1), (5), 30.

The appellant company, a subsidiary of a United States company, was incorporated for the purpose of marketing, throughout Canada, a vacuum cleaner sold under a trade-name registered in Canada in the name of the parent company, which held assignments of the necessary patents. No written licence was given to the appellant but the evidence showed that the American company permitted the appellant and another company, C.R. Co., to use its Canadian patent and trade-mark rights.

The appellant and C.R. Co. entered into an agreement whereby the latter agreed to manufacture vacuum cleaners for the appellant and the appellant undertook to indemnify C.R. Co. against any claims for infringement of patents.

C.R. Co. received a licence under the *Excise Tax Act* and paid sales tax and excise tax on the prices charged by it to the appellant, but under the agreement it was entitled to be reimbursed for these taxes by the appellant. The appellant took delivery of the cleaners from C.R. Co. and sold them through its distributors.

Held (Cartwright J. dissenting): Taxes were properly payable on the prices charged by the appellant to its distributors, rather than on the prices charged by C.R. Co. to the appellant. The appellant was within the definition of "manufacturer or producer" in s. 2(*a*)(ii) of the Act, since C.R. Co. manufactured the goods "for" the appellant and the latter exercised complete control over the production. Even if the appellant did not own or hold a patent right it used a patent right, and also the trade-mark right which was an "other right" within the meaning of the definition. The words "producer or manufacturer" in s. 30 of the Act should receive the same construction as "manufacturer or producer" in ss. 2(*a*)(ii) and 23(1). *The King v. Shore,* [1949] Ex. C.R. 225, approved.

Per Cartwright J., *dissenting*: C.R. Co. was the actual manufacturer of the goods, and the Act showed that it was Parliament's intention to levy the taxes on the price at which the manufacturer sold to a purchaser, in this case the appellant. The contract between the appellant and C.R. Co. was one for the sale of "future goods" as defined in s. 6(1) of the Ontario *Sale of Goods Act,* and property in the goods passed to

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the appellant from time to time as provided in Rule 5 of s. 19 of that Act. The contract could not be construed as one of agency. *Dixon v. London Small Arms Company* (1876), 1 App. Cas. 632, applied.

APPEAL from a judgment of the Exchequer Court of Canada[1]. Appeal dismissed, Cartwright J. dissenting.

P. B. C. Pepper, for the defendant, appellant.

G. Henderson, Q.C., for the plaintiff, respondent.

The judgment of Kerwin C.J. and Abbott, Martland and Judson JJ. was delivered by

THE CHIEF JUSTICE:—By an information exhibited in the Exchequer Court Her Majesty the Queen under the provisions of the *Excise Tax Act* claimed from the appellant, Rexair of Canada Limited, a sum of money for excise tax and sales tax together with interest, penalties and licence-fees. Hyndman J., sitting as Deputy Judge, gave judgment as asked[1] following an earlier decision of Cameron J. in *The King v. Shore*[2].

The appellant was incorporated in 1947 under the *Dominion Companies Act* as a wholly-owned subsidiary of Martin-Parry Corporation, a United States company, to market throughout Canada a vacuum cleaner known as the "Model C. Rexair Conditioner and Humidifier" and sold under the trade name "Rexair", which is registered in Canada in the name of Martin-Parry. That company is also the holder by assignment of various patents of invention in the United States and other countries, including five in Canada, the latter being in respect of parts of vacuum cleaners. While no written licence was given, the evidence is explicit that Martin-Parry permitted the appellant and Canadian Radio Manufacturing Corporation Limited (hereinafter referred to as "Canadian Radio") to use its Canadian patent and trade-mark rights.

An agreement, dated July 10, 1950, was entered into between the appellant and Canadian Radio whereby the latter agreed to manufacture for the appellant 10,000 "Rexairs" and wherein the appellant undertook to idemnify Canadian Radio against all claims for infringement of patents. It was also provided that no change in material

[1] [1956] Ex. C.R. 267, [1956] C.T.C. 108, 56 D.T.C. 1056.
[2] [1949] Ex. C.R. 225, [1949] C.T.C. 159.

or design should be made without the prior written approval of the appellant. Clause 1(e) contemplated that some of the tools required for the manufacturing operation might be transfered from Martin-Parry, although no such transfer was made. The same clause also provided that all tools required would become the property of the appellant and would not be used in the production of goods except for the appellant. By cl. 4 the appellant agreed to disclose improved procedures resulting from the experience of Martin-Parry. By cl. 8 the appellant was entitled to maintain an inspector in the plant of Canadian Radio with authority to reject any parts or completed machines which did not conform to the appellant's drawings (which were to be and were furnished by the appellant to Canadian Radio) and to the appellant's standard of finish and test specifications. In accordance with this clause, an employee of the appellant spent part of most of the days during which the units were actually being manufactured at the plant of Canadian Radio.

Canadian Radio received a licence under the *Excise Tax Act* and paid sales and excise taxes on the prices charged by it to the appellant, but, by the effect of cl. 1(f) of the agreement, was entitled to be reimbursed therefor by the appellant. The appellant took delivery of the Rexairs from Canadian Radio and sent them to its distributors and the taxes now claimed are on the prices charged by the appellant to those distributors, less the amounts paid by Canadian Radio.

While the rates of taxation varied throughout the period in question—February 1, 1951, to November 1953—it is agreed that reference may be made to the *Excise Tax Act*, R.S.C. 1952, c. 100. By subs. (1) of s. 23 thereof, an excise tax is imposed in respect of goods "manufactured or produced in Canada" and by subs. (2) "when the goods are manufactured or produced and sold in Canada, such excise tax shall be paid by the manufacturer or producer at the time of delivery of such goods to the purchaser thereof". Subsection (5) provides for the application to certain articles of the words "manufactured or produced

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in Canada", but these are special cases and have no significance in the disposition of the appeal. Section 2, however, is important:

2. In this Act,

(a) "manufacturer or producer" includes

* * *

(ii) any person, firm or corporation that owns, holds, claims, or uses any patent, proprietary, sales or other right to goods being manufactured, whether by them, in their name, or for or on their behalf by others, whether such person, firm or corporation sells, distributes, consigns, or otherwise disposes of the goods or not.

Subsection (2) of s. 23 refers to "when goods are manufactured or produced and sold in Canada", but clearly the Rexairs were so manufactured or produced and the question is whether the appellant was the manufacturer or producer. On the evidence referred to above that question must be answered in the affirmative. Canadian Radio agreed to manufacture them "for" the appellant and the control exercisable and in fact exercised by the appellant over the production leads to the same conclusion. Even if the appellant did not own or hold a patent right (which is an affirmative, and not merely a negative, right) it used a patent right and also an "other right" being the trade-mark right; and both of these were rights to goods being manufactured for or on their behalf by Canadian Radio and so bring the appellant within the extended meaning of "manufacturer or producer".

Mr. Pepper argued that taking the French version of s. 2 (a)(ii) together with the English text, as is indeed proper, a different construction was not merely suggested but required. The French version is as follows:

2. Dans la présente loi, l'expression

(a) "fabricant ou producteur" comprend

* * *

(ii) toute personne, firme ou corporation qui possède, détient, réclame ou emploie un brevet, un droit de propriété, un droit de vente ou autre droit à des marchandises en cours de fabrication, soit par elle, en son nom, soit pour d'autres ou en son nom par d'autres, que cette personne, firme ou corporation vende, distribue, consigne ou autrement aliène les marchandises ou non.

". . . des marchandises en cours de fabrication" should be taken as the equivalent of "goods [which are] being manufactured". Reading (ii) as a whole in the French

version, there are no grounds upon which it may be construed in a sense differing from that to be ascribed to the English text.

The sales tax is imposed by s. 30 of the *Excise Tax Act* in the following words:

> 30. (1) There shall be imposed, levied and collected a consumption or sales tax of eight per cent on the sale price of all goods
>
> (*a*) produced or manufactured in Canada
>
> (i) payable, in any case other than a case mentioned in subparagraph (ii), by the producer or manufacturer at the time when the goods are delivered to the purchaser or at the time when the property in the goods passes, whichever is the earlier, ...

Although, in this section, the reference is to the tax being payable by "the producer or manufacturer" rather than by "the manufacturer or producer" in s. 2, the meaning of each phrase is the same. Furthermore, s. 31 (1) of the Interpretation Act, R.S.C. 1952, c. 158, provides:

> 31. (1) In every Act, unless the contrary intention appears,
>
> * * *
>
> (*n*) where a word is defined other parts of speech and tenses of the same word have corresponding meanings;

so that, in any event, "produced or manufactured" is entitled to the assistance of the extension of the meaning of "manufacturer or producer" in s. 2(*a*).

It may be that, as was suggested, all the arguments now advanced were not presented to the Exchequer Court in *The King v. Shore, supra,* but for the reasons given above that decision was correct and this appeal must be dismissed with costs.

CARTWRIGHT J. (*dissenting*):—The relevant facts are set out in the reasons of the Chief Justice and in those of the learned Deputy Judge[1].

The question to be decided is whether the excise tax, levied under s. 23 of the *Excise Tax Act,* hereinafter referred to as "the Act", and the sales tax levied under s. 30 of the Act are to be computed on the sale of the vacuum cleaners by the appellant to the distributors who purchased from it or on the sale, if there was one, from Canadian Radio Manufacturing Corporation Limited, hereinafter referred to as "Canadian Radio", to the appellant. The answer depends on whether Canadian Radio or the

[1] [1956] Ex. C.R. 267, [1956] C.T.C. 108, 56 D.T.C. 1056.

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appellant was the manufacturer of the goods within the meaning of that word as used in the sections mentioned.

The claim of the respondent is founded largely on s. 2(*a*)(ii) of the Act which reads:

> 2. In this Act,
>
> (*a*) "manufacturer or producer" includes
>
> * * *
>
> (ii) any person, firm or corporation that owns, holds, claims, or uses any patent, proprietary, sales or other right to goods being manufactured, whether by them, in their name, or for or on their behalf by others, whether such person, firm or corporation sells, distributes, consigns, or otherwise disposes of the goods or not.

There was some discussion in argument as to what word in clause (ii) is the object governed by the preposition "for". It appears to me to be "others". I think the words "or for or on their behalf by others" are used as the equivalent of "or for others or on their behalf by others". That this is so would be clearer if there were commas after the words "for" and "by" and the punctuation were as follows: "or for, or on their behalf by, others"; but any doubt on the matter appears to me to be removed by the wording of the French version, "soit pour d'autres ou en son nom par d'autres". This point may not be of great importance as the learned Deputy Judge has based his decision on the view that the goods were being manufactured by Canadian Radio on behalf of the appellant. He says in part[1]:

> If I am correct in this interpretation of the said agreement, it seems to me one cannot escape the conclusion, examining the said agreement as a whole, that the units in question were being manufactured on behalf of Rexair, and for no other purpose.

The learned Deputy Judge finds—and on the evidence it is indisputable—that Canadian Radio was the actual manufacturer of the goods; and correctly states the issue to be whether or not in spite of this the appellant and not Canadian Radio must be regarded as the manufacturer within the meaning of the *Excise Tax Act*.

On a consideration of ss. 23 and 30, read in the context of the whole Act, it appears to me to be the intention of Parliament to levy the taxes with which we are concerned on the sale price of goods sold by the manufacturer thereof

[1] [1956] Ex. C.R. at p. 273.

to a purchaser, payable at the time of delivery of the goods or (in the case of sales tax) at the time when the property in the goods passes, whichever is the earlier.

There is no suggestion in the case at bar that the appellant and Canadian Radio were not entirely independent corporations dealing with each other at arm's length; and if the contract between them was one of sale, in my opinion, it would be on the price paid by the appellant to Canadian Radio that the taxes should be computed. If, on the other hand, on the true construction of the terms of the contract, Canadian Radio agreed to manufacture the goods as the agent of the appellant or, to use the words of s. 2(*a*)(ii), to manufacture the goods on its behalf, the appeal would fail, for then the appellant would be the manufacturer, *qui facit per alium facit per se,* and the first sale of the goods would be that made by it to its distributors.

On a consideration of all the terms of the contract, and with deference to the contrary view entertained by the learned Deputy Judge, I have reached the conclusion that the contract was one for the sale of "future goods" as defined in *The Sale of Goods Act,* R.S.O. 1950, c. 345, s. 6(1), reading as follows:

> 6.—(1) The goods which form the subject of a contract of sale may be either existing goods owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods".

and that the property in the goods passed to the appellant from time to time as provided in Rule 5 of s. 19 of the last-mentioned act, which reads:

> *Rule 5*—(i) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer, and such assent may be expressed or implied, and may be given either before or after the appropriation is made;
>
> (ii) where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not), for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

The circumstances, that the goods were to be manufactured to the specifications of the appellant, that the appellant had the right of inspection and rejection, that

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the contract contained an "escalator clause", that the appellant agreed to indemnify Canadian Radio against claims for infringement of patents, that certain dies and tools were to be purchased by the appellant and that Canadian Radio agreed not to sell the goods to anyone other than the appellant do not, I think, permit us to treat the contract as one of agency and not of sale. It seems clear that the goods while in process of manufacture were the property of Canadian Radio and that a loss which happened by fire would have fallen upon Canadian Radio. The reasons against construing the contract in the case at bar as one of agency appear to me to be as cogent as those found sufficient by the House of Lords in *Dixon v. The London Small Arms Company, Limited*[1].

I confess to having difficulty in fully understanding the intention of Parliament in enacting s. 2(*a*)(ii), quoted above; but I cannot construe the clause as changing the incidence of taxes which in my opinion under the plain words of s. 23 and s. 30 fall upon the sale from Canadian Radio to the appellant to a later sale made by the appellant to others. Having reached the conclusion that the contract between Canadian Radio and the appellant was one under which the appellant purchased from Canadian Radio goods manufactured by the latter, I find it impossible to hold that the appellant was itself the manufacturer of the goods.

I would allow the appeal, set aside the judgment of the Exchequer Court and dismiss the information with costs throughout.

Appeal dismissed with costs, CARTWRIGHT J. *dissenting.*

Solicitors for the defendant, appellant: McMillan, Binch, Stuart, Berry, Dunn, Corrigan & Howland, Toronto.

Solicitor for the plaintiff, respondent: F. P. Varcoe, Ottawa.

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[1] (1876), 1 App. Cas. 632.

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DEEP SEA TANKERS LIMITED AND SHELL OIL COMPANY (*Plaintiffs*) ..... APPELLANTS;

*Mar. 19, 20
Jun. 26

AND

THE SHIP "TRICAPE" AND HER OWNERS, TRITON STEAMSHIP COMPANY LTD. (*Defendants*) .. RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Damages following collision—Loss of hire—Special terms in charterparty.

A charterparty covering several ships provided in cl. 5 that if any vessel covered by it was "laid up or delayed for any period on account of circumstances beyond the control of Owner and its agents" the charterer should continue to be liable for hire, but the owner, out of any sums received "as hire, compensation, indemnity, damages or otherwise", would reimburse the charterer for all sums paid as hire for the period.

One of the vessels covered by the charterparty was involved in a collision with another ship, which was found wholly to blame for the collision.

Held: The damages to which the owner of the damaged ship was entitled should include damages for loss of use of the ship while in detention for repairs. The inference to be drawn from cl. 5 of the charterparty was that as between the parties hire was deemed to cease to be payable, or to be repayable in case of prepayment, to the extent that the owner might recover against the wrongdoer. In these circumstances, the owner had a provable loss against the wrongdoer. *The "Mergus"* (1947), 81 Lloyd, L.R. 91, referred to. The fact that payment had actually been made in this case could make no difference; the governing factor was liability to repay in the events that had happened. What the owner had, by virtue of cl. 5, was a complete indemnity against loss of hire. The loss was initially paid by the charterer subject to the right of reimbursement. *Chargeurs Réunis Compagnie Française de Navigation à Vapeur et al. ("Ceylan") v. English & American Shipping Company ("Merida")* (1921), 9 Lloyd, L.R. 464 at 466, distinguished.

APPEAL from a judgment of A. I. Smith D.J.A.[1], delivered following a reference to assess damages. Appeal allowed.

Jean Brisset, Q.C., and *L. Lalande, Q.C.*, for the plaintiffs, appellants.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright and Judson JJ.

[1] [1956] Ex. C.R. 221.

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DEEP SEA TANKERS LTD. *et al.* *v.* THE "TRICAPE" *et al.*

C. Russell McKenzie, Q.C., for the defendants, respondents.

THE CHIEF JUSTICE:—At the opening of the hearing we considered a preliminary objection that there was no jurisdiction to hear the appeal on the ground that this was an attempt to appeal directly to this Court against a report of a referee. The original trial of the question of liability was held before Mr. Justice A. I. Smith, District Judge in Admiralty, and his finding that the "Tricape" was wholly to blame for the collision which caused the damage complained of was affirmed by this Court. Thereafter, on April 21, 1955, the judge made an order referring the assessment of damages to the District Registrar, but, instead, the parties proceeded with the assessment of damages before the judge himself. Under those circumstances we decided that what had happened should be treated as a continuation by consent of the original trial of the action before the same judge. What was appealed against therefore was a judgment and the hearing proceeded.

For the reasons given by Mr. Justice Judson the appeal should be disposed of as indicated by him.

The judgment of Taschereau, Locke, Cartwright and Judson JJ. was delivered by

JUDSON J.:—The appellant Deep Sea Tankers Limited is a subsidiary company of the appellant Shell Oil Company and the owner of the tanker "Paloma Hills", which is under a long term time-charter to the parent company. The "Paloma Hills" was involved in a collision with the "Tricape" off the coast of Venezuela on March 21, 1948. The "Tricape" was found by A. I. Smith J., District Judge in Admiralty, wholly to blame for the collision and that finding was affirmed by this Court on April 28, 1953[1]. The judgment directed a reference to assess the damages and this is an appeal from what we held on the argument of the present appeal to have been a continuation before A. I. Smith D.J.A. of the original trial. Shortly before the commencement of that continuation the Shell Oil Company, the time-charterer, was joined as an additional plaintiff.

The only item of damages allowed by the learned trial judge[2] was for physical damage to the ship in the sum of $19,243.77, plus interest at the rate of 5 per cent. per

[1] [1953] 2 S.C.R. at p. viii. [2] [1956] Ex. C.R. 221.

annum, calculated in respect of various items which make up the sum of $17,192.22 shown in statement "B" from the dates upon which the said items respectively were paid, and on the sum of $2,051.55 from July 1, 1948. He allowed nothing on a claim of approximately $40,000 for loss of use of the ship while in detention for repairs for a period of 19 days. He rejected the charterer's claim for such loss because, under certain authorities, a time-charterer has no cause of action for loss of use of the ship, even though it is obligated by its contract to pay the owner during the period of detention. He rejected the owner's claim because it could prove no loss, the hire having been paid pursuant to contract by the time-charterer. And finally, he held that cl. 5 of the charterparty, to be set out in full and considered later, did not affect the question of the right to recover by either charterer or owner.

Without expressing any view as to the soundness of the authorities in pursuance of which the learned trial judge rejected the charterer's claim, I turn to a consideration of the owner's claim and of cl. 5 of the charterparty (covering several ships), which reads:

> 5. If any vessel shall be laid up or delayed for any period on account of circumstances beyond the control of Owner and its agents, or if any vessel shall be requisitioned, captured or interned for any period, Charterer shall nevertheless continue to be liable to Owner for "Owner's Hire" as defined in paragraph 3(b) hereof during such period. Out of, and to the extent of, any sums received by Owner as hire, compensation, indemnity, damages or otherwise, from any Government, agency, insurer, or other third party, in respect of any events mentioned in this paragraph, Owner shall reimburse Charterer for all sums paid in any manner by Charterer as "Owner's Hire" hereunder for such period and any balance then remaining shall be applied by Owner as promptly as possible to the prepayment or retirement of indebtedness secured by any then existing mortgage on such vessel, and if there be no such indebtedness so secured, to the prepayment or retirement of any other then existing indebtedness of Owner incurred in connection with such vessel or vessels.

Why did the parties contract in this particular way, providing first for a continuing liability to pay hire and then for a right of reimbursement? They were doubtless attempting to avoid the application of the authorities relied on by the trial judge. A simple cesser-of-hire clause, a common enough provision (30 Halsbury, 2nd ed. 1938, 310-1) would not have served their purpose because it would not have been accepted by those responsible for financing the construction of these ships. It is necessary to

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DEEP SEA TANKERS LTD. *et al.* *v.* THE "TRICAPE" *et al.*

Judson J.

provide that, whatever may happen, the hire will be available from some source to retire the indebtedness incurred for construction. For this reason the clause begins with an obligation on the charterer to pay hire during the period of detention arising from the stated causes. Then, confining the operation of the clause to the actual case now before the Court, to the extent of any recovery from the wrongdoer, the owner must reimburse the charterer. Does this bring about a qualification of the obligation to pay hire? The inference to be drawn from the arrangement and form of the clause is that as between the parties hire is deemed to cease to be payable, or to be repayable in case of prepayment, to the extent that the owner may recover against the wrongdoer.

Does this enable an owner to answer the defence that he has been paid and that he has no provable loss? He is obviously under a contractual obligation to pay over to the charterer detention damages to the extent that hire has been received during the period of detention. Whatever may be the outcome of the litigation, the owner is assured of the hire or its equivalent, but as between owner and charterer and in case of a claim against a third party, hire is deemed to cease to be payable to the extent of the owner's right of recovery against the wrongdoer. In these circumstances, the owner has a provable loss against the wrongdoer. This was also the opinion of Willmer J. in *The "Mergus"*[1], where there was a similar clause under consideration, not, it is true, precisely in the same terms but in terms so like in effect that I cannot draw any distinction between the two. The fact that payment has actually been made in this case can make no difference. The governing factor is liability to repay in the events that have happened.

Another way of stating the result is this. By the use of cl. 5 owner and charterer have made their contract one of indemnity in relation to the payment of hire. What the owner has by virtue of this clause is a complete indemnity against loss of hire. The loss is initially paid by the charterer subject to a right of reimbursement in certain events. This is a very different situation from the one commented upon by Bankes L.J. in *Chargeurs Réunis Compagnie Française de Navigation à Vapeur et al. ("Ceylan") v. English & American Shipping Company ("Merida")*[2]. In

[1] (1947), 81 Lloyd, L.R. 91.

[2] (1921), 9 Lloyd, L.R. 464 at 466.

that case one finds nothing beyond an obligation to pay hire at an agreed rate for the period of detention with which the litigation was concerned. There was no element of indemnity in that contract and the Court so found. In this case, the wrongdoer cannot answer the claim of the owner by pleading that he had been paid by the charterer. It is no concern of the wrongdoer and no answer to the claim against him that the loss has been paid by a third party under a contract of indemnity.

The result is the same whether the case is treated as one of a quantitative or limited cesser of hire or one of indemnity. There is error in the judgment appealed from in the omission to give any effect to cl. 5 and the appeal should be allowed. As to the damages to be awarded for loss of time, three methods of computation were suggested, the first based upon cost of replacement, the second upon the hire actually payable in this case and the third on actual cost of operation of the ship. There is not much difference in the result, but, in the case of a long-term time-charter, the proper method of computation appears to me to be a contractual one, which results in a sum of $39,351.37.

I would allow the appeal with costs and increase the damages by the sum of $39,351.37, which, being added to $19,243.77, makes a total of $58,595.14, for which the appellants are entitled to judgment, together with interest at the rate of 5 per cent. per annum, calculated in respect of various items which make up the sum of $17,192.22 shown in statement "B" from the dates upon which the said items respectively were paid, and on the sum of $2,051.55 from July 1, 1948. They are also entitled to interest at the rate of 5 per cent. per annum on the sum of $39,351.37 from July 1, 1948. In view of the fact that the defendants had insisted upon the production of formal proof in respect of various items comprising the sum of $19,243.77, and considering, on the other hand, that the adding of the Shell Oil Company as a plaintiff was unfounded and useless, the trial judge directed that the costs of the further proceedings before him should be borne equally by the plaintiffs and defendants. He, of course, allowed nothing for loss of use. Bearing in mind the considerations mentioned, but also the

fact that the claim for loss of use is now allowed, it would be fair to award the appellants one-half the costs of the assessment of damages.

Appeal allowed with costs.

Attorneys for the plaintiffs, appellants: Beauregard, Brisset, Reycraft & Lalande, Montreal.

Attorney for the defendants, respondents: C. Russell McKenzie, Montreal.

IRVING OIL COMPANY LIMITED (*Defendant*) ..... APPELLANT;

AND

CANADIAN GENERAL INSURANCE COMPANY (*Plaintiff*) ... RESPONDENT.

1958
*May 26, 27
Jun. 26

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Insurance—Public liability insurance—Exclusions—"Operation or use" of motor vehicle—Delivery of oil from tank-truck.

A servant of the plaintiff company, in delivering fuel-oil to a theatre, negligently allowed oil to escape into the building, which was shortly thereafter destroyed by fire. The owner of the building recovered judgment against the plaintiff based upon a finding that the negligence of the plaintiff's servant had been the cause of the damage.

The plaintiff claimed indemnity from the defendant which had insured it against, *inter alia,* public liability, under a policy that expressly excluded damage resulting from the "operation or use of any . . . motor vehicle".

Held: The action must fail. The case was indistinguishable from *Stevenson v. Reliance Petroleum Limited; Reliance Petroleum Limited v. Canadian General Insurance Company,* [1956] S.C.R. 936.

There was no ambiguity in the exclusion, and the fact that another exclusion in a different part of the policy, which also referred to "operation or use" of a motor vehicle, expressly mentioned "the loading or unloading thereof" did not import into the exclusion here in question any ambiguity as to whether "loading or unloading" was included in "operation or use". The differences, both in the language and in the subject-matter of the two clauses, were sufficient to prevent the one from affecting the interpretation of the other.

On the pleadings as drawn in this action, it was not open to the plaintiff to contend that the cause of the damage, as found by the Courts in the original action, included a separate act of negligence of the plaintiff's

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

servant in failing to take steps to nullify the effects of the spillage, and that that negligence was not one arising from or caused by the "operation or use" of the truck.

Per Rand J.: Even if this issue were open on the pleadings, the plaintiff could not succeed since the truck operator's failure to take steps to nullify the consequences of his own negligence was not a violation of an original duty toward the theatre-owner, the breach of which created a new cause of action.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division, affirming a judgment of Bridges J. dismissing the action. Appeal dismissed.

A. J. Campbell, Q.C., and *E. Neil McKelvey*, for the defendant, appellant.

A. B. Gilbert, Q.C., and *A. N. Carter, Q.C.*, for the plaintiff, respondent.

The judgment of Kerwin C.J. and Taschereau J. was delivered by

THE CHIEF JUSTICE:—Mr. Campbell agrees that his first point has been determined adversely to the appellant by the decision of this Court in *Stevenson v. Reliance Petroleum Limited; Reliance Petroleum Limited v. Canadian General Insurance Company*[1], unless, as he contends, there is an ambiguity in the second exception in the property liability endorsement. For the reasons given by Mr. Justice Rand I can find no such ambiguity.

As to Mr. Campbell's second point, my view is that it is not open to him to contend that the cause of the fire, as determined in *F. G. Spencer Co. Ltd. v. Irving Oil Co. Ltd.*[2], included the failure of the tank-truck operator to take some step after he had negligently spilled the oil. A consideration of the pleadings in the present action and of what occurred at the trial leaves no doubt that there was no arrangement whereby all the findings of fact in the original action should be available in the present litigation. The matter of pleadings in the present action was one to which the solicitors for the parties had given careful consideration and even if they had been mistaken as to the effect upon the present respondent of the judgment in the first action there is no doubt that it was agreed that the destruction by fire was caused by the negligence of the appellant's

[1] [1956] S.C.R. 936, 5 D.L.R. (2d) 673.
[2] 28 M.P.R. 320, [1952] 2 D.L.R. 437.

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employee in delivering the fuel oil in the manner set out in the pleadings, *i.e.*, that he "negligently caused a quantity of such fuel oil to be spilled on the floors of the furnace room in the basement of the said theatre". This is sufficient to dispose of the second contention and I, therefore, express no opinion as to the result if this were not so.

The appeal must be dismissed with costs.

RAND J.:—This appeal arises out of a claim under a policy of liability insurance. The liability insured against was primarily that for personal injury and was provided by four specifically described "insuring agreements". The first of these, denominated no. 1, covered damages for bodily injury, sickness or disease, including death; the second, or no. 2, called for investigation by the insurer of the cause of liability and negotiations for settlement; no. 3, the defence by the insurer on behalf of the insured of suit against the latter and the costs involved, and no. 4, the payment of the premiums on bonds necessary to release attachments and on appeal bonds, costs taxed against the insured in the defence of the suit, expenses incurred by the insurer, interest accruing after entry of judgment for damages and expenses by the insured for imperative and immediate medical and surgical relief at the time of the accident. It was declared that payments made pursuant to agreements nos. 2, 3 and 4 should be in addition to the applicable limit of liability of the policy.

The policy provided further, by a separate and added agreement, that

> Insuring Agreement No. 1 of this policy is extended to indemnify the Insured against loss by reason of the liability imposed upon the Insured by law for damages to or destruction of property . . . [except that belonging to the insured], resulting either directly or indirectly from the business operations of the Insured and caused by accident occurring within the policy period.

The limit of liability under the property provisions was $1,000 but the costs of the trial and appeal amounted to over $40,000 and this is the principal item of the claim in these proceedings.

To the personal injury insurance there were certain exclusions, those pertinent to the issue here being contained in no. 4:

> This Policy shall have no application with respect to, and shall not extend to nor cover, any claims arising or existing by reason of, any of the following matters:
>
> * * *

4. The possession, ownership, maintenance, operation or use by or for the Insured of (a) aircraft or watercraft, (b) motor vehicles (including trailers) owned, hired or leased by, or in the care, custody or control of, the Insured or employees of the Insured or any motor vehicles (including trailers) away from the premises, (c) other vehicles, or the loading or unloading thereof, dogs, riding, driving or draught animals, or bicycles, while such other vehicles, dogs, animals or bicycles are away from the premises.

To the property liability there were similar exceptions, with the second of which only we are concerned:

2. The existence, ownership, care, maintenance, operation or use of any boat, vessel or other floating equipment, elevator or escalator (including elevator shafts, hoistways, equipment and machinery contained therein), aircraft, motor vehicle, trailer, tractor, locomotive engine or train, or other vehicle or any draught or driving animal.

The facts to which these provisions are to be applied can be shortly stated. In delivering fuel-oil to a theatre the operator of a tank-truck negligently allowed oil to slop over the pipe leading to the basement and to run down a chute through which the pipe passed; the oil reaching the basement through the chute was found to have been the direct cause, within an hour and a half of the spilling, of a fire that destroyed the theatre.

Mr. Campbell puts his case for the appeal on two grounds: first, that the words of the property liability exclusion, no. 2, "operation or use" of a motor vehicle, are to be read as ambiguous in respect of "loading or unloading" such a vehicle; and secondly, that the cause as found by the Courts in the original action included negligence of the tank-truck operator in failing to take steps to nullify the effects of the negligent spillage and that that failure was not one arising from or caused by the "operation or use" of the truck.

The ambiguity in exclusion no. 2 is said to arise from the interpretation of the contract as a whole and in particular from the precise specification in exclusion no. 4 of the primary insurance of the words "loading or unloading" in relation to "other vehicles", whether or not they are applicable to motor vehicles. It is argued that by that express specification the scope of "operation or use" for the purposes of the policy has had subtracted from it "loading or unloading" and that consequently the exclusion of "operation or use" of a motor vehicle in clause no. 2 is at

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least rendered doubtful of its inclusion of "loading or unloading". In that case the ambiguity, it is argued, should be resolved against the insurer.

But the differences both in the general language and in subject-matter of these two clauses are, in my opinion, sufficient in themselves to prevent the one from so affecting the interpretation of the other. The subject-matter of the first, bodily injury and death, is wholly discrete from that of property damage. The phraseology indicates clearly that they were drafted and are to be treated independently of one another. Particularly is that so when the words "operation or use" in relation to property damage, taken alone, admittedly extend to loading or unloading where, as here, those services are part of the function of the vehicle itself, that is, through the working of which they are performed: *Stevenson v. Reliance Petroleum Limited; Reliance Petroleum Limited v. Canadian General Insurance Company*[1]. A distinct and separate clause, to have the qualifying effect suggested, would call for little less than an identity of subject-matter with, and be so bound up with or related in liability to, the other as to require us to seek a means of harmonizing them. Neither of these considerations can be said to be present in the policy before us.

To the second contention two answers are given: first, that the pleadings have limited the cause to the negligence in unloading, and, secondly, that the suggested negligence is not to be taken as an original and independent cause divorced from the original negligence.

Paragraph 7 of the statement of claim alleges the delivery of oil in the ordinary course of the appellant's business to the theatre: para. 8 states that in the action for damages brought against the appellant, liability was alleged for the loss incurred "for the reasons set forth in the Statement of Claim in the said [original] action". Paragraph 9 declares the contestation of that action, its trial and the judgment of liability for the damages claimed. By para. 5 of the defence it is set forth that the servant of the appellant

> delivered the said fuel oil . . . from a motor vehicle to the said F. G. Spencer Company Limited at its theatre in the Town of Kentville, in the Province of Nova Scotia by means of a nozzle, rubber hose and pump, operated by the engine forming part of the said motor vehicle owned by the Plaintiff. The said McIntyre in delivering the said fuel oil in the

[1] [1956] S.C.R. 936, 5 D.L.R. (2d) 673.

manner aforesaid negligently caused a quantity of such fuel oil to be spilled on the floors of the furnace room in the basement of the said theatre.

and para. 6:

As to paragraph 8 of the Plaintiff's Statement of Claim the Defendant admits that about an hour and a half after the aforesaid delivery of fuel oil to the said theatre fire broke out in the said premises which resulted in the total destruction thereof. Such destruction of the said theatre and its contents by fire was directly traceable to and was caused by the said negligence of the Plaintiff's said servant or agent McIntyre, acting in the course of his employment as such, while filling the fuel tanks of the said theatre by means of the said nozzle, rubber hose and pump operated by the engine forming part of the said motor vehicle owned by the Plaintiff.

In the reply the appellant "admits the allegations contained in paragraphs 5 and 6 of the defendant's defence".

It was stated by Mr. Gilbert and not disputed that the pleadings had been the subject of joint discussions between counsel for both parties and that the allegations they contain were carefully phrased for the purpose of agreement on a precise statement of the act of negligence creating liability, and avoiding, what would otherwise have been necessitated, the determination of that question anew. The first action, it should be mentioned, was not defended on behalf of the appellant by the respondent.

At the beginning of the trial a statement was made by counsel for the appellant in these words:

MR. MCKELVEY: Now, your Lordship, it will be necessary to refer, in the course of perhaps this case and certainly the case coming up tomorrow, to this judgment and my learned friend Mr. Gilbert has agreed that we can use the reports of that Nova Scotia judgment in so far as it is necessary to refer to them as evidence, if that is in order with your Lordship. The only other alternative is to file certified copies and it seems more practical to use the printed volume.

To this it was remarked:

MR. GILBERT: My Lord, if I may just interject, the only difference between the certified copies as compared with the printed report is the date on the certified copy, which is July 26, 1951.

Following that, counsel, in his opening, used this language:

In the pleadings the statement of claim sets out various terms of the policy and the defendants in the statement of defence refer to the policy for those terms, so that there is no dispute over anything pertaining to the policy; once the policy is placed in evidence, the thing will speak for itself. There is no dispute either that the question of what happened in the Nova Scotia Courts is also agreed in the pleadings. The statement of defence alleges that the damage was due to the negligence of the operator of a tank-truck owned by Irving Oil in filling the tanks of the theatre

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while he was using a nozzle attached to a rubber hose to pump with, which was on his tank-truck, so there is no dispute over that, and no dispute it was the negligence of this man McIntyre, the driver of the truck.

The first of those statements is said by Mr. Campbell, for the purposes of these proceedings, to make available all findings of fact in the original action and that that was the intent and purpose of the acquiescence by Mr. Gilbert in what was said. But this Mr. Gilbert rejects and I agree with him that the exchange is not to be so interpreted. I find no evidence of an intention to permit reference to the judgments for the purpose of modifying the defined issue of fact settled by the pleadings.

Mr. Campbell is not, then, at liberty to go beyond the statement of the negligence as the cause of the fire expressly admitted in the reply by the appellant. But I cannot see that the restriction to the act of spillage affects, in the slightest degree, the reality in the cause of the fire. The failure of the truck-operator to take steps to nullify the consequences of his own negligence is not a violation of an original duty toward the theatre-owner the breach of which creates a new cause of action. He had been negligent and was aware of it and of the possible consequences that might follow from it; his duty was to himself and to his employer to intercept those consequences; but from the moment of the negligent act of spillage its operation continued to the end as the effective agency and was expressly found to have been the direct cause of the loss. Any duty to take preventive measures was merely incidental to and arose out of the primary negligence; it did not create a new and independent cause superseding the latter as producing the consequences. It would be a novel idea in such an insurance that liability of the insurer could be created by mere inaction by the guilty actor toward the consequences of a negligent cause set in motion by himself excluded by the policy: a premium would be placed on inaction where there was any doubt of the success of preventive action. Even as parallel causes operating together, the first would engage the exclusion. The negligent act and the subsequent disregard of consequences are properly to be looked upon as one act continuing until the possibility of liability for legal, damaging consequences has been exhausted; the act of minimizing of damages by the wrongdoer taken alone is mere retrieving, in his own interest, the fault committed.

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On both these grounds I think the appeal fails and I would dismiss it with costs.

LOCKE J.:—I agree that this appeal should be dismissed with costs.

CARTWRIGHT J.:—I agree with the reasons and conclusion of my brother Rand, subject only to the following reservation.

As I agree that, in view of the manner in which the issues were defined in the pleadings and by counsel at the trial, the appellant is not at liberty to contend that an effective and distinct cause of the fire was the failure of the operator of the truck to take preventive measures following the negligent spilling of the oil, I express no opinion upon the validity of that contention.

I would dispose of the appeal as proposed by my brother Rand.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: McKelvey, Macaulay & Machum, Saint John.

Solicitors for the defendant, respondent: Gilbert, McGloan & Gillis, Saint John.

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*Apr. 28, 29
Jun. 26

NORTH BAY MICA COMPANY LIMITED ..... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Special provisions in case of mine—When mine "came into production"—The Income Tax Act, 1948 (Can.), c. 42, s. 74, as amended by 1951, c. 51, s. 25.

Mines and minerals—What constitutes bringing mine "into production"—Mica—Abandonment of operation—Subsequent reopening of new dyke by different company—Special provisions as to income tax—The Income Tax Act, 1948 (Can.), c. 42, s. 74, as amended by 1951, c. 51, s. 25.

*PRESENT: Kerwin C.J. and Cartwright, Abbott, Martland and Judson JJ.

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P.M. Co. successfully operated a mica mine from October 1942, but by February 1945 it had almost exhausted the supply of raw mica then known to it. After having a thorough inspection made by geologists, the company decided not to proceed with further investigations and in October 1945 it ceased operations. In 1949 a different geologist made a thorough inspection of the property, as a result of which he and an associate obtained a lease of the mining claims from P.M. Co. He caused appellant company to be incorporated in 1950, and it bought the claims from P.M. Co. and continued operations. It proceeded thereafter to find and develop a new dyke or vein of mica of which P.M. Co. had not known. Ore in reasonable commercial quantities was obatined from this dyke from 1950 onwards.

Held (Kerwin C.J. and Judson J. dissenting): The income from the property was properly excluded from the appellant's income for the taxation year 1951, under s. 74 of the *Income Tax Act*, as amended. The property in question had lost the character of a mine between its abandonment by P.M. Co. and the commencement of operations by the appellant; what the appellant acquired was not a "mine" but a derelict and abandoned property which it hoped to develop into a mine. In this view, the mine "came into production", within the meaning of s. 74, in 1950. *Semble*, the "mine" of the appellant was one entirely different from the "mine" of P.M. Co.

Per Kerwin C.J. and Judson J., *dissenting*: The word "mine" in s. 74 should be construed as denoting a physical thing and the mine operated in 1950-51 by the appellant was the same mine as that operated by P.M. Co. before 1946. It came into production of ore in 1942 and was therefore not within s. 74.

APPEAL from a judgment of Ritchie J. of the Exchequer Court of Canada[1], affirming a decision by the Minister of National Revenue. Appeal allowed, Kerwin C.J. and Judson J. dissenting.

D. W. Mundell, Q.C., and *S. D. Thom, Q.C.*, for the appellant.

W. R. Jackett, Q.C., and *T. Z. Boles*, for the respondent.

The judgment of Kerwin C.J. and Judson J. was delivered by

THE CHIEF JUSTICE (*dissenting*):—This is an appeal against a judgment of the Exchequer Court[1] dismissing the appeal of the appellant, North Bay Mica Company Limited, from the decision by the Minister of National Revenue confirming the reassessment of the appellant for the taxation year 1951 under the *Income Tax Act*, 1948 (Can.), c. 52, now R.S.C. 1952, c. 148. The point in issue is whether the appellant was correct in not including in the computation of its income for that year the income

[1] [1955] Ex. C.R. 300, [1955] C.T.C. 260, 55 D.T.C. 1157.

derived by it from the operation of a mica mine formerly owned and operated by Purdy Mica Mines Limited. The section of the Act as applicable to the taxation year 1951 is s. 74, as amended by 1951, c. 51, s. 25 (now replaced by s. 85(5), first enacted by 1952, c. 29, s. 24):

74. (1) Where a corporation establishes that a mine was

(*a*) a metalliferous mine, or

(*b*) an industrial mineral mine certified by the Minister of Mines and Technical Surveys to have been operating on mineral deposits (other than bedded deposits such as building stone),

that came into production of ore during the calendar years 1946 to 1954, inclusive, income derived from the operation of the mine during the period of 36 months commencing with the day on which the mine came into production (other than any portion thereof in the year 1946) shall, subject to prescribed conditions, not be included in computing the income of the corporation.

(2) In this section, "production" means production in reasonable commercial quantities.

We are not concerned with a metalliferous mine, but with an industrial mine which, it is agreed, was certified by the Minister of Mines and Technical Surveys to have been operating on mineral deposits (other than bedded deposits such as building stone). The dispute is whether the income of the appellant from the operation of this mine was derived from a mine that came into production of ore in reasonable quantities during the calendar years 1946 to 1950.

The learned trial judge dealt with the history of certain provisions of the *Income War Tax Act,* R.S.C. 1927, c. 97, and the *Income Tax Act,* and while counsel for the appellant disavowed any suggestion that he was relying in any way upon such history, it does not detract from the conclusion reached in the Exchequer Court. Counsel did refer to a letter of August 9, 1951, written on behalf of the Director General, Corporation Assessments Branch, to the appellant's solicitor, but I agree with Mr. Jackett that if what is therein stated is meant to apply to s. 74 it cannot affect what the Court deems to be the proper construction of that provision.

From October 1942, Purdy Mica Mines Limited had successfully operated a mica mine on certain mining claims owned by it in the township of Mattawan, in the Province of Ontario. After obtaining reports from certain geologists, the Purdy company decided that it would not proceed with

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any further investigations into the possibilities of securing additional mica. In October 1945 it ceased operations and from that time to 1949 there was no activity of any kind by it on the property.

James J. Kenmey, having become interested in the claims, made a thorough investigation, as a result of which a lease was first granted to his associate, Paul A. McDermott, and subsequently assigned to Kenmey and two others who carried on business in partnership under the name of North Bay Mica Company. This partnership proceeded to operate on the leased claims in 1949. The appellant was incorporated under the Ontario *Companies Act* by letters patent of January 27, 1950, and continued the operations. By arrangement the claims were sold to the appellant by the Purdy company which received certain payments in cash and a 10 per cent. stock interest in the appellant company.

The word "mine" in s. 74 should be construed as denoting a physical thing. It was argued, however, that the Purdy company had abandoned the mine and that, although the work done by the appellant company is on the same mining claims, what Kenmey and his associates commenced and the appellant continued was a different mine and, therefore, cannot be said to have come into production as early as 1946. The evidence as to what occurred generally is uncontradicted and is set out by the trial judge. The following references are, however, of particular importance. In cross-examination Mr. Kenmey admitted that with respect to pit no. 3 (the important one in the operations of the Purdy company) he found stringers leading off into the wall rock and that the Purdy company had exposed another dyke but had done nothing about it. He continued:

> Well the stringers which led off into the wall rock, in my impression, was, in fact, another dyke that they had done nothing about. Those stringers were, in fact another—indications of another dyke—I will put it that way.

The truth of the matter appears to be as expressed by the witness George B. Langford, when he testified that the Purdy company

> mined the ore which they could see from day to day and did not spend the time or money estimated to develop ore for the mining operations of the future. They did not, until they came to the end of their ore and then they undertook some rather extensive drilling operations to try and find some more pegmatite.

That drilling did not find any ore but Mr. Kenmey's work did.

The mine operated in 1950-51 by the appellant is the same mine as that operated by the Purdy company down to 1945. The mine came into production of ore in October 1942 and therefore it cannot be said that it came into production as late as 1946, the first year mentioned in s. 74.

The appeal should be dismissed with costs.

The judgment of Cartwright and Martland JJ. was delivered by

CARTWRIGHT J.:—The relevant facts out of which this appeal arises are undisputed and are stated in the reasons of the Chief Justice. I wish, however, to emphasize two matters: (i) that in 1945 Purdy Mica Mines Limited had given up all thought of carrying on any further mining operations on the claims later acquired by the appellant and had removed its buildings and machinery; and, (ii) that, while the lens of mica discovered and worked by the appellant was in close proximity to one of those worked by Purdy Mica Mines Limited, the last-mentioned company had failed to discover it and was unaware of its existence.

The question before us turns upon the construction of s. 74 of the *Income Tax Act*, which is set out in the reasons of the Chief Justice.

For the appellant it is contended that the word "mine" as used in cl. (*b*) of s. 74(1) means not "a portion of the earth containing mineral deposits" but rather "a mining concern taken as a whole, comprising mineral deposits, workings, equipment and machinery, capable of producing ore". Support for this contention is sought in the circumstances that if "mine" has the first of the two suggested meanings, then, (i) the phrase "certified . . . to have been operating on mineral deposits" is inapt as it presupposes an entity capable of carrying on operations; and (ii) the draftsman should have substituted for the clause "that came into production" the clause "that was brought into production". From this the appellant goes on to argue that the "mine" of the appellant is one entirely different from the "mine" of Purdy Mica Mines Limited.

I incline to the view that this contention is sound; but, be that as it may, the facts appear to me to bring the claim of the appellant within the plain words of the section. The

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appellant is a corporation. It has established that the mine from the operation of which it derived its income for the year 1951 was an industrial mine certified by the Minister of Mines and Technical Surveys to have been operating on mineral deposits (other than bedded deposits such as building stone) that came into production of ore in reasonable commercial quantities during the year 1950.

The argument of the respondent is, in effect, that this would be so but for the fact that some years prior to 1946 the same mine, then operated by Purdy Mica Mines Limited, came into production of ore in reasonable commercial quantities. That this would be a sufficient answer if the same property, to use a neutral word, had been continuously operated as an industrial mine and had merely changed hands I do not doubt; but it appears to me that in the interval between the cessation of operations by Purdy Mica Mines Limited and the commencement of those of the appellant the property had lost the character of a mine. What the appellant acquired was not a mine but a derelict and abandoned property which it hoped to develop into a mine.

The submission of the respondent is that if an industrial mine has at any time been operated on a particular piece of property and been brought into production of ore in commercial quantities, then, notwithstanding the fact that its operation has been completely and finally abandoned, no industrial mine subsequently operated on the same piece of property, no matter how long thereafter, can come within the intendment of s. 74.

It appears to me that the construction for which the respondent contends necessitates adding to the section some such words as those I have italicized so as to make it read: "that came into production of ore *for the first time* during the calendar years 1946 to 1954 inclusive" or "that *first* came into production . . .".

If on consideration of the words of the section in their ordinary sense, their true meaning appeared doubtful, as I think it does not, it would be proper to inquire what was the object which Parliament had in view as appearing from the circumstances with reference to which the words were used. The object was clearly to encourage the development of productive industrial mines of the sort described in the

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section. This object would not be rendered less desirable by the circumstance that at some earlier time, ore had been produced from the same piece of property.

The respondent relied on the following, often quoted, passage in the judgment of Ritchie C.J. in *Wylie et al. v. The City of Montreal*[1]:

> I am quite willing to admit that the intention to exempt must be expressed in clear unambiguous language; that taxation is the rule and exemption the exception, and therefore to be strictly construed . . .

In my opinion, resort can properly be had to the principle stated in this passage only if the Court is unable to determine the meaning of the words it is called upon to interpret after calling in aid all relevant rules of construction.

I would allow the appeal, set aside the judgment below and the amended assessment and restore the original assessment of September 21, 1951, under which no tax was levied. The appellant is entitled to its costs in the Exchequer Court and in this Court.

ABBOTT J.:—I would allow the appeal and dispose of the matter as proposed by my brother Cartwright.

Appeal allowed with costs, KERWIN C.J. *and* JUDSON J. *dissenting.*

Solicitors for the appellant: Manning, Mortimer, Mundell & Bruce, Toronto.

Solicitor for the respondent: A. A. McGrory, Ottawa.

MARIO E. LATTONI AND BERNARD A. CORBO ..... APPELLANTS;

1958

*May 28
Jun. 26

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

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

Criminal law—Conspiracy to commit offence—Distinction from substantive offence—Inapplicability of limitation-period prescribed for substantive offence—The Immigration Act, R.S.C. 1952, c. 325, ss. 50-52, 56.

*PRESENT: Kerwin C.J. and Taschereau, Rand, Martland and Judson JJ.

[1] (1885), 12 S.C.R. 384 at 386.

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A charge of conspiracy to commit offences under the *Immigration Act* is one of criminal conspiracy under the *Criminal Code* and is neither in form nor in substance a charge under the *Immigration Act*. Consequently the provisions of the latter Act as to time-limits for instituting prosecutions have no application to such a charge.

Criminal law—Appeals—Whether accused "acquitted" by trial Court—Judgment on motion to quash indictment—Proper order on appeal if judgment set aside—The Criminal Code, 1953-54 (Can.), c. 51, ss. 584(1)(a), 597(2)(a).

A motion to quash an indictment was made on the arraignment of the accused and the trial judge granted the motion in the following words: "Acte d'accusation cassé et les deux accusés sont acquittés."

Held: This judgment constituted an acquittal within the meaning of s. 584(1)(*a*) of the *Criminal Code* and the Crown had a right to appeal from the decision. The Court of Appeal having reversed the judgment of the trial judge, the accused were entitled to appeal to the Supreme Court under s. 597(2)(*a*).

Held, further: The proper order for the Court of Appeal to make in such circumstances was that the record be returned to the Court below and that there be a new trial.

APPEAL by the accused from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], setting aside a judgment of a Judge of the Sessions of the Peace. Appeal dismissed subject to a variation.

The two accused were charged in an indictment containing numerous counts summarized as follows by Owen J. in the Court of Queen's Bench:

The Respondents were charged with having, between the 1st January 1950 and the 31st December 1952, conspired together and with others to commit the following criminal acts:

(*a*) Bribing an agent of the Crown to issue false visas (Sec. 408 and 368 Cr. C.).

(*b*) Bringing immigrants into Canada illegally (Sec. 408 Cr. C.).

(*c*) Obtaining by false pretences (Sec. 408 and 304, 323 and others Cr. C.).

(*d*) Making false documents (Sec. 408 and 309 Cr. C.).

(*e*) Using forged documents (Sec. 408 and 311 Cr. C.).

(*f*) Defrauding certain persons of several thousand dollars (Sec. 408 and 323 Cr. C.).

In the same indictment the Respondents were accused of having between the same dates committed the following criminal acts:

[1] [1958] Que. Q.B. *360*.

1. (*a*) Using false documents.
   (*b*) Causing persons to use these documents as though they were genuine (Sec. 311 and 21 Cr. C.).
2. (*a*) Doing or omitting to do certain things for the purpose of enabling persons to use false documents.
   (*b*) Assisting persons to commit the same criminal acts (Sec. 311 and 21 Cr. C.).

On the arraignment of the accused, their counsel moved to quash the indictment and this motion was granted by Proulx J.S.P., whose reasons for judgment contained the following paragraphs:

PREAMBULE

Dans cet acte d'accusation, il est clair qu'on a essayé de contourner la loi, par le truchement de la conspiration!

Toutes les infractions substantives dont il est question dans les différents chefs d'accusation sont couvertes par les arts. 50, 51, 52 de la *Loi sur l'Immigration,* même les infractions commises hors du Canada selon l'art. 54 de la dite loi.

L'article 5, para. 2, du *Code Criminel* stipule que "nul ne doit être condamné au Canada pour une infraction commise hors du Canada" mais "sous réserve de la présente loi [*le Code Criminel*] ou de toute autre loi du Parlement du Canada".

En principe, on aurait dû poursuivre sous la *Loi sur l'Immigration.* Mais voilà! toutes les infractions prévues par la *Loi sur l'Immigration* sont poursuivables sur déclaration sommaire de culpabilité, sauf les infractions prévues par l'art. 51, qui peuvent être poursuivies par voie de mise en accusation avec le consentement du ministre.

Or, l'art. 56 de la *Loi sur l'Immigration* stipule que les procédures sur déclaration sommaire de culpabilité doivent être intentées dans les trois ans qui suivent la date de l'infraction.

L'acte d'accusation allègue que les infractions auraient été commises du 1er janvier 1950 au 31 décembre 1952, et la dénonciation est datée du 28 mars 1956. Il est évident que la poursuite a procédé en vertu du *Code Criminel,* parce que la procédure sur déclaration sommaire de culpabilité en vertu de la *Loi sur l'Immigration* était prescrite; on passait outre à l'intention du législateur.

* * *

CONCLUSION

On retrouve aux arts. 50, 51 et 52 de la *Loi sur l'Immigration,* toutes ces accusations de complicité et infractions substantives du *Code Criminel.* Nous pouvons même aller jusqu'à dire que les éléments de conspiration se retrouvent dans le para. (*j*) de l'art. 50 de la *Loi sur l'Immigration.* C'est comme si l'on avait mis cette loi et le *Code Criminel* côte à côte et recherché dans le code ces infractions prescrites sous la *Loi sur l'Immi-*

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gration ou pour la poursuite desquelles il fallait le consentement du ministre. Ensuite, on a logé des accusations de conspiration pour justifier la poursuite sous le *Code Criminel* et contourner la loi.

Dans mon humble opinion, cet acte d'accusation est une parodie de la procédure, un déni de justice, une moquerie de la loi et surtout un souverain mépris du législateur.

Le Tribunal conclut que tous ces chefs d'accusation sont irréguliers, illégaux et nuls, de nullité absolue!

En l'occurrence, la Cour ne peut rien modifier, comme on pourrait le faire en certains cas sous l'art. 510(3) du *Code Criminel*: en toute conscience, elle ne peut que casser un tel acte d'accusation et acquitter les accusés.

The Crown appealed to the Court of Queen's Bench which allowed the appeal and ordered "that the record be returned to the Court below in order that the trial of the accused may proceed according to law".

The accused obtained leave to appeal to the Supreme Court of Canada.

J. Cohen, Q.C., and *F. Kaufman,* for the appellant Lattoni.

D. Dansereau, Q.C., for the appellant Corbo.

J. Miquelon, Q.C., and *A. Nadeau,* for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is an appeal by the accused against the judgment of the Court of Queen's Bench (Appeal Side), Province of Quebec, setting aside the judgment of Judge W. Proulx, a Judge of the Sessions of the Peace for the District of Montreal, which latter judgment had granted a motion to quash the indictments preferred against the appellants. The first argument on their behalf is that Judge Proulx did not acquit them and that there was no right of appeal by the Crown from his decision. It might be pointed out that, if this argument were correct, there would be no appeal to this Court, because under s. 597 of the *Criminal Code* the accused would not be persons who had been acquitted of an indictable offence and whose acquittal had been set aside by the Court of Appeal.

However, the appellants' first contention cannot prevail. The following appears at the end of the formal judgment of Judge Proulx:

> Le Juge rend le jugement suivant: Acte d'accusation cassé et les deux accusés sont acquittés. Annexé au présent jugement le Jugement de M. le Juge W. Proulx cassant l'acte d'accusation et acquittant les accusés.

His reasons conclude:

> . . . en toute conscience, elle [la cour] ne peut que casser un tel acte d'accusation et acquitter les accusés.

His report to the Court of Appeal ends:

> Pour toutes ces raisons, j'ai cru de mon devoir de casser un tel acte d'accusation, en toute conscience, justice et équité.

Reading all of these documents in their entirety I agree with the Court of Appeal that the judgment of Judge Proulx was a final judgment quashing the indictment because he considered that all criminal proceedings as a result of the alleged acts of the accused were prescribed. I also agree that it was not a judgment on procedural grounds owing to a defect in the indictment and therefore if the accused were charged subsequently with the same offences as those embodied in the indictment, they could plead *autrefois acquit*. It was a decision on a question of law alone and being a judgment or verdict of acquittal was appealable under s. 584 of the Code.

As to the grounds upon which Judge Proulx proceeded, there was no obligation on the Crown to lay charges under the *Immigration Act*, but it was entitled to prefer an indictment, as it did, charging conspiracy which could be laid only under the Code. Any period of prescription that might apply under the *Immigration Act* is not applicable to charges of conspiracy under the Code.

The appeal should be dismissed but the judgment of the Court of Queen's Bench (Appeal Side) should be amended by striking out the last paragraph thereof* and inserting in lieu thereof the following:

> DOTH ORDER that the record be returned to the Court below and that there be a new trial.

Appeal dismissed subject to a variation in the judgment.

Attorney for the appellant Lattoni: J. Cohen, Montreal.

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Attorney for the appellant Corbo: D. Dansereau, Montreal.

Attorneys for the respondent: J. Miquelon and A. Nadeau, Montreal.

*This paragraph read as follows:

"DOTH ORDER that the record be returned to the Court below in order that the trial of the accused may proceed according to law."

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*May 20, 21
**Oct. 7

VALIDITY OF SECTION 92(4) OF THE VEHICLES ACT, 1957 (SASK.)

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law—Validity of s. 92(4) of The Vehicles Act, 1957 (Sask.), c. 93—Breath tests for alcohol in motor vehicles cases—Suspension or revocation of driver's licence if breath sample not given—Whether conflict with criminal law—Whether results of test admissible in criminal proceedings—Criminal Code, ss. 222, 223, 224.

Section 92(4) of *The Vehicles Act*, 1957 (Sask.), c. 93, which provides for the suspension or revocation of an automobile driver's licence where, *inter alia*, being suspected of driving or of having driven while under the influence of intoxicating liquor, he refuses to permit a sample of his breath to be taken, is not *ultra vires*, in whole or in part. (*per* Taschereau, Rand, Fauteux, Abbott and Judson JJ.; Locke, Cartwright and Martland JJ., *contra*.)

The result of the chemical analysis of such a sample of a person's breath obtained under s. 92(4) is admissible in evidence in any proceedings against him under s. 222 or s. 223 of the *Criminal Code*, on the issue whether he was intoxicated or had his ability impaired by alcohol, whether or not the provisions of s. 92(4) were brought to his attention before he gave the sample (*per Curiam*).

Per Taschereau, Fauteux, Abbott and Judson JJ.: There is no repugnancy between s. 92(4) of *The Vehicles Act* and the *Criminal Code*. In s. 224 of the Code, Parliament has declared that "for the purposes of this section" there is no obligation for a person to give a sample of his breath and barred evidence or comment as to the refusal to give a sample or as to the fact that one was not taken; and by the same words indicated its intention not to trench upon the right of a province to create, for provincial purposes, a legal obligation to give a sample. The section does not have the effect of excluding from the evidence in proceedings under s. 222 or s. 223 of the *Criminal Code* the result of a test taken under s. 92(4) of *The Vehicles Act*.

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*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux, Abbott, Martland and Judson, JJ.

**The Chief Justice, owing to illness, took no part in the judgment.

Section 92(4) of *The Vehicles Act* does not create a legal obligation to give a sample. It leaves to the licence-holder the faculty to comply with or ignore what is a request and not a requirement; non-compliance with the request does not amount to a violation of the enactment.

Even if it could be held that in effect, if not in terms, the impugned legislation creates a statutory compulsion, it does not clash with s. 224(4). The words "for the purposes of this section" imply that, for purposes other than criminal proceedings, a person might be required to give a sample. The situation dealt with in s. 224(4) is not one arising when a sample has been given or taken, but when it has not.

Furthermore, the impugned legislation is not legislation in relation to criminal law but in relation to the administration and control of highways in the province for the protection of the travelling public and of the automobile insurance fund created under the provincial legislation.

Per Rand J.: Section 92(4) of *The Vehicles Act* does not fall within the prohibition of s. 224. The word "required" in s. 224(4) is to be taken as envisaging an effective compulsion such as that exerted against a recalcitrant witness, *i.e.*, commitment for contempt; and the effect of the refusal to give a sample, that it may be used as evidence by the province in deciding upon the suspension or cancellation of a driver's licence, is not of that nature. It follows that the analysis of a sample of breath obtained under s. 92(4) is voluntarily furnished and is admissible as evidence in prosecutions under s. 222 or s. 223. There is, thus, no evidentiary inconsistency between different offences.

Per Locke and Cartwright JJ.: Section 92(4) of *The Vehicles Act* of Saskatchewan invades a field fully occupied by valid legislation of Parliament, is in direct conflict with that legislation and cannot stand.

Parliament has seen fit to declare in subs. 224(4) not only that a person is not required to give a sample but also that the fact of his refusal shall not be given in evidence or made the subject of comment. Section 92(4) deals with a person in the same situation and its direct effect is to require such person to give a sample of his breath under pain of losing his driver's licence.

Even if it were to be assumed, for purposes of this appeal, that the provincial enactment would be *intra vires* if the field was clear, it has the direct effect of nullifying throughout the province the prohibition of s. 224(4). The words "for the purposes of this section" do not confine the effect of that section so as to leave unoccupied a field of legislation which is competent for a province to enter, on the contrary, s. 92(4) is directed solely to a person requested by the police to allow the taking of a sample for the purposes of s. 224(4).

Even though it would be an illegal act to prevail upon a person to give a sample of breath by threatening him with loss of his permit, and contrary to s. 224(4), that illegality would not render inadmissible the evidence of the result of the chemical analysis of the sample so obtained.

Per Locke and Martland JJ.: Section 92(4) falls within the second branch of the fourth proposition enunciated by Lord Tomlin in *Attorney General for Canada v. Attorney General for British Columbia,* [1930] A.C. 111 at 118. The field is not clear. Section 224(4) means that a person is to be free to decide whether or not he will give a sample of breath for chemical analysis. Section 92(4) comes into operation in

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cases where there is a suspicion that there has been committed a breach of s. 222 or s. 223, and means that a person suspected of such an offence must submit to a breath test or suffer the penalty of losing his right to drive. The two legislations therefore meet and the provisions of the *Criminal Code* must prevail.

Furthermore, there is repugnancy between the impugned provincial legislation and the *Criminal Code*.

Since s. 92(4) is *ultra vires*, there is no compulsion by its operation and consequently the results of the chemical analysis would be admissible in proceedings under s. 222 or s. 223.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], on a reference by the Lieutenant-Governor in Council.

E. L. Leslie, Q.C., and *R. S. Meldrum, Q.C.*, for the Attorney-General of Saskatchewan.

E. D. Noonan, Q.C., appointed by the Court of Appeal in opposition.

D. H. W. Henry, Q.C., for the Attorney General of Canada.

W. B. Common, Q.C., for the Attorney-General for Ontario.

The judgment of Taschereau, Fauteux, Abbott and Judson JJ. was delivered by

FAUTEUX J.:—Pursuant to the *Constitutional Questions Act*, R.S.S. 1953, c. 78, the Lieutenant-Governor in Council of the Province of Saskatchewan referred to the Court of Appeal two questions for hearing and consideration, the substance of which being:

(i) Whether subs. (4) of s. 92 of *The Vehicles Act, 1957* (Sask.), c. 93,—which empowers the Highway Traffic Board to suspend or revoke the driving license of any license-holder who, amongst other cases provided, "when suspected of driving, or of having driven, a motor vehicle while under the influence of intoxicating liquor, he refused to comply with the request of a police officer or police constable that he submit to the taking of a specimen of his breath"—is, in whole or in part, *ultra vires* of the Saskatchewan Legislative Assembly; and

[1] (1958), 12 D.L.R. (2d) 470, 24 W.W.R. 385, 27 C.R. 369, 12 C.C.C. 129.

(ii) Whether, in any proceedings, in Saskatchewan, under s. 222 or s. 223 of the *Criminal Code* of Canada, the result of a chemical analysis of such a specimen is, on the issue whether the accused was intoxicated or had his ability to drive impaired by alcohol, admissible in evidence where, before he gave a sample of his breath, (*a*) the provisions of subs. (4) of s. 92 of the provincial Act were brought to his attention and (*b*) where such provisions were not brought to his attention.

The following opinion was delivered by the Court of Appeal[1] on February 11, 1958:

As to the first question. The majority held the provincial enactment *intra vires* as being, in the views of Martin C.J.A. and Culliton J.A., legislation in relation to the administration and control of highways in the Province and, in the views of Gordon J.A., legislation for the protection of the travelling public on the highways and of the automobile insurance fund created under provincial legislation, *i.e. The Automobile Accident Insurance Act*; McNiven J.A. held it *ultra vires* as being an invasion of the field of criminal law and criminal procedure.

As to the second question, Martin C.J.A., Culliton and McNiven JJ.A. concluded to the inadmissibility of the evidence on the ground that subs. (4) of s. 224 of the *Criminal Code* has the effect of excluding from prosecution such evidence obtained under the compulsion of provincial enactment, Gordon J.A., on the contrary, held such evidence admissible on the ground that subs. (4) of s. 224 merely gives the suspected driver the right to refuse a sample of his breath and protects him only in that refusal, being also of opinion that the provincial enactment does not amount to a form of compulsion.

Hence the appeal of the Attorney-General of Saskatchewan and the cross-appeal of E. D. Noonan, Q.C.,—counsel appointed by the Court of Appeal pursuant to s. 6 of *The Constitutional Questions Act* to argue in opposition to the submissions of the Attorney-General for Saskatchewan—against the majority opinion given by the Court on the second and the first question, respectively.

[1] (1958), 12 D.L.R. (2d) 470, 24 W.W.R. 385, 27 C.R. 369, 120 C.C.C. 129.

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The primary objection against validity being that of repugnancy with the *Criminal Code*, it is necessary to consider and construe the relevant provisions of both s. 224 of the Code and s. 92 of *The Vehicles Act, 1957*.

The Criminal Code. The provisions of s. 224 are admittedly procedural in nature and purposely ancillary to those of ss. 222 and 223 which create respectively the offence of driving while intoxicated and the offence of driving while ability to drive is impaired by alcohol. Subsections 224(3) and 224(4) read as follows:

(3) In any proceedings under section 222 or 223, the result of a chemical analysis of a sample of the blood, urine, breath or other bodily substance of a person may be admitted in evidence on the issue whether that person was intoxicated or under the influence of a narcotic drug or whether his ability to drive was impaired by alcohol or a drug, notwithstanding that he was not, before he gave the sample, warned that he need not give the sample or that the results of the analysis of the sample might be used in evidence.

(4) No person is required to give a sample of blood, urine, breath or other bodily substance for chemical analysis for the purposes of this section and evidence that a person refused to give such a sample or that such a sample was not taken is not admissible nor shall such a refusal or the fact that a sample was not taken be the subject of comment by any person in the proceedings.

Prior to the enactment of the predecessors to s. 224(3) and s. 224(4), *i.e.*, s. 285(4)(*d*) and s. 285(4)(*e*), a minority in the judiciary had expressed certain doubts as to the evidentiary value and relevancy of the results of a chemical analysis of a bodily substance or held the view that a warning, of the nature of the one governing the admissibility of confessions, was a condition precedent to the admissibility of such evidence on the issue of intoxication or impaired ability under what is now ss. 222 and 223. In enacting what is now in s. 224(3), Parliament disposed of this conflict in judicial opinion but did not, as indicated in the reasons for judgment of this Court in *Attorney General of Quebec v. Bégin*[1], make any innovation as to the law but simply stated what it actually was. Indeed the confession rule requiring a warning, exclusively concerns *self-incriminating statements* of the accused, and aims at the exclusion of those which are untrue. As its subject-matter or purpose, the confession rule does not embrace the *incriminating conditions* of the body, features, finger-prints,

[1] [1955] S.C.R. 593, 5 D.L.R. 394, 21 C.R. 217, 112 C.C.C. 209.

clothing or behavior of the accused, that persons, other than himself, observe or detect and ultimately report as witnesses in judicial proceedings.

Having thus settled the matter by reiterating by the provisions of s. 224(3) that there was no duty to warn a person that he need not give a sample and that the result of its analysis might be used in evidence, Parliament, by those in s. 224(4), added that "No one is required to give a sample of blood.... for chemical analysis, for the purposes of this section" and that the refusal to do so or the non-taking of a sample could not be proved or commented upon in proceedings under s. 222 or s. 223.

The first of these two additions does not derogate from the general law, according to which no one, failing a statutory requirement to the contrary, is obliged, in law, to give a sample. In saying what it said, Parliament, in my view, simply intended to forestall, *ex abundanti cautela,* any suggestion that the creation of a legal obligation was intended in the provisions now found in s. 224. By these amendments to the Code, the choice is not taken away from the suspected person. There is nothing, either express or implied in this part or in the whole of the section, indicating that Parliament was at all concerned with the nature of the reasons which, in any particular case, might in fact have a decisive influence on the mind of a suspected person, as is the case under the confession rule. Nor can I find, in this provision, the manifestation of any intent of Parliament to trench—as it possibly might have done as a step genuinely taken in relation to criminal procedure—upon the right of a provincial Legislature to create, for genuine provincial purposes, a legal obligation to give a sample. Effect must be given to the words "for the purposes of this section" which, qualifying the range of this part of the provision, are indicative of the true intent of Parliament.

The prohibitive enactment, in the latter part of s. 224(4), derogates from the prior law, in that it bars, in any proceedings under s. 222 or s. 223, evidence or comment as to the fact of the refusal to give a sample or as to the fact that a sample was not taken. Thus, in these proceedings, the possibility of any inference whatever, being drawn from

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evidence or comment with respect to either one of these two facts, is definitely ruled out; and to this extent goes the derogation.

Counsel for the Attorney General of Canada construed s. 224(4) as having the consequential effect of excluding from the evidence the result of a test taken without a consent of the suspected person. This construction is predicated on the presence, in the enactment, of the declaration that no one is required to give a sample and of the prohibition as to evidence and comment. I am unable to agree with this submission. What, in my view, is the purpose of the declaration has already been indicated. The prohibition itself is absolute. While it might be said to confer an immunity against incriminating inferences, it rules out definitely any inference—likely or not to affect the case for the prosecution or the case for the defence—which might be drawn, not only from the refusal to give a sample, but also from the fact that none was actually taken. Moreover, the submission implies the assumption, which can hardly have been that of Parliament, that in all cases where a sample would be taken notwithstanding refusal, the result of its analysis would be incriminating; fear of incrimination is assumed to be the only possible reason for either a refusal to give a sample or the fact that none was actually taken. The acceptance of this submission would lead to the exclusion from the evidence, not only of incriminating but also of such exculpating evidence as might result from the actual taking of a test notwithstanding refusal. When enacting the provisions of s. 224(4), Parliament is presumed to have had in mind (i) the rule of evidence according to which evidence, obtained unlawfully or under compulsion of law, is not for that reason alone, inadmissible, *Kuruma v. The Queen*[1], *Attorney General of Quebec v. Bégin* (*supra*) and *Rex v. Walker*[2], and (ii) the rule of construction according to which a Legislature will not be presumed to have departed from the general system of the law without expressing an intention to do so with irresistible clearness. The language, here used by Parliament, is not apt to indicate an intent such as the one contended for.

[1] [1955] A.C. 197, [1955] 1 All E.R. 236.
[2] [1939] S.C.R. 214, 2 D.L.R. 353, 71 C.C.C. 305.

The Vehicles Act, 1957. Section 92(4), in the context of which is found the impugned provision, *i.e.*, s. 92(4)(*d*), reads as follows:

(4) The board may suspend an operator's, chauffeur's, learner's or instructor's licence for a period not exceeding ninety days if, after an examination of the circumstances, it is satisfied:

(*a*) that the holder thereof is afflicted with or suffering from such physical or mental disability or disease as might prevent him from exercising reasonable and ordinary control over a motor vehicle; or

(*b*) that he is not well skilled in the operation of a motor vehicle; or

(*c*) that his habits or conduct are such as to make his operation of a motor vehicle dangerous to public safety; or

(*d*) that, when suspected of driving, or of having driven, a motor vehicle while under the influence of intoxicating liquor, he refused to comply with the request of a police officer or police constable that he submit to the taking of a specimen of his breath;

and if, after a hearing of which reasonable notice has been given to the holder of the licence and after a further examination of the circumstances, the board is again so satisfied it may suspend the licence for a stated period or revoke it.

As a matter of construction, it is suggested that the impugned enactment compels, in law or at least in effect, one to do what, in a similar situation, s. 224(4) of the *Criminal Code* says he is not legally obliged to and, for this reason, the former provision is held *ultra vires,* as repugnant to the latter.

With deference, I am unable to agree with this submission. In terms, the provincial enactment creates no legal obligation. It leaves, to the license-holder, the faculty to comply with or ignore what is a request and not a requirement; and no one suggested that non-compliance with the request amounts to a violation of the enactment. Indeed and under the provision, the suspected license-holder has the same right and is in a position similar to that of a person who, being suspected of physical or mental affliction likely to prevent the exercise of reasonable care and ordinary control over a motor vehicle, is requested, as a condition precedent to the issuance or maintenance of a driving license, to submit to an examination. In either case, to deprive the suspected person of a license, because of non-compliance, might be adopting a measure prejudicial to that person but nonetheless necessary to enable the provincial authorities to adequately discharge their duty to protect the users of the road. In either case, the difficulty

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and the consequences of the choice of the suspected person do not affect the nature of his rights and are, *per se,* ineffective to create a legal obligation.

Even if it can be held, as is suggested, that in effect, if not in terms, the impugned provision does create statutory compulsion, on a considered view of the true character of s. 224(4) of the *Criminal Code,* the former provision does not clash with the latter. I have already indicated that in stating "No one is required to give a sample . . . for chemical analysis, *for the purposes of this section",* Parliament, in my view, simply meant to silence any suggestion that the amendments then made carried an obligation to give a sample for the purposes of these criminal proceedings. In the statement itself, there is an implication that, for purposes other than criminal proceedings, one might be required to give a sample. This implication, consonant with the general law, negatives any intent of Parliament to invade the field in such a way as to trench upon provincial jurisdiction to create such an obligation for genuine provincial purposes. And it is significant that, as above indicated, Parliament did not see fit, on the occasion, to depart, as it might have done, from the general rule of evidence according to which the result of a test authorized for genuine provincial purposes is admissible in evidence in criminal proceedings. The situation dealt with in s. 224(4) is not the one arising when a sample has been given or taken but when it has not. I cannot therefore see the alleged conflict and hold that the impugned enactment will operate to prevent the attainment of the object of s. 224 of the *Criminal Code* according to its true intent, meaning and spirit.

I am also in respectful agreement with the view that the impugned legislation is not, as contended, legislation in relation to criminal law but in relation to the administration and control of highways in the province for the protection of the travelling public and of the automobile insurance fund created under the provincial legislation. That the provinces have undisputed authority to issue licenses or permits for the right to drive motor vehicles on their highways and that this authority carries with it the authority to suspend or cancel them upon the happening of certain conditions, are undoubted principles. *Provincial Secretary*

of P.E.I. v. Egan[1]. What, in the latter decision, was said, particularly by Sir Lyman Duff, in affirmation of validity, finds its application in this case.

I would, therefore, answer the questions as follows:

Question 1. Subsection (4) of s. 92, para. (*d*) is not *ultra vires* of the Legislative Assembly of Saskatchewan in whole or in part;

Question 2. The result of a chemical analysis of the breath of a person taken under s. 92, subs. (4)(*d*) is admissible in prosecutions under ss. 222 and 223 of the *Criminal Code*.

RAND J.:—The Lieutenant-Governor in Council of Saskatchewan has submitted to the Court of Appeal for that province the following questions:

(1) Is subsection (4) of section 92 of *The Vehicles Act*, 1957, Statutes of Saskatchewan, 1957, Chapter 93, *ultra vires* of the Legislative Assembly of Saskatchewan in whole or in part?

(2) In any proceedings in Saskatchewan under sections 222 or 223 of the *Criminal Code* of Canada is the result of a chemical analysis of a sample of breath of a person admissible in evidence on the issue whether that person was intoxicated or whether his ability to drive was impaired by alcohol

(*a*) where the provisions of subsection (4) of section 92 of *The Vehicles Act*, 1957 were brought to the attention of the accused before he gave a sample of his breath for chemical analysis;

(*b*) where the provisions of subsection (4) of section 92 of *The Vehicles Act*, 1957 were not brought to the attention of the accused before he gave a sample of breath for chemical analysis.

Section 92, subs. (4), para. (*d*) of *The Vehicles Act, 1957*, the controlling paragraph, provides:

(4) The board may suspend an operator's, chauffeur's, learner's or instructor's licence for a period not exceeding ninety days if, after an examination of the circumstances, it is satisfied:

* * *

(*d*) that, when suspected of driving, or of having driven, a motor vehicle while under the influence of intoxicating liquor, he refused to comply with the request of a police officer or police constable that he submit to the taking of a specimen of his breath;

and if, after a hearing of which reasonable notice has been given to the holder of the licence and after a further examination of the circumstances, the board is again so satisfied it may suspend the licence for a stated period or revoke it.

By ss. 222, 223 and 224 of the *Criminal Code*:

222. Every one who, while intoxicated or under the influence of a narcotic drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of

[1] [1941] S.C.R. 396, 3 D.L.R. 305, 76 C.C.C. 227.

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(*a*) an indictable offence and is liable

* * *

(*b*) an offence punishable on summary conviction and is liable

* * *

223. Every one who, while his ability to drive a motor vehicle is impaired by alcohol or a drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of an indictable offence or an offence punishable on summary conviction and is liable

* * *

224. . . .

(3) In any proceedings under sections 222 or 223, the result of a chemical analysis of a sample of the blood, urine, breath or other bodily substance of a person may be admitted in evidence on the issue whether that person was intoxicated or under the influence of a narcotic drug or whether his ability to drive was impaired by alcohol or a drug, notwithstanding that he was not, before he gave the sample, warned that he need not give the sample or that the results of the analysis of the sample might be used in evidence.

(4) No person is required to give a sample of blood, urine, breath or other bodily substance for chemical analysis for the purposes of this section and evidence that a person refused to give such a sample or that such a sample was not taken is not admissible nor shall such a refusal or the fact that a sample was not taken be the subject of comment by any person in the proceedings.

I take the rule of immunity from incriminating evidence to be confined to that which bears a testimonial character: *Attorney-General of Quebec v. Begin*[1]; this judgment, in my opinion, decides that matters of fact elicited from an individual not of that character do not come within it. Whether the use, therefore, under the provincial statute here, of a refusal to give a sample of blood or other substance as evidence for provincial purposes, not conflicting with that protective rule of criminal law, is within the competence of the province, and its admissibility in a prosecution under s. 222 or s. 223 of the Code, depend upon whether or not it is within the prohibition of s. 224.

That section declares that "no person is required to give a sample" of blood or other substance, and that the fact of a refusal to give it, or that it was not taken, is inadmissible, with comment on either fact likewise forbidden; permitting the sample to be taken is to be voluntary. The controlling word is "required"; what modes of coercion are by that word contemplated which will clash with the immunity given? As the section deals with matter analogous to self-incrimination we should look to the nature of the com-

[1] [1955] S.C.R. 593, 5 D.L.R. 394, 21 C.R. 217, 112 C.C.C. 209.

pulsion against which that rule is a shield, and that by which disclosure is enforced where the privilege is taken away. By s. 5(1) of the *Canada Evidence Act* a witness is not excused from answering on the ground that the answer may incriminate him or subject him to civil liability; if he refuses, by what means is the obligation to answer enforced? The word "required" is to be taken as envisaging similar means, an effective compulsion such as that, for example, exerted against a recalcitrant witness, commitment as for contempt. Is the effect of a refusal to give a sample, that it may be used as evidence by the province in deciding upon the suspension or cancellation of an automobile license, of that nature?

The answer to this must take into account a consideration of the impact on a constantly intensifying traffic of persons and vehicles on the highways of their use by automobiles, and its ghastly results from mere carelessness in operation alone. When to the lethal dangers inherent and multiplying under the best of ordinary circumstances we add the most potent and destructive factor, the intoxicated driver, a stage has been reached where the public interest rises to paramount importance.

The analogous rule against self-incrimination is one for the protection not of the guilty, but of the innocent; and the grounds underlying it are the dangers of compulsion not only in bringing about incrimination to the innocent but, as Professor Wigmore points out, in its inevitable abuse and the concomitant moral deterioration in methods of obtaining evidence and in the general administration of justice in criminal matters.

Under s. 92(4)(*d*) the danger to the innocent is virtually non-existent; only a failure either in the analysis itself or in the honesty of the technician can be said to present a hazard; and when the only result of either an incriminating analysis, or the initial refusal to give a sample, is the use of the one or other fact as relevant to a decision on a license, the imperious concern of the public overbears, as factors of error, those speculative possibilities. This result of a minor and only an indirect inference from a refusal to give is in extreme contrast with the commitment of a witness until his contempt is purged, drastic enough but not to be compared with the ancient practice of torture.

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The consequence of refusal under s. 92(4)(*d*) is not, in my opinion, within the contemplation of s. 224; the disclosure, if induced, presents only a most unlikely possibility of prejudice to an innocent person, and even should he stand on his refusal arbitrarily in an exaggerated assertion of personal dignity, the worst that can happen is to be deprived of what, in his case, may be a questionable privilege.

From this it follows that the analysis of a sample of breath obtained under s. 92(4)(*d*) is voluntarily furnished and is admissible as evidence in prosecutions under s. 222 or s. 223 by s. 224 or any other sections of the Code. There is thus no evidentiary inconsistency between different offences as was suggested on the argument.

I would, therefore, answer the questions as follows:

Question 1. Subsection (4) of s. 92, para. (*d*) is not *ultra vires* of the Legislative Assembly of Saskatchewan in whole or part;

Question 2. The result of a chemical analysis of the breath of a person taken under s. 92, subs. (4)(*d*) is admissible in prosecutions under ss. 222 and 223 of the *Criminal Code*.

The judgment of Locke and Cartwright JJ. was delivered by

CARTWRIGHT J.:—The questions submitted by the Lieutenant-Governor in Council of Saskatchewan to the Court of Appeal for that Province and the relevant statutory provisions are set out in the reasons of my brother Rand.

I have reached the conclusion that the answers to the questions should be as follows:

To Question (1): Clause (*d*) of subsection (4) of section 92 of *The Vehicles Act*, 1957, Statutes of Saskatchewan, 1957, Chapter 93 is *ultra vires* of the Legislative Assembly of Saskatchewan.

To Question (2): (*a*): Yes.
(*b*): Yes.

In my opinion, s. 224(3) and s. 224(4) of the *Criminal Code* are *intra vires* of Parliament as being legislation, under head 27 of s. 91 of the *British North America Act*, in relation to "the Criminal Law . . . including the Procedure in Criminal Matters" and the subject-matter of these subsections is not merely ancillary, or necessarily incidental, to Criminal Law and the Procedure in Criminal Matters but is an integral part thereof.

For some time it has been criminal for a person to drive a motor vehicle while intoxicated or while his ability to drive is impaired by alcohol. These crimes are now set out in ss. 222 and 223 of the *Criminal Code*.

Of recent years it has been generally accepted that the result of a chemical analysis of a sample of the breath of a person is of some assistance in determining whether he was intoxicated or whether his ability to drive a motor vehicle was impaired by alcohol. There have been differences of judicial opinion as to the circumstances under which evidence of the result of a chemical analysis of the sort mentioned could be legally admitted on the trial of a criminal charge; some of the cases in which these differences arose are referred to in *Attorney-General for Quebec v. Begin*[1].

In my opinion, it is unnecessary, for the decision of the first question, to consider whether in enacting s. 224(3) and s. 224(4), or their predecessors s. 285(4*d*) and s. 285(4*e*), Parliament made any change in the pre-existing law. Those subsections now declare the law, and whether or not what they enact was previously the common law it is now the statute law of Canada.

From their terms it is obvious that s. 224(3) applies in any proceedings under s. 222 or s. 223 and that s. 224(4) comes into play when a person is suspected of having committed an offence against either of those sections. Section 224(4), then, deals with a person who is suspected of having committed an offence against s. 222 or s. 223. It is clear from the wording of the subsection that Parliament contemplates that a person in that situation may be asked to give a sample of his breath but is left free to consent or to refuse; Parliament has seen fit to declare not only that he is not required to give the sample but also that the fact of his refusal shall not be given in evidence or made the subject of comment in proceedings under the sections mentioned. It appears to me that s. 92(4) of *The Vehicles Act* of Saskatchewan deals with a person in the same situation as that dealt with by s. 224(4) of the *Criminal Code* and that its direct effect is to require such person to give a sample of his breath under pain of being liable to be temporarily or permanently prevented from driving a motor

[1] [1955] S.C.R. 593, 5 D.L.R. 394, 21 C.R. 217, 112 C.C.C. 209.

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vehicle in the Province of Saskatchewan, a penalty which in the case of some individuals might amount to a deprivation of livelihood.

For the purposes of this appeal I am prepared to assume, although I regard it as doubtful, that s. 92(4)(*d*) of *The Vehicles Act* would be *intra vires* of the Legislature if, to use the words of Lord Tomlin in *Attorney-General for Canada v. Attorney-General for British Columbia*[1], the field was clear; but its direct effect appears to me to be to nullify throughout the Province of Saskatchewan the provision in s. 224(4) of the *Criminal Code* that a person in the circumstances mentioned above is not required to give a sample of breath. Whatever be the precise meaning given to the word "required", unless it is to be restricted to "compelled by irresistible physical force", I am of opinion that a statute declaring that a person who refuses to do an act shall be liable to suffer a serious and permanent economic disadvantage does "require" the doing of the act. With deference to those who hold a contrary view, it appears to me to be playing with words to say that a person who is made liable to a penalty (whether economic, pecuniary, corporal or, I suppose, capital) if he fails to do an act is not required to do the act because he is free to choose to suffer the penalty instead.

It was suggested in argument that the words "for the purposes of this section" contained in s. 224(4) of the *Criminal Code* confine the effect of that subsection so as to leave unoccupied a field of legislation which it is competent for the Province to enter. I am unable to see how this argument assists the case of those who seek to support the provincial legislation, as it seems clear that s. 92(4)(*d*) of *The Vehicles Act* is directed solely to a person requested by a police officer to allow the taking of a specimen of his breath for the purposes of s. 224, *i.e.*, to enable a chemical analysis to be made the result of which may be admitted in evidence pursuant to s. 224(3).

For these reasons I am of opinion that s. 92(4)(*d*) of *The Vehicles Act* of Saskatchewan invades a field fully occupied by valid legislation of Parliament, is in direct conflict with that legislation, and cannot stand.

[1] [1930] A.C. 111 at 118, 1 D.L.R. 194.

In view of the answer which I think should be given to question 1, question 2 appears to become comparatively unimportant, but, in my opinion, it falls within the reasoning of this Court in *Attorney-General for Quebec v. Bégin* (*supra*). At common law the evidence, being that of the existence of an objective fact, would, if relevant, have been admitted, although illegally obtained; and I am unable to construe the wording of s. 224(4) of the *Criminal Code* as showing an intention to change the law in this regard. Clear and unambiguous words would, I think, be necessary to effect such an alteration in the law of evidence.

To prevail upon a person, suspected of an offence against s. 222 or s. 223 of the Code, to give a sample of breath by threatening him with loss of his permit to drive should he refuse would, in my opinion, be contrary to s. 224(4) and an illegal act; but that illegality would not render inadmissible the evidence of the result of a chemical analysis of the sample so obtained.

For these reasons I would answer Question 2(*a*) and (*b*) in the affirmative.

The judgment of Locke and Martland JJ. was delivered by

MARTLAND J.:—I agree with the conclusions of my brother Cartwright.

With respect to the first question in the reference, the issue has been clearly stated in the factum of the appellant, the Attorney-General of Saskatchewan, as follows:

> The real question here is, it is submitted, whether or not there is any conflict between the provisions of the *Criminal Code* of Canada dealing with the offences commonly referred to as drunken driving and driving while impaired which provisions are set out in the Reference and the provisions of Subsection (4)(*d*) of Section 92 of *The Vehicles Act*.

Counsel for the appellant contended that this subsection was *intra vires* of the Saskatchewan Legislature because it came within the first branch of the fourth proposition enunciated by Lord Tomlin in *Attorney General for Canada v. Attorney General for British Columbia*[1], which states:

> (4.) There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail: see *Grand Trunk Ry. of Canada v. Attorney-General of Canada.*

[1] [1930] A.C. 111 at 118, 1 D.L.R. 194.

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In my view the subsection falls within the second branch of this proposition. The field is not clear. Subsection (4) of s. 224 of the *Criminal Code* specifically enacts that no person is required to give a sample of breath for the purposes of that section. I interpret this to mean that, in relation to criminal proceedings under s. 222 for driving while intoxicated, or under s. 223 for driving while impaired, a person is to be free to decide whether or not he will give a sample of breath for chemical analysis. Paragraph (*d*) of subs. (4) of s. 92 of *The Vehicles Act* gives power to the Highway Traffic Board to suspend or revoke a licence to drive if it is satisfied that the holder, when suspected of driving or having driven a motor vehicle while under the influence of intoxicating liquor, refuses to comply with a request of a police officer or constable that he submit to the taking of a specimen of his breath. It comes into operation in cases where there is a suspicion that there has been committed a breach of s. 222 or s. 223 of the *Criminal Code*. It means that a person suspected of having committed such an offence must submit to a breath test or suffer the penalty of losing his right to drive a motor vehicle. The two legislations therefore meet and the provisions of the *Criminal Code* must prevail.

It was contended that the decision of this Court in *Provincial Treasurer of Prince Edward Island v. Egan*[1], was authority to support the validity of the provincial enactment. In that case the legislation in question provided that the licence to operate a motor vehicle of a person convicted of driving a vehicle while under the influence of intoxicating liquor or drugs should automatically be suspended. As was pointed out by counsel who argued in opposition to the validity of the Saskatchewan legislation, the statutory provision in question in the *Egan* case only became applicable after there had been a conviction under the *Criminal Code*. There was no conflict as between it and the provisions of the *Criminal Code*.

Further, it is to be noted that Duff C.J.C., in the *Egan* case says at p. 402:

> In every case where a dispute arises, the precise question must be whether or not the matter of the provincial legislation that is challenged is so related to the substance of the Dominion criminal legislation as to be

[1] [1941] S.C.R. 396, 3 D.L.R. 305, 76 C.C.C. 227.

brought within the scope of criminal law in the sense of section 91. If there is repugnancy between the provincial enactment and the Dominion enactment, the provincial enactment is, of course, inoperative.

For the reasons previously given, I think there is such repugnancy in the present case.

With regard to the second question in the reference, it was common ground between counsel that the question was to be interpreted as (a) referring to a breath test taken at the request of a police officer or constable under s. 92(4)(*d*) of *The Vehicles Act* and (b) referring to the admissibility of the evidence as against the accused.

Having found that s. 92(4)(*d*) is *ultra vires* of the Legislative Assembly of Saskatchewan, I agree with the contention of counsel for the Attorney General of Canada that the results of chemical analyses of samples of breath would be admissible as against the accused in proceedings under s. 222 or s. 223 of the *Criminal Code* because, in view of that finding, there is no compulsion by operation of that subsection.

I would therefore hold that paragraph (*d*) of subs. (4) of s. 92 is *ultra vires* of the Legislative Assembly of the Province of Saskatchewan and that both questions 2(*a*) and 2(*b*) of the reference should be answered in the affirmative.

Solicitor for the Attorney-General of Saskatchewan: J. L. Salterio.

Solicitor appointed by the Court of Appeal in Opposition: E. D. Noonan.

Solicitor for the Attorney General of Canada: W. R. Jackett.

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

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*Feb. 17, 18, 19
**Oct. 7

STEPHEN FRANCIS MURPHY (*Plaintiff*) APPELLANT;

AND

CANADIAN PACIFIC RAILWAY COMPANY (*Defendant*) ..... RESPONDENT;

AND

THE ATTORNEY GENERAL OF CANADA ..... INTERVENANT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Constitutional law—Validity of Canadian Wheat Board Act, R.S.C. 1952, c. 44—Trade and Commerce—Property and Civil Rights—Whether interference with s. 121 of the B.N.A. Act, 1867.

The plaintiff tendered to the defendant railway at Winnipeg one bag each of wheat, oats and barley, to be conveyed to Princeton, British Columbia. The grain had been grown in Manitoba, but there was no suggestion that it was done by the plaintiff or the company of which he was the president and majority shareholder. The defendant refused to transport the grain, and alleged, in defence to the action taken by the plaintiff, that it was prohibited to do so by the provisions of the *Canadian Wheat Board Act,* and more particularly of s. 32. The plaintiff raised the validity of the Act by contending that it interfered with property and civil rights in the province, and further that s. 32 thereof infringed the provisions of s. 121 of the *B.N.A. Act.*

Held: The action should be dismissed. The defendant railway was justified in refusing to transport the grain.

Per Taschereau, Locke, Fauteux and Abbott JJ.: The *Canadian Wheat Board Act,* which controls and regulates not one trade or business but several, including the activities of the producer, the railroads, and the elevators, in so far as its provisions relate to the export of grain from the province for the purpose of sale, is an act in relation to the regulation of trade and commerce within s. 91 of the *B.N.A. Act.* The fact that it interferes with property and civil rights in the province is immaterial.

The question as to whether a producer of grain in Manitoba who is carrying on a business outside the province is prevented by s. 32 from transporting his own grain for his own purposes was not raised by the pleadings or by the evidence. But assuming that the issue had been raised and that such a prohibition is invalid, it would be clearly severable.

The impugned legislation does not contravene the provisions of s. 121 of the *B.N.A. Act.* There is nothing of the nature of a custom duty affecting interprovincial trade authorized by the *Canadian Wheat Board Act.*

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*PRESENT: Kerwin C. J. and Taschereau, Rand, Locke, Cartwright, Fauteux and Abbott JJ.

**The Chief Justice, owing to illness, took no part in the judgment.

Per Rand J.: The scheme of the Act is that generally all grain entering interprovincial and foreign trade is to be purchased and marketed by the Board, and none purchased directly from the farmers can be shipped to another province without a permit from the Board. The Act embodies a policy adopted by Parliament as being in the best interests of the grain producers and the country generally, and that administration is within the competence of Parliament to set up. Assuming that s. 121 of the *B.N.A. Act* is applicable equally to action by Dominion and Province, the charge, related to administrative expenses, exacted as a condition of the shipment is not an impediment to the free passage contemplated by that section, when it is looked at in its true character as an incident in the administration of a comprehensive extra-provincial marketing scheme. The word "free" in s. 121 means without impediment related to the traversing of a provincial boundary.

The tender by a producer of his own grain for transport to his home in another province would be an item in interprovincial trade and would fall within the Act if it was done, as in the present case, for the purposes and in the course of a business.

Per Cartwright J.: Assuming that s. 32 of the Act forbids a producer in one province to transport his own grain into another province to be there used by him for his own purposes, and assuming that prohibition to be invalid as contravening s. 121 of the *B.N.A. Act*, such a prohibition is clearly severable.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], affirming a judgment of Maybank J.[2] Appeal dismissed.

M. J. Finkelstein, Q.C., and *K. G. Houston*, for the plaintiff, appellant.

H. M. Pickard, for the defendant, respondent.

W. R. Jackett, Q.C., H. B. Monk, Q.C., and *J. D. Affleck, Q.C.*, for the intervenant.

The judgment of Taschereau, Locke, Fauteux and Abbott JJ. was delivered by

LOCKE J.:—There are, in my opinion, questions as to the power of Parliament to enact certain of the provisions of the *Canadian Wheat Board Act*, R.S.C. 1952, c. 44, one of which is suggested in the judgment of the learned Chief Justice of Manitoba[1] which need not be considered in dealing with this appeal except to the limited extent hereinafter referred to. It was said in the judgment of

[1] (1956), 4 D.L.R. (2d) 443, 19 W.W.R. 57.
[2] (1956), 1 D.L.R. (2d) 197.

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the Judicial Committee in *Citizens' Insurance Company v. Parsons*[1], and it has been said many times since that in performing the difficult duty of deciding questions arising as to the construction of ss. 91 and 92 of the *British North America Act* it is a wise course to decide each case which arises without entering more largely upon the interpretation of the statute than is necessary for the decision of the particular question in hand. For this reason the issues raised by the pleadings and by the admissions made at the trial must be examined.

The appellant is the president and the majority shareholder of a company named Mission Turkey Farms Ltd., incorporated under the laws of British Columbia and which carries on the business of raising turkeys at Mission City and Princeton in that province. On September 29, 1954, the appellant tendered to the respondent at Winnipeg one sack of wheat, one of oats and one of barley, requesting that the grain be conveyed to Princeton and at the time tendered the proper freight charges. It was admitted at the trial that this grain was grown in Manitoba. While the appellant gave evidence, he did not say by whom the grain was owned or how it came into his possession, but it is not suggested that it was grown in Manitoba either by him or by Mission Turkey Farms Ltd. There is no evidence as to the proposed consignee nor any admission as to this. As this does not, in my opinion, affect any issue raised, it may, I think, be assumed that it was proposed to forward the grain to Mission Turkey Farms Ltd.

Other than the allegations as to the tendering of the grain for shipment and the proper freight charges, all of the allegations in the Statement of Claim were denied in the Statement of Defence. As to this, the respondent pleaded that it refused to accept the grain for transport and to accept the money tendered as freight since the appellant was prohibited from causing the grain to be so transported and the respondent was prohibited from transporting it by the provisions of the *Canadian Wheat Board Act* and particularly s. 32 and the regulations made pursuant to that Act.

[1] (1881), 7 App. Cas. 96 at 109, 51 L.J.P.C. 11.

The constitutional issue was raised by the reply by which it was alleged that the *Canadian Wheat Board Act* was *ultra vires* the Parliament of Canada and that the regulations referred to were, therefore, invalid. As to this it was said that in view of the provisions of the *British North America Act* Parliament could not enact or enforce the *Canadian Wheat Board Act*. The reply further asserted that the Act trenched upon the powers of the province as it interfered with property and civil rights in the Province. The reference to the powers of Parliament under s. 91 was further amplified by contending that s. 32 of the Act exceeded the powers of Parliament in that s. 121 of the *British North America Act* provides that all articles of the growth, produce or manufacture of any of the provinces shall be admitted free into each of the other provinces and that the provisions of the impugned Act enabled the Wheat Board to exact a tax on all grain transported from one province to the other.

Maybank J., before whom the trial was held, dismissed the action and that judgment was upheld in a unanimous judgment of the Court of Appeal for Manitoba[1] delivered by the Chief Justice.

The Attorney General for Canada intervened in the proceedings in the Court of Queen's Bench and was represented by counsel in the Court of Appeal and in this Court.

Section 91 vests in Parliament exclusive legislative authority in relation, *inter alia,* to the regulation of trade and commerce, and the concluding sentence of that section declares that any matter coming within any of the classes of subjects enumerated in it shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects assigned exclusively to the Legislatures of the Provinces.

There are two questions to be determined; the first, as to whether s. 32 of the Act, and the Act as a whole, are in relation to the regulation of trade and commerce; the second, as to whether the regulation infringes the provisions of s. 121 of the *British North America Act, 1867.*

[1] (1956), 4 D.L.R. (2d) 443, 19 W.W.R. 57.

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The purpose of the *Canadian Wheat Board Act* is made apparent by an examination of its provisions. The Board constituted by the Act is required to buy all wheat, oats and barley produced in the designated area, that area being substantially the three prairie provinces. Under regulations which the Board is empowered to make, deliveries of grain to elevators or to railway cars may be limited and, except with the permission of the Board, no person may deliver grain to an elevator who is not the actual producer of the grain and in possession of a permit book issued by the Board, or load into a railway car any such grain which has not previously been delivered under a permit book and with the Board's permission. The Board is required to undertake the marketing of all the grain delivered either to elevators or railway cars and the producers receive their proportionate share of the moneys realized from the sale of grain of the grade delivered by them less the expenses of the operation of the Board. It is a matter of common knowledge that much the greatest part of the grain delivered to elevators or to railway cars is exported from the province in which it is grown either to other provinces of Canada or to foreign countries. Grain consumed upon the farms or retained for use as seed is not, of course, affected by the provisions of the statute.

As the purpose is to pool the amounts realized from the sale of these various kinds of grain in each crop year, it has apparently been considered by Parliament to be essential that complete control of exports should be vested in a body such as the Board. Accordingly, s. 32 which is attacked in the reply to the Statement of Defence and which appears in Part IV of the Act under the heading "REGULATION OF INTERPROVINCIAL AND EXPORT TRADE IN WHEAT" provides that, except as permitted by the regulations, no person other than the Board shall export from Canada any such grain owned by a person other than the Board or transport or cause to be transported from one province to another any such products owned by any person other than the Board or sell or agree to sell such grain situated in one province

for delivery in another province or outside of Canada, or buy or agree to buy such grain situated in one province for delivery in another.

It is further provided by s. 32 that any agreement for the sale of such grain in contravention of any provision of the Act or of any regulation or order made under its authority shall be void. As part of the plan to vest the desired control in the Wheat Board, s. 5 declares that all flour mills, feed mills, feed warehouses and seed cleaning mills theretofore or thereafter constructed are works for the general advantage of Canada and a schedule to the Act lists a great number of such establishments in the western provinces which are affected by the section. By s. 174 of the *Canada Grain Act,* R.S.C. 1952, c. 25, all elevators in Canada are declared to be works for the general advantage of Canada.

Dealing with the first question, it appears to me to be too clear for argument that the *Canadian Wheat Board Act* in so far as its provisions relate to the export of grain from the province for the purpose of sale is an Act in relation to the regulation of trade and commerce within the meaning of that expression in s. 91. As pointed out by the learned Chief Justice of Manitoba, it has been long since decided that the provinces cannot regulate or restrict the export of natural products such as grain beyond their borders. That question was most carefully reviewed in the judgment of the Court of Appeal of Saskatchewan in *Re The Grain Marketing Act, 1931*[1], in the judgment delivered by Turgeon J.A. The matter had been considered in earlier cases and in the judgment delivered by Duff J., as he then was, in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*[2], a case which dealt with the marketing of natural products produced in the province of British Columbia, it was said that foreign trade and trading matters of interprovincial concern are among the matters included within the ambit of head 2 of s. 91. The matter was recently considered in this Court

[1] [1931] 2 W.W.R. 146.
[2] [1931] S.C.R. 357 at 371, 2 D.L.R. 193.

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in the *Reference respecting the Farm Products Marketing Act, R.S.O. 1950, c. 131*[1], where the statement in *Lawson's* case was followed and the earlier authorities reviewed.

This being so, in my opinion the fact that of necessity it interferes with property and civil rights in the province of the nature referred to in head 13 of s. 92 is immaterial. For reasons which have been stated in a great number of cases decided in the Judicial Committee as well as in this Court, it has been decided that if a given subject-matter falls within any class of subjects enumerated in s. 91 it cannot be treated as covered by any of those in s. 92. The language of Lord Maugham in *Attorney General of Alberta v. Attorney General of Canada*[2], merely repeats what had been decided in many previous cases. It is, of course, obvious that it would be impossible for Parliament to fully exercise the exclusive jurisdiction assigned to it by head 2 and many others of the heads of s. 91 without interfering with property and civil rights in some or all of the provinces. Some of the cases which illustrate this are *Tennant v. Union Bank*[3], *Attorney General of British Columbia v. Canadian Pacific Railway*[4], the street ends case, *Grand Trunk Railway v. Attorney General of Canada*[5], the contracting out case, and the recent judgment of this Court in *Attorney General of Canada v. Canadian Pacific Railway et al*[6].

It is contended for the appellant that the power to regulate trade and commerce under head 2 does not enable Parliament to regulate a particular trade, but this is too broad a statement. The result of the cases in the Judicial Committee dealing with this question appear to me to be most clearly summarized in the judgment of Lord Atkin in *Shannon v. Lower Mainland Dairy Products Board*[7], where it was said:

> It is now well settled that the enumeration in section 91 "The Regulation of Trade and Commerce" as a class or subject over which the Dominion has exclusive legislative powers does not give the powers to regulate for legitimate provincial purposes particular trades or businesses so far as the trade or business is confined to the province.

[1] [1957] S.C.R. 198, 7 D.L.R. (2d) 257.
[2] [1939] A.C. 117 at 130, [1938] 3 W.W.R. 337, 4 D.L.R. 433.
[3] [1894] A.C. 31.
[4] [1906] A.C. 204 at 210.
[5] [1907] A.C. 65.
[6] [1958] S.C.R. 285, 12 D.L.R. (2d) 625.
[7] [1938] A.C. 708 at 719, 4 D.L.R. 81, 2 W.W.R. 604.

The *Canadian Wheat Board Act* controls and regulates not one trade or business but several, including the activities of the producer, the railroads, the elevators and flour and feed mills and, except to a very minor extent, these activities are directed to the export of grain or grain products from the province, activities which the province itself is powerless to control.

In the able argument addressed to us by Mr. Finkelstein he has pointed out that, as s. 32 of the Act reads, a producer of grain in Manitoba who is carrying on outside the province an activity such as that of Mission Turkey Farms Ltd. in British Columbia is prevented from transporting, either by rail or otherwise, his own grain for his own purposes. This appears to be the case as the section declares by subs. (*b*) that no person other than the Board may transport or cause to be transported from one province to another province wheat or wheat products owned by a person other than the Board.

This question, however, is not raised either by the issues defined by the pleadings or by the facts given in the evidence. It is not contended that the appellant produced the grain which he sought to ship by the railway or that the company to whom I have presumed it was consigned was the producer of the grain in Manitoba. It was alleged in the Statement of Claim but not proven that the appellant was a poultry farmer. All that was proved was that he was the president of a company engaged in that business. The only possible inference to be drawn from the evidence is that the appellant bought the grain from some producer in Manitoba, either on his own behalf or on behalf of the British Columbia company, for the purpose of exporting it from the province in defiance of the Act and of the regulations.

If, however, contrary to my view, the question as to the validity of the prohibition of such a movement of a grower's own grain should be considered as having been raised and if it be assumed for the purpose of argument that such prohibition is invalid as being for any reason beyond the powers of Parliament, such prohibition would be clearly severable. It would affect only a minute portion of the western grain crop and it is impossible to sustain an

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argument that Parliament would not have passed the Act as a whole if it were known that in this respect s. 32 exceeded its powers.

There remains the question as to whether the legislation contravenes the provisions of s. 121 of the *British North America Act*. That section has been construed in the judgments delivered in this Court in *Gold Seal Limited v. The Attorney General of Alberta*[1], where Duff J., as he then was, said (p. 456):

> . . . that the real object of the clause was to prohibit the establishment of customs duties affecting interprovincial trade in the products of any province of the Union.

and Anglin J., as he then was, agreed (p. 466). This interpretation was accepted by the Judicial Committee in *Atlantic Smoke Shops Limited v. Conlon*[2]. There is nothing of this nature authorized by the *Canadian Wheat Board Act*.

In my opinion, this appeal fails and should be dismissed with costs. There should be no order as to costs for or against the intervenant.

RAND J.:—This appeal impugns the validity of prohibitory and compulsory features of *The Canadian Wheat Board Act, 1935*, as amended. The appellant is a poultry farmer in British Columbia and the president and majority shareholder of a company organized to engage in the business of raising and marketing poultry. Sufficient quantities of feed in wheat, oats and barley to meet the requirements of business of that class are not available from local production and it has become necessary to import from the prairie provinces; and it is out of an attempted shipment by the appellant from Manitoba to British Columbia that the dispute arises.

Speaking generally, the scheme of the Act is that primarily all grain entering interprovincial and foreign trade is to be purchased and marketed by the Board, and none purchased directly from the farmers on the prairies can be shipped to another province without the production of a license from the Board. This means that, regardless of the price paid to the producer, for the purpose of a private interprovincial movement, the grain is dealt with

[1] (1921), 62 S.C.R. 424, 62 D.L.R. 62, 3 W.W.R. 710.
[2] [1943] A.C. 550 at 569, 4 D.L.R. 81, 3 W.W.R. 113.

as if, by the shipper, it had been sold to and thereupon repurchased at the established price from the Board. Sales by the Board for a crop season are pooled and the gross returns less administration expenses equalized among the producers. When the grain is delivered an initial payment is made to the producer with a participation certificate entitling him to share in the ultimate net return. A certificate is likewise given to the individual shipper. In the result the latter is required to pay to the Board the difference between the initial payment and the then selling price. Since the certificate enables him to share in any further return realized, he is treated as a producer selling to the Board and is obliged to share in the administration expenses.

To bring the matter to a test, the appellant in Manitoba bought three sacks of grain, one of wheat, one of oats and one of barley, all grown in that province, and tendered them to the respondent Railway Company for carriage to British Columbia. The license not being forthcoming, the Railway declined to accept them and this action was brought. In justification of its refusal, the respondent pleaded the Act and the regulations made under it and the sufficiency in law of that plea is before us.

The Act consists of six Parts. Part I establishes the Board as a body corporate and an agent of Her Majesty in right of Canada for the object of "marketing" in interprovincial and export trade wheat grown in Canada. Appropriate powers are conferred and the marketing is to be by means of buying from producers, selling and pooling the proceeds.

Part II is a code of provisions dealing with elevators and dominion railways. By the *Canada Grain Act* all elevators in the prairie provinces are declared to be works for the general benefit of Canada under s. 91(29) of the *British North America Act*. Section 16 of the *Wheat Act* prohibits, except with the permission of the Board, the delivery or acceptance of grain to or by an elevator unless the person delivering (*a*) is the actual producer of or entitled as a producer to the grain; (*b*) at the time of delivery produces a permit-book under which he is entitled to deliver the grain in the current crop year; and (omitting two requirements not material here) (*e*) that the quantity

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delivered does not exceed the quota estimate by the Board for the particular delivery point. Section 17 forbids, without similar permission, the loading of grain into a railway car that is not delivered under a permit-book. Even that permission requires the terms of s. 16, unless expressly excepted, to be complied with as in delivery to an elevator. The permit-book, by s. 18, authorizes delivery of grain produced on the land of the producer. Various powers in relation to elevators and railways are vested in the Board by s. 20, including the making of regulations for the delivery to or the receipt of grain into elevators, the delivery out of elevators to railway cars or lake vessels, and the allocation generally of cars on railways to elevators, loading points or persons. By s. 21 the Board is authorized to prescribe terms for delivery and acceptance of grain at elevators or railways by persons other than producers.

Part III deals with voluntary marketing. The Board is bound to buy all wheat offered by a producer; a selling pool is provided, and the returns equalized between producers according to the quantity and grade of wheat delivered by them.

The title to Part IV is in these words: "REGULATION OF INTERPROVINCIAL AND EXPORT TRADE IN WHEAT." By s. 32, except as permitted by regulation, no person other than the Board may (*a*) export from or import into Canada wheat or wheat products owned by a person other than the Board; (*b*) transport or cause to be transported from one province to another the same commodities so owned; (*c*) sell or agree to sell those commodities situated in one province for delivery in another or outside of Canada; and (*d*) the converse of (*c*), buy or agree to buy such commodities from one province for delivery in another or outside of Canada. Section 33 provides for the issue by the Board of licences to ship where that is otherwise forbidden.

In Part V, s. 35 authorizes the Governor in Council by regulation to extend the application of Parts III or IV, or both, to oats and barley and thereupon the provisions of those Parts shall be deemed to be re-enacted in Part V including the appropriate expansion of definitions. That

was done prior to the tender of the grain for shipment here and the Act was then operative on all three commodities.

In Part VI, s. 45 makes the following declaration:

> 45. For greater certainty, but not so as to restrict the generality of any declaration in the *Canada Grain Act* that any elevator is a work for the general advantage of Canada, it is hereby declared that all flour mills, feed mills, feed warehouses and seed cleaning mills, whether heretofore constructed or hereafter to be constructed, are and each of them is hereby declared to be works or a work for the general advantage of Canada, and, without limiting the generality of the foregoing, each and every mill or warehouse mentioned or described in the Schedule is a work for the general advantage of Canada.

The provisions of the Act embody a policy adopted by Parliament as being in the best interests of the grain producers and the country generally; and the question is whether that administration is within the competence of Parliament to set up, which, in turn, is to be decided on the validity of the substantive enactments of Parts III and IV.

As a preliminary skirmish, it was stressed by Mr. Finkelstein that the prohibition was equivalent to forbidding a producer in Manitoba from having his own property for his own purposes carried to his home in another province and this was assumed to be an outrageous thing. That the shipment offered, if carried, would have been an item in interprovincial trade is, I think, beyond question. Whether or not the statute would gather in every conceivable mode of moving goods across a provincial boundary, such as a person transfering his home and belongings from one province to another, including an ordinary supply of grain for domestic use, or where the farm straddles the border line of two provinces, the gathering of crops on one side and storing them in the owner's barns on the other, it is unnecessary to consider. In the situation before us, the intended shipment was to be one of transportation across a provincial line for the purposes and in the course of a business. It makes no difference whether business is connected or associated with the owner's production of raw material in another province or with that of strangers; in either case the merchandise and the transportation serve exactly the

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same purpose, and ownership is irrelevant. The merchandise was to move between interprovincial points in the flow of goods of an economic and business character and that is sufficient.

The main contention was that the legislation and regulations infringed s. 121 of the Act of 1867 that

> All articles of the Growth, Produce or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the Provinces.

Assuming this section to be applicable equally to action by Dominion and province, is the charge exacted as a condition of the shipment an impediment to that free passage for which the section provides? Viewing it in isolation, as a hindrance to interprovincial trade detached from all other aspects, the demand bears the appearance of a violation. Apart from matters of purely local and private concern, this country is one economic unit; in freedom of movement its business interests are in an extra-provincial dimension, and, among other things, are deeply involved in trade and commerce between and beyond provinces.

But when the exaction is looked at in its true character, as an incident in the administration of a comprehensive extra-provincial marketing scheme, with its necessity of realizing its object in the returns to producers for all production except for local purposes, interference with the free current of trade across provincial lines disappears. The subjects of trade by their nature embody an accumulation of economic values within legislative jurisdiction, wages, taxes, insurance, licence fees, transportation and others, all going directly or indirectly to make up or bear upon the economic character of those subjects; and the charge here is within that category as one item in a scheme that regulates their distribution.

"Free", in s. 121, means without impediment related to the traversing of a provincial boundary. If, for example, Parliament attempted to equalize the competitive position of a local grower of grain in British Columbia with that of one in Saskatchewan by imposing a charge on the shipment from the latter representing the difference in production costs, its validity would call for critical examination. That result would seem also to follow if

Parliament, for the same purpose, purported to fix the price at which grain grown in Saskatchewan could be sold in or for delivery in British Columbia. But burdens for equalizing competition in that manner differ basically from charges for services rendered in an administration of commodity distribution. The latter are items in selling costs and can be challenged only if the scheme itself is challengeable.

Section 121 has been considered in two cases, *Gold Seal Limited v. Attorney General of Alberta*[1] and *Atlantic Smoke Shop Limited v. Conlon*[2]. In the former a majority of this Court, Duff J., Anglin J. and Mignault J., held that prohibition by Parliament of the importation of intoxicating liquor manufactured in a province into another where its sale for consumption was illegal did not infringe the section; Duff J. at p. 456 said:

> The phraseology adopted, when the context is considered in which this section is found, shows, I think, that the real object of the clause is to prohibit the establishment of customs duties affecting interprovincial trade in the products of any province of the Union;

A similar view was expressed by Anglin J. at p. 466, and by Mignault J. at p. 470 who added to customs duties "other charges of a like nature". In *Atlantic Smoke Shop*, at p. 569, Viscount Simon remarked in part on the *Gold Seal* judgment:

> The meaning of section 121 cannot vary according as it is applied to dominion or to provincial legislation, and their Lordships agree with the interpretation put on the section in the *Gold Seal* case.

What was being considered there was a provincial tax to be paid by a person purchasing tobacco at retail for consumption by himself or others. Included in the confirmation was s. 5 which required of residents payment of the tax on tobacco brought in for their personal consumption from other provinces. Infringement of s. 121 in that case would have been by a tax as distinguished from *Gold Seal*, by prohibition in support of valid provincial law; in neither was it necessary to explore s. 121 beyond those limits.

[1] (1921), 62 S.C.R. 424, 62 D.L.R. 62, 3 W.W.R. 710.
[2] [1943] A.C. 550, 4 D.L.R. 81, 3 W.W.R. 113.

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The case of *James v. Commonwealth of Australia*[1] was strongly urged upon us by Mr. Finkelstein. There the Commonwealth had passed an Act bringing interstate commerce in dried fruits under regulation. Its effect was to prohibit interstate trade to unlicensed shippers and to restrict it quantitatively when under licence. The latter was the result of a requirement that a determined percentage of the total production by a grower must be exported from Australia or destroyed and that only the balance could be sold either in the grower's own state or in any other state of the Commonwealth. Section 92 of the constitutional Act, 63-64 Vict., c. 12, declared:

> On the imposition of uniform duties of customs, trade, commerce, and intercourse among the states, whether by means of internal carriage or ocean navigation, shall be absolutely free.

The issues were whether the section bound the Commonwealth, and if so, whether the legislation infringed it. The Judicial Committee found the regulation to be *ultra vires* of the Commonwealth to enact.

Even if the constitutional considerations in that issue were the same as those to be taken into account in this, the difference in character of the restrictions would be a sufficient distinction between them. But those considerations are not the same. The Australian constitution is a federal scheme in the general acceptation of that expression; it is one in which autonomous states confer on their collective organization segments of their own legislative, executive and judicial powers, retaining their original endowment so far as it is not transferred and not otherwise withdrawn from them. In that of Canada a converse formulation was effected: in constitutional theory, a new and paramount Dominion was created to which was attributed power to legislate for its peace, order and good government generally. This was subject to certain local and private powers exclusively vested in provinces then created; but those powers in turn were made subordinate to paramount and exclusive authority specifically defined and reserved to the Dominion. The organization was brought into existence as of an original creation. Expressly and by implication the existing structures, their laws, institutions and constitutional status, so far as compatible

[1] [1936] A.C. 578.

with the new order, were carried forward; but in the words of Viscount Haldane in *Attorney General, Commonwealth of Australia v. The Colonial Sugar Refining Company Limited*[1],

> . . . although it (the Canadian constitution) was founded on the Quebec Resolutions and so must be accepted as a treaty of union among the then provinces, yet when once enacted by the Imperial Parliament it constituted a fresh departure, and established new Dominion and Provincial Governments with defined powers and duties both derived from the Act of the Imperial Parliament which was their legal source.

By the Australian Act, the regulation of Trade and Commerce committed by s. 51(1) to the Commonwealth was "subject to this constitution", which drew in s. 92, and was not exclusive; and so far as their legislation did not conflict with that of the Commonwealth, the States could likewise regulate interstate trade.

This diversity in structure and the scope and character of power over interstate trade and commerce, although illuminating in its disclosure of variant constitutional arrangements, suffices to require an independent approach to and appraisal of the question before us. Section 91(2) of the Act of 1867 confides to Parliament, "Notwithstanding anything in this Act," the exclusive legislative authority to make laws in relation to "The Regulation of Trade and Commerce". By what has been considered the necessary corollary of the scheme of the Act as a whole, apart from general regulations applicable equally to all trade, and from incidental requirements, this authority has been curtailed so far but only so far as necesary to avoid the infringement, if not "the virtual extinction", of provincial jurisdiction over local and private matters including intra-provincial trade; but the paramount authority of Parliament is trenched upon expressly only as it may be affected by s. 121. Pertinent to this is the ruling in *Attorney General of British Columbia v. Attorney General of Canada*[2], affirmed[3], in which it was held that customs duties imposed on the import of liquor by British Columbia under s. 91(2) did not violate s. 125 exempting all property of the province from taxation.

[1] [1914] A.C. 237 at 253.
[2] (1922), 64 S.C.R. 377, 38 C.C.C. 283, [1923] 1 W.W.R. 241, 1 D.L.R 223.
[3] [1924] A.C. 222, 42 C.C.C. 398, [1923] 3 W.W.R. 1249, 4 D.L.R. 669.

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I take s. 121, apart from customs duties, to be aimed against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of trade activity divested of all regulation I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade. What is forbidden is a trade regulation that in its essence and purpose is related to a provincial boundary.

The scheme of the *Wheat Act* is primarily to benefit producers of wheat in areas to which that product can now be said to be indigenous. Its effect is not to reduce the quantity of either foreign or interprovincial trade; whatever the demands of the provinces for these goods, the Board, under its duty to market the production of the "regulated areas", is bound to supply those requirements. But it is concerned also to spread the furnishing of that supply equitably among the producers. The individual with grain on hand may, because of quota, be unable to sell at the particular moment to a buyer in another province but his neighbour can do so. If the demands, export and interprovincial, are sufficient, all production will move into trade; what may be delayed is the particular disposal by the individual of his excess over the initial quota, not the movement of grain. The Act operates on the individual by keeping him in effect in a queue but the orderly flow of products proceeds unbated.

Section 121 does not extend to each producer in a province an individual right to ship freely regardless of his place in that order. Its object, as the opening language indicates, is to prohibit restraints on the movement of products. With no restriction on that movement, a scheme concerned with internal relations of producers, which, while benefiting them, maintains a price level burdened with no other than production and marketing charges, does not clash with the section. If it were so, what, in these days has become a social and economic necessity, would be beyond the total legislative power of the country, creating a constitutional hiatus. As the provinces are incompetent to deal with such a matter, the two jurisdic-

tions could not complement each other by co-operative action: nothing of that nature by a province directed toward its own inhabitants could impose trade restrictions on their purchases from or sales of goods to other provinces. It has become a truism that the totality of effective legislative power is conferred by the Act of 1867, subject always to the express or necessarily implied limitations of the Act itself; and I find in s. 121 no obstacle to the operation of the scheme in any of the features challenged.

Objection was taken to s. 33(*c*) which contemplates a situation where permission is given an individual to export wheat and a charge exacted of such sum as

> . . . in the opinion of the Board represents the pecuniary benefit enuring to the applicant pursuant to the granting of the license, arising solely by reason of the prohibition of imports or exports of wheat and wheat products without a license and the then existing differences between prices of wheat and wheat products inside and outside of Canada.

The subsection, as is seen, is limited to export and is clearly severable; and, being inapplicable to interprovincial trade, its validity is not in question here.

Finally, the contention is made that the purported declarations under the *Canada Grain Act* as well as the *Canadian Wheat Board Act* that all elevators, mills and feed warehouses in the three prairie provinces are works for the general advantage of Canada under s. 91(29) of the Act of 1867 are invalid, that declarations under that power must specify the individual work in respect of which considerations for and against have been weighed by Parliament; but we are not called upon to examine this contention. The prohibition of shipment in the case before us is contained in s. 32 of Part IV of the Act and it was in compliance with para. (*b*) of that section that acceptance of the shipment by the Pacific Railway was refused. The declarations mentioned are pertinent to the application of certain provisions of Part II governing delivery and acceptance of grain at elevators and railways but these are subsidiary to the prohibitions and regulations of carriage under Part IV. It is not suggested that, assuming s. 32 to be valid, the Pacific Railway is not bound by its terms to refuse the shipment as it did, and no elevator is involved. I should add that I am not to be taken as implying that restrictions on local elevators and mills, in

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relation, among other things, to delivery to carriers of grain for interprovincial transportation could not validly be imposed by Parliament.

I would, therefore, dismiss the appeal with costs.

CARTWRIGHT J.:—I am in general agreement with the reasons of my brother Rand and those of my brother Locke and would dispose of the appeal as they propose. I wish, however, to add a few words as to one of the submissions made by Mr. Finkelstein in the course of his full and able argument.

It was urged that s. 32 of the *Canadian Wheat Board Act* forbids a person who produces grain in one province to transport the grain so produced into another province to be there used by himself for his own purposes, that this prohibition is invalid, that it cannot be severed from the other provisions of the section and that consequently the whole section falls. The facts in the case at bar do not fall within the supposed case on which Mr. Finkelstein bases this argument but this circumstance does not affect the relevance of his submission to the issue of constitutional validity.

It seems clear that the enactment of such a prohibition would be beyond the powers of any provincial legislature and so would appear *prima facie* to fall within the powers of Parliament under the opening words of s. 91 of the *British North America Act* and to be valid, unless it contravenes s. 121 of that Act.

It may be that if, on its true construction, s. 32 would have the effect of prohibiting the supposed transportation it would be in conflict with s. 121 as being a prohibition which, to borrow the words of my brother Rand, "in its essence and purpose is related to a provincial boundary" and not being a regulation of trade or commerce (since there are difficulties in regarding a person as engaged in trade or commerce with himself) or a necesary incident of such regulation. If this be so it would furnish a strong reason for construing s. 32 as excluding from its operation the transportation in the case supposed, but I do not find it necesary to reach a final conclusion on the point as, in my opinion, the supposed prohibition if invalid is clearly severable.

I agree that the appeal should be dismissed with costs and that no order as to costs should be made for or against the intervenant the Attorney General of Canada.

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Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Finkelstein, Finkelstein & Houston, Winnipeg.

Solicitor for the defendant, respondent: H. M. Pickard, Winnipeg.

Solicitors for the intervenant: Monk, Goodwin & Higenbottam, Winnipeg.

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE (*Mis-en-Cause*) ..... APPELLANT;

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*Jun. 17
**Oct. 7

AND

INDUSTRIAL ACCEPTANCE CORPORATION LIMITED (*Petitioner*) RESPONDENT.

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

Revenue—Customs—Breach of Customs Act—Automobile seized—Whether interest of assignee of conditional sale agreement affected—Evidence—Customs Act, R.S.C. 1952, c. 58.

The respondent was the assignee of the conditional sale agreement of a car, title to which was to remain in the vendor until the price had been paid in full. When the car was seized by the R.C.M.P. for a breach of the *Customs Act,* the respondent took proceedings, pursuant to s. 166 of the Act, for a declaration that its interest in the car was not affected by the seizure. The petition was granted with costs by the trial judge and by the Court of Appeal. The Crown appealed to this Court.

Held: The appeal should be dismissed, but the order as to costs should be deleted from the judgments below. The respondent was entitled to a declaration that its interest in the car had not been affected by the seizure.

Per Taschereau, Fauteux and Abbott JJ.: Under s. 166(5) of the Act, the claimant becomes entitled to an order that his interest is not affected by the seizure once he has shown, to the satisfaction of a judge, that he did, at the relevant time, exercise all reasonable care to satisfy himself that the vehicle was not likely to be used contrary to the Act.

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*PRESENT: Kerwin C.J. and Taschereau, Cartwright, Fauteux and Abbott JJ.

**The Chief Justice, owing to illness, took no part in the judgment.

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The condition precedent to the right to obtain the relief is precisely that a positive and specific inquiry, as to whether there are reasons to suspect such a likelihood, was made and negatived any reason for such suspicions. What that inquiry should be to satisfy that standard of care is for the judge to appreciate in the light of the particular circumstances of each case. The judge, in this case, does not appear to have misdirected himself as to the law, and while, on the whole of the evidence, he might reasonably have reached a contrary conclusion, it cannot be said that his conclusion cannot be supported.

Per Taschereau, Cartwright, Fauteux and Abbott JJ.: The order as to costs should not have been made by the judge of the Superior Court, and hence should not have been confirmed by the Court of Appeal. The special jurisdiction conferred on the judge in the matter is exhausted once the application for relief has been heard and decided on the merits. A comparison of subs. (5) with subs. (6) makes it clear that Parliament has not seen fit to provide for the imposition of costs by the judge of the Superior Court.

Per Cartwright J.: The Act imposes upon any lien-holder the duty of using all reasonable care to satisfy himself that the vehicle is not likely to be used contrary to the provisions of the Act. The standard of conduct required by the statute is that of the reasonable man. It cannot be said that the Courts below have erred in holding that the respondent used all the care which a reasonable man would have used in the particular circumstances.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Desmarais J. Appeal dismissed.

G. Favreau, Q.C., and *P. M. Ollivier*, for the appellant.

E. Veilleux, Q.C., for the respondent.

The judgment of Taschereau, Fauteux and Abbott JJ. was delivered by

FAUTEUX J.:—This is an appeal, with leave of this Court, from a judgment of the Court of Appeal[1], for the Province of Quebec, affirming an order, made by Desmarais J. of the Superior Court under what is now s. 166 of the *Customs Act*, R.S.C. 1952, c. 58, declaring that the interest of respondent, in a motor vehicle seized as forfeited under this Act, is not affected by the seizure and granting, with costs against appellant, respondent's application for such an order.

The first submission on behalf of appellant is stated as follows:

The Court of Queen's Bench (Appeal Side) has erred in law in assuming that, so long as the vendor had no reason to suspect at the time of the sale that the vehicle now under seizure would be used for illegal purposes,

[1] [1957] Que. Q.B. 284.

the Finance Company now claiming under Section 179 of the Customs Act had no obligation to make a positive enquiry as to the likelihood of said vehicle being used contrary to the Act.

For the consideration of this point, reference was made to what was said by Taschereau J., with the concurrence of the other members of the Court of Appeal[1]:

> Dans mon opinion, la loi ne peut exiger et n'exige pas qu'un acheteur de contrat de vente conditionnelle d'automobile soit obligé, à moins d'avoir des soupçons sérieux, lors de chaque achat, de faire des enquêtes qui forceraient les compagnies, d'après M. Chevrier, à faire six ou sept cents téléphones par jour. De plus, ces compagnies s'exposeraient à ce que des clients, parfaitement honnêtes, soient froissés par de telles enquêtes.

As construed by counsel for the appellant, this language would indicate that, in the views of the Court below, the obligation to inquire arises only if and when there are serious suspicions that the vehicle sold is likely to be used contrary to the provisions of the Act. If this be a proper interpretation, I must say, with deference, that the law in the matter was not accurately stated. Under subs. (5) of s. 166 of the Act, the claimant becomes entitled to an order that his interest is not affected by the seizure, once he has shown, to the satisfaction of the Judge, that he did, at the relevant time, exercise all reasonable care to satisfy himself that the vehicle was not likely to be used contrary to the provisions of the Act. The condition precedent to the right to obtain the relief is precisely that a positive and specific inquiry as to whether there are reasons to suspect such a likelihood, was made and negatived any reason for such suspicions. The fact that such an inquiry might offend the person who is the subject thereof cannot minimize the obligation to make it.

On this ground, however, appellant cannot succeed for this inaccurate view of the law was not taken, in first instance, by Desmarais J.

The second submission in support of the appeal is that:

> The Court of Queen's Bench (Appeal Side) has erred in law and in fact in holding that, at all events, the burden imposed upon claimant Finance Company by Section 179 (now s. 166) of the Customs Act has been legally and sufficiently discharged by the latter relying on the vendor's general knowledge of the purchaser, on the said purchaser's answer that he had no criminal record, and on the general statement of another finance company that its experience with the purchaser had been good.

[1] [1957] Que. Q.B. 284 at 287.

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What, in each of the cases, the inquiry should be to satisfy the standard of care set forth in subs. (5) of s. 166, is for the Judge before whom relief is claimed to appreciate in the light of the particular circumstances of the case under consideration. It is obvious that the nature and extent of such inquiries will differ widely in various cases and that no general rule can be laid down as to what they must consist of. In the present case, the appellant urged that, had respondent communicated with the local detachment of the R.C.M.Police, he would have learned that the purchaser had been recently convicted of an offence under the Act, and that, having failed to do so, he could not be said to have taken all reasonable care. It may very well be that in certain areas and under certain circumstances, the specific and positive inquiries to which I have referred should include an inquiry of the police or some other public authority; but such procedure cannot be held to be necessary in all of the cases to satisfy the standard of care described in the enactment.

In the case at bar, Desmarais J., as already indicated, does not appear to have misdirected himself as to the law; and while, on the whole of the evidence, he might reasonably have reached a conclusion contrary to the one he adopted, I am unable to say that the latter cannot be supported.

The third and last submission is that:

> The Court of Queen's Bench (Appeal Side) erred in law in affirming the decision of the Judge of the Superior Court to the effect that Appellant has to bear the costs of the proceedings before the Superior Court, inasmuch as Section 179 (now s. 166) of the Customs Act, although authorizing a Judge of that Court to make the Order declaring the applicant's interest in a vehicle, and although providing for the procedure to be followed in this respect, does not provide for costs to be imposed either in favour of or against the Crown, at that stage.

Admittedly, the vehicle was legally seized as forfeited under the Act. The relief claimed by respondent is of an exceptional and statutory nature. The special jurisdiction conferred in the matter, by Parliament, to a Judge of the Superior Court, is exhausted, in my view, once the application for relief has been heard and decided on the merit. Parliament has not seen fit to provide for the imposition of costs in the matter. That there was no intention of Parliament to allow the rule governing as to costs in ordinary procedure, under the *Code of Civil Procedure,* to

obtain on an application made under subs. (5) of s. 166, is made clear when the terms of this subsection are contrasted with those of subs. (6) of s. 166, providing for a right of appeal from an order given under subs. (5) and which, in part, enacts that ". . . the appeal shall be asserted, heard and decided according to the ordinary procedure governing appeals to the Court of Appeal from Orders or judgments of a Judge".

I agree that the order as to costs should not have been made by Desmarais J. and should not, consequently, have been confirmed, as it has been, by the Court of Appeal.

Under these circumstances, I would vary the order made by Desmarais J. by deleting the order as to costs, and dismiss the appeal against the order that respondent's interest in the vehicle is not affected by the seizure; and considering that both parties to the appeal succeed in part only, there should be no costs here or in the Court of Appeal.

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Queen's Bench (Appeal Side)[1] affirming a judgment of Desmarais J. declaring, pursuant to what is now s. 166 of the *Customs Act,* R.S.C. 1952, c. 58, hereinafter referred to as "the Act", that the interest of the respondent in an automobile, which had been seized under the provisions of the Act, was not affected by such seizure.

On May 20, 1953, Roland Blais, an automobile dealer at Lennoxville, sold a 1950 model car to Luc Routhier under a conditional sale agreement, by the terms of which the title to the car was to remain in the vendor until the price was paid in full. The price, including charges for interest and insurance, was $982.30; of this $300 was paid in cash leaving a balance of $682.30. On the same day Blais assigned the agreement and all his rights thereunder to the respondent and guaranteed payment of the balance.

Routhier was unknown to the respondent but the latter had done business with Blais since 1946 and their relationship had been satisfactory. In answer to inquiries Blais told Chevrier, the assistant manager of the respondent, that he had known Routhier since 1946, and that the latter had never been convicted of any offence. Chevrier then inquired of an officer of the Traders Finance Company

[1] [1957] Que. Q.B. 284.

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and was told that Routhier had had dealings with that company, that its experience with him had been good and that he had paid well. The respondent made no other inquiries.

On July 3, 1953, the car in question was seized by police officers as Routhier had used it to commit an offence under the Act. It was conceded that the respondent was innocent of any complicity in the offence which resulted in the seizure or of any collusion with Routhier in relation thereto; but the appellant contended that it did not appear that the respondent had fulfilled the obligation resting upon it under clause (b) of subs. 5 of s. 179 (now s. 166) of the Act. This subsection reads as follows:

> (5) Where, upon the hearing of an application, it is made to appear to the satisfaction of the judge
>
> (*a*) that the claimant is innocent of any complicity in the offence resulting in such seizure or of any collusion with the offender in relation thereto, and
>
> (*b*) that the claimant exercised all reasonable care in respect of the person permitted to obtain the possession of such vessel, vehicle, goods or thing to satisfy himself that it was not likely to be used contrary to the provisions of this Act, or, if a mortgagee or lien-holder, he exercised such care with respect to the mortgagor or lien-giver,
>
> the claimant shall be entitled to an order that his interest be not affected by such seizure.

In fact, although it was unknown to the respondent or Blais or the Traders Finance Company, Routhier had been convicted on October 2, 1952, of having possession of cigarettes illegally imported into Canada and had been fined $52 and costs. The main contention of the appellant was that the respondent should have made inquiries of the police as to whether Routhier had ever been convicted and that, not having done so, it had not exercised all reasonable care in respect of Routhier to satisfy itself that the car was not likely to be used contrary to the provisions of the *Customs Act*.

The learned trial judge was satisfied that the respondent had exercised all reasonable care in the circumstances and the members of the Court of Queen's Bench were unanimously of the same opinion.

In my opinion the Act imposes upon any lien-holder, who permits another to obtain possession of the vehicle on which he holds a lien and who desires to avail himself

of the protection afforded by s. 166 of the Act, the duty of using all reasonable care to satisfy himself that the vehicle is not likely to be used contrary to the provisions of the Act. The standard of conduct required by the statute is, I think, the same as that required by the common law of a person under a duty to take care, i.e., that of the reasonable man.

The question in the case at bar appears to me to be whether we can say that the courts below have erred in holding that the respondent used all the care which a reasonable man, mindful of his duty under the Act, would have used in the particular circumstances. In dealing with this question it is helpful to recall the often quoted passage in the judgment of Lord Macmillan in *Glasgow Corporation v. Muir*[1]:

> The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from overconfidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation and what, accordingly, the party sought to be made liable ought to have foreseen. Here there is room for diversity of view, as, indeed, is well illustrated in the present case. What to one judge may seem far-fetched may seem to another both natural and probable.

Counsel for the appellant contends that a reasonable man in the position of the respondent would have had in contemplation, notwithstanding the reports received from Blais and from the Traders Finance Company, that Routhier might well have been likely to use the car in contravention of the Act, and should therefore have made further inquiries, particularly from the police, before allowing Routhier to have possession of the car. I do not say that this is an impossible view, but my inclination is to disagree with it, and I find myself unable to say that the courts below were in error in arriving at the unanimous conclusion that it should be rejected. It follows that I would dismiss the appeal.

[1] [1943] A.C. 448 at 457, [1943] 3 All E.R. 44, 112 L.J.P.C. 1.

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There remains the question whether Desmarais J. had jurisdiction to order the respondent, who represents the Crown, to pay the costs of the application. On this question I agree with the reasons and conclusion of my brother Fauteux.

In the result the appellant succeeds on the question as to the order as to costs which Desmarais J. should have made but fails on the main issue as to whether the respondent was entitled to an order that its interest in the automobile be not affected by the seizure. In these circumstances I would be inclined to give the costs in the Court of Queen's Bench and in this Court to the respondent, but, as the other members of the Court take a different view, I concur in the disposition of the appeal proposed by my brother Fauteux.

Appeal dismissed subject to a variation; no costs.

Solicitor for the appellant: W. R. Jackett, Ottawa.

Solicitors for the respondent: Blanchet & Peloquin, Sherbrooke.

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*Jun. 6
Dec. 19

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**May 5, 6
Oct. 7

DOMINION ENGINEERING WORKS LIMITED ..... APPELLANT;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE (CUSTOMS AND EXCISE), THE CANADIAN ASSOCIATION OF EQUIPMENT DISTRIBUTORS, A. B. WING LIMITED ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Customs and excise—Importation of power shovel with 2½ cubic yard dipper capacity—Whether of a "class or kind not made in Canada"—Customs Tariff, R.S.C. 1952, c. 60, tariff items 427, 427a—The Customs Act, R.S.C. 1952, c. 58.

The respondent, W. Co., imported a power shovel of a nominal dipper capacity of 2½ cubic yards. It is undisputed that such a shovel was not made in Canada at the date of import, but that those ranging from

*PRESENT: Kerwin C.J. and Locke, Cartwright, Abbott and Nolan JJ.
**PRESENT: Taschereau, Rand, Fauteux, Martland and Judson JJ.

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½ cubic yard to 2 cubic yards were made in Canada at that time. The customs appraiser entered the shovel under tariff item 427 of the Act and the Deputy Minister confirmed the classification. The Tariff Board reversed the Deputy Minister's decision and classified the shovel under item 427*a*, which carries a much lower rate of duty, as being of a "class or kind not made in Canada". The appellant, a Canadian manufacturer of power shovels and cranes and who had intervened as an interested party before the Tariff Board, appealed to the Exchequer Court on the question whether the Tariff Board had erred in law. The classification under item 427*a* was confirmed by the Exchequer Court.

Held (Rand J. dissenting): The appeal should be dismissed. The power shovel was properly classified under item 427*a*.

Per Taschereau, Fauteux, Martland and Judson JJ.: The Board was right in coming to a conclusion that the shovel was of a class or kind not made in Canada. There was ample evidence in support of its conclusion, no application of any wrong principle and no failure to apply a principle that should have been applied. It is not an error in law to reject a classification by potential or actual competitive standards and to prefer, as the Board did, a classification according to a generally accepted trade classification based on size and capacity.

Section 2(2) of the *Customs Act* had no application to the facts of this case.

Per Rand J., *dissenting*: Both the Board and the Exchequer Court misinterpreted the legislation and ignored an element material to their decision. Tariff items 427 and 427*a*, as well as many other items and provisions in the *Customs Act*, establish that the purpose of the legislation is not only to serve as a means of revenue but also to provide a margin of protection to Canadian manufacturers. That purpose can be shown only in one way, by the determination on evidence whether or not in Canada there is an actual competition between any of the machines differently designated. This purpose and its relevancy to the issue were not referred to by the Board and were categorically rejected by the Exchequer Court. Their conclusions were therefore vitiated by this error in law.

APPEAL from a judgment of Thorson P.[1] in the Exchequer Court of Canada, affirming a decision of the Tariff Board. (Subsequent to the hearing of June 6, 1957, the Court ordered a rehearing.) Appeal dismissed, Rand J. dissenting.

A. Forget, Q.C., and *Joan Clark*, for the appellant.

R. W. McKimm, for the respondent, the Deputy Minister of National Revenue.

G. F. Henderson, Q.C., and *R. H. McKercher*, for the respondent, Canadian Association of Equipment Distributors.

J. M. Coyne, for the respondent, A. B. Wing Limited.

[1] [1956] Ex. C.R. 379.

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The judgment of Taschereau, Fauteux, Martland and Judson JJ. was delivered by

JUDSON J.:—The question in this appeal is whether a certain power shovel, described as having a nominal dipper capacity of two and a half cubic yards, is dutiable under tariff item 427*a* of schedule "A" of the *Customs Tariff* as being of a class or kind not made in Canada. If it is, it is dutiable at the rate of $7\frac{1}{2}$ per cent. instead of $22\frac{1}{2}$ per cent. which it would have to bear if it came within item 427 of schedule "A". The machine was imported by the respondent A. B. Wing Limited at Vancouver. The customs appraiser there entered it under item 427 with a duty of $22\frac{1}{2}$ per cent. This action was confirmed by the Deputy Minister of National Revenue for Customs and Excise. The respondent A. B. Wing Limited then appealed from the decision of the Deputy Minister to the Tariff Board where the appellant, Dominion Engineering Works Limited, a Canadian manufacturer of power shovels and cranes, intervened as an interested party, as did the Canadian Association of Equipment Distributors. The Board ruled that the power shovel was of a class or kind not made in Canada. Dominion Engineering Works Limited then obtained leave from the Exchequer Court pursuant to s. 45(1) of the *Customs Act*, R.S.C. 1952, c. 58, to appeal upon a question which, in the opinion of that Court, was a question of law. The question was:

> Did the Tariff Board err, as a matter of law, in holding that the crawler-mounted convertible full-revolving power shovel imported under Vancouver Entry No. 35748 of 21st September, 1953, is properly classifiable for Tariff purposes under Tariff Item 427*a*?

The Exchequer Court[1] dismissed the appeal and confirmed the decision of the Tariff Board. Dominion Engineering Works Limited now appeals to this Court.

It is undisputed that power shovels with a nominal dipper capacity of two and a half cubic yards or more were not made in Canada at the date of import. On the other hand, power shovels with a nominal dipper capacity ranging from one-half cubic yard to two cubic yards were being made in Canada at that time. The Tariff Board found that a classification of power shovels by nominal dipper capacity was generally understood and accepted by the trade in both

[1] [1956] Ex. C.R. 379.

Canada and the United States, and was probably the most practical single standard according to which these implements could be classified. "Nominal dipper capacity" defines a class of power shovel having certain specifications which indicate the work it is capable of doing. It defines the over-all capacity and performance of a machine and implies more than a mere difference in size. The submission made by the appellant and by the Crown before the Board was that since machines ranging in size up to a nominal dipper capacity of two cubic yards were made in Canada, the machine next larger in size could not, by reason only of the difference in size, be of a different class or kind. The Board held that where the capacities of machines are established in clearly defined sizes, "the least arbitrary and perhaps therefore the best line of demarcation is in accordance with those sizes which are, in fact, made in Canada as opposed to those sizes which are not".

The Exchequer Court held that there was no error on the part of the Tariff Board in its acceptance of the trade classification of power shovels into different classes or kinds; that the Board's finding was a finding of fact; that the two and a half cubic yard shovel was different in fact from the two cubic yard shovel and that there was material before the Tariff Board upon which it could reasonably declare that the imported shovel was of a class or kind not made in Canada. My opinion is the same as that of the Exchequer Court, that the Tariff Board came to the correct conclusion.

The appellant repeats the same argument before us, namely, that classification according to recognized trade sizes is incorrect and that the Board and the Exchequer Court should have considered whether the imported shovel entered into competition with domestic production; that they should have found that the two and a half cubic yard size was competitive in some respects with the two cubic yard size, and that if it was competitive with something made in Canada, it could not be described as being of a class or kind not made in Canada. It scarcely needed the evidence of experts to tell the Board that with two power shovels so close in size, there must be a certain amount of overlapping of possible function. The smaller machine can work in places where the larger machine might be used, but there would not, of course, be precisely the same performance by the two machines. To this extent it is correct to

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say that the two machines are competitive, but the same theory would apply to any of these machines in varying degrees, for all machines designed for mechanical excavation are capable of entering into competition in some degree. I do not know how any Board called upon to classify machinery of this type could do so by adopting the standard of potential competition. The Board heard evidence directed to the question whether these two machines were competitive, interchangeable or equivalent to such a degree as to outweigh the choice of classification by size. It did not adopt the trade classification automatically and without regard to the other evidence. It had before it evidence of comparative capacity, the weight of the machines, the comparative uses and performance of the two machines and the circumstances in which one machine would be used in preference to another, and with this evidence before it, concluded that the two and a half cubic yard shovel was of a class or kind not made in Canada.

Where are the errors in law asserted by the appellant in this case? I have already stated that in my opinion there was ample evidence before the Board to justify the finding made. This is not a case of a finding being made in the absence of evidence. Further, I am totally unable to discover that in making this classification the Board applied the wrong principle or failed to apply a principle that it should have applied. The task of the Board was to classify a piece of machinery—to determine whether it was of a class or kind not made in Canada. This is a task involving a finding of fact and nothing more. It is not error in law to reject the classification by potential or actual competitive standards and to prefer classification according to a generally accepted trade classification based on size and capacity. I do not think there is any error in the Board's decision but if there were, it could only be one of fact.

I agree with the learned President of the Exchequer Court that s. 2(2) of the *Customs Act* has no application to the facts of this case. This is the section which provides that

> All the expressions and provisions of this Act, or of any law relating to the Customs, shall receive such fair and liberal construction and interpretation as will best ensure the protection of the revenue and the attainment of the purpose for which this Act or such law was made, according to its true intent, meaning and spirit.

The appellant's contention was that this section should be applied because more revenue would be obtained and more protection afforded to domestic manufacturers if the power shovel in question here were classified under item 427 instead of item 427*a*. I can see no room for the application of such a principle in this case. Items 427 and 427*a* are plain and unambiguous. The two are to be read together. Item 427 covers all machinery composed wholly or in part of iron or steel, n.o.p. Item 427*a* comprises all machinery composed wholly or in part of iron or steel, n.o.p., of a class or kind not made in Canada. The machine in question here must fall within one or the other of these items according to findings of fact and it is impossible to hold that Parliament, by virtue of s. 2(2) of the *Customs Act,* intends greater weight to be given to one item than the other or to compel a classification under item 427 in preference to item 427*a*.

The appellant has failed to bring his case within the definition of error in law as formulated by this Court in *Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue for Customs & Excise*[1], and I would dismiss the appeal with costs. The order for costs should provide for one set of costs only to be paid to the respondent A. B. Wing Limited. The other respondents should bear their own costs.

RAND J. (dissenting):—The issue in this appeal is whether what is described as a crawler-mounted, convertible, full-revolving power shovel with a nominal dipper capacity of 2½ cubic yards, imported from the United States, is subject to customs duty under item 427 or item 427*a* of the tariff. Those items are:

Item 427	All machinery composed wholly or in part of iron or steel, n.o.p., and complete parts thereof	10 p.c. 27½ p.c. 35 p.c.
(GATT		22½ p.c.)
427*a*	All machinery composed wholly or in part of iron or steel, n.o.p., of a class or kind not made in Canada; complete parts of the foregoing.	Free 27½ p.c. 35 p.c.
(GATT		7½ p.c.)

[1] (1956), 1 D.L.R. (2d) 497.

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The issue depends on whether a machine of a nominal dipper capacity of 2½ cubic yards so imported and not made in Canada is of a class or kind made in Canada vis-à-vis a 2 cubic yard machine so made.

These machines have as their primary function excavation by means of a shovel involving digging, lifting, swinging and dumping, the material of the soil. As can at once be foreseen, they may be built on an ascending scale of size, weight, reach and other features, each aggregate having an effective capacity for work depending upon the total conditions in which it is carried on.

In the United States a Standard of categories has been set up by the manufacturing industry and approved by the Administration of Standards by which, for the purposes of furnishing information of the grouped characteristics of the categories to prospective purchasers, the machines are classified. The symbol used to distinguish the groups is the "nominal dipper capacity" indicated in these reasons by the letters n.d.c. Nominal capacities run, in size, from ¼ of a cubic yard to 3 cubic yards and upwards. Those of ⅜, ½, ⅝, ¾, 1, 1¼, 1½, 2 and 2½ yards are in the United States called the "commercial sizes" and are included in the Standard, while those of 3 yards and over are treated as for use in special situations or undertakings. The "nominal" figures I take to represent the mathematical capacity of the dipper which would be attached to a machine bought by reference to its "nominal capacity". In other words, the mathematical capacities are used to designate machines with an aggregate of specifications brought within more or less understood degrees of dimensional ranges.

Each group has its ideal conditions in which the greatest functional performance can be obtained, but obviously these optimum conditions would seldom be met. The effective utility of the machines may be specific or general, and their performance depends on the site of work to be done, its nature, the kind of material to be excavated, the conditions surrounding the excavation such as freedom of action for the boom and dipper, the extent of the lift, the width or depth of cut, the swing required for dumping and other features. The material may be rock, gravel, clay, light soil, etc., all more or less significant to the performance; the excavation may be deep, shallow or narrow, in the latter

case hampering the swing and dumping. The distance for disposing of the material and the means and conditions under which it is to be done are likewise to be taken into account. In short, from a purely mechanical or physical point of view the machine is that which in the whole of the particular circumstances and conditions is most suitable for the purposes of the person undertaking work; its operational utility, as it is said, is then substantially integrated with what is to be done.

These are operating considerations. Equally important are economic factors: the cost of the machine, the expenses involved in transportation to, from and about work, operational expense related to the rate of performance, the number of men to be employed, the difficulties of handling heavier machines as contrasted with those of lighter weight; these must likewise be brought under examination and their impact on the operating characteristics mentioned is inevitably influential and may be controlling. For example, the larger and heavier machine will lift a greater quantity or weight of material in one bite of the shovel, but a cheaper machine with a smaller dipper may take less time for each shovel swing and tend to reduce the handicap in size. The exhibits show that for excavating moist loam or light sandy clay a 2 yds. machine with a dumping swing of 45 degrees takes 17 seconds for each shovel cycle, against 18 for a $2\frac{1}{2}$ yds. size; with 180 degrees, the figures are 30 against 32; for common earth, at 135 degrees, 29 against 31, and for 180 degrees, 34 against 36. The difference of 2 seconds is maintained in excavating hard tough clay with the similar angles of swing. These items illustrate the refinements in economic factors pertinent to the total judgment of machine utility.

The Standard, as its principal purpose, furnishes a definite meaning for the symbols used and those who subscribe to it voluntarily undertake to use the terms agreed upon only with the connotations so ascribed to them. When a person orders a $1\frac{1}{2}$ yds. nominal dipper capacity machine, he has in mind the general specifications which that symbol indicates. The dimensions of individual parts or members of the machine in any case may, of course, be varied, but in such a case notice of that fact is given. The Standard has no official standing among the manufacturers in this

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country, and although it may be that they observe roughly the same dimensional aggregates indicated by the symbols there is no sufficient evidence to show that it has become such an established and understood practice as to amount to representation that such and such characteristics of Canadian-built machines are indicated by the particular symbol employed.

Moreover, different sizes of dippers, among other interchangeable parts, may be used on any machine: a 2 yds. n.d.c. unit can be equipped with a 2½ yds. capacity dipper. The standard dimensions in many cases overlap: the length of the boom on a 2 yds. machine is from 22 feet to 25 feet, 2½ yds., from 25 feet to 26 feet; the handle on the 2 yds. runs from 17 feet to 19 feet, on the 2½, 18 to 19 feet; the maximum cutting height on a 2 yds. is 26 feet to 30 feet, on a 2½ yds., 28 feet to 35 feet; the maximum cutting radius 33 feet to 36 feet, against 35 feet to 38 feet. The weights parallel the increases of dipper capacity, but the differences as factors in utility can be counterbalanced so as to overlap by the scale of outrigging used. The figures shown are related to normally favourable conditions of operation.

A further consideration to be taken into account is that of continuity of use. On page 6 of the statement of the Standard the following language is used:

> Regardless of the economy of a new and modern excavator, tailored to the correct size for current work, sufficient work must be in sight to pay off the capital investment, and good prospects for future work (or resale) must be available to convert the investment into profits and return of capital for future replacement equipment.

One machine may be most suitable for a particular case but that case may never recur. General use means utility in more or less continuous work or with the least idleness of the machine. Purchased by a contractor, it will ordinarily be for his general purposes; one job which would completely consume a machine is conceivable but would be a rare event. In industrially and commercially advanced and complicated countries with giant works and undertakings, such as the United States, operations may become specialized in terms of machine dimensions and the type will vary in different countries and in different parts of the same country. In Canada that is well exemplified: the machines in question are convertible into cranes and, for that purpose as well as for excavation, face the differences of physical and

economic conditions from British Columbia to Newfoundland, such as the topography and soil of the prairies and, say, of northern Quebec. There may be a clear differentiation of ordinary and effective use between a $\frac{3}{8}$ yd. n.d.c. and a 2 or $2\frac{1}{2}$ yds. n.d.c. machine; a contractor, confining himself to excavating basements for moderately priced dwellings, could probably meet his requirements most effectively and economically with a $\frac{3}{8}$ yd. n.d.c. unit which for the general purposes of a large scale works contractor would be of no use whatever; conversely, the use for dwelling basement work of a 2 yds. n.d.c. machine might be both inefficient and uneconomic. But when we come to the utility distinction between a 2 yds. n.d.c. and one of $2\frac{1}{2}$ yds. capacity a wholly different situation may be present.

The inference from all this is that the so-called standard classification is one in which there is no absolute functional disparateness between some of the classes specified; as we approach those of approximate dimensions the choice between one and another may depend on considerations other than, or in addition to, those of ideal mechanical utility; the cost economics may determine that choice and this question then arises: by what means is the judgment of a purchaser on all these factors to be determined by a tribunal?

For this we are remitted to an examination of the language of the tariff items. The first, 427, establishes the normal duty on machinery applicable to the machine here; it assumes that in the marketing of such machines ordinary competitive conditions prevail. Item 427*a* contemplates a different situation, that in which the machinery imported is of a "class or kind not made in Canada". Two features of the language of these items to be examined are the words "class or kind" and the purpose of the legislation; and it will be convenient to consider the words first.

I can have little doubt that all of these machines from the lowest rating to the highest are, in a broad sense, of the same "kind". Their function is the same, the mechanical operation by which they perform work is the same, and the different units vary only in the more or less accidental characteristics which they embody. Their basic components are crawler-mounting, convertibility, full revolving means, front end operating equipment, and power operation. With

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these as foundation characteristics, the differences between, say, a 2 yds. and a $2\frac{1}{2}$ yds. n.d.c. machine from then on can be said to be dimensional, not functional.

But that does not exhaust the enquiry. The word "class" sharpens the distinction to be observed between what is made in Canada and what not, even though of the same general kind. In the dimensional spectrum scaled from $\frac{1}{4}$ yd. to 3 yds. n.d.c. and beyond, overlapping in dimensions, utility and performance is not seriously in dispute. This progressive series in immediate continuity presents no means in itself of differentiating competitive utility so to enable us to classify the machine within the meaning of the item. If, in the trade, these so-called nominal dipper capacities represented distinct and discrete functional utilities either in character or volume of performance, without practicable interchangeability in use or of mechanical parts, and in material conditions of a society in which high specialization in machine requirements had been reached, it would be not unreasonable to say that a practical basis of determining the class under the item was present which satisfied the purpose of the legislation whatever it might be.

But that simple state of things is not present, and resort is necessary to the purpose of the special provision of item 427*a*. Of that I am bound to say I have no doubt. Reading the two items together, 427 serves not only as a revenue means but also to provide a margin of protection to Canadian manufactures. On no other ground does the introduction of item 427*a* appear to me to make sense. Before the Tariff Board it was remarked that the purpose of these items in juxtaposition was doubtful, to which I can only reply that if there is any other purpose apart from revenue than protection, it has not been mentioned nor am I able to imagine it; any benefit in a lower duty to the Canadian consumer disappears when a similar Canadian machine is available; and a dumping duty would be absurd if only prices to the consumer were being considered. In fact it was argued before us that protection was the purpose and that the Tariff Board had taken it into account; but that view of the purpose and its relevance to the issue was

categorically rejected by the President of the Exchequer Court and there is not a syllable of reference to it in the decision of the Board. With the greatest respect to both the Board and to the President I am driven to hold that the customs items in question, as well as many other items and provisions in the *Customs Act,* including that against dumping foreign products into the country, establish the contrary. A court I think shuts its eyes to realities in refusing to recognize that fact.

In the setting of all the considerations that come into play in the purchase of these machines, that purpose can be shown only in one way, by the determination on evidence whether or not in Canada there is an actual competition between any of the machines differently designated. If there is, that fact must be regarded as a material, if not a determining, factor in allocating the machine to the one item or the other; if there is not, the issue falls. I think both the Board and the President misinterpreted the legislation, that they have in the circumstances ignored an element material to their decision, and that this involved an error of law which vitiated their conclusions.

The test to be applied may present some difficulty and require some delicacy of judgment in its application. It may be stated in this manner: assuming, as an inference from evidence, that a certain number of $2\frac{1}{2}$ yds. units would be imported under item 427*a*, could 10 per cent. of that number, by reason of effective competition if brought in under item 427, be supplied by 2 yds. units made in Canada? To put it in another form, would the difference between the duties under the two items, in at least 10 per cent. of commercial transactions in which a $2\frac{1}{2}$ yds. machine would be a competing unit, be the effective factor in determining the sale of the Canadian 2 yds. product in preference to that of the imported $2\frac{1}{2}$ yds. product? If so, the imported machine is within a "class" made in this country and is chargeable with duty under item 427.

I would allow the appeal and remit the matter to the Tariff Board to be reconsidered and if necessary reheard in the light of the interpretation of the items so formulated. The appellant should have a single set of costs in the Court

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of Exchequer and this Court against the respondents The Canadian Association of Equipment Distributors and A. B. Wing Limited; apart from that no costs should be awarded.

Appeal dismissed with costs, RAND J. *dissenting.*

Solicitors for the appellant: Common, Howard, Cate, Ogilvy, Bishop & Cope, Montreal.

Solicitor for the respondent, the Deputy Minister of National Revenue: W. R. Jackett, Ottawa.

Solicitors for the respondent, A. B. Wing Limited: Herridge, Tolmie, Gray, Coyne & Blair, Ottawa.

Solicitors for the respondent, Canadian Association of Equipment Distributors: Gowling, MacTavish, Osborne & Henderson, Ottawa.

EDWIN RISTER, WILLIAM F. JACOBS, OSCAR WALTERS AND ISAAC BJERSTEDT (*Plaintiffs*) — APPELLANTS;

AND

LORENZ A. HAUBRICH, OTHERWISE DESCRIBED AS LAWRENCE HAUBRICH (*Defendant*) ..... — RESPONDENT.

1958

*May 21, 22, 23

**Oct. 7

ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF SASKATCHEWAN

Damages—Diversion of water—Onus under s. 8 of The Water Rights Act, R.S.S. 1953, c. 48.

To establish a claim under s. 8 of *The Water Rights Act*, R.S.S. 1953, c. 48, the onus is on the claimant to show that the damages for which he claims were caused by reason of the alleged diversion of waters.

Held: The action in which the plaintiffs alleged that their lands had been flooded by water wrongfully diverted by the defendant, should be dismissed. The plaintiffs failed to satisfy the onus of establishing, by a preponderance of evidence, that, but for the work done by the defendant, they would not have sustained the damages for which they claimed. The weight of evidence is in favour of the proposition that the work was not the cause of their loss.

APPEAL from a judgment of the Court of Appeal for the Province of Saskatchewan, reversing a judgment of McKercher J. Appeal dismissed.

A. E. Neville, Q.C., for the plaintiffs, appellants.

E. D. Noonan, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a unanimous jugdment of the Court of Appeal of Saskatchewan, which allowed an appeal from the judgment of McKercher J., who had given judgment awarding damages, in the aggregate, in excess of $17,000 and costs to the appellants Rister and Jacobs against the respondent. The appellants alleged that their lands had been flooded by water, which they claimed had been wrongfully diverted by the respondent. The appellants Walters and Bjerstedt did not claim damages, but,

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright and Martland JJ.

**The Chief Justice, owing to illness, did not take part in the judgment.

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along with the other two appellants in their statement of claim, asked for an injunction requiring the respondent to open the original natural channel and to dyke the new water course causing the flooding of the appellants' lands. This relief was not pressed or granted at the trial.

The respondent is the owner of the north half of section 24, township 12, range 8, west of the 3rd meridian in the Province of Saskatchewan. The south half of this section is owned by Ivan Moulton, who was a witness in, but not a party to, these proceedings. The lands to the south of Moulton's land, the north half of section 13, are owned by the appellant Rister. The lands to the south of Rister's land, the south half of section 13, are owned by the appellant Bjerstedt. The lands to the south of Bjerstedt's land, the north half of section 12, are owned by the appellant Walters. The appellant Jacobs owns the east halves of sections 14 and 23, which lie immediately to the west of the lands owned by the respondent, Moulton, Rister and Bjerstedt. His claim related only to the east half of section 14.

A large slough, known as Bjerstedt's Slough, at the times material to this action, covered the major part of Bjerstedt's lands and a portion of those of Rister, Walters and Jacobs.

The north half of section 24, owned by the respondent, is bounded on three sides by roads. On the west and north are two municipal roads and on the east there is a provincial highway, no. 19. There are two culverts under the road on the west, a twenty-four-inch metal culvert about 450 feet south of the northwest corner of section 24, and a thirty-six-inch metal culvert about 900 feet south of the twenty-four-inch culvert. On the road to the north of section 24 there had been a wooden culvert or bridge about two feet by six feet, which was replaced in 1955 by a thirty-six-inch metal culvert. This is located on the north boundary of the northeast quarter of section 24. The road to the north of section 24 had been built by the rural municipality of Glen Bain in 1945.

The evidence establishes that, at the time of the spring run off, water from an area of some fourteen to fifteen square miles drains into the east half of section 23, from where it flows, by means of the two culverts in the road to the west of section 24, mostly through the larger culvert,

onto the north half of section 24. On occasions when there had been a heavy run off the water had overflowed across the road itself because the two culverts were inadequate to handle the flow. It was the contention of the appellants that, prior to 1950, the water would flow generally across the north half of section 24 in a northeasterly direction and from there to the south half of section 25 immediately to the north. Ultimately this water would reach a slough known as Thompson's Slough, which lies further to the northeast. It was, however, admitted in evidence, and particularly in that of the appellant Bjerstedt that, in years when there was a heavy run off, water would also flow south from the north half of section 24, ultimately reaching the Bjerstedt Slough.

The respondent leased the north half of section 24 for some years prior to 1945, when he purchased it. In November of 1947 he employed one Paulson to straighten out the course in which the water had been flowing across his land. Paulson used a municipal road maintainer with a twelve-foot blade. Presumably the blade was tilted at an angle and then a ditch was cut in a "V" shape which was about two feet deep and about two feet wide at the top. This ditch commenced not far from the larger, more southerly culvert on the road west of the respondent's land, thence a distance north and then in an easterly direction. The ditch did not extend to the north boundary of section 24. At the point at which it stopped it connected with an existing channel which extended to that boundary, where there was a ditch south of the municipal road which led to the culvert under that road.

The appellants sought to establish that the earth thus excavated was piled to the south of the ditch, as it proceeded east, and to the east of the ditch, as it proceeded north, thus forming a continuous earth dyke. However, the evidence of several witnesses, including Paulson himself, is that in some places earth was piled on the one side of the ditch and in other places on the other side.

Paulson's evidence as to the exact scope of his work is not too clear. It was suggested by the appellants that he had constructed a complete, new ditch, but the weight of evidence indicates that, in fact, he connected up existing pot holes in the old runway. It was also suggested that he had

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filled in the old channel. He himself says "we levelled it out and filled in a bit of it in." However, as pointed out by Gordon J.A., in his judgment in the Saskatchewan Court of Appeal, concurred in by all the other members of the Court, the significant fact is that Paulson worked for only about two and one-half hours, part of which was spent in filling in an old basement. The total sum paid by the respondent in respect of his work was $24.

The appellants' contention, as set forth in their statement of claim, is that the respondent, by reason of Paulson's work, had filled in and dyked an existing channel and caused the water coming onto the respondent's land to flow south to the Bjerstedt Slough, instead of northeast to the Thompson Slough. In support of this proposition the appellants adduced evidence that prior to 1947 there had been a natural channel toward the northeast, following a snake-like course, variously estimated by witnesses as from ten to twelve feet wide and with a depth of three to four feet.

Evidence was also led to show that, whereas the land comprising the Bjerstedt Slough had been broken in the 1930's and had been completely seeded prior to and in 1949, it had been flooded in each of the years 1950 to 1955 inclusive.

In answer to these contentions there are certain facts which require consideration. There is the very limited period of time during which Paulson worked, which would have been inadequate to permit his filling a channel of the kind described by the appellants' witnesses. Also there are those pointed out by Gordon J.A. in his judgment in the following terms:

> There are certain salient facts which must be constantly borne in mind. The first is that the years 1950 to 1955 inclusive were certainly the wettest consecutive years in the history of this Province. The evidence clearly establishes this fact, if I could not take judicial notice of it. The second is that cultivated land erodes very readily, whereas prairie grass has a peculiar resistance to erosion. The third fact is that it was very much more to the advantage of the defendant to have the water diverted north than to have it come south through his land.

The respondent filed in evidence two maps of his land. One of these, ex. D.4, was prepared in 1955 by Ronald Ferber, a district engineer on the staff administering the *Prairie Farmers Rehabilitation Act* in Gravelbourg. This was prepared from a survey made by George Beynon, a

graduate in agriculture and engineering, and, at the time, employed on the staff administering the *Prairie Farmers Rehabilitation Act*, in September 1950. The other, ex. D.3, a contour map, was prepared by John Joseph Schaeffer, a qualified civil engineer, in September 1956. The elevations on the two maps are almost identical and show that there was no general change in the area between 1950 and 1956.

These maps, and the evidence given in relation to them, show that the purpose of the ditch dug by Paulson was to seek to divert the water reaching the respondent's land, by way of the larger culvert on the road west of it, into the northeast channel. They also show that, after water flowing through that culvert has joined with that flowing from the smaller culvert to the north, a point is reached on the respondent's land from which all such water can, by reason of the relative land elevations on the north half of section 24, flow equally well either to the northeast toward Thompson's Slough or south to the Bjerstedt Slough. However, the flow of water to the northeast is impeded by the municipal road to the north of section 24, which is some two to three feet higher in elevation than the adjoining land, and which thus has the effect of causing the water to move toward the south rather than to the northeast.

Each of these professional witnesses agreed that, if there were a small flow of water, the ditch constructed by the respondent would carry it to the northeast, but that, in case of a heavy flood, the result would be the same as if no ditch had been constructed and in such case the bulk of the water would flow toward the south.

The evidence is clear that the run offs in the years 1950 to 1955 were very heavy.

Referring to Schaeffer's map, Gordon J.A., in his judgment, points out:

> It is interesting to note that in the northern runway, where the water did reach the ditch to the south of the northern municipal road, the elevation is 76.8 and at the point where it left the southern boundary of the southeast quarter of section 24, the elevation is 69.6 so the gradual slope of this whole section from the point where the water enters is more markedly to the south than the north. Another point that must be borne in mind is that when the waters flooded over the west municipal road as it did in 1950, at an elevation of 92 feet, not only the ditch dug by the defendant

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but its alleged three foot banks would be completely submerged and when the waters receded, the bank would be so soft that it would be readily swept away at its weakest point, which, as stated above, from the southern culvert was at an elevation of 86.5 feet.

A further factor in relation to the flow of water to the south is also referred to in this judgment as follows:

> Further, the learned trial judge, very properly held that the cultivation of the fifteen acres at the point where the water entered section 24 was a factor in diverting the water south, but there is nothing illegal in that. The defendant had a perfect right to cultivate his land and make it as productive as possible and all agree that if it had not been for the five successive very wet seasons, the plaintiffs would have suffered no injury. Once the water reached the cultivated land, it was bound to tear out a channel and the contour map clearly indicates that this channel was eroded just where one would expect to find it. Once started it would require a major operation to divert it.

I agree with Gordon J.A. that this action, if it were to succeed, must be brought within the statutory provision which is now s. 8 of *The Water Rights Act,* R.S.S. 1953, c. 48, and which was formerly s. 8 of c. 41 of the Revised Statutes of Saskatchewan 1940. That section reads as follows:

> 8. (1) No person shall divert or impound any surface water not flowing in a natural channel or contained in a natural bed and no person shall construct or cause to be constructed any dam, dyke or other works for the diversion or impounding of such water, without having first obtained authority to do so under the provisions of this Act.
>
> (2) If any person without having obtained such authority diverts or impounds surface water not flowing in a natural channel or contained in a natural bed or constructs or causes to be constructed any dam, dyke or other works for the diversion or impounding of such water, such person shall be liable to a civil action for damages at the instance of any person who is or may be damnified by reason of such diversion, impounding or construction.

Counsel for the appellants contended that if the respondent built the ditch in question to divert water to the north he would become legally liable if, having done so, the ditch proved to be inadequate for that purpose. I do not agree with this contention. To succeed in an action under s. 8 the person claiming damages must establish in evidence that the damages for which he claims were caused by reason of the diversion which is alleged. The onus was upon the appellants to show that their damages were the consequence of what the respondent had done.

Reference was made by the appellants to *Corporation of Greenock v. Caledonian Railway Company*[1]. It is to be noted that the following statement of the law by Professor Rankine, in his work on the Law of Land Ownership in Scotland, 4th ed., p. 376, was cited with approval by Lord Chancellor Finlay and Lord Dunedin in that case at pp. 571 and 577. His statement of the law is as follows:

> The sound view seems to be that even in the case of an unprecedented disaster the person who constructs an opus manufactum on the course of a stream or diverts its flow will be liable in damages provided the injured proprietor can show (1.) that the opus has not been fortified by prescription, and (2.) that but for it the phenomena would have passed him scathless.

In my view the appellants have not satisfied the onus of establishing, by a preponderance of evidence, that, but for the work done by the respondent, they would not have sustained the damages for which they claim. The weight of evidence is in favour of the proposition that it was not the cause of their loss.

The learned trial judge found that the damages sustained by the appellants had resulted from the action of the respondent and the construction of the road to the north of the respondent's land by the rural municipality of Glen Bain. In reaching this conclusion the only witness whose evidence he doubted was the respondent himself. His conclusions were inferences drawn from the evidence of the other witnesses.

For the reasons above given and those given by Gordon J.A. in the Court of Appeal, I do not agree that, on this evidence, it should be found that the appellants have established affirmatively that their damage was caused by any wrongful act on the part of the respondent. A claim has not been proven under s. 8 of *The Water Rights Act*.

I would, therefore, dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Bagshaw, Neville & Wilson, Regina.

Solicitors for the defendant, respondent: Gravel, MacLean & Sirois, Regina.

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

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*May 13, 14
Oct. 7

LABOUR RELATIONS BOARD and THE HONOURABLE ROBERT W. BONNER, Q.C., ATTORNEY GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA, and RETAIL, WHOLESALE and DEPARTMENT STORE UNION, LOCAL 580 .....APPELLANTS;

AND

TRADERS' SERVICE LIMITED .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Labour—Certificate of bargaining authority issued by Labour Relations Board—Certiorari—Whether failure to give party opportunity to be heard—Whether Board declined jurisdiction—Labour Relations Act, 1954 (B.C.), c. 17.

The defendant union applied to the Labour Relations Board for a certificate of bargaining authority of all the employees, except those excluded by the Act, of the plaintiff company. Eleven of the eighteen members in the group were stated to be members in good standing. It was alleged that among these eleven employees, six were, in fact, employees of B, a company operating at the same address as the plaintiff and having the same management and control. The Board notified the plaintiff of the application and advised it of its right to make written submissions within 10 days. The plaintiff protested that a mistake in identity had been made. The Board replied that an investigation would be made. No further written communication ensued between the Board and the plaintiff until the certificate had been issued. In the meantime, a second application to cover the employees of B company was made, and subsequently withdrawn, and this was not disclosed to the plaintiff.

A representative of the Board attended at the plaintiff's office and found that (a) the 6 employees in question were on the plaintiff's payroll under the heading of B company, (b) their pay cheques were drawn by the plaintiff on its own bank account, and (c) their income tax T.D. 4 forms and unemployment insurance books showed the plaintiff as their employer. The plaintiff's manager stated that the two companies made separate income tax returns and that the Workmen's Compensation Board recognized the two entities.

The trial judge, on a motion for *certiorari*, quashed the order of the Board on the ground that the Board had declined jurisdiction in that it violated s. 62(8) of the Act when it failed to disclose to the plaintiff the issue raised and to give it an opportunity to meet it. This judgment was affirmed by the Court of Appeal.

Held (Locke and Cartwright JJ. dissenting): The appeal should be allowed. There was no failure to give an opportunity to be heard and no question of jurisdiction arose on that ground.

*PRESENT: Rand, Locke, Cartwright, Abbott and Judson JJ.

Per Rand, Abbott and Judson JJ.: There was no departure by the Board from the complete fulfilment of its statutory duty. The issue raised was perfectly plain to the union and the Board as well as to the plaintiff who chose to ignore the procedure of the Board. There is no duty imposed by the Act on the Board to open its files and send copies of every communication it receives in connection with an application. Failure to do what is not required cannot be construed as a denial of the right to be heard or a refusal of jurisdiction.

By its finding of fact, supported by the evidence, that the 6 employees were employed by the plaintiff, the Board acted pursuant to s. 65 of the Act and its decision is final and conclusive. The matter was solely within the Board's jurisdiction and is not open to judicial review. The internal financial arrangements between the two companies were of no concern either to the Board or the employees.

In determining that the 6 men were employees of the plaintiff, the Board was not determining the status of a person at large, and therefore that determination was not on a collateral issue. *Bradley v. Canadian General Electric* (1957), 8 D.L.R. (2d) 65, and *Labour Relations Board v. Safeway Ltd.*, [1953] 2 S.C.R. 46, referred to.

Per Locke and Cartwright JJ., *dissenting*: The trial judge found that the attention of the respondent was never directed to the fact that the union claimed that the employees alleged to be working for Traders' Transport Service Limited were to be included in the certification and that this was the only substantial issue which the Board had to investigate and determine. The Court of Appeal agreed with this finding and there were thus concurrent findings on this question of fact. As these findings were cleary right the appeal should be dismissed. *Mantha v. City of Montreal*, [1939] S.C.R. 458, and *Toronto Newspaper Guild v. Globe Printing Co.*, [1953] 2 S.C.R. 18, followed.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of McInnes J.[2] quashing a certification order. Appeal allowed, Locke and Cartwright JJ. dissenting.

L. A. Kelley, Q.C., for the Attorney General for British Columbia and the Board, appellants.

R. J. McMaster, for the union appellant.

G. A. Cumming, for the respondent.

The judgment of Rand, Abbott and Judson JJ. was delivered by

JUDSON J.:—This is an appeal from the judgment of the Court of Appeal for British Columbia[1] dismissing an appeal from the order of Mr. Justice McInnes[2] which, on a motion

[1] (1958), 11 D.L.R. (2d) 364.
[2] (1957), 9 D.L.R. (2d) 530, 23 W.W.R. 67, 26 C.R. 360.

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for *certiorari,* quashed a decision of the Labour Relations Board. The ground for the decision of the Court is summarized in the following paragraph of the reasons for judgment of Mr. Justice McInnes[1]:

> I hold therefore that it was incumbent upon the Board to disclose to the applicant the issue raised by the Union's application for certification and to give the applicant an opportunity to meet it. They failed to do so and have, in my opinion, thereby violated the provisions of Section 62(8) of the Labour Relations Act supra in that they did not "Give any opportunity to all interested parties to present evidence and make representations." By so acting they have declined jurisdiction. No authority need be cited for the proposition that when the Board declined jurisdiction its order must be set aside and I accordingly hereby set the same aside.

The obvious implication here is that the Board fell short of the standard of conduct required of it by such cases as *Local Government Board v. Arlidge*[2] and *Board of Education v. Rice*[3]. With the greatest respect, my opinion is that, having regard to the other relevant provisions of the Act and the regulations, these cases have no application on the facts disclosed here; that there was no failure to give an opportunity to be heard, and that no question of jurisdiction arises on this ground. Since I come to this conclusion, it is necessary to review in some detail the evidence before the Court. It was all in the form of affidavits and transcripts of the cross-examination upon them.

On August 8, 1956, the union applied to the Board to be certified as the bargaining authority of all employees of the respondent, Traders' Service Limited, at 343 Railway Street, Vancouver, except office staff and outside employees. The application stated that there were eighteen employees in the group and that eleven of these were members in good standing. The respondent alleges that the union included in these eleven employees six truck drivers who, in fact, were employees of another company, Traders' Transport Service Limited. This latter company, which I now refer to as the Transport Company, had its office at the same address as the respondent, and both companies had the same management and control. If the six truck drivers were in fact the employees of the Transport Company and not of the respondent, then the claim of the union to have as members in good standing the majority of the employees

[1] 9 D.L.R. (2d) at 542. [2] [1915] A.C. 120.
[3] [1911] A.C. 179, 80 L.J.K.B. 769.

in the unit was erroneous. On August 9, 1956, the Board, as required by its regulations, gave notice of the application to the respondent company which then had the right to submit its observations to the registrar of the Board and to request a hearing. If a hearing was requested, reasons had to be given and also a statement of the nature of the further oral evidence or representations (regulation 9(3)).

The only reply received from the respondent was a letter dated August 13, 1956, which suggested to the Board that it had made some mistake either in the application or in the name of the firm intended to be named and that, in consequence, the statutory notice enclosed with the Board's letter would not be posted. The explanation for this letter later given by the manager, in his affidavit, was that his company had been getting mail from time to time addressed to a company with a similar name. The reply of the Board on the following day, August 14, 1956, was to the effect that if any mistake in identity had been made, it would be disclosed by the investigation and that the respondent had been clearly named as the employer of the unit. The Board's letter repeated its request that notice of the application be posted as required by the regulations. There was no further written communication from the company to the Board nor from the Board to the company until the Board made its certification on November 9, 1956. There was no further obligation prescribed by the Act or the regulations which would impose a duty upon the Board to keep the respondent informed of what was going on. Regulation 9(7) expressly provides that

> Where a person fails to reply within the time-limit prescribed by these regulations, that person is not entitled, except by leave of the Board, to any further notice of proceedings or to make further representation or to give further evidence to the Board in connection therewith.

Nor is there any obligation to hold an oral hearing. By regulation 9(6) the Board has a discretion in this matter. If it decides to hold a hearing, it must give a statutory notice to the proper persons. In this case no oral hearing was held. None was asked for and it must be assumed that the Board thought that none was necessary.

The task before the Board was a simple one. It was to ascertain whether the union represented a majority of employees in the unit. For this purpose it instructed its

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officer to make an investigation. He attended at the company offices on two occasions, on August 15 and August 28, for the purpose of examining the payroll records of the company. He found that the six truck drivers whose status is in dispute were entered on the payroll of the respondent under the heading "Traders' Transport Service Limited". The four classifications on the payroll record of the respondent were "Office, Warehouse, Labelling, Traders' Transport Service Limited". The undeniable facts are (a) that the truck drivers' names were on the respondent's payroll under the heading of the Transport Company; (b) that the truck drivers' pay cheques were drawn by the respondent on its own bank account; (c) that their income tax T.D. 4 forms showed the respondent as their employer; (d) that their unemployment insurance books showed the respondent as their employer; (e) that the respondent and the Transport Company had the same management and control and operated from the same address; and (f) that the truck drivers knew nothing about internal inter-company arrangements or their purpose. The truck drivers filed affidavits stating that they were employees of the respondent.

As far as these inter-company arrangements are concerned, the manager stated that they made separate income tax returns and that the Workmen's Compensation Board recognized the two entities and treated the truck drivers as employees of the Transport Company. The position taken by him is that he had no idea that the application for certification covered these truck drivers who, he says, were employees of the Transport Company. Both the union and the Board were aware that there might be a problem. The union filed an application on August 31, 1956, for certification of the employees of the Transport Company. There was an exchange of correspondence between the Board and the union about this matter and the result was that the union withdrew its application for certification of the employees of the Transport Company and held to its assertion that these six truck drivers were employees of the respondent. Copies of this correspondence between the Board and the union were not supplied to the Service Company and, in my opinion, there was no obligation to supply them or to disclose the correspondence.

The learned trial judge has found that it was incumbent upon the Board to disclose to the company the issue raised by the union's application for certification and to give the applicant an opportunity to meet it. This failure, it is said, is a violation of s. 62(8) of the Act, which provides that the Board "shall determine its own procedure, but shall in every case give an opportunity to all interested parties to present evidence and make representation." The duties of this Board are governed by the *Labour Relations Act* and by the regulations made under it. I can find no departure by the Board from the complete fulfilment of its statutory duty. It gave the respondent the required notice of the application and advised it of its rights to make written submissions within ten days; it immediately corrected what I regard as the respondent's feigned inability to understand what was going on; it made the necessary examination of records as required by s. 12(2); in accordance with regulation 9(2) and s. 12(2) it prescribed the nature of the evidence that it required from the union; the respondent made no submissions of any kind and did not reply to the statutory notice. It had ample opportunity to present evidence and make any representations that it wished. It chose to ignore the procedure of the Board. A board such as the Labour Relations Board is required to do its duty but that duty is defined by the Act and the regulations. What more can a board do in a case of this kind? According to the judgment under appeal there was a failure to disclose the issue raised. The issue raised was perfectly plain to the union and the Board and I think it was equally plain to the respondent. Whether or not this is so can make no difference. To avoid being open to an accusation of this kind, a board engaged on such a task as this would have to open its files and send copies of every written or oral communication that it received in connection with the application. There is no such duty imposed by this Act and failure to do what is not required should not be construed as a denial of the right to be heard or a refusal of jurisdiction.

At the end of his reasons for judgment, the learned judge directed a very serious criticism against the Board to the effect that it was "actively assisting and advising the Union in the presentation of its submission and at the same time scrupulously avoiding any communication to the employer

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of the nature of the claim being made against it." In his view this conduct on the part of the Board was "reprehensible and should not be condoned." The Court of Appeal were unanimous in dismissing the appeal but stated at the same time: "We do feel impelled, however, with respect, to dissociate ourselves from his closing comments critical of the conduct of the appellant Board." With equal respect, I also wish to dissociate myself from these comments, and, it seems to me, with the rejection of this criticism the foundation for this judgment largely disappears.

My opinion is that no question of jurisdiction arose for the Court's consideration in this case. What the Board did was to make a finding of fact and, indeed, one that was very simple and obviously correct, that these six employees were employed by the respondent. By s. 65 of the Act the Board is required to determine whether a person is an employer or employee and this decision is to be final and conclusive. The matter, therefore, was solely within the Board's jurisdiction and it is not open to judicial review. In making its finding of fact, the Board proceeded exactly as it was authorized to do by statute. There was no refusal of jurisdiction or lack of jurisdiction or conduct outside or in excess of its jurisdiction. The matter is not one of jurisdiction at all. There was ample evidence on which the Board could make its finding and any other finding would have been surprising. All the evidence pointed to these employees being the employees of the respondent. Employment is a question of fact and depends upon contract. The internal financial arrangements between the respondent and the Transport Company were of no concern either to the Board or the employees.

In support of the judgment, in addition to the ground on which it was founded, the respondent urged that the decision of the Board was open to attack because in deciding that these men were employees of the respondent and not the Transport Company, it made a wrong decision on what counsel chose to refer to as a "collateral issue", that such a wrong decision cannot be the foundation of jurisdiction and that consequently, the jurisdiction itself is open to attack. This argument, it seems to me, fails at its very beginning. What is there "collateral" or outside the main issue in the determination here that a particular person is

an employee of a particular employer? The Board is not determining the status of a person at large but with reference to an employer named in the application. That is the very subject-matter of the adjudication. The same argument has been put forward and rejected in the cases having to do with employees exercising managerial functions or employed in a confidential capacity. *Bradley v. Canadian General Electric*[1] and *Labour Relations Board v. Safeway Ltd.*[2], are decisively against the argument. There is no difference in principle between a determination of the capacity in which a person is employed and a determination of the question of the relation of employer and employee. Neither question is a collateral issue. There are no two issues here before the Board, the first whether the man is an employer and the second whether he is the employer of a particular employee. The issue is a single one and entirely within the Board's jurisdiction. It was for the Board and the Board alone to make the finding on the one issue and this finding is not open to review by the Court.

I would allow the appeal with costs throughout.

LOCKE J. (*dissenting*):—Traders' Service Limited, the respondent in the present appeal, was incorporated under *The Companies* Act of Bristish Columbia on July 4, 1932, under the name D.N.S. Labelling Company Limited. That name was, in the same year, changed to the one it now bears. The objects of the company were stated as being to acquire and take over as a going concern the business then carried on by D.N.S. Labelling Company at Vancouver and the assets of that company and to carry on *inter alia* the business of carters, warehousemen, labellers and shippers of goods.

Traders' Transport Service Limited, to be referred to more particularly hereafter, was incorporated under the same Act by a memorandum of association dated January 23, 1942. The declared objects of the company included engaging in the business of draymen, carters, packers and warehousemen and to operate trucks and other vehicles for such purpose. At the relevant times these two companies carried on business at 343 Railway Street in Vancouver.

[1] [1957] O.R. 316 at 325, 8 D.L.R. (2d) 65 at 72.
[2] [1953] 2 S.C.R. 46, 107 C.C.C. 75, 3 D.L.R. 641.

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On August 7, 1943, as is shown by a letter bearing that date addressed to Traders' Transport Limited by the Board of Industrial Relations, a collective bargaining agreement made by that company with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers' Union Local No. 31 acting as the representative of its employees was approved.

Arthur H. Muir was during the year 1956 the President and Managing Director of these two companies and apparently had a controlling interest in the shares of each of them. According to an affidavit made by him and filed on the application for a writ of certiorari, Traders' Service Limited operated a public storage warehouse and a labelling, weighing and sampling business at the address mentioned and while a small portion of the work was carried on at that address the greater part of it was done on the premises of its various customers.

The affidavit further states that Traders' Transport Service Limited carried on a public cartage and transfer business at 343 Railway Street and owned approximately fourteen cartage trucks but operated only two of them.

As evidence of the fact that the companies carried on their operations separately copies of the income tax returns made by them respectively to the Department of National Revenue were produced and form part of the record. An examination of these returns shows that for the fiscal year ending March 31, 1956, Traders' Service Limited had a gross revenue of $153,269.77, and apart from wages the largest single article of expense was for cartage. For the same year Traders' Transport Service Limited had a total revenue of $37,776, all derived from the rental of its trucks. The trucks, or at least, some of them, which did trucking for Traders' Service Limited, bore the name of that company.

Companies employing workmen engaged in businesses such as those carried on by the companies in question are required to make returns to the Workmen's Compensation Board of the Province under the provisions of *The Workmen's Compensation Act,* R.S.B.C. 1948, c. 370, and to contribute to the accident fund established by the Board. For the purpose of assessment under the Act all industries in the Province are divided into classes, of which there are

twenty, and this number may be added to by the Board and assessments vary according to the hazard attaching to the work carried on. That the employees of these two companies were assessed under that Act separately for the year 1955 is proven by copies of notices of assessment sent to them by the Board for that year.

According to the affidavits of Muir and of Victor R. Clerihue, a chartered accountant, who had been the auditor of Traders' Service Limited since 1935 and of Traders' Transport Service Limited since the date of its incorporation, the payroll cheques of both companies were drawn upon the bank account of Traders' Service Limited, this practice, according to Mr. Clerihue, having been followed "for reasons of banking and accounting convenience and in order to reduce the clerical work and cost involved". The auditor's affidavit further states that all payroll payments paid in respect of the employees of Traders' Transport Service Limited were charged against the operation of that company and appear in the operating statements of that company.

A copy of the payroll records of Traders' Service Limited for the period August 1 to August 15, 1956, was produced which shows the wages or salaries paid to those employed in its office, warehouse and for labelling and below these classifications, under the heading: Traders' Transport Service Limited, appears the name of nine employees with the amounts of wages paid to each for the period.

On August 9, 1956, the appellant union filed with the Labour Relations Board on a form supplied by the latter an application for certification as the bargaining representative of the employees of Traders' Service Limited. The general nature of the business of the company was described as "storage and distribution warehouse" and the description of the group of employees for which certification was asked was "all employees of the company except office staff and outside salesmen and those with the authority to employ or dismiss". The application did not suggest that any of the employees were engaged in the operation of trucks and neither Traders' Transport Service Limited nor its employees were mentioned.

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The *Labour Relations Act* is c. 17 of the Statutes of British Columbia for 1954. The statute repealed and replaced *The Industrial Conciliation and Arbitration Act* (c. 31, Statutes of 1937) as amended. Extensive amendments had been made to the last-named statute by c. 28 of the Statutes of 1943 by which, for the first time in British Columbia, it was enacted that when a majority of the employees affected are members of one trade union the union shall have the right to conduct collective bargaining on their behalf and employers were required to bargain with them. By that Act the Minister of Labour was authorized to take such steps as he thought proper to satisfy himself that a majority of the employees were members of the union. If he were not so satisfied, the claim of the union to bargaining rights was to be rejected.

By s. 10 of *The Labour Relations Act,* a trade union claiming to have as members in good standing a majority of employees in a unit that is appropriate for collective bargaining may apply to the Board of Industrial Relations established under the Act to be certified in cases where, *inter alia* no collective agreement is in force and no trade union has been certified for the unit. By subs. (2), it is provided that a trade union claiming to have as members in good standing a majority of employees in a unit appropriate for collective bargaining employed by two or more employers may make application to be certified for such unit. Subsection (4) provides that where such an application is made for a unit in which the employees are employed by two or more employers,

> The Board shall not certify the trade union unless:
>
> .....
>
> (*b*) A majority of the employers have consented to representation by one trade-union; and
>
> (*c*) A majority of the employees of each employer have consented to representation by the trade-union making the application.

Section 12 requires the Board upon an application for certification being made to determine whether the proposed unit is appropriate for collective bargaining and to make such examination of records and other inquiries including the holding of such hearings as it deems expedient to determine the merits of the application, and, if the Board is in doubt as to whether or not the majority of the employees in

the unit were at the date of the application members in good standing of the trade union, it may direct that a representation vote be taken. Subsection (5) of s. 12 reads:

> (5) If the Board is satisfied that less than fifty per centum of the employees in the unit were, at the date of the application, members in good standing of the trade-union, the Board shall not certify the trade-union for the employees in the unit.

The legal effect of certification is stated in s. 13. The union certified shall immediately replace any other trade union representing the unit and shall have exclusive authority to bargain collectively on behalf of the unit and to bind it by a collective agreement until the certification is revoked. Section 62, subs. (8) reads:

> (8) The Board shall determine its own procedure, but shall in every case give an opportunity to all interested parties to present evidence and make representation.

Section 65 authorizes the Board, in certain circumstances, to reconsider any order made by it under the Act and to vary or revoke it.

Upon receipt of the application for certification the Labour Relations Board, on August 9, 1956, wrote to Traders' Service Limited advising that company that the appellant union had applied to be certified for a unit of its employees stating that an officer of the Department of Labour would investigate the merits of the application and saying that written submissions concerning the application would be considered by the Board if received within ten days of the date of the notice. Enclosed with the letter was a form of notice to be posted up in the establishment of the company advising the employees that the union had applied for certification and that written submissions concerning it would be considered if received by the Registrar of the Board within ten days.

It is to be noted that the letter did not mention Traders' Transport Service Limited or its employees or otherwise suggest to the respondent that certification was asked for the employees of that company. It is clear that if the proposed unit included the employees of the latter company the Board was without jurisdiction to certify the trade union since the consent of the two employers had not been asked or given.

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The respondent wrote in reply to the Board on August 13, 1956, saying that it was felt that there must be "some mistake in this application or in the name of the firm intended to be named" and saying that apparently the staff had not been approached by the union. To this the Board replied on August 14 asking that the notice be posted and if there was a mistake in identity it would be disclosed by the investigation.

Muir, in the second affidavit made by him in support of the application, said that there had been confusion in the delivery of mail intended for another company named Traders' Sales Ltd. and it was this that he had in mind when suggesting a mistake in identity.

On August 15, 1956, Alexander Titmus, an Industrial Relations Officer of the Department of Labour, went to the premises of the respondent and had a discussion either with Muir or with his accountant. Muir says that he had no discussion with Titmus at this time having turned him over to the accountant. Titmus says his discussion was with Muir. While Titmus made an affidavit on March 6, 1957, which was filed on behalf of the Board, it was limited to saying that he had discussed with Muir "the subject of my investigation and the matter of my business with the said Traders' Service Ltd." and that he had again had a discussion with him on October 29, 1956, before the Order of Certification was made.

No further particulars of the information obtained by Titmus were given and when cross-examined upon his affidavit, upon advice of counsel for the Board, he refused to give any further particulars.

Section 71 of *The Labour Relations Act* provides *inter alia* that the information obtained for the purpose of the Act in the course of his duties by an employee of the Department of Labour shall not be open to inspection by the public or any court, and the employee shall not be required to give evidence relative thereto. Subsection (2) provides that no such employee shall be required to give testimony in any civil case respecting information obtained for the purpose of the Act.

Titmus when cross-examined said that when he went to the respondent's premises in August his purpose was to inspect the payroll records of the company and it is proved

by the evidence of Muir that he was shown the payroll records which were kept in the manner above described. Whether the payroll for the two-week period ending August 15 had been made up at the time Titmus was there on that date is not made clear but previous payrolls were prepared in the same manner. An examination of the payroll produced shows that excluding the office staff, Traders' Service Limited employed fourteen men and Traders' Transport Service Limited the nine men above referred to.

The respondent company did not make any written representations to the Board within the ten-day period and indeed if a majority of those who were employed by it according to its written records were members in good standing of the appellant union, representations by the company would have been pointless.

After Titmus left the premises of the respondent on August 15 there was no further communication between the appellant Board and anyone representing the Department of Labour until October 29 when, as stated, Titmus again returned and made some further inquiries. During the interval, however, the Registrar of the Board had carried on a correspondence with the appellant union and copies of the letters exchanged were filed on the hearing of the application.

On August 9, the Registrar wrote Gerald C. Emary, the Western Area Director of the union, acknowledging the application for certification. On August 24, Emary wrote the Chief Executive Officer of the Labour Relations Branch of the Department of Labour referring to the application, saying that when it was filed the union were of the opinion that all of the employees were employees of Traders' Service Limited but that it appeared that there were two companies:

> The parent company being Traders' Service Ltd. and the subsidiary company located at the same address and heretofore an inactive company which as far as we were concerned at the time existed in name only.

The letter continued by saying that the union had reason to believe that included in the group of employees it wished to represent were certain employees considered as being employees of Traders' Transport Service Limited and asked that the application for certification be amended so as to include that company. On August 27, the Registrar wrote

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Emary answering his letters and saying that, if the application was to be amended, the consents required by s. 10(4)(*b*) of the Act and by the Regulations should be filed. On August 30, 1956, Emary again wrote the Chief Executive Officer asking that his letter of August 24 be disregarded and enclosing a separate application for certification as bargaining representative of certain of the employees of Traders' Transport Service Limited. The business of the company was stated in this application as being "storage and distribution warehouse" and the group of employees described as "all employees except office employees, outside salesmen and those with authority to employ or dismiss".

No notice was given to the respondent company by the Labour Relations Board of this correspondence and no notice was given to Traders' Transport Service Limited of this application.

On September 13, 1956, Emary wrote to the Board referring to the application for certification for the employees of Traders' Transport Service Limited filed on August 31, saying:

> The latter application for certification resulting (sic) from information conveyed to us by your Department that the employees on whose behalf we were seeking certification in our application of August 8th were employed by two companies i.e. Traders' Service Ltd. and Traders' Transport Service Ltd.

The letter continued by asking that the second application be disregarded as the union were satisfied that there were no employees of Traders' Transport Service Limited and that "it exists merely as a company in name only". Further correspondence ensued between the Registrar and Emary in which the latter contended that there were no employees of Traders' Transport Service Limited and sent copies of certain pay cheques issued to certain of the men whose names it was shown appeared on the payroll above mentioned as employees of Traders' Transport Service Limited, which cheques were drawn by Traders' Service Limited. In addition statutory declarations of five men employed as truck drivers at 343 Railway Street were enclosed, all of which were made on or immediately prior to October 15, 1956, which stated that they were employed by Traders' Service Limited and not by Traders' Transport Service Limited.

In addition to the admitted fact, as proven by the affidavits of Muir and Clerihue, that the employees of both companies had been paid by the cheques of the respondent, it was shown that a document referred to as an income tax slip said by Emary to have been received by one Kalish from the respondent company showed the amount of his remuneration from that company and the amounts deducted for income tax.

Upon this information the Labour Relations Board, on November 8, 1956, wrote to the respondent company enclosing a certificate which stated that the Labour Relations Board had determined that the employees of Traders' Service Limited, except those excluded by the Act, were a unit appropriate for collective bargaining and that the Retail, Wholesale and Department Store Union Local 560 was certified as a union to represent all the employees in the unit.

Following this the union presented a collective agreement assuming to represent not only those persons who, according to Muir, were employed by the respondent, but also all those employed as truck drivers by Traders' Transport Service Limited. Correspondence then ensued between the respondent's solicitors and the Board in which it was pointed out that the time for appeal from the Order of Certification had expired. On January 9, 1957, the Registrar wrote to say that the Board was willing to receive and consider a submission that the time for appeal should be extended. To this letter no reply was given and the application for the writ made.

The important duty imposed upon the Labour Relations Board under the statute in question does not differ in any material respect from that imposed under the Ontario statute which was considered by this Court in *Toronto Newspaper Guild v. Globe Printing Co.*[1]

The duty which had been cast upon the Minister of Labour by the 1943 amendment to *The Industrial Conciliation and Arbitration Act* of 1937 was transferred by the present Act to the Board. The question to be decided is of grave importance to the employees concerned since the effect of it in every case is that bargaining rights as between

[1] [1953] 2 S.C.R. 18, 106 C.C.C. 225, 3 D.L.R. 561.

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the employees and their employers may be given to a union on behalf of a minority of the members who may not wish it to represent them so long as that minority is less than fifty per cent of those sought to be included in the unit. The duty cast upon the Board is administrative in my opinion, but in determining the question it must act only in the manner in which it is authorized by the statute.

While the Board is permitted to determine its own procedure, it is required by subs. (8) of s. 62 as well as by the common law to give an opportunity to all interested parties to present evidence and make representations upon the point to be decided. I do not think the provisions of subs. (8) add anything to the obligation cast by law upon the Board. The judgment of the Lord Chancellor in *Board of Education v. Rice*[1] states the applicable law in language which has been adopted on more than one occasion by this Court. Lord Loreburn there said:

> Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. 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. .....
> 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. .....
> 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.

The nature of the obligation cast upon such a Board so expressed was adopted by Sir Lyman Duff C.J., in delivering the judgment of the majority of this Court in *Mantha v. City of Montreal*[2] and by Kellock J. in the *Toronto Newspaper Guild*[3].

[1] [1911] A.C. 179 at 182, 80 L.J.K.B. 769.
[2] [1939] S.C.R. 458, 467, 4 D.L.R. 425.
[3] [1953] 2 S.C.R. 18 at 32.

While it is true the certificate issued to the appellant union said that it applied to the employees of Traders' Service Limited, the course of the correspondence between the union and the Board, the actions taken by the union following the issuing of the certificate and the arguments addressed to this Court on behalf of the appellants all show that in determining that the union represented a majority of the employees, those men whom the respondent contended were employees of Traders' Transport Service Limited were included. Muir swore that Haines, a business agent of the union, had told him that without the men whom Muir contended were employed by the Transport Company the union did not have a majority in the unit.

The only material question which the Board was required to determine in the present matter was as to whether a majority of the employees affected were at the date of the application members in good standing of the union. Whether in determining that question the Board complied with the requirements of subs. (8) of s. 62 and of the duty cast upon it at common law is a question of fact and not of law.

McInnes J., by whom the application was heard, said in part[1]:

> It will be seen at once that the attention of Traders' Service Limited was never directed to the fact that it was the intention of the Union to claim that employees who were allegedly working for Traders' Transport Service Limited were to be included in the certification. This, of course, was the only substantial issue which the Board had to investigate and determine and in my view it was imperative that the attention of Traders' Service Limited should have been directed to that issue.

The Court of Appeal[2] agreed with this finding of fact and dismissed the appeal. We are invited by the appellants to reverse these concurrent findings: for my part I decline to do so. I would add that, after carefully examining all the available evidence, I entirely agree with that finding.

It is impossible to suggest that the letter addressed by the Registrar to the company on August 8, 1956, or any other letter written on behalf of the Board to the respondent up to the time the certificate was issued gave any

[1] (1957), 9 D.L.R. (2d) 530 at 538.
[2] (1958), 11 D.L.R. (2d) 364.

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indication to the respondent that the union contended, as the correspondence demonstrates it did, that Traders' Transport Service Limited employed none of the men. Other than to ask Muir or his accountant whether the eight men whose names were listed in the payroll sheet under the heading Traders' Transport Service Limited, were paid by Traders' Service Limited, there was nothing in what transpired between Titmus and Muir to suggest to the respondent that any such claim was made by the union. On the record as it is it appears clear that the Board did not know the facts as to the separate incorporation of these two companies, of the varying nature of the business carried on by them respectively or the reason why the Transport Company's employees were paid by cheques of the respondent company and the question was determined by the Board in ignorance of these facts. According to Emary, Traders' Transport Service Limited was "a company in name only" whatever that may mean: if it was intended to mean that that company did not function separately, the evidence of Muir and Clerihue, if believed, proved the contrary.

It is not our function to determine what was in fact the truth as to the identity of the employer of the men whom the payroll records indicated were employees of Traders' Transport Service Limited. If two employers were concerned, the Board was without jurisdiction to certify the union as the bargaining agent without the consent of the employer by reason of the provisions of subs. (4) of s. 10 of the Act. If, as the evidence on the face of it would indicate, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers' Union Local 31 continued to be authorized to bargain on behalf of the employees of the Transport Company, the Board was equally without jurisdiction by reason of the provisions of subs. (1)(*b*) of s. 10, and, unless the Board complied with its duty to afford both sides full opportunity to be heard, the Order made was beyond its powers.

I would dismiss this appeal with costs.

CARTWRIGHT J. (*dissenting*):—The facts out of which this appeal arises and the contentions of the parties are sufficiently stated in the reasons of other members of the Court.

It appears to me that the only controversial issue which the Labour Relations Board, hereinafter referred to as "the Board", had to decide in order to dispose of the application for certification made by the appellant union was whether certain six truck-drivers were employees of the respondent or of another company, Traders' Transport Service Limited. The correspondence between officials of the Board and of the union, quoted in the reasons of McInnes J., makes it abundantly clear that the Board was made aware by the union that it asserted and that the respondent denied that these truck-drivers were employed by the respondent.

In these circumstances the authorities referred to in the reasons of my brother Locke and in those of McInnes J. appear to me to establish that, at the least, the duty of the Board was, in the words of McInnes J.,

> to disclose to the respondent the issue raised by the union's application for certification and to give the applicant an opportunity to meet it.

I agree with my brother Locke that the question whether or not this duty of disclosure was fulfilled is one of fact; and upon it there are concurrent and unanimous findings in the Courts below. Under the long established practice of this Court we ought not to disturb these findings unless satisfied that they are clearly wrong; a perusal of the whole record brings me to the conclusion that they are right.

I would dismiss the appeal with costs.

Appeal allowed with costs, LOCKE *and* CARTWRIGHT JJ. *dissenting.*

Solicitors for the appellants Attorney-General of British Columbia and the Board: Paine, Edmonds, Mercer & Williams, Vancouver.

Solicitors for the appellant union: Davis, Hossie, Campbell, Brazier & McLorg, Vancouver.

Solicitors for the respondent: Norris, Cumming & Bird, Vancouver.

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*Nov. 1
Nov. 20

IN RE JACK GOLDHAR

Courts—Jurisdiction—Habeas corpus—Criminal law—Common law offences—Section 57 of the Supreme Court Act, R.S.C. 1952, c. 259—Jurisdiction of a judge of the Supreme Court of Canada—Sufficiency of commitment order—The Penitentiary Act, R.S.C. 1952, c. 206, ss. 49(1), 51.

A judge of the Supreme Court of Canada has jurisdiction under s. 57 of the *Supreme Court Act* to issue a writ of *habeas corpus ad subjiciendum* in cases of commitment for the offence of conspiracy.

As it is no longer possible to prosecute a person for an offence at common law, there can no longer be a commitment in a criminal case for such an offence, and any offence now charged under the *Criminal Code* must be considered as a criminal case under an Act of the Parliament of Canada, within the meaning of s. 57 of the *Supreme Court Act*.

Held: The application should be refused. There was adequate authority for the detention of the applicant.

APPLICATION for the issuance of a writ of *habeas corpus ad subjiciendum*. The applicant was sentenced in May 1956 to 12 years' imprisonment after being convicted by a jury of conspiracy to have in his possession a drug for the purpose of trafficking, an indictable offence under the *Opium and Narcotic Drug Act*, R.S.C. 1952, c. 201, contrary to the *Criminal Code*. Application refused.

M. Robb, Q.C., for the applicant.

D. H. W. Henry, Q.C., and *L. E. Levy*, for the Attorney-General of Ontario.

MARTLAND J. (in Chambers):—Application has been made on behalf of Jack Goldhar, under s. 57 of the *Supreme Court Act*, for the issuance of a writ of *habeas corpus*. That section provides as follows:

> 57. (1) Every judge of the Court, except in matters arising out of any claim for extradition under any treaty, has concurrent jurisdiction with the courts or judges of the several provinces, to issue the writ of habeas corpus ad subjiciendum, for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.
>
> (2) If the judge refuses the writ or remands the prisoner, an appeal lies to the Court.

The applicant was convicted and sentenced, at the City of Toronto, in the County of York, on April 27, 1956, and May 4, 1956, respectively, by His Honour Judge Macdonell and a jury, of conspiring to have in his possession a drug, to wit, diacetylmorphine, for the purpose of trafficking.

*PRESENT: Martland J., in Chambers.

an indictable offence under the *Opium and Narcotic Drug Act*, contrary to the Criminal Code. He is presently a prisoner in Kingston Penitentiary under a sentence of 12 years' imprisonment.

Notice of the application was served upon the Attorney-General of Ontario and the Director of Public Prosecutions for the Province of Ontario and the Crown was represented at the hearing of this application.

At the outset counsel for the Crown submitted that there is no jurisdiction for the issuance of the writ in this case. He contended that conspiracy was an offence at common law and that, therefore, there was no authority under s. 57 to issue a writ of *habeas corpus* because there had been no commitment in a criminal case under an Act of the Parliament of Canada. He relied upon the decision of the Supreme Court of Canada in *Smith v. R.*[1] as authority for this proposition. In that case Rinfret J. (as he then was), delivering the judgment of the majority of the Court, said at p. 582:

> That the jurisdiction of the judges of the Supreme Court of Canada in respect of habeas corpus extends only to offences which are criminal by virtue of statutes of the Parliament of Canada and not to offences which were criminal at common law is, we think, the true effect of section 57 of the Supreme Court Act. (See In re Pierre Poitvin, 1881 Cassels' Digest, 327, and In re Robert Evan Sproule, (1886) 12 S.C.R. 140, in each of which cases the commitment was for murder). In the Sproule case we draw particular attention to the reasons at pages 184, 203 and 240.

He cited, with approval, the opinion enunciated by Duff J. (as he then was), sitting in chambers in *In re Charles Dean*[2]:

> The jurisdiction extends only, I think, to those cases in which the "commitment" has followed upon a charge of a criminal offence which is a criminal offence by virtue of some statutory enactment of the Parliament of Canada; it does not, in my opinion, extend to cases in which the "commitment" is for an offence which was an offence at common law or under a statute which was passed prior to Confederation and is still in force.

I must, however, consider the impact of the amendments of the Criminal Code enacted since these cases were decided. Section 15 of the *Criminal Code*, as it existed prior to April 1, 1955, provided as follows:

[1] [1931] S.C.R. 578, 4 D.L.R. 465, 56 C.C.C. 51.
[2] (1913), 48 S.C.R. 235 at 236, 9 D.L.R. 364, 20 C.C.C. 374.

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15. Where an act or omission constitutes an offence, punishable on summary conviction or on indictment, under two or more Acts, or both under an Act and at common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of such Acts, or at common law, but shall not be liable to be punished twice for the same offence.

It recognized the possibility of prosecution for offences at common law. The offences in question in *In re Charles Dean* and *Smith v. R.* were offences at common law.

However, s. 8 of the *Criminal Code,* which became effective on April 1, 1955, specifically provides as follows:

8. Notwithstanding anything in this Act or any other Act no person shall be convicted

(*a*) of an offence at common law,

(*b*) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or

(*c*) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,

but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or magistrate had, immediately before the coming into force of this Act, to impose punishment for contempt of court.

Section 7 preserves the criminal law of England that was in force in a province before the new *Criminal Code* came into force, except as altered, varied, modified or affected by the new *Criminal Code,* or any other Act of the Parliament of Canada.

It would appear that, although the rules and principles of the common law respecting crimes, including defences to charges of crime, were preserved by s. 7, it is no longer possible to prosecute a person for an offence at common law. Consequently it appears to me that a person can no longer be committed in a criminal case for a common law offence and that any offence now charged under the *Criminal Code* must be considered as a criminal case under an Act of the Parliament of Canada, within the meaning of s. 57 of the *Supreme Court Act.*

I, therefore, hold that there is jurisdiction under s. 57 to issue a writ of *habeas corpus* on this application, if, in the circumstances, the applicant is entitled to it, and I proceed to consider the merits.

The applicant has filed, on this application, an affidavit of Ernest Valerie Swain, a solicitor of the City of Kingston, to which is annexed a copy of a document entitled "Calendar of Sentences-Sessions". In it J. W. Copeland, Deputy Clerk of the Peace, York, certifies, under the seal of the Court of General Sessions of the Peace in and for the County of York, that "at a General Session of the Peace held at the Court House in the City of Toronto in and for the County of York the following prisoner, having been duly convicted of the crime set opposite his name, was sentenced as hereunder stated by His Honour Judge Ian M. Macdonell". The certificate is dated May 4, 1956. Beneath this certificate there follow four column headings entitled respectively: "Name of Prisoner", "Offence", "Date of Sentence" and "Sentence". Beneath these respective column headings there appears the following material: "Goldhar, Jack", "Conspiracy (to have in possession a drug for the purpose of trafficking)", "4th May, 1956" and "Twelve years in the Kingston Penitentiary".

The affidavit states on information that the said Calendar of Sentences-Sessions is the only document received at the Records Office of the Kingston Penitentiary when a person is convicted by a judge at a Court of General Sessions of the Peace or by a judge at a County Court and that there was no warrant of committal held by the keeper of Kingston Penitentiary against Jack Goldhar.

Counsel for the applicant contended that this document was not an adequate authority for the detention of the applicant and referred to s. 49(1) and s. 51 of the *Penitentiary Act*.

Section 49(1) reads as follows:

> 49. (1) The sheriff or deputy sheriff of any county or district, or any bailiff, constable, or other officer, or other person, by his direction or by the direction of a court, or any officer appointed by the Governor in Council and attached to the staff of a penitentiary for that purpose, may convey to the penitentiary named in the sentence, any convict sentenced or liable to be imprisoned therein, and shall deliver him to the warden thereof, without any further warrant than a copy of the sentence taken from the minutes of the court before which the convict was tried, and certified by a judge or by the clerk or acting clerk of such court.

The relevant portions of s. 51 provide:

> 51. The warden shall receive into the penitentiary every convict legally certified to him as sentenced to imprisonment therein, unless certified by the surgeon of the penitentiary to be suffering from a danger-

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ously infectious or contagious disease, and shall there detain him, subject to the rules, regulations and discipline thereof, until the term for which he has been sentenced is completed, or until he is otherwise legally discharged, . . .

Subsection (1) of s. 49 relates to the conveyance of a convict to a penitentiary. Section 51 relates to the authority for his detention at the penitentiary.

It would seem to me that the document in issue does legally certify that the applicant is sentenced to imprisonment at Kingston Penitentiary for a term of twelve years.

The authorities establish that on an application of this kind I am not entitled to enter into the merits of the case, but am limited to an inquiry into the cause of commitment as disclosed by the documents which authorize the detention. There is nothing disclosed in the document in question to indicate that the commitment of the applicant to Kingston Penitentiary was in any way irregular.

If, however, I am wrong in my opinion as to the adequacy of this document under s. 51 of the *Penitentiary Act*, I should go on to say that counsel for the applicant acknowledged that, if inadequate, it would be in order for the warden of Kingston Penitentiary to be permitted to obtain a proper minute. His chief objection to the questioned document was that the offence was not properly described in it in that the description of the offence failed to follow the wording of the indictment.

A copy of the indictment was filed on the application and the relevant portions of it allege that Jacob Rosenblat, Jack Goldhar, Leonuell Joseph Craig and Hennelore Rosenblum, at the City of Toronto, in the County of York, and elsewhere in the Province of Ontario, between March 19 and August 6, 1955, unlawfully did conspire together the one with the other or others of them and persons unknown to commit the indictable offence of having in their possession a drug, to wit, diacetylmorphine, for the purpose of trafficking, an indictable offence under the *Opium and Narcotic Drug Act*, contrary to the *Criminal Code* of Canada.

The main point argued on behalf of the applicant is that the indictment alleges a conspiracy between March 15 and August 6, 1955. Part of the period mentioned (*i.e.*, that portion prior to April 1) was prior to the coming into force of the new *Criminal Code*.

Under s. 573 of the old *Criminal Code* the maximum penalty for conspiracy to commit an indictable offence was seven years. Under s. 408(1)(*d*) of the new *Criminal Code* the maximum penalty for conspiracy to commit an indictable offence (other than conspiracy to murder, conspiracy to bring a false accusation or conspiracy to defile) is the same as the penalty imposed in respect of the particular indictable offence regarding the commission of which there has been a conspiracy. In the case of having in possession a drug for the purpose of trafficking, the maximum penalty, under s. 4(3)(*b*) of the *Opium and Narcotic Drug Act,* is fourteen years.

Counsel for the applicant then refers to s. 746(2)(*b*), which provides that:

> (2) Where proceedings for an offence against the criminal law are commenced after the coming into force of this Act the following provisions apply, namely,
>
> * * *
>
> (*b*) if the offence was committed before the coming into force of this Act, the penalty, forfeiture or punishment to be imposed upon conviction for that offence shall be the penalty, forfeiture or punishment authorized or required to be imposed by this Act or by the law that would have applied if this Act had not come into force, whichever penalty, forfeiture or punishment is the less severe;

He contends that, applying this subsection, the maximum penalty which could be imposed upon the applicant was seven years.

In order to succeed on this argument it would have to be established upon the material before me that the offence for which the applicant was convicted was actually committed before April 1, 1955. There is nothing to establish that it was. The material does establish that the applicant was convicted and sentenced by a Court of competent jurisdiction of the offence charged. I was informed by counsel that an appeal had been taken against the conviction to the Court of Appeal of Ontario and was dismissed. It appears that there was no appeal against sentence and that the point now taken in argument was not raised.

In *In re Sproule*[1], Strong J. (as he then was) says:

> If any proposition is conclusively established by authorities having the support of the soundest reasons, it is that, after a conviction for felony by a court having general jurisdiction of the offence charged,

[1](1886), 12 S.C.R. 140 at 204.

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a habeas corpus is an inappropriate remedy, the proper course to be adopted in such a case, being that to which the prisoner in the present case first had recourse, viz.: a writ of error. The anomalous character of such an interference with the due course of justice, in intercepting the execution of the judgment of a court of competent jurisdiction, and by which a single judge in chambers might reduce to a dead letter the considered judgment of the highest court of error, would to my mind be itself sufficient even without authority to induce a strong presumption that such a state of the law could not possibly exist.

For the above reasons the application is refused.

Application refused.

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*Jun. 17
Nov. 19

LEO PERRAULT LIMITEE (*Defendant*) ..APPELLANT;

AND

GEORGES TESSIER (*Plaintiff*) .....RESPONDENT.

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

Sale—Determined quantity of lumber—Refusal to pay for goods received—Apprehension of breach of contract—Subsequent deliveries accepted—Art. 1496, 1532 of the Civil Code.

The plaintiff agreed to sell to the defendant a determined quantity of lumber. The lumber was to be measured by the purchaser on delivery and was to be paid on the 15th and 30th of each month. The defendant, after receiving notice from the plaintiff that he had no more wood available, continued to accept subsequent deliveries but refused to pay for them in an attempt to protect his anticipated claim in damages for breach of contract.

In his action, the vendor claimed payment for the lumber delivered and asked for the cancellation of the contract for the balance of the lumber remaining to be delivered. The purchaser made a cross-demand in which he claimed damages for breach of contract and pleaded compensation. The action was maintained and the cross-demand dismissed by the trial judge and by the Court of Appeal.

Held: The appeal should be dismissed.

The letter written by the vendor cannot be interpreted as a refusal to deliver the balance of the lumber called for by the contract, particularly in the light of the subsequent conduct of both parties. As the buyer was in breach of his obligation to pay the price, the vendor was entitled at his option to treat that breach as terminating the contract for the balance, to take action for the amount owing and to ask that the contract be dissolved.

The law is well settled in Quebec that in a synallagmatic contract the party to such contract who is himself in default cannot claim damages from the other party for breach of the contract.

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*PRESENT: Taschereau, Rand, Fauteux, Abbott and Judson JJ.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Côté J. Appeal dismissed.

H. Aronovitch, for the defendant, appellant.

R. Bergeron, Q.C., for the plaintiff, respondent.

The judgment of Taschereau, Fauteux, Abbott and Judson JJ. was delivered by

ABBOTT J.:—This is an appeal from a judgment of the Court of Queen's Bench[1] unanimously affirming a judgment of the Superior Court rendered March 19, 1956, which had maintained respondent's action to the extent of $5,582.93 for lumber sold and delivered to appellant and had dismissed the latter's cross-demand claiming damages in the amount of $12,000 for breach of contract.

The facts are as follows. On November 26, 1949, the parties entered into a contract in writing for the sale of 1,000,000 feet of lumber, the contract reading as follows:

LEO PERRAULT Ltée

Manufacturiers, Bois de sciage

MONTREAL, 26 Nov. 1949.

ACHETE DE GEORGES TESSIER ST-FELICIEN
EXPEDIER A LEO PERRAULT LTEE
QUAND courant de l'anée 1950 sur demande
F.O.B. St. Felicien
1,000,000 pieds Epinette & Cyprès
qualité 5e Meilleur
Longueur 8 à 14 pieds
Largeur 100/3 200/4 300/5 200/6 100/7 50/8 30/9
20/10
scié 2" faible $1\frac{7}{8}$ mesuré $1\frac{3}{4}$ $45.00
La 6e qualité $37.00
Deux largeurs peuvent être inclus dans le même char.
TERMES Payable le 15 et le 30 du mois.

Fret comptant. Nous ne sommes pas responsables en cas de feu, grève, délai ou toute autre cause hors de notre contrôle. Réclamations devront être faites dans les dix jours après la réception des marchandises.
ACCEPTEE—

(signé) L. PERRAULT Acheteur (signé) GEORGES TESSIER Vendeur.

Subsequently, by mutual consent, it was agreed that the delivery point would be changed to Montreal and that the lumber would be measured by the purchaser on arrival there, for the purpose of determining the price of each shipment.

[1] [1958] Que. Q.B. 420.

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At the request of appellant, deliveries commenced at the beginning of June 1950, and they continued until October 11 when something in excess of 600,000 feet had been delivered. Respondent testified that his reason for stopping further deliveries was the appellant's failure to pay for the five cars unloaded at Montreal on various dates from September 18 to October 11, payment for which fell due on September 30 and October 15 respectively. At the trial, the president of appellant company attempted to justify its failure to pay for the lumber delivered upon an apprehension that respondent would fail to deliver the balance of the lumber contracted for and in order to protect a possible claim in damages for breach of contract. He based this apprehension on a letter from respondent dated September 16, 1950, which read as follows:

LES CHANTIERS TESSIER, LTEE
Marchands de Bois de Construction
Moulin à scie—Préparation du bois et Contracteur

ST-FELICIEN, Qué., 16 sept, 1950
Cté Lac St-Jean, P.Q.

Léo Perreault Ltée.
Montréal

Monsieur:—

Il me reste à vous expédier 2 ou 3 chars, bois acheté de Armand Bouchard. Comme je vous l'ai dit lors de mon passage à Montréal il ne me reste plus de bois. Je vous ai tout envoyé la production de l'hiver dernier. Aussitôt que j'aurai de grands chars je vous l'expédierai.

Bien à vous
(signé) GEORGES TESSIER

Obviously appellant paid no atention to this letter at the time and continued to accept deliveries in September and October. Moreover, appellant did not answer the said letter although, on September 23, it wrote to respondent acknowledging receipt of the two cars which it had received on September 18 and 19 and, as I have said, it continued to receive and accept further shipments up to October 11, 1950, although it failed to report to respondent the result of the measurement of the lumber in the last three cars shipped or to pay for them. Appellant continued to maintain this discreet silence until November 24, 1950,

when following the receipt of telegrams demanding payment of the amounts due for the five carloads of lumber delivered, it wrote to respondent in the following terms:

24 novembre 1950

Mr. Georges Tessier,
St-Félicien,
Cher monsieur,

Comme nous manquons de beaucoup de bois dans le moment, nous vous demandons de bien vouloir remplir la balance de notre contrat d'ici la fin de l'année.

Nous avons attendu ce bois au tout début de l'automne, et comme vous n'expédiez plus, ceci nous cause un grand dérangement. Votre coopération sera hautement appréciée.

Bien à vous,

Léo Perrault Ltée
Par: D. L. Jacques.

In a subsequent letter, dated December 10, 1950, appellant made the following reference to its indebtedness:

si tout le bois était entré il nous ferait plaisir de faire un règlement final et de contracter de nouveau pour votre coupe 1951.

On January 22, 1951, in reply to a further demand for payment from La Banque Canadienne Nationale to which the account had been assigned, appellant wrote the Bank as follows:

Que monsieur Tessier nous envoie le bois qu'il a contracté avec nous et il nous fera plaisir de vous faire parvenir sans retard le chèque que vous nous demandez.

On March 2, 1951, respondent instituted the present action to recover the price of the lumber delivered in September and October 1950 and asked that the contract be cancelled and annulled for the balance of the lumber remaining to be delivered under the said contract. In its defence, dated September 26, 1951, appellant pleaded in substance, that it had fulfilled all its obligations under the contract and justified its refusal to pay for the lumber already delivered upon the alleged refusal of the respondent to deliver the balance of the lumber called for by the contract. At the same time it filed a cross-demand claiming from respondent damages of $12,000 for breach of contract and asked that any amount found due to respondent be declared to be compensated.

In my opionion the appeal should be dismissed. I am in agreement with the reasons of Bissonnette and Hyde JJ. in the Court of Queen's Bench[1] and there is little that I

[1] [1958] Que. Q.B. 420.

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can usefully add to them. I cannot interpret the letter of September 16, 1950, as a refusal by respondent to deliver the balance of the lumber called for by the contract, particularly in the light of the subsequent conduct of both parties, to which I have referred. The principal obligation of a buyer is to pay the price (C.C. 1532), appellant was in breach of this obligation from September 30 and October 15 respectively, and its default continued up to the time respondent's action was instituted. At any time prior to that date, respondent was entitled at his option to treat that breach as terminating the contract for the balance, to take action for the amount owing and to ask in the conclusions of his action that it be dissolved: *Caplette et al v. Beaudoin*[1].

As to the cross-demand, the law is well settled in Quebec that in a synallagmatic contract the party to such contract who is himself in default cannot claim damages from the other party for breach of the contract. As Taschereau J. (speaking for himself, Locke, Fauteux and Abbott JJ.) has pointed out in *Lebel v. Commissaires d'Ecoles de Montmorency*[2]:

C'est la doctrine de NON ADIMPLETI CONTRACTUS qui veut que chaque contractant soit autorisé à considérer qu'il doit, comme une garantie de ce qui lui est dû, et tant que l'une des parties refuse d'exécuter son obligation, l'autre partie peut agir de même.

Planiol (Traité Elémentaire de Droit Civil Vol. 2, p. 329, N° 949) s'exprime ainsi:—

"Malgré le silence de nos textes, nous pouvons donc formuler cette règle: Dans tout rapport synallagmatique, chacune des deux parties ne peut exiger la prestation qui lui est due *que si elle offre elle-même d'exécuter son obligation . . . Les contrats synallagmatiques doivent donc, dans la rigueur du droit, être exécutés selon notre expression populaire 'donnant, donnant'."*

The appeal should be dismissed with costs.

RAND J.:—The reasons of my brother Abbott in which the majority of the Court concur assume that the letter of September 16 is not to be interpreted as a definitive notice that the vendor will not deliver any more lumber after the remaining three shipments in the letter mentioned; on that finding of fact the legal conclusion is drawn. I am inclined to view the letter as a positive repudiation of subsequent deliveries which would call for

[1] (1926), 41 Que. K.B. 398 at 405. [2] [1955] S.C.R. 298 at 305.

the consideration of important principles; but in the circumstances I defer to the interpretation of the majority and join in the dismissal of the appeal.

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Rand J.

Appeal dismissed with costs.

Attorneys for the defendant, appellant: Chait & Aronovitch, Montreal.

Attorneys for the plaintiff, respondent: Bergeron & Bergeron, Montreal.

EDOUARD PARENT AND ROLAND BELAIR (*Defendants*) ..... APPELLANTS;

1958
*Oct. 7
Nov. 19

AND

GERARD VACHON (*Plaintiff*) .....RESPONDENT.

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

Motor vehicles—Collision at intersection—Right of way—Nature of right—Duty of driver having right of way—Anticipation of danger—Evidence—Objection—Art. 340 of the Code of Civil Procedure.

The right of way at an intersection is not an absolute right in the sense that the driver, having the right of way, is not, by reason of it, relieved from the duty to take reasonable precautions, apt to prevent a collision, when the possibility of the danger of the collision is reasonably apparent.

The plaintiff, a passenger in a taxi-cab owned by the defendant P and driven by the defendant B, was injured following a collision at an intersection in the city of Montreal between the taxi-cab and a motor vehicle driven by O. The taxi-cab had the right of way through the intersection and was hit on its right rear by O's vehicle which failed to stop as required by a stop-sign. A witness who was driving on the same street as the taxi-cab but in an opposite direction, observing the speed of O's vehicle as it approached the intersection, anticipated that it would not stop and immobilized his own car. The action was maintained by the trial judge and by the Court of Appeal.

Held: The appeal should be dismissed and the action maintained.

Per Taschereau, Locke, Fauteux and Abbott JJ.: This Court should not interfere with the judgment below whose conclusion was authorized by the evidence considered.

Per Cartwright J.: Although on the evidence a different conclusion might well have been reached, the finding of fact made by the Courts below should not be disturbed.

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*PRESENT: Taschereau, Locke, Cartwright, Fauteux and Abbott JJ.

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Per Curiam: It was not necessary to consider the admissibility of the evidence, obtained in cross-examination and objected to under art. 340 of the *Code of Civil Procedure*, as it was regarded as unimportant by the trial judge and disregarded by the Court of Appeal.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Caron J. Appeal dismissed.

F. Mercier, for the defendants, appellants.

J. P. Massicotte, for the plaintiff, respondent.

The judgment of Taschereau, Locke, Fauteux and Abbott JJ. was delivered by

FAUTEUX J.:—Dans l'avant-midi du 4 novembre 1953, l'intimé, passager dans un taxi appartenant à Edouard Parent et conduit par son employé Roland Bélair, tous deux appelants en cette cause, fut grièvement blessé au cours de collisions successives intervenues à l'intersection des rues Viger et St-Hubert, à Montréal. Ce taxi procédait du sud au nord sur la rue St-Hubert et était entré dans l'intersection lorsqu'il fut frappé à l'arrière droite par un véhicule portant licence d'Ontario et conduit par Claude St-Onge, de l'est à l'ouest, sur la rue Viger. Comme conséquence du choc en résultant, le taxi fut projeté sur un autre véhicule voyageant du nord au sud sur la rue St-Hubert, et dont le conducteur Pierre Loyer avait, en anticipation du danger, assuré l'immobilisation sur la rue St-Hubert, à quelque dix ou douze pieds au nord de l'intersection.

L'intimé prit une action en dommages contre St-Onge et les deux appelants et demanda contre les trois une condamnation conjointe et solidaire. Advenant l'audition, son procureur déclara ne pas procéder contre St-Onge; ce dernier avait dû être assigné par la voie des journaux et n'avait pas comparu.

L'action fut maintenue contre Parent et Bélair et le jugement de la Cour Supérieure fut confirmé unanimement en Cour d'Appel[1]. De là le pourvoi devant cette Cour.

Les appelants soumettent deux griefs.

Le premier se fonde sur la prétention qu'aux fins de son jugement, le juge de première instance aurait tenu compte d'une preuve prise sous réserve d'une objection, basée sur

[1] [1958] Que. Q.B. *85.*

les dispositions de l'art. 340 du *Code de Procédure Civile* et dont le mérite n'aurait été décidé ni en première instance ni en appel.

Comme deuxième moyen, on a soumis que la preuve au dossier, même en incluant celle à laquelle on s'est objecté, n'établit pas la responsabilité des appelants.

Disons immédiatement, qu'en face de la preuve, la faute de St-Onge ne saurait faire de doute. Suivant le règlement municipal alors en vigueur, il était tenu d'arrêter son véhicule avant d'entrer dans l'intersection. Un signal d'arrêt bien en évidence lui rappelait cette obligation à laquelle il ne s'est pas conformé. D'après le témoignage de Loyer, seul témoin sur le point, St-Onge "allait une bonne vitesse, lui, mais c'est encore assez difficile à juger, peut-être 25 milles à l'heure" "ou peut-être entre 25 et 30; il allait assez vite parce que j'étais certain qu'il ne ferait pas le 'Stop' ". Dans leur défense à l'action, les appelants ont plaidé que St-Onge "roulait à une vitesse illégale, excessive et désordonnée", "était distrait, inattentif et n'avait pas le contrôle de sa voiture". C'est donc en constatant la vitesse à laquelle St-Onge s'approchait de l'intersection, que Loyer jugea que l'arrêt réglementaire ne serait pas fait et anticipa l'imminence du danger. Cette appréciation de la situation s'est avérée bien fondée.

Comme Loyer, Bélair, le conducteur du taxi, avait priorité de passage sur St-Onge; mais, contrairement à Loyer et fort de son droit, il poursuivit sa course, entra dans l'intersection à une vitesse de 15 à 20 milles à l'heure, dit-il, et la collision se produisit.

Le droit de passage, ainsi qu'il a été rappelé par cette Cour particulièrement dans *Thériault v. Huctwith et al.*[1] et *Provincial Transport Co. v. Dozois and Sansfaçon*[2], n'est pas un droit absolu. Le titulaire de ce droit n'est pas, en raison d'icelui, relevé de l'obligation de prendre, lorsque la possibilité d'un danger de collision est raisonnablement apparente, les précautions raisonnables aptes à prévenir cette collision. Aucun reproche n'est et ne peut être fait à Bélair sur la façon dont il conduisait sa voiture, si ce n'est que, dans les circonstances, il aurait manqué à ces prescriptions qualifiant le droit de passage.

[1] [1948] S.C.R. 86, 3 D.L.R. 542. [2] [1954] S.C.R. 223.

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Fauteux J.

Considérant toute la preuve au dossier, sauf, cependant, celle à laquelle les appelants se sont objectés, les juges de la Cour d'Appel en sont unanimement venus à la conclusion que ce reproche était fondé. Ils s'en sont exprimés comme suit:

> If it was evident to Loyer that there was a risk of collision with the truck, as in fact there was, it should have been equally evident to the appellant Bélair. If he had looked, he would have seen the danger and he owed a duty to his passenger to avoid it by slowing down or stopping. If he failed to look, he was likewise at fault.

Suivant le témoignage de Loyer, il est manifeste qu'en raison de la situation des lieux, Bélair était en meilleure position que ce dernier pour observer la venue du véhicule conduit par St-Onge. A sa droite, il n'y avait pas de construction, mais un parc public. Il était donc en mesure de réaliser la possibilité, sinon l'imminence, du danger de collision. Réalisant ce qu'il pouvait et devait réaliser, il était tenu de prendre et pouvait, comme Loyer, prendre les précautions raisonnables aptes à prévenir cette collision. Ainsi en a jugé la Cour d'Appel. La conclusion à laquelle elle en est arrivée est autorisée par la preuve qu'elle a considérée. Il n'y a donc pas lieu d'intervenir.

Il y a lieu d'ajouter que si le juge de première instance a référé à la preuve à laquelle les appelants se sont objectés, il a fait cette référence, comme l'indique M. le Juge Montgomery de la Cour d'Appel, simplement pour indiquer qu'il n'attachait aucune importance particulière à cette preuve et que, même si elle devait être considérée, elle ne pouvait changer la décision à laquelle il en était arrivé, sans ce faire.

Dans les circonstances, je renverrais l'appel avec dépens.

CARTWRIGHT J.:—The facts are stated in the reasons of my brother Fauteux.

It is clear that the main cause of the accident was the negligent and unlawful conduct of St-Onge who drove past the stop-sign and into St-Hubert Street at a speed estimated by the only witness who gave evidence on that point at between 25 and 30 miles per hour.

The question is whether the respondent has satisfied the onus which rested upon him of showing that Belair, the driver of the taxi-cab in which he was a passenger, was also guilty of negligence which was an effective cause of the accident.

Belair was proceeding at between 15 and 20 miles per hour as he entered the intersection and, assuming that his right of way would be respected, proceeded to cross it.

It is clear from many authorities including those referred to by my brother Fauteux and *Walker v. Brownlee*[1], that the driver entering an intersection although he has the right of way is under a duty to act so as to avoid a collision if reasonable care on his part will prevent it. In applying this rule to the facts of a particular case it is necessary to remember the statement of Lord Atkinson in *Toronto R. W. Co. v. King*[2]:

> Traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets.

In the case at bar in order to succeed it was necessary for the respondent to obtain a finding that after Bélair became aware, or by the exercise of reasonable care should have become aware, of St-Onge's disregard of the law he had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed himself.

The learned trial judge and the Court of Queen's Bench[3] were of opinion that the evidence of Loyer coupled with the absence of a satisfactory explanation by Bélair of his failure to appreciate the danger which Loyer said was apparent warranted a finding of negligence on the part of Bélair.

I have read all the evidence with care and if I had been called upon to decide the matter at first instance I incline to the view that I would have reached a different conclusion, particularly in view of the facts (i) that the highest estimate of the speed at which St-Onge was approaching was "between 25 and 30 miles per hour", (ii) that Loyer when he formed the opinion that St-Onge was not going to stop, was unaware that there was a stop-sign requiring the latter to stop before entering the intersection, and (iii) that Bélair's vehicle, which was being driven at a lawful and moderate rate of speed was struck on the right rear.

[1] [1952] 2 D.L.R. 450. [2] [1908] A.C. 260 at 269.
[3] [1958] Que. Q.B. *85*.

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Cartwright J.

However, the question is one of fact and I am not prepared to differ from the unanimous view of all the learned Justices in the Courts below.

I agree with my brother Fauteux that the evidence elicited from Bélair in cross-examination ,subject to Mr. Mercier's objection based on art. 340 of the *Code of Civil Procedure,* was regarded as unimportant by the learned trial judge and was disregarded by the learned Justices in the Court of Queen's Bench and that it is unnecessary for us to consider the question of its admissibility.

I would dispose of the appeal as proposed by my brother Fauteux.

Appeal dismissed with costs.

Attorneys for the defendants, appellants: Brais, Campbell, Mercier & Leduc, Montreal.

Attorney for the plaintiff, respondent: J. P. Massicotte, Montreal.

1958

*Jun. 20
Oct. 7

EDOUARD GAGNON (*Defendant*) .....APPELLANT;

AND

ARMAND DEROY (*Plaintiff*) .....RESPONDENT.

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

Motor vehicles—Negligence—Passenger injured—Use of car permitted on condition that it be driven by owner's chauffeur—Whether owner liable—Whether chauffeur in the performance of the work for which he was employed—Art. 1054 of the Civil Code.

The plaintiff sought damages for injuries suffered while he was a passenger in a car owned by the defendant and driven by the defendant's chauffeur.

The defendant's nephew, wishing to take a fishing party to a lake out of town and unable to drive, asked the defendant for the loan of the car and was told to make his arrangements with the chauffeur. The defendant was ready to lend the car if the chauffeur wished to drive. The chauffeur agreed although it was on a Sunday, a day when he was not working and for which he was not paid by the defendant. The chauffeur took the party to the lake, left them

*PRESENT: Taschereau, Locke, Cartwright, Fauteux and Judson JJ.

there and drove back to the city. In the evening, he went back, picked up the party and the accident occurred while they were returning to the city. The nephew was supposed to pay the expenses of the trip but the defendant says that he received no money. The trial judge and the Court of Appeal held the defendant liable.

Held (Taschereau and Fauteux JJ. dissenting): The appeal should be dismissed and the action maintained. At the time of the accident, the chauffeur was in the performance of the work for which he was employed pursuant to art. 1054 C.C.

Per Locke, Cartwright and Judson JJ.: The governing factor in this case, and the one involving the defendant in liability, is the insistence that the regular chauffeur, normally a servant of the owner, do the driving. The very purpose of that insistence was to make sure that the car was properly driven by a person in whom the owner had confidence and by no one else. The chauffeur was therefore on his master's business at the time, for the purpose of driving and looking after the car.

Per Taschereau J., *dissenting*: The driver was not in the performance of the work for which he was employed by the defendant. This was a pleasure trip in which the defendant did not participate and which was not arranged in his interest. There was no relation of master and servant. The driver was driving in the interest of another person and was not acting for the profit or advantage of his employer.

Per Fauteux J., *dissenting*: The plaintiff has failed to establish that at the time of the accident the driver was the servant of the defendant and was in the performance of the work for which he was employed. On Sundays—the day of the trip—the chauffeur never worked for and was never paid by the defendant who, on such days, had no power or control over him.

The defendant was not interested in his nephew's fishing expedition. He was willing to permit the use of his car but left it entirely to his nephew to obtain the assent of the chauffeur, and to make his arrangements with him. With such arrangements, as both his nephew and the chauffeur could make, he intended to take, and took no part. Even if the evidence could show that this permission to use his car was conditioned on it being driven by the chauffeur, it does not follow that this act of authority on the part of the owner was sufficient, in the circumstances, to create a relationship of master and servant between the defendant and the chauffeur.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming, Hyde J. dissenting, a judgment of Girouard J. Appeal dismissed, Taschereau and Fauteux JJ. dissenting.

G. Esnouf, Q.C., for the defendant, appellant.

L. A. Pouliot, Q.C., for the plaintiff, respondent.

TASCHEREAU J. (*dissenting*):—Le 14 juin 1953, une voiture automobile, propriété de l'appelant Edouard Gagnon, est venue en collision avec une autre voiture

[1] [1957] Que. Q.B. *704*.

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automobile appartenant à Georges Doyon. La voiture d'Edouard Gagnon l'appelant était conduite par son cousin Alphonse Gagnon. Cette collision est survenue dans la cité de Québec, à l'intersection du boulevard des Alliés et de la route de la Savane, et se produisit vers 10.40 heures du soir.

Armand Deroy l'intimé, était un passager dans la voiture d'Edouard Gagnon, et comme conséquence de cet accident, il a subi des lésions corporelles graves et permanentes pour lesquelles il a réclamé en Cour supérieure la somme de $24,247.08.

L'honorable juge de première instance a maintenu l'action contre les trois défendeurs Edouard Gagnon, Georges Doyon et Alphonse Gagnon le conducteur, et les a condamnés à payer conjointement et solidairement, la somme de $8,795 avec intérêts et dépens. De ce jugement, seul Edouard Gagnon, le propriétaire du véhicule, a appelé, et la Cour du banc de la reine[1] a rejeté l'appel, M. le Juge Hyde étant dissident.

La preuve révèle qu'Alphonse Gagnon, le conducteur de la voiture de l'appelant, conduisait souvent à titre d'employé la voiture de ce dernier, mais, la seule question qui se pose est de savoir si le dimanche en question, date de l'accident, Alphonse Gagnon était dans l'exercice de ses fonctions quand ledit accident est survenu. Alphonse Gagnon conduisait habituellement pour son patron, un cheval dans la forêt, mais à certaines occasions, il avait charge de la camionnette de l'appelant, pour conduire les ouvriers au travail et pour les en ramener. Dans l'occurrence, il s'agissait d'un voyage de pêche organisé par un nommé Gaston Bernard qui désirait, avec des amis, se rendre au lac St-Joseph.

Dans la voiture de l'appelant, se trouvaient huit personnes dont Alphonse Gagnon le conducteur, Armand Deroy la victime de cet accident, et Gaston Bernard un neveu de l'appelant. Alphonse Gagnon était accompagné d'une amie, et après avoir reconduit les voyageurs au lac St-Joseph, le matin pour y faire la pêche, il est revenu à Québec, puis est retourné les chercher le soir. C'est en revenant que se produisit l'accident.

[1] [1957] Que. Q.B. *704*.

Il est admis que ce voyage fut organisé par Gaston Bernard, qui a demandé à son oncle l'appelant, de lui prêter sa voiture, mais comme il ne savait pas conduire, il fut entendu qu'Alphonse Gagnon conduirait *s'il consentait à le faire*. Sur ce point, voici le témoignage, lors de l'examen au préalable, d'Edouard Gagnon lui-même:

R. C'était un voyage, c'est un de mes neveux qui m'avait demandé pour le monter au Lac St-Joseph. Et je lui ai dit, 'arrange-toi avec le chauffeur, s'il veut te monter, vous paierez les dépenses de la machine.' Le chauffeur l'a monté.

Q. Il vous a payé ça à vous?

R. Ils n'ont pas payé du tout.

Q. Ils allaient à quel endroit?

R. Au Lac St-Joseph.

Q. Vous dites qu'ils n'ont pas payé, ils n'ont peut-être pas payé à vous, mais est-ce qu'ils ont payé à d'autres personnes, est-ce qu'ils ont payé Alphonse Gagnon?

R. Non monsieur.

Q. Ni, à votre neveu?

R. Le neveu, je ne le sais pas.

Q. Vous ne lui avez pas demandé?

R. Non monsieur.

Q. Il s'appelle Gaston Bernard?

R. Oui.

Q. C'était arrangé avec vous?

R. Avec lui, Gaston Bernard, il payait les dépenses.

Q. Gaston Bernard, il vous en avait parlé, il vous avait demandé le char?

R. Il avait demandé le char, il payait les dépenses je lui ai dit: 'Demande à Alphonse s'il veut te monter, c'est correct.'

Q. Vous avez . . . . ils ont demandé à Alphonse de les monter?

R. Oui monsieur.

Q. Je comprends que vous le payiez, ça fait partie de son travail?

R. Non, cette journée-là, je ne le payais pas, c'était un dimanche.

Q. Il allait pour s'amuser?

R. Il montait avec son amie qui était avec lui.

Q. C'était pour un voyage pour son plaisir, c'était des jeunesses?

R. Il montait le voyage, il redescendait, et il remontait les chercher

Il ressort de ce témoignage, comme d'ailleurs du reste de toute la preuve, que l'appelant a consenti à ce que Bernard montât avec ses amis au lac St-Joseph, ce dimanche en question, et que la voiture serait conduite par Alphonse Gagnon, s'il consentait, vu que Bernard n'avait pas la compétence voulue. Il est aussi établi qu'à ce moment, il existait une période de chômage, et qu'Alphonse Gagnon ne travaillait pas, *et n'était jamais payé le dimanche*. Il s'agissait bien d'un voyage de plaisir, auquel l'appelant ne participait pas et qui n'était nullement organisé dans son intérêt. Il était complètement étranger à cette excursion.

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Dans ces conditions, l'appelant était-il responsable des conséquences de cet accident, et le conducteur agissait-il dans l'exécution de ses fonctions? Avec déférence je ne le crois pas. Je ne puis voir, dans l'occurrence, aucune relation de maître et de préposé entre l'appelant et le conducteur de la voiture. Le conducteur qui était libre de refuser, a consenti, pour obliger Bernard, à conduire la voiture pour ce voyage. Il a utilisé son temps libre pour faire une course étrangère à ses fonctions habituelles, et il n'agissait pas pour le profit ou l'avantage de son patron.

Il a été souvent décidé par nos tribunaux que si un employé conduit la voiture de son maître pour ses fins personnelles, il n'engage pas la responsabilité de ce dernier. Dans l'occurrence, il conduisait pour Bernard organisateur de cette randonnée.

Il est essentiel, pour que le commettant soit responsable de l'acte de son employé, que ce dernier *fasse l'affaire du patron,* au moment de l'acte dommageable. Comme le dit M. le Juge Hyde de la Cour du banc de la reine[1]:

> As Alphonse Gagnon was prepared, to devote his *off-duty day* to driving his employer's car when loaned to Bernard and in the sole interest of the latter and his friends, he was not, in my opinion, in the performance of the work for which he was employed by Appellant.

Dans la cause de *The Governor and Company of Gentlemen Adventures of England v. Vaillancourt*[2], Sir Lyman Duff a dit:

> "Le fait dommageable" must be something done in the execution of the servant's functions as servant or *in the performance of his work as servant.*

Vide aussi *Vezina v. Compagnie d'Autobus de Charlesbourg*[3], *Alain v. Hardy*[4], *Roy v. Consolidated Glass Co. of Canada Ltd.*[5], Beaudoin "Responsabilité en cas d'accident d'automobile", p. 199, Nadeau "Traité de droit civil", vol. 8, no. 412, p. 359. La jurisprudence, comme les auteurs, enseignent que le commettant est celui dans l'intérêet duquel le préposé exerce ses fonctions.

[1] [1957] Que. Q.B. *704.*
[2] [1923] S.C.R. 414 at 416.
[3] (1940), 78 Que. S.C. 174.
[4] [1951] S.C.R. 540.
[5] [1945] Que. K.B. 565.

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Dans une cause de *Marois v. Hibbard Motor Sales*[1], il a été décidé, et je m'accorde avec cet exposé de la loi:

> Lorsqu'un *employé, avec le consentement implicite du patron, se sert d'une automobile de ce dernier, le dimanche, pour les fins d'une promenade,* l'acte du conducteur reste en dehors de ses fonctions. Au cas d'accident, il n'y a pas lieu d'appliquer l'article 1054 C.C. relatif à la responsabilité du commettant.

Je ne crois pas que la cause de *Grimaldi v. Rostaldi*[2] puisse nous guider dans la présente cause, car les faits se présentaient sous un jour entièrement différent. Dans cette cause, il a été établi que le maître, qui était propriétaire de l'automobile, avait donné des instructions précises à son chauffeur, et que ce dernier *agissait dans son intérêt.* Il restait un serviteur, dans l'exercice de ses fonctions, et il n'y a pas eu déplacement de responsabilité.

Pour ces raisons, je crois que l'appel doit être maintenu, et l'action rejetée avec dépens de toutes les Cours.

The judgment of Locke, Cartwright and Judson JJ. was delivered by

JUDSON J.:—Both the learned trial judge and the Court of Appeal[3], Hyde J. dissenting, have found the appellant liable in damages for injuries suffered by the respondent, who was a passenger in the appellant's car at the time of the accident. The accident occurred on Sunday, June 14, 1953, at eleven o'clock at night. The driver of the car was Alphonse Gagnon, a cousin of the appellant Edouard Gagnon, and the liability of Edouard depends upon whether Alphonse was at the time of the accident a servant of Edouard in the performance of the work for which he was employed. (Art. 1054 of the *Civil Code.*)

The facts are rather unusual but not seriously in dispute. Edouard's nephew, Gaston Bernard, wished to take a fishing party to a lake near the city of Quebec. Gaston was unable to drive a car. He asked his uncle, Edouard, for the loan of the car and the uncle told him to make his arrangements with the chauffeur, Alphonse. If Alphonse wished to drive, and it was a Sunday when he was not working, Edouard was ready to give his permission. The nephew was supposed to pay the expenses of the trip but the uncle says that in fact he received no money. It follows

[1] [1943] Que. S.C. 296. [2] [1933] S.C.R. 489, 4 D.L.R. 647.
[3] [1957] Que. Q.B. *704.*

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from the uncle's evidence that he left it to the nephew, Gaston Bernard, to make the arrangements with the chauffeur, Alphonse. Alphonse gives a slightly different account of the transaction. He says that he was asked by his employer, Edouard, to make the trip. I do not think that it makes any difference who asked him to make the trip. The fact is that the car would only be available for the transport of Gaston Bernard and his party if Alphonse was willing to drive, and Alphonse was free to accept or refuse.

Alphonse drove the party to the lake in the morning and came back with the car. He returned in the evening to fetch the party back and it was on the return journey that the accident occurred. Alphonse was not paid by his employer for this day and Sunday was not a normal day of employment. His ordinary duties were to drive this vehicle for the transportation of other employees to and from work in the woods and, when he was not doing this, to work as a logger. The fishing trip was totally unconnected with the ordinary business operations of the employer and the ordinary employment of Alphonse. Nevertheless, my opinion is that the employer is liable in the circumstances of this case under the following clause of art. 1054 of the *Civil Code,* which reads:

> Masters and employers are responsible for the damage caused by their servants and workmen in the performance of the work for which they are employed.

The test for the determination of responsibility has been formulated in these terms by Duff J. in *The Governor and Company of Gentlemen Adventurers of England v. Vaillancourt*[1]:

> *Le fait dommageable* must be something done in the execution of the servant's functions as servant or in the performance of his work as servant. If the thing done belongs to the kind of work which the servant is employed to perform or the class of things falling within *l'exécution des fonctions,* then by the plain words of the text responsibility rests upon the employer. Whether that is so or not in a particular case must,

[1] [1923] S.C.R. 414 at 416.

I think, always be in substance a question of fact, and although in cases lying near the border line decisions on analogous states of fact may be valuable as illustrations, it is not, I think, the rule itself being clear, a proper use of authority to refer to such decisions for the purpose of narrowing or enlarging the limits of the rule.

And further:

It cannot be insisted upon too strongly that an act done by an employee *à l'occasion* of his service may or may not be one for which the employer is responsible under Article 1054 C.C., depending in every case upon the answer to the question: "Was the act done in the execution of the employee's service or in the performance of the work for which he was employed?"

The inference that I draw from the transaction, which is the one drawn by the learned trial judge and the majority of the Court of Appeal[1], is that Edouard was furnishing transportation to his nephew and his fishing party by permitting the use of his car, to be driven by the chauffeur who ordinarily drove it. If that chauffeur had refused to drive, there would have been no car available to Gaston. Alphonse was at this time in the performance of work for which he was employed, namely, driving his master's car, and at the time of the accident he was his master's servant. Gaston and his party were at the time of the accident the guests of Edouard in Edouard's car driven by Edouard's chauffeur. Gaston Bernard had neither control of the car nor control of the chauffeur. There was no delivery of possession of the car and no loan of it to him. He was taken to the lake and left there. The car was driven back to the city by the chauffeur and not left in the possession of Gaston Bernard. At the proper time the chauffeur returned to pick up the party. This double journey is of considerable significance to me.

I agree with Taschereau J. in the Court of Queen's Bench that the case cannot be distinguished in principle from *Grimaldi v. Restaldi*[2], which was also a case where a car and chauffeur were provided for a guest. Rinfret J. said at p. 492:

[1] [1957] Que. Q.B. 704.

[2] [1933] S.C.R. 489, 4 D.L.R. 647.

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Il faut se demander qui avait le contrôle de l'employé au moment du fait qui a causé l'accident; et, à son tour, ce contrôle dépend du droit de donner des instructions et des ordres, du "droit de surveillance et de direction" (Dalloz, 1909-1-135).

This principle does not involve physical presence and physical ability to give orders at the time of the accident. Liability follows from the legal relationship. In the present case the very purpose of insisting that the chauffeur go with the car was to make sure that it was properly driven by a person in whom the owner had confidence and not by any other person who might be chosen to drive by Gaston Bernard. The governing factor, in my opinion, in this case and the one which involves the appellant in liability is the insistence upon the regular chauffeur, normally a servant of the owner, doing the driving. He was on his master's business at the time of the accident for the purpose of driving and looking after the car.

For these reasons and those given by the learned trial judge and the majority of the Court of Appeal, I would dismiss the appeal with costs.

FAUTEUX J. (*dissenting*):—L'action de l'intimé contre l'appelant se fonde sur les dispositions de l'art. 1054 C.C. L'unique question en litige est de savoir si l'intimé a établi, comme il y était tenu pour réussir, qu'au moment de cet accident imputé à Alphonse Gagnon, celui-ci était le préposé de l'appelant et agissait dans l'exécution des fonctions auxquelles ce dernier l'avait employé.

L'accident s'est produit un dimanche, au retour d'une excursion de pêche, alors que le camion de l'appelant, conduit par Alphonse Gagnon, est entré en collision avec un autre véhicule; et, dans le résultat, l'intimé fut blessé.

Cette partie de pêche avait été conçue et organisée par Gaston Bernard, le neveu de l'appelant. Pour faire cette excursion, Bernard demanda à son oncle s'il pouvait avoir l'usage du camion. Ce dernier lui dit: "Arrange-toi avec le chauffeur, s'il veut te monter vous paierez les dépenses de la machine."

L'appelant est bûcheron et, lorsqu'il avait du travail, employait Alphonse Gagnon comme conducteur de son camion pour reconduire et ramener les bûcherons du chantier. Les dimanches, cependant, Alphonse Gagnon était maître absolu de son temps et n'était aucunement asujetti aux ordres de l'appelant; il n'était pas sous emploi et n'était pas payé. On était, de plus, au temps où s'est produit cet accident, en période de chômage.

L'appelant n'avait et, de fait, ne porta aucun intérêt à cette expédition. Totalement étranger à cette initiative de son neveu, il entendait demeurer étranger à l'accord que ce dernier et Alphonse Gagnon pouvaient conclure et, de fait, il y demeura étranger. Dès qu'il n'était pas appelé à payer les dépenses de gazoline et qu'Alphonse Gagnon accepterait, peu importe les conditions de cette acceptation, de rendre à Bernard le service que celui-ci lui demanderait, l'appelant était consentant de permettre l'usage de son véhicule. Le fait qu'il ait invité son neveu à s'entendre avec Gagnon paraît, suivant la preuve, tout aussi compatible avec le fait que le neveu ne savait pas conduire qu'avec la conclusion que la conduite du véhicule par Gagnon conditionnait la permission donnée. Mais, même si la preuve justifiait de conclure que la conduite du véhicule par nul autre que Gagnon était la condition de cette permission, je ne crois pas qu'il s'ensuivrait que cet acte d'autorité exercé par le propriétaire du camion soit suffisant, dans les circonstances de cette cause, pour établir entre lui et Gagnon, une relation de commettant et préposé. Comme déjà indiqué, il n'y avait les dimanches aucune relation d'employeur et d'employé, de commettant et de préposé, entre l'appelant et Gagnon; ces jours-là, le premier n'avait aucun pouvoir ou droit sur le second. C'est en raison de ce fait non contredit que l'appelant invita, comme il le devait nécessairement, son neveu à s'arranger avec Gagnon. En somme, il a assujetti la permission donnée à son neveu d'utiliser son camion, à l'établissement d'une entente entre ce dernier et Gagnon, entente à

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laquelle lui-même entendait rester étranger et suivant laquelle Gagnon pouvait participer à l'expédition au même titre que Bernard ou en devenir le préposé. A la vérité, Gagnon gardait le droit d'imposer comme condition de son accord que Bernard paie ses services; et l'eût-il fait, on ne mettrait pas en doute la nature des relations juridiques ainsi établies entre lui et Bernard, aussi bien que la responsabilité qui pouvait en découler pour ce dernier. Mais le fait que Gagnon n'ait pas exigé de paiement et qu'il ait, pour des raisons qui lui sont propres, trouvé autrement son compte pour le service qu'il accepta de rendre à Bernard, ne peut avoir pour résultat de constituer l'appelant employeur ou commettant de Gagnon.

Dans *Grimaldi v. Restaldi*[1], la question à déterminer était de savoir si Grimaldi, employeur du chauffeur conduisant Restaldi lors de l'accident, avait retenu pour lui-même, au lieu de les céder à Restaldi, le pouvoir et le droit de donner des instructions à son chauffeur. Cette question peut difficilement se présenter en l'espèce puisqu'à la vérité, l'appelant n'avait, les dimanches, comme il l'a reconnu en invitant son neveu à s'entendre avec Gagnon, aucun pouvoir ou droit sur ce dernier.

Pour ces raisons et celles données par mon collègue Monsieur le Juge Taschereau, je suis d'avis que l'intimé n'a pas prouvé, comme il lui incombait, qu'au moment de cet accident imputé à Gagnon, celui-ci était le préposé de l'appelant et agissait dans l'exercice des fonctions auxquelles ce dernier l'avait employé; je maintiendrais l'appel et rejetterais l'action avec dépens de toutes les Cours.

Appeal dismissed with costs, Taschereau and Fauteux JJ. dissenting.

Attorney for the defendant, appellant: G. Esnouf, Québec.

Attorneys for the plaintiff, respondent: Bherer, Juneau & Côté, Québec.

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[1] [1933] S.C.R. 489, 4 D.L.R. 647.

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DAME LINNIE HOLLAND McEWEN (*Plaintiff*) ..... APPELLANT;

AND

ESTATE CHARLES RUITER JENKINS ET AL. (*Defendants*) ..... RESPONDENTS;

AND

EDITH HOLLAND ET AL. ..... MIS-EN-CAUSE.

*Mar. 6, 7, 10, 11, 12
*Apr. 23, 24, 25
Oct. 7

DAME LINNIE HOLLAND McEWEN (*Plaintiff*) ..... APPELLANT;

AND

ESTATE CHARLES RUITER JENKINS (*Defendant*) ..... RESPONDENT;

AND

WESLEY H. BRADLEY ET AL. (*Defendants*) ..... MIS-EN-CAUSE.

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

Wills—Power of attorney—Capacity—Burden of proof—Action to set aside will and power of attorney—Accounting—Arts. 831, 835, 919 of the Civil Code—Arts. 566, 578 of the Code of Civil Procedure.

When a *prima facie* case is made against the *juris tantum* presumption of sanity, the person supporting the instrument has the burden of showing that the giver of the instrument was of sound mind. This obligation of proving lucid intervals by preponderance of evidence applies in the case of a will as well as in the case of a power of attorney. Furthermore, in order to avoid the instrument it is not necessary that the giver be totally insane, the rule being that a disposing mind and memory is one able to comprehend, of its own initiative and volition, the essential elements of the transaction.

The plaintiff, a particular legatee under the will of the deceased and also one of his heirs-at-law as a first cousin, instituted proceedings in annulment of the deceased's will, made 25 days before his death, and of a power of attorney signed 14 months prior, on the ground of fraud and incapacity. The power of attorney had been signed in favour of the defendant J, and both he and the defendant B had been appointed executors and trustees by the will. The action was directed against both defendants personally.

The trial judge held that both the will and the power of attorney were null and void and ordered the defendant J to account for his administration under the power of attorney, and dismissed the action against the

*PRESENT: Taschereau, Rand, Cartwright, Fauteux and Judson JJ.

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defendant B. The plaintiff appealed on the grounds that the trial judge had failed to find fraud, had failed to order both defendants to account for their administration under the will, and that the action against B had been dismissed. The estate of the deceased defendant J cross-appealed, but was the only party to do so.

The Court of Appeal, by a majority judgment, dismissed the appeal, declared valid the power of attorney and confirmed the judgment at trial as to the invalidity of the will on the ground that it had become *res judicata* since no interested party had appealed the judgment on this point.

Held: The action should be maintained. The will and the power of attorney were null for lack of mental capacity, and, furthermore, the judgment at trial avoiding the will was *res judicata* and could not be challenged.

The proponents of the will and of the power of attorney have failed to satisfy the onus, resting upon them, of establishing that at the time of signing the instruments, the deceased had the necessary mental power to execute them and that his weakness of mind allowed him to comprehend the effect and consequences of the acts which he performed. It has been shown that the deceased's mind was, at the relevant times, habitually in a state of confusion, incapable of discernment, and no satisfactory evidence was adduced that the instruments were executed during periods of lucid intervals.

The plaintiff, being an heir *ab intestat* if the will was void, had a sufficient interest to attack the power of attorney so as to increase the value of the estate.

None of the universal legatees having appealed to the Court of Appeal, the judgment at trial avoiding the will became *res judicata.* The executor had no interest to appeal that part of the judgment, as he does not represent the estate. His intervention in the contestation of a will is limited by art. 919 C.C. to exceptional instances only.

As the obligation to account rests also upon a person whose authority to act is derived from an instrument found void for lack of mental capacity, there should be an accounting of the administration done under the will as well as under the power of attorney.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], varying a judgment of Mitchell J. Appeal allowed.

R. S. Willis, C. D. Gonthier and *J. D. Hackett,* for the plaintiff, appellant.

A. Rousseau, for the defendant Jenkins Estate.

J. de M. Marler, Q.C., for the mis-en-cause.

The judgment of the Court was delivered by

TASCHEREAU J.:—We are concerned with two appeals in the present matter, in which Dame Linnie Holland McEwen is the appellant in both, arising out of an action instituted by her in the Superior Court for the district of St. Francis,

[1] [1955] Que. Q.B. 785.

in annulment of a power of attorney and of the last will of the late John C. Holland executed by him some time prior to his death, by reason of fraud and incapacity.

The plaintiff-appellant is a first cousin of the late John C. Holland and she is a particular legatee of $1,000 under the will, and she is also one of his heirs-at-law.

John C. Holland, retired printer and publisher, domiciled in the village of Rock Island in the district of St. Francis, Province of Quebec, made his last will and testament in the form derived from the laws of England on February 18, 1949. After having bequeathed all his property both moveable and immoveable, real and personal, to his executors and trustees, IN TRUST, he made some particular legacies to his sister-in-law Mrs. Agnes Holland, and to each of eleven cousins, of $1,000 each. He left to his friend Dr. Carson, to Mirabelle Robinson, to his physician Dr. Schurman, the sum of $1,000 each, and to Mrs. Helen A. Batchelor and Alma Talbot the sum of $500 each. He instructed his trustees to pay without interest the rest, residue and remainder of his estate in equal parts, share and share alike, to the Salvation Army and to the Canadian Red Cross Society, to be used for the general charitable and philanthropic activities of these two organizations.

He appointed as executors and trustees his friend Charles R. Jenkins, of the village of Rock Island, and his attorney Wesley H. Bradley, of the city of Sherbrooke.

On January 30, 1948, John C. Holland also signed a general power of attorney in favour of Charles R. Jenkins, appointing him his mandatory as his sole and exclusive agent and attorney, with full rights to sell, buy, hypothecate, discharge, discuss, transact, compromise, settle and turn to any account, the whole or any part of certain described properties in the power of attorney at his full discretion. Jenkins, in the same document, agreed and obligated himself to render an accounting to the mandator of all things done by him at the request of the mandator, and to show the equal division of profits and revenues to which each of them was entitled, by reason of an understanding existing between them in connection with said properties, but no evidence of which has been adduced.

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This power of attorney was signed in the presence of Dr. Schurman, his physician, and Mrs. Helen A. Batchelor, his nurse.

John C. Holland died on March 15, 1949, viz, 14 months after signing this power of attorney, and 25 days after the signature of his last will and testament.

The appellant who, under the will, inherited as a particular legatee of a sum of $1,000, and who, as a first cousin is an heir-at-law, instituted legal proceedings in the month of August 1950, in which she claimed that the late John C. Holland was not, after January 20, 1948, of sound and disposing mind, memory or judgment; that he was incapable of assenting to and understanding any act of alienation of his property by will, sale or otherwise, and that at and after January 20, 1948, he was under the undue influence, power and control of one of the defendants, Charles R. Jenkins. She concludes that the power of attorney executed on January 30, 1948, by the late John Calvin Holland should be declared invalid, illegal and of no effect; that all the deeds executed by the said defendant Jenkins under the power of attorney be annulled, set aside and declared invalid; that the last will of the late John Calvin Holland be declared invalid and of no effect; that the executors and defendants be condemned jointly and severally to account to plaintiff and to the mis-en-cause, the heirs-at-law, for the property of the late John Calvin Holland and for their administration thereof, and give to plaintiff and the mis-en-cause, the heirs-at-law, the immediate possession thereof; and further that the defendants, personally, be condemned to pay the costs of the action, and that the mis-en-cause be condemned to pay the costs only in the event of contestation.

The action was directed against Charles Ruiter Jenkins and Wesley H. Bradley personally, and the heirs-at-law were mis-en-cause, as well as the other parties referred to as the legatees mentioned in the last will and testament of the late John C. Holland. Five other parties of Rock Island and the surrounding villages referred to as the purchasers, under the power of attorney, were also mis-en-cause, as well as James W. Downing, Registrar for the Stanstead division, registry office of the district of St. Francis.

The Superior Court maintained with costs the plaintiff's action against the defendant Charles R. Jenkins, dismissed it against Wesley H. Bradley, and maintained it against the mis-en-cause, contesting, The Salvation Army and the Canadian Red Cross Society, with costs against the estate of the late John C. Holland. The Court decided that the alleged last will and testament of the late John C. Holland was null and void for all legal purposes as well as the power of attorney dated January 30, 1948. The Court also annulled, saving the rights of the purchasers to claim from the estate of the late John C. Holland any and all things to which they were by law entitled, six deeds of sale executed by Charles R. Jenkins under the power of attorney, and finally declared Charles R. Jenkins *comptable* to the estate of the late John Calvin Holland, of his administration as a result of the said power of attorney.

The plaintiff, although having succeeded on several grounds in the Superior Court, appealed from that judgment alleging that the trial judge had failed to grant some of the remedies prayed for. Particularly, the plaintiff complained that the Superior Court failed to find fraud, failed also to order the defendants Charles R. Jenkins and Wesley H. Bradley to account for their administration of the property of the late Holland, condemning only Jenkins to account for his administration under the power of attorney, without setting a delay within which the account must be rendered, and because it dismissed the action against defendant Bradley.

The Court of Queen's Bench[1] unanimously dismissed this appeal and confirmed the judgment of the learned trial judge as to the points appealed from.

Before the Court of Queen's Bench, the estate, by reprise d'instance, of the late Charles Ruiter Jenkins cross-appealed, and the Court, Mr. Justice Gagné dissenting, allowed the appeal of the late Charles Ruiter Jenkins, declared valid the power of attorney executed by Holland in his favour, quashed the order enjoining Jenkins to account for his administration under the power of attorney, and dismissed the action against him. The Court

[1] [1955] Que. Q.B. 785.

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of Queen's Bench, however, confirmed the judgment of the Superior Court, which had maintained the action against the mis-en-cause contesting, the Salvation Army and the Canadian Red Cross Society, the sole residuary legatees under the will, and had declared the will invalid, on the ground that this judgment had become *chose jugée*, no interested party having appealed from the judgment on this point. It will be noted that *only* the estate of Charles R. Jenkins cross-appealed, and that neither the Salvation Army nor the Canadian Red Cross Society, who were universal legatees under the will annulled by the judgment of the Superior Court, availed themselves of this right.

Before this Court, the plaintiff in the Superior Court Lennie Holland McEwen appeals from the judgment of the Court of Queen's Bench dismissing her appeal, and also appeals from the judgment of the same Court allowing the appeal of Charles R. Jenkins. The Canadian Red Cross Society and the Salvation Army before this Court cross-appeal from the judgment confirming the maintaining of the plaintiff's action against them, and confirming the declaration that the will and probate were null and void.

The first point that has to be considered is the capacity of the late John C. Holland to execute the power of attorney and the last will and testament which he has made. The learned trial judge has, I think, clearly expounded the law in his judgment. He applied the principle that if it is once shown that a party is not in his right mind, in reference to a future transaction, the onus is thrown upon the party who wants to sustain the validity of that transaction to show that, although not at one time in his right mind, he had recovered and was *compos mentis*. (Vide *Russell v. Lefrancois*[1], *Phelan v. Murphy*[2], *Thuot v. Berger*[3], *Mathieu v. Saint-Michel*[4]).

In this last case Mr. Justice Rand, speaking for Taschereau and Locke JJ., said at page 487:

> The evidence . . . was sufficient to raise a prima facie presumption of that degree of mental weakness or unsoundness and to cast upon those supporting the instrument of donation the burden of displacing it by convincing proof that the deceased at the time was able to give such a consent.

[1] (1883), 8 S.C.R. 335.
[2] (1938), 76 Que. S.C. 464.
[3] (1938), 77 Que. S.C. 211.
[4] [1956] S.C.R. 477, 3 D.L.R. (2d) 428.

In the same case at page 488, Mr. Justice Abbott speaking for himself and Mr. Justice Fauteux, said:

> In my opinion the medical evidence was sufficient to raise a prima facie presumption of mental incapacity. On the principle enunciated in *Russell v. Lefrançois* (supra), the burden of establishing capacity to have made the donation and the will was therefore shifted to the propounding party and in my view the appellants failed to discharge that burden.

The Judicial Committee of the Privy Council had also said previously in *Robins v. National Trust Company*[1]:

> Those who propound a will must show that the will of which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases, if there is no suggestion to the contrary, any man who is shown to have executed a will in ordinary form, will be presumed to have capacity, but the moment the capacity is called in question, then at once the onus lies on those propounding the will to affirm positively the testamentary capacity.

In *Baptist v. Baptist*[2], it was held, affirming the judgment of the Court below,

> that art. 831 C.C. which enacts that the testator must be of sound mind, does not declare null only the will of an insane person, but also the will of all those whose weakness of mind does not allow them to comprehend the effect and consequences of the act which they perform.

The first part of art. 831 C.C. reads as follows:

> Every person at full age, of sound intellect, and capable of alienating his property, may dispose of it freely by will, without distinction as to its origin or nature, . . .

Article 835 C.C. says:

> The capacity of the testator is considered relatively to the time of making his will . . .

It is in the light of these sections that it has been established by the jurisprudence of the Province, that if a *prima facie* case is made against the *juris tantum* presumption of mental sanity, the person supporting the instrument has the burden to show that the testator was of sound mind.

Moreover, it has been decided, and these decisions are no longer challenged, that in order to avoid a will, it is not necessary that the testator be *totally insane,* and the rule is that a disposing mind and memory is one able to comprehend, of its own initiative and volition, the essential elements of will-making, property, objects, just

[1] [1927] A.C. 515, 1 W.W.R. 692, 2 D.L.R. 97.
[2] (1894), 23 S.C.R. 37.

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claims to consideration, revocation of existing dispositions, and the like. "Merely to be able to make rational responses is not enough, nor to repeat a tutored formula of simple terms. There must be a power to hold the essential field of the mind in some degree of appreciation as a whole." *Leger v. Poirier*[1].

It is with these fundamental legal principles in mind that the learned trial judge approached the facts of the present case.

For a long time Holland had suffered from diabetes and in the year 1939 he had an automobile accident, as a result of which he was taken to a hospital in the city of Sherbrooke. He remained in the hospital for several months under the care of Dr. Ellis, who prescribed insulin for his diabetic condition. When he returned to Rock Island, his home town, his capacity had lessened considerably, and he was lame and walked with a cane. Very often he would fall asleep on his desk and at his meals. He showed less interest in his life, and the trial judge states that the evidence reveals that there was a gradual debility in his physical and mental functions.

On January 20, 1948, he was stricken with *un caillot au cerveau* which caused partial paralysis, and which necessitated his confinement to bed in the Newport General Hospital where he died on March 15, 1949. After his admission to the hospital on March 13, 1948, Mr. Justice White, after taking cognizance of the deliberations of the family council, found that Holland was incapable of carrying on his business, and appointed Herman A. Carson as judicial adviser with the powers given by art. 351 C.C. The learned trial judge also found that from the time that Holland became hospitalized until his death, he was a very sick man. This was the opinion of the medical experts, and it was also apparent to persons with no medical training who visited him at the hospital.

After having reviewed all the evidence on this question of fact, the trial judge says:

> I have heard the witnesess with the exception of Mrs. Batchelor and Miss Talbot, who were heard under a rogatory commission, and after having carefully studied and considered the voluminous transcription of all the evidence, I am left with a broad though clear cut conviction that the mind of the testator during the whole period of this fourteen months

[1] [1944] S.C.R. 152.

was one without any interest, devoid of initiative, and not capable of discernment. This state of mind is a complete contrast to the aggressive, independent and active mind of the late Mr. Holland before his illness. There is not one occasion indicated in the evidence when he can be said to have asserted his own will while in the hospital. There are multiple instances of his agreeableness. He always agreed. It is interesting to note that at any time when his consent or refusal to a proposal was obtained from him, it was at the instance of a question put to him, often in a leading form. On the whole taken together, the balance of the evidence is weighted heavily against the capacity of the late Mr. Holland at all times to which the evidence gives light.

The above statement of the trial judge has reference not only to the will he made on February 18, 1949, approximately one month before his death, but also to the power of attorney executed on January 30, 1948, ten days after he suffered the stroke which caused paralysis. The trial judge refers to a period of fourteen months as being "one without any interest, devoid of initiative, and not capable of discernment". In his judgment he says:

> The position with respect to the power of attorney is different only in that it was signed on the 30th of January 1948, ten days after he was admitted to the hospital, and prior to the said judgment rendered by this Court appointing a judicial adviser to the late Mr. Holland upon a petition made by the Plaintiff to have him interdicted for insanity.
>
> But the evidence is so strong that at many times both before and after the execution of the Power of attorney Mr. Holland was in a state of mind which would render him incapable of giving a valid consent to a document that any added burden put upon the Plaintiff because the Power of Attorney antedated the decision upon the Petition for interdiction by a period of about one month has in my view been rebutted.
>
> Here again as in the case of the Will the evidence as to the late Mr. Holland's capacity at the time the Power of Attorney was executed is weak. I accept Mr. Frégau's statement that he was not present at the time the Power of Attorney was executed, without hesitation. The Defendant Jenkins was present but did not testify. Mrs. Batchelor, the nurse, was the sole witness offered and her evidence is no more convincing than in the instance of the Will.

In the Court of Queen's Bench[1], Mr. Justice St-Jacques held that the appellant had no legal status to ask for the annulment of the power of attorney, being only a particular legatee for $1,000. With this statement I do not agree, because the will being void, she was an heir *ab intestat*, and had an interest in obtaining a declaration of nullity of the power of attorney, so as to increase the value of the estate, of which she was an heir-at-law. Mr. Justice St-Jacques also held that when the power of

[1] [1955] Que. Q.B. 785.

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attorney was given, it was not established that Holland was not competent to sign the instrument. I will deal with this point later.

As to the will, he held that it was impossible to set aside the judgment of the trial judge because Jenkins, the executor and the only appellant by cross-appeal before the Court of Queen's Bench, had no status to support the will, the universal legatees not having appealed to the Court of Queen's Bench the judgment of the trial judge setting it aside. He thought, therefore, that there was *res judicata* as to the invalidity of the will.

Mr. Justice Gagné came also to the conclusion that as to the will, there was *res judicata,* Jenkins having no interest to appeal. He also reached the conclusion, agreeing with the learned trial judge, that it had not been established that Holland was competent at the time of signing his will. He also agreed with the trial judge that Holland was mentally incapable of signing the power of attorney. He therefore dismissed both appeals, being of opinion that the two instruments were null and void for lack of capacity, and that it was therefore unnecessary to examine the contention of the appellant that they were obtained by fraud or illegal manoeuvres.

Mr. Justice Hyde also held that the executor had no interest in the will and that as to it there was *res judicata.* He however reached the conclusion that the power of attorney was signed at a moment when Holland was *compos mentis.*

Three judges of the Court of Queen's Bench consequently held that as to the will, there was *res judicata,* and that the judgment should stand, but only Mr. Justice Gagné held that the testator was mentally incapable. The majority of the Court of Appeal, Mr. Justice Gagné dissenting, held that the power of attorney was valid.

I agree with the learned trial judge and with Mr. Justice Gagné, that at the time of signing the power of attorney and his last will, Holland did not have the necessary mental power to execute them, and that his weakness of mind did not allow him to comprehend the effect and consequences of the acts which he performed. He had even affixed his signature on a white piece of paper, evidently not knowing

that it was intended to be a power of attorney to be completed later, which Mr. Fregeau, Q.C., refused to do. It has been overwhelmingly shown that his mind was habitually in a state of confusion, incapable of discernment, and no satisfactory evidence has been adduced that the instruments were executed during periods of lucid intervals. This burden rested upon the proponents of the will and of the power of attorney. They have totally failed, on this point, to satisfy me.

I may add that the constant jurisprudence which imposes upon the proponents of a will the obligation to prove lucid intervals by preponderance of evidence, when a *prima facie* case of incapacity has been established, applies not only in cases of wills, but also in cases of execution of other instruments, as for instance *powers of attorney.*

Moreover, I am in complete agreement with the unanimous pronouncement of the Court of Queen's Bench, that as to the will, there was *res judicata,* the universal legatees not having appealed. Only Jenkins did, and he had no interest to do so. The principal function of the executor is to see to the proper execution of the will. He does not represent the estate; he is the mandatory of the deceased, and it is from him only that he holds his powers. An action to set aside a will cannot be directed against him. (Colin et Capitant, Droit Civil Français, t. 3, 1950, p. 961) (Encyclopédie Dalloz, Droit Civil, vol. 2, p. 690 et seq, verbo Exécuteur Testamentaire) (Aubry et Rau, Droit Civil Français, vol. 11, 5e ed., p. 425) (Baudry-Lacantinerie, Traité de Droit Civil, Des Donations et Testaments, vol. 2, p. 317) (Duranton, Cours de Droit Français, t. 9, p. 590) (Laurent, Droit Civil Français, vol. 14, p. 386) (Beudant, Droit Civil Français, Donations entre vifs et Testaments, vol. 7, t. 2).

In certain instances, the executor may support the validity of the will (919 C.C.), but his possible intervention is limited to certain cases only. As Demolombe says (Cours de Droit Civil, Donations entre vifs, vol. 22, t. 5, p. 66, nº 79):

> Et encore, pensons-nous que ce serait le droit et le devoir de l'exécuteur d'intervenir, s'il s'apercevait que les héritiers *s'entendent frauduleusement* avec les tiers pour dissimuler au préjudice des légataires, l'actif réel de la succession, soit par des jugements, qu'ils voudraient laisser rendre collusoirement contre eux, soit par des traités quelconques.

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At p. 57, no. 68, he adds:

> Nous ajoutons qu'il pourrait prendre parti tout à la fois contre les uns et contre les autres, s'il arrivait que les héritiers et légataires s'entendissent pour tromper, de concert, les intentions du testateur.

The French law is similar to ours on this point, and Mignault shares the same views as the commentators of the *Code Napoleon*. He says (Droit Civil Canadien, vol. 4, pp. 477 and 478):

> En vertu des pouvoirs généraux que la loi lui confère, l'exécuteur testamentaire doit protéger le testament lorsque les héritiers ou légataires ou même des tiers tentent collusoirement de le faire annuler. A cet effet, l'article 919 porte que s'il y a contestation sur la validité du testament, l'exécuteur testamentaire peut se rendre partie pour la soutenir; et cette disposition doit s'entendre tant de la validité du testament tout entier que d'un legs qu'il renferme. Ce n'est pas que l'exécuteur soit le représentant de la succession ou qu'il ait qualité pour plaider au nom des héritiers; ces derniers seuls sont les représentants de la succession. *Mais comme l'exécuteur testamentaire a pour mission de veiller à l'exécution du testament, il convenait de lui donner le droit d'intervenir dans une instance où l'on attaque ce testament, afin d'éviter que par collusion l'héritier ne le laisse annuler.* Tel est le seul but de la disposition que j'ai citée. *On ne pourrait donc pas poursuivre l'exécuteur testamentaire en nullité du testament*: ne représentant pas la succession, il n'a pas qualité pour répondre à cette action. *L'action doit être dirigée contre l'héritier lui-même,* et l'exécuteur testamentaire peut intervenir dans l'instance, s'il le juge à propos, afin de soutenir le testament, mais là se borne son rôle. C'est ainsi qu'on doit entendre une décision du juge Larue dans une cause de *Poitras v. Drolet* (12 C.S. p. 461), à l'effet que l'exécuteur testamentaire n'est que l'administrateur des biens de la succession, et n'a pas qualité pour lier contestation sur la légalité du testament, *laquelle ne peut être débattue qu'avec les héritiers ou légataires du testateur.*

I have therefore reached the conclusion that the will and power of attorney are null for lack of mental capacity, and furthermore, that the judgment avoiding the will not having been appealed by the interested parties, constitutes *res judicata,* and cannot be challenged now.

Article 919 C.C. and the authorities cited above, not only establish the absence of interest of the executors to appeal before the Court of Queen's Bench, but also show that the action could not have been directed against them *es-qualité,* as claimed by the respondents and cross-appellants. The executors had to be sued personally as they have been, although I agree with the Courts below that fraud has not been conclusively shown.

I do not believe that it is necessary to determine if undue influence has been exercised to overbear the will of the testator. Having reached the conclusion that Holland was mentally incapable, this aspect of the case need not be discussed.

Jenkins and Bradley purported to act as executors of a will which is null and void, and Jenkins furthermore acted under a power of attorney which I find invalid. It necessarily follows that Jenkins and Bradley, having assumed the role of executors, and having administered the estate *de facto,* must account to the heirs-at-law, as well as Jenkins who acted under the power of attorney. The administration of property on behalf of another party, whether as trustee, mandatory, tutor, curator, testamentary executor, or *negotiorum gestor,* involves the obligation to account.

This obligation also rests upon a person whose authority to act, derives from an instrument which is found to be void for lack of mental capacity. The obvious conclusion is that Jenkins and Bradley must account to the heirs-at-law for the administration of the estate under the will, and the former must also account for his administration under the power of attorney. The heirs have the absolute right to know what has become of the assets of the estate, and under the *Code of Civil Procedure* (art. 566), a time limit must be determined. I believe that a delay of four months from the date of the pronouncement of this judgment would be fair and reasonable. If the respondents fail to do so, then the appellant must avail herself of the dispositions of art. 578 of the *Code of Civil Procedure.*

It has been argued on behalf of the respondents, and the cross-appellants, that this action cannot succeed, because it has not been shown that all the heirs-at-law were *mis-en-cause.* I entirely disagree with this proposition. When the estate is finally settled, all the heirs will of course have to be legally called, and if any have not been *mis-en-cause* in the present instance, a suggestion which I doubt very much, their rights may always be safeguarded. Moreover, as it has been said in *Russell v. Lefrançois, supra,* this technical question may not be raised here now, the respondents having failed to do so in the courts below.

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In this latter case, Taschereau J., as he then was, said at p. 362:

> Les parties souffriraient une criante injustice si nous refusions maintenant d'adjuger sur le litige pour un tel motif. Dans la cause de *Richer v. Voyer* (5 Rev. Lég. 600), le Conseil Privé disait sur une objection semblable prise devant lui:
>
> > Their Lordships would be most reluctant to dismiss this suit for want of parties at this final stage, unless it was clearly demonstrated that they ought to do so.
>
> Ici, il n'est pas absolument nécessaire que toutes les parties intéressées à cette succession soient présentes pour que nous décidions de la contestation que le demandeur, l'intervenante et la défenderesse *Morin,* ont bien voulu lier ensemble en l'absence des autres. Notre jugement ne pourra, il est vrai, affecter en loi ceux qui ne sont pas en cause; mais il est à espérer, cependant, qu'il mettra virtuellement fin à toute contestation sur ce testament.

And further at p. 363:

> Ceci est encore une objection que cette cour ne peut que voir que d'un mauvais œil à cet étage de la cause. Il serait bien malheureux qu'après une contestation si longue et si coûteuse, le litige entre les parties fût tout à recommencer par suite d'une objection de cette nature prise au dernier moment.

I would therefore direct that the will be held invalid for mental incapacity, and on this point I agree that there is *res judicata,* and I would also declare the power of attorney void, as not having been executed by a person of sound intellect. I would order W. H. Bradley, as well as the Jenkins estate, representing the late Charles Ruiter Jenkins, to render an account within four months of the pronouncement of this judgment, of their administration of the estate of the late John C. Holland, and I would also order the Jenkins estate to account within the same period of time for the administration by Charles R. Jenkins under the power of attorney, signed by the late John C. Holland.

The plaintiff's appeals are allowed.

The judgment of the trial judge is modified as to the defendant Charles Ruiter Jenkins, former executor of the will of John C. Holland, now represented by his estate, who will have to account within four months from the date of the pronouncement of this judgment to the estate of the late John C. Holland. The action against Wesley H. Bradley, co-executor of the estate, is maintained, and it is ordered that he also account within the same period of time to the Holland estate. The power of attorney signed by John C. Holland on January 30, 1948, in favour of

Charles R. Jenkins is declared null and void, as not having been executed by a person of sound intellect. The estate of Charles Ruiter Jenkins will also have to account to the Holland estate for his administration under the said power of attorney within the same period of time. The cross-appeal lodged before this Court by the Canadian Red Cross Society and the Salvation Army is dismissed.

The defendants, viz: the estate of the late Charles Ruiter Jenkins, and Wesley H. Bradley, will pay the costs in the Superior Court, but there will be no order as to the costs against the mis-en-cause the Canadian Red Cross Society and the Salvation Army.

In the Court of Queen's Bench, the respondents, viz: the estate of the late Charles Ruiter Jenkins and Wesley H. Bradley, will pay the costs, but the costs of the cross-appeal by Charles Ruiter Jenkins will be borne only by his estate. There will be no costs against the mis-en-cause, the two charitable institutions, who did not appeal.

Before this Court, the plaintiff-appellant Linnie Holland McEwen will be entitled to her costs in both appeals, and to her costs on the cross-appeal by the Canadian Red Cross Society and the Salvation Army, which is dismissed.

Appeals allowed and cross-appeal dismissed with costs.

Attorneys for the plaintiff, appellant: Hackett & Mulvena, Montreal.

Attorneys for the defendants, respondents: Rousseau, Howard & Bradley, Sherbrooke.

MICHAEL HARRISON and CLARE McKAY, an infant under the age of twenty-one years by his next friend, F. J. McKAY and the said F. J. McKAY (*Plaintiffs*) ..... APPELLANTS;

AND

MARY A. BOURN (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Motor vehicles—Collision between car making left-hand turn across road and car coming in opposite direction—View of turning car not obstructed—Driver absolved from negligence by jury—Verdict unrea-

*PRESENT: Locke, Cartwright, Fauteux, Martland and Judson JJ.

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sonable and unjust—Duty under s. 41(1)(d) of The Highway Traffic Act, R.S.O. 1950, c. 167—Objections to judge's charge—Real issue never put to jury—New trial directed.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming a judgment dismissing the action after a trial by jury.

H. G. Chappell and *A. F. Rodger,* for the plaintiffs, appellants.

T. N. Phelan, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

JUDSON J.:—This is an appeal from the judgment of the Court of Appeal for Ontario which affirmed a judgment dismissing the plaintiffs' action after a trial with jury. The plaintiff Harrison was the owner and driver of one of the cars and the plaintiff McKay was his passenger. This car collided with a car owned and driven by the defendant Mary A. Bourn on October 4, 1956, a little before 9 p.m. on No. 11 highway between Thornhill and Steele's Avenue. Harrison was south-bound and Miss Bourn was north-bound. No. 11 highway at this point is a four-lane highway, two lanes north and two lanes south, divided by a double white line. Miss Bourn was in the north-bound passing lane and made a left-hand turn from this lane across the two south-bound lanes, intending to enter the parking lot of Loblaw's store. The collision occurred when her car was pointing in a westerly direction with its front close to the entrance to the parking lot. She was blocking the south-bound driving or curb lane and also part of the south-bound passing lane. She says that she did not see the south-bound Harrison car until the moment of impact. The evidence is undisputed that she had a clear view to the north for seven or eight hundred feet.

The jury absolved Miss Bourn from negligence and found the plaintiff Harrison entirely to blame for the accident because he was travelling at an excessive speed through an area marked "Caution". The caution sign is some three hundred feet north of the Loblaw store on the west side of the highway and is undoubtedly intended to warn south-bound traffic of the existence of the store and the probability of traffic entering and leaving the parking lot attached to the store. The Court of Appeal dismissed

the appeal, the majority holding that it was open to the jury on the evidence adduced to exonerate Miss Bourn from any causative negligence. Mr. Justice F. G. MacKay dissented on the ground that on the whole of the evidence, no jury reasonably could have exonerated the respondent from some degree of negligence causing the accident. He would have granted a new trial.

My opinion, with respect, is the same as that of Mr. Justice F. G. MacKay. On the defendant's own story, she did not see the oncoming car until the moment of impact. On any view of the evidence this car was in view during the whole time when she was making her turn across the south-bound two lanes. Her duty in making this turn is clearly defined by s. 41(1)(*d*) of *The Highway Traffic Act:*

> (*d*) The driver or operator of a vehicle upon a highway before turning to the left or right from a direct line shall first see that such movement can be made in safety, and if the operation of any other vehicle may be affected by such movement shall give a signal plainly visible to the driver or operator of such other vehicle of the intention to make such movement.

There was a plain disregard by Miss Bourn of the direction given by the first part of this rule. Quite apart from the objections urged against the judge's charge, this case appears to me, as it did to the dissenting judge in the Court of Appeal, to be one which requires the intervention of an appellate Court as being "so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it"; *McCannell v. McLean*[1]; *Adam v. Campbell*[2].

It is also my opinion that the appellant's objections to the judge's charge are well founded. The issues here were very simple—the speed of the Harrison car, the propriety of Miss Bourn's turn and her duty to look and to see what was coming across her proposed path. Had she looked she could not have failed to see the lights of the oncoming

[1] [1937] S.C.R. 341, 343, 2 D.L.R. 639.
[2] [1950] 3 D.L.R. 449, 454.

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car. She says that she did look and that she did not see any such car. In these circumstances, there was real substance in the plaintiff's objection taken at the conclusion of the judge's charge that there had been failure to instruct the jury in accordance with *Swartz v. Wills*[1], to the effect that "where there is nothing to obstruct the vision and there is a duty to look, it is negligence not to see what is clearly visible". Such an instruction was at no time given.

I do not think that the real issue with regard to the allegation of negligence against the defendant was ever put to the jury. The sections of *The Highway Traffic Act* having to do with left and right turns at intersections; left turns from a one-way highway into an intersecting two-way highway; left turns from a two-way highway into an intersecting one-way highway; moving from one lane to another—none of which were relevant to the issues in this case and all of which were submitted to the jury—could only serve to obscure the one section that had real relevancy and which the jury appears to have ignored completely.

I would allow the appeal with costs both here and in the Court of Appeal and direct a new trial. The costs of the first trial will be reserved to the trial judge.

Appeal allowed with costs, new trial directed.

Solicitors for the plaintiffs, appellants: Chappell, Walsh & Davidson, Toronto.

Solicitors for the defendant, respondent: Phelan, O'Brien, Phelan & Rutherford, Toronto.

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[1] [1935] S.C.R. 628 at 634, 3 D.L.R. 277.

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*Oct. 20, 21
Nov. 19

RICHARD HAIG HUNT (*Plaintiff*) .....APPELLANT;

AND

MACLEOD CONSTRUCTION COMPANY LIMITED, S. HAJCHAK, GORDON L. WILSON AND WAINO KUMPULA (*Defendants*) ..... RESPONDENTS;

AND

B. R. WESTON .....THIRD PARTY.

MACLEOD CONSTRUCTION COMPANY LIMITED ..... PLAINTIFF BY COUNTERCLAIM;

AND

RICHARD HAIG HUNT, GORDON L. WILSON, WAINO KUMPULA AND B. R. WESTON ..... DEFENDANTS BY COUNTERCLAIM.

WALTER MAYO (*Plaintiff*) .....APPELLANT;

AND

MACLEOD CONSTRUCTION COMPANY LIMITED, S. HAJCHAK, GORDON L. WILSON AND WAINO KUMPULA (*Defendants*) ..... RESPONDENTS;

AND

B. R. WESTON .....THIRD PARTY.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Actions—Negligence—Several defendants—Motion of non-suit granted to two of the defendants—Motion made at conclusion of defence of remaining defendant and also after case on counterclaim of same defendant had been put in—Whole case on question of liability had been heard—Power of trial judge to rule on motion at that stage—Propriety of granting motion upon the evidence—Power correctly exercised by trial judge.

APPEALS from two judgments of the Court of Appeal for Ontario, reversing a judgment of Spence J. Appeals allowed, Rand and Cartwright JJ. dissenting in part.

J. J. Robinette, Q.C., and *G. B. Weiler, Q.C.*, for the plaintiffs, appellants.

H. Steen, Q.C., for the defendant G. L. Wilson, respondent.

*PRESENT: Rand, Cartwright, Abbott, Martland and Judson JJ.

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A. Petrone, for the defendant W. Kumpula, respondent.

P. B. C. Pepper, Q.C., and *W. Herridge,* for the third party B. R. Weston.

T. N. Phelan, Q.C., for the defendants MacLeod Construction Company Limited and S. Hajchak, respondents.

The judgment of Rand and Cartwright JJ. was delivered by

CARTWRIGHT J. (*dissenting in part*):—The relevant facts and the course followed at the trial are set out in the reasons of my brother Judson. For the reasons given by him I agree with his conclusion that there was nothing to prevent the learned trial judge from ruling on the application for a non-suit made by counsel for Wilson and Kumpula at the conclusion of the defence of MacLeod Construction and Hajchak, and that consequently the question becomes one of the propriety of granting the non-suit upon the evidence.

I have reached the conclusion that the non-suit should have been refused. The evidence established that the vehicles of Wilson and Kumpula were parked on the travelled portion of the highway in violation of s. 43(1) of *The Highway Traffic Act,* R.S.O. 1950, c. 167, which reads as follows:

> No person shall park or leave standing any vehicle whether attended or unattended, upon the travelled portion of a highway, outside of a city, town or village, when it is practicable to park or leave such vehicle off the travelled portion of such highway; provided, that in any event, no person shall park or leave standing any vehicle, whether attended or unattended, upon such a highway unless a clear view of such vehicle and of the highway for at least 400 feet beyond the vehicle may be obtained from a distance of at least 400 feet from the vehicle in each direction upon such highway.

The purpose of this provision is plain. It is, in the words of Rand J. in *Brooks v. Ward and The Queen*[1], "to rid the highways of unnecessary hazards". It was open to the jury to find that the place in which the vehicles mentioned were parked was one of peculiar danger, being at the crest of a hill and on a curve in the highway, on which east-bound or west-bound vehicles might lawfully be approaching each other at a combined speed of 100 miles

[1] [1956] S.C.R. 683 at 687, 4 D.L.R. (2d) 597.

per hour, and that so long as their drivers permitted them to remain in that position they were guilty of continuing negligence.

On all the evidence, I am unable to see how the jury, once they had exonerated Hunt from negligence, could fail to find Hajchak guilty of negligence which was an effective cause of the accident; but it was, in my opinion, open to them to take the view that the negligence of Wilson and Kumpula, which was clearly at least *causa sine qua non* of the accident, was also an effective cause.

Where one party, A, has negligently created a dangerous situation and another, B, after becoming aware of the danger or after he should by the exercise of reasonable care have become aware of it, could by the exercise of reasonable care have avoided the danger but fails to do so, B may be solely responsible for the resulting damage. Whether he will be solely responsible depends upon the answer to the question, whether a clear line can be drawn between the negligence of A and that of B; and that question is one of fact.

In the case at bar, in my opinion, if it had been left to the jury, on a proper direction, to say whether a clear line could be drawn between the negligence of Wilson and Kumpula and that of Hajchak they might, acting reasonably, have answered the question either in the affirmative or in the negative. I am, therefore, of opinion that the learned trial judge erred in withdrawing this question from them.

I am, however, unable to agree with the view of the Court of Appeal that there should be a new trial of all the issues. The jury, after a proper charge, have absolved Hunt and Weston of negligence and have assessed the damages of Hunt and Mayo. I have already indicated my view that no jury acting reasonably could have failed to find Hajchak guilty of some negligence which was an effective cause of the accident. In these circumstances I am of opinion that the judgments entered at the trial in favour of Hunt and Mayo against MacLeod Construction Company Limited and Hajchak should stand, but that a new trial should be directed to determine whether, and if so to what extent, MacLeod Construction Company

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Limited and Hajchak are entitled to contribution from Wilson and Kumpula in respect of the amounts payable by them to Hunt and Mayo, such new trial to be before a jury unless all parties agree that it should be without a jury. The making of such an order is authorized by s. 29 of *The Judicature Act*, R.S.O. 1950, c. 190, which reads:

> A new trial may be ordered upon any question without interfering with the decision upon any other question.

I would therefore allow the appeals, set aside the judgments of the Court of Appeal, and, subject to the right of election hereinafter mentioned, direct as follows. In the Hunt action, paras. 1, 2, 5 and 6 of the judgment of the learned trial judge should be restored and paras. 3 and 4 thereof should be vacated and set aside. In the Mayo action paras. 1, 2 and 5 of the judgment of the learned trial judge should be restored and paras. 3 and 4 thereof should be vacated and set aside. In both actions there should be a new trial limited to the issue as to whether MacLeod Construction Company Limited and Hajchak are entitled to contribution from Wilson and Kumpula or either of them, and if so to what extent, in respect of the amounts payable by them to Hunt and Mayo. The appellants and the third party will recover their costs in the Court of Appeal and in this Court from MacLeod Construction Company Limited and Hajchak. MacLeod Construction Company Limited and Hajchak will recover their costs in the Court of Appeal and in this Court from Wilson and Kumpula, and the costs of the first trial as to the issues between these parties shall be disposed of by the Judge presiding at the new trial.

As it is possible that the respondents MacLeod Construction Company Limited and Hajchak will not desire a new trial limited as set out above, I would direct that if MacLeod Construction Company Limited and Hajchak so elect within two weeks from the delivery of judgment in these appeals, the appeals should be disposed of as above set out but that failing such election the judgments of the learned trial judge should be restored with costs throughout.

The judgment of Abbott, Martland and Judson JJ. was delivered by

JUDSON J.:—For an understanding of the issues involved in this appeal it is necessary to set out the facts in some detail. The accident happened on the Trans-Canada highway a short distance west of Fort William on July 1, 1954, at 7.30 p.m. in good summer weather. One Richard Hunt was driving in a westerly direction on the north side of the highway with a passenger Walter Mayo. At the scene of the accident there were two parked vehicles partly on the travelled portion of the highway and partly on the shoulder, both facing east. One of these vehicles was a truck owned by W. Kumpula and the other a car owned by G. L. Wilson. Wilson's car had broken down and Kumpula's truck had towed it into the position in which the vehicles were at the time of the accident. The MacLeod Construction Company's truck was travelling in an easterly direction driven by S. Hajchak. As it approached the parked vehicles the driver noticed the situation but he was waved on by a bystander, B. R. Weston, who had been a passenger in the Wilson car. Hajchak followed Weston's signal and swung to the north side of the highway directly into the path of the west-bound Hunt car and there was a head-on collision wholly on the north side of the highway. Both Hunt and Mayo started separate actions. Hunt sued MacLeod Construction, the driver Hajchak, Wilson, the owner of the parked car, and Kumpula, the owner of the parked truck. MacLeod Construction brought in Weston as third party and claimed indemnity against him. It also counterclaimed against Hunt, Wilson, Kumpula and Weston for damage to its truck. The separate action of Mayo, Hunt's passenger, was constituted in the same way with the exception that there was no counterclaim in this action for damage to the truck.

At the trial the plaintiffs put in their case and the defendant, MacLeod Construction and its driver put in their complete defence and the case on the counterclaim, which included the calling as a witness of the third party, Weston. At this stage the owners of the two parked vehicles, Wilson and Kumpula, moved for a non-suit in

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the action and counterclaim, and Weston moved for a non-suit. The learned trial judge granted the applications of Wilson and Kumpula and dismissed them from the action and counterclaim. Weston's application for a non-suit was dismissed. The jury's finding was that Hajchak, the driver of the MacLeod Construction truck, was negligent and that Hunt and Weston were not negligent. The exoneration of Weston from negligence in this matter occurred in the counterclaim. There was no jury notice in the third party proceedings.

As a result, Hunt and Mayo obtained judgment in full for their claims. The counterclaim of MacLeod Construction Company for damages to its truck was dismissed and the third party proceedings against Weston were dismissed, the learned trial judge accepting the verdict of the jury exonerating Weston from negligence. MacLeod Construction Company and its driver were therefore found 100 per cent. responsible for this accident.

MacLeod Construction Company appealed to the Court of Appeal from this finding and a new trial was ordered on all the issues. It is stated in the unanimous reasons of the Court of Appeal that the non-suit was granted at the conclusion of the plaintiff's case and that on the authority of *McCarroll v. Powell*[1], a non-suit should not be granted at the conclusion of the plaintiff's case against one defendant when the plaintiff is claiming against two defendants alleging fault on the part of both of them, because a non-suit against one prevents the assertion by the other defendant of his claim to have the degrees of fault apportioned between the two defendants pursuant to the provisions of *The Negligence Act*. The impropriety of the non-suit at this stage of the proceedings is thoroughly understandable. Even though the plaintiff may not have put in a case to go to the jury against both defendants, one defendant still has the right to assert by way of defence that this is a case for apportionment of responsibility by the jury and his evidence might even show the other defendant to be solely to blame.

The judgment of the Court of Appeal in the present case is based upon the assumption that the non-suit was granted in favour of Wilson and Kumpula at the close of

[1] [1955] O.W.N. 281, 4 D.L.R. 631.

the plaintiff's case. It was in fact granted at the conclusion of the defence of MacLeod Construction and Hajchak. They had no further evidence to offer on the question of liability and it was expressly so stated by their counsel. At this stage of the proceedings, when the motions for non-suit were made, the learned trial judge was of the opinion that the plaintiff had no case to go to the jury against Wilson and Kumpula and that MacLeod Construction and Hajchak in their defence had likewise failed to prove a case for apportionment fit for submission to the jury against these two defendants. The whole case on the question of liability had then been heard. There was at that point nothing to prevent the learned trial judge from ruling on a non-suit. *McCarroll v. Powell* has no application. There could be no impairment of the right of MacLeod Construction and Hajchak to assert a claim for apportionment of negligence against the co-defendants because this opportunity has been given and the right fully exercised.

The question therefore becomes one of the propriety of the non-suit in the circumstances of the case. Wilson and Kumpula had been parked for some time at the scene of the accident. The MacLeod Construction truck was the only east-bound vehicle. The driver admits that he saw the parked vehicles in plenty of time to stop. Whether he should stop or whether he should go around and how he should go around were matters entirely within his choice. The jury has exonerated Weston, the bystander. My opinion is that the learned trial judge correctly exercised his power to grant a non-suit and that there is no ground for interference with his ruling.

I would therefore allow the appeals with costs both here and in the Court of Appeal and restore the judgments granted at the trial.

Appeals allowed with costs, RAND *and* CARTWRIGHT JJ. *dissenting in part.*

Solicitors for the plaintiff Hunt, appellant: Weiler & Weiler, Fort William.

Solicitor for the plaintiff Mayo, appellant: Bernard Shaffer, Fort William.

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Solicitor for the defendants MacLeod Construction Co. Ltd. and S. Hajchak, respondents: James F. W. Ross, Port Arthur.

Solicitors for the defendant Wilson, respondent: Hughes, Agar, Amys & Steen, Toronto.

Solicitor for the defendant Kumpula, respondent: Alfred A. Petrone, Port Arthur.

Solicitor for third party: Harold G. Blanchard, Port Arthur.

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*Feb. 19, 20, 21, 24
**Nov. 3

IN THE MATTER OF AN ACT FOR EXPEDITING THE DECISION OF CONSTITUTIONAL AND OTHER PROVINCIAL QUESTIONS, BEING CHAPTER 37 OF THE REVISED STATUTES OF MANITOBA, 1940,

AND

IN THE MATTER OF A REFERENCE PURSUANT THERETO BY THE LIEUTENANT-GOVERNOR-IN-COUNCIL TO THE COURT OF APPEAL FOR THE HEARING OR CONSIDERATION OF CERTAIN QUESTIONS ARISING WITH RESPECT TO CLAUSE 16 OF THE CONTRACT SET FORTH IN THE SCHEDULE TO CHAPTER 1 OF THE STATUTES OF CANADA, 1881, AND THE MUNICIPAL ACT, BEING CHAPTER 141 OF THE REVISED STATUTES OF MANITOBA, 1940, AS AMENDED.

THE ATTORNEY-GENERAL FOR MANITOBA ..... APPELLANT;

AND

CANADIAN PACIFIC RAILWAY COMPANY ..... RESPONDENT;

AND

THE ATTORNEY GENERAL OF CANADA ..... INTERVENANT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Constitutional law—Railways—Municipal taxation—Whether C.P.R. property in area added to Manitoba in 1881 taxable by municipalities—Statutes of Canada (1881), c. 1—B.N.A. Act, 1871 (Imp.), c. 28—Boundaries Act, 1881 (Can.), c. 14; 1881 (Man.), c. 1 and c. 6.

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*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux and Abbott JJ.

**The Chief Justice, owing to illness, took no part in the judgment.

The exemption given to the Canadian Pacific Railway from taxation by "the Dominion or by any Province hereafter to be established, or by any Municipal Corporation therein", which is contained in cl. 16 of the contract between the company and the Government of Canada, approved and ratified by c. 1 of the Statutes of Canada (1881), applies to the territory taken from the then North-West Territories in 1881 and added to the existing Province of Manitoba by the *Boundaries Act,* 1881 (Can.), c. 1, to which the Province consented in c. 1 and c. 6 of its statutes for the year 1881.

Per Taschereau, Rand, Cartwright, Fauteux and Abbott JJ.: The exemption was more than a term of a contract, it was a "provision enacted" within the meaning of ss. 2 and 3 of the *Boundaries Act.* The effect of the charter as an Act was to declare that exemption legislatively. When a contractual right of this nature becomes vested by statute in a company, in order to carry out the legislative intent, there is necessarily to be attributed to it the character of enactment. But even if that is not so, yet, as being contained in an Act of Parliament, it is a provision enacted respecting the railway and its lands within s. 2(*b*) of the *Boundaries Act.*

The exemption, not from taxation by a future province, but from taxation under future-created provincial power, having become legislative in character, as law was in force in the added territory when the extension became effective in 1881; it was continued in force by the *Boundaries Act,* which, by its terms, withdrew from provincial taxation the subject-matter described, which it was not beyond the competence of Parliament to do. *Attorney General of Saskatchewan v. C.P.R.,* [1953] A.C. 594.

The tax exemption did not cease to exist when, in 1906, the provisions of the *Boundaries Act* which had been repealed and re-enacted in 1887, were in turn repealed and not re-enacted. The *Boundaries Act* became a limitation of the taxing power of the province embodied in its constitution.

Per Locke and Cartwright JJ.: Sections 2 and 3 of the *B.N.A. Act,* 1871, empowered Parliament to impose the restriction on the powers of taxation of the Province of Manitoba as its limits were defined by the legislation of 1881 and the latter section empowered the legislature to agree to this as one of the terms upon which the addition to its boundaries were made and to pass the legislation of that year. The judgment of the Judicial Committee in *Attorney General for Saskatchewan v. C.P.R.,* [1953] A.C. 594, has settled the question as to whether taxes may be levied in respect of the business carried on as a railway upon the main and the branch lines as distinct from general municipal taxation.

The Dominion has not expressly or impliedly repealed, by acts passed since 1881, the restriction on taxation: *Minister of National Revenue v. Molson,* [1938] S.C.R. 213 at 218. As to the province, it was without power to pass any legislation which might affect in any way the restriction on its taxation powers provided by the legislation of 1881: an Act of the Imperial Parliament would have been required.

Canadian Pacific Railway Company v. Burnett (1889), 5 Man. R. 395; *Canadian Pacific Railway Company v. Municipality of Cornwallis* (1890), 7 Man. R. 1; (1891), 19 S.C.R. 702; *Canadian Pacific Railway*

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Company v. Municipality of North Cypress (1905), 14 Man. R. 382; (1905), 35 S.C.R. 550; *Reference Re Section 17 of the Alberta Act*, [1927] S.C.R. 364, referred to.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], on a reference by the Lieutenant-Governor in Council. Appeal dismissed.

The following questions were asked and were answered as follows by the Court of Appeal[2]:

1. Does said clause 16 exempt and free from taxation under the said The Municipal Act of Manitoba the main line of the Canadian Pacific Railway Company in the said territory added as aforesaid to the province of Manitoba in 1881?

Answer: Yes.

2. Does said clause 16 exempt and free from taxation under the said The Municipal Act of Manitoba the branch lines of the Canadian Pacific Railway Company constructed pursuant to said clause 14 in the said territory added as aforesaid to the Province of Manitoba in 1881?

Answer: No, except as in the answer to Question 4.

3. Does said clause 16 exempt and free from taxation under the said The Municipal Act of Manitoba the following property situated in the said territory added as aforesaid to the Province of Manitoba in 1881: All stations and station grounds, work shops, buildings, yards and other property and appurtenances required and used for the construction and working of the said main line of the Canadian Pacific Railway Company in the said territory added as aforesaid to the Province of Manitoba in 1881?

Answer: Yes.

4. Does said clause 16 exempt and free from taxation under the said The Municipal Act of Manitoba the following property situated in the said territory added as aforesaid to the Province of Manitoba in 1881: all stations and station grounds, work shops, buildings, yards and other property and appurtenances required and used for the construction and working of the said branch lines of the Canadian Pacific Railway Company constructed pursuant to said clause 14 in the said territory added as aforesaid to the Province of Manitoba in 1881?

[1] [1956] 2 D.L.R. (2d) 112, 73 C.R.T.C. 208.
[2] [1956] 2 D.L.R. (2d) at 131, 73 C.R.T.C. at 228.

Answer: No, except such of those properties above as are also required and used for the construction and working of the main line.

5. Does said clause 16 exempt and free from taxation the Canadian Pacific Railway Company under the said The Municipal Act of Manitoba in respect of the business carried on as a railway on the main line of the Canadian Pacific Railway Company in the said territory added as aforesaid to the Province of Manitoba in 1881?

Answer: Yes.

6. Does said clause 16 exempt and free from taxation the Canadian Pacific Railway Company under the said The Municipal Act of Manitoba in respect of the business carried on as a railway on the branch lines of the Canadian Pacific Railway Company constructed pursuant to said clause 14 in the said territory added as aforesaid to the Province of Manitoba in 1881?

Answer: No, except such business as above carried on as a railway on branch lines as is required for or in connection with the construction and working of the main line or with or for the purpose of business on the main line.

A. E. Hoskin, Q.C., J. Allen, Q.C., and *J. H. Stitt, Q.C.,* for the appellant.

C. F. H. Carson, Q.C., A. Findlay, Q.C., and *H. M. Pickard,* for the respondent.

D. H. W. Henry, Q.C., for the Attorney General of Canada, intervenant.

The judgment of Taschereau, Rand, Fauteux and Abbott JJ. was delivered by

RAND J.:—This appeal raises a question of exemption from taxation of that portion of the main line with its appurtenances of the Canadian Pacific Railway lying within an area of Manitoba which, in 1881, was taken from the then North-West Territories and added to the province by complementary legislation of Parliament and legislature. The exemption is based upon cl. 16 of the agreement providing for the construction of the railway, originally between the government of Canada and the promoters of the undertaking for whom the Canadian

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Pacific Railway Company was by legislation substituted. The issues, in substance, are whether it was competent to the Dominion to make the exemption a term or condition of the legislation effecting the extension, and if so, whether the language employed was adequate to the purpose.

The same question as applied to lands granted to the company as subsidy was before this Court in 1891 and 1904 and on both occasions the claim of the company was upheld: *The Rural Municipality of Cornwallis v. Canadian Pacific Railway Company*[1] and *The Rural Municipality of North Cypress et al v. Canadian Pacific Railway Company*[2]. Those judgments are now challenged generally. Since they were rendered important constitutional questions arising from the establishment of provinces out of Rupert's Land and the North-West Territories have been passed upon by the Judicial Committee; and although in this appeal we are, as I think, concluded by them, since the controversy is intended, in any event, to be carried to the Committee and elaborate arguments have been presented to us, it may not be out of place to state the considerations which lead me independently of them to their result.

The obligation on the Dominion government to construct a railway between the Pacific coast and the railway system in Ontario arose as one of the terms of the entry of British Columbia into the Dominion. That union was effected as of July 20, 1871, and shortly afterwards Parliament enacted legislation containing general provisions as the first step towards implementing the obligation. After a series of difficulties, embarrassments and vicissitudes, the government and the promoters came to a final accord in 1881.

The constituting documents with the accompanying legislation contain the provisions on which the issue is to be decided. They consist of the contract with a draft charter annexed to it; the statute of Parliament, 44 Vict., c. 1, to which it was a schedule, ratifying it, authorizing the Dominion government to incorporate the promoters and their associates, and generally to take the necessary measures to set the project on its course; the dominion and provincial enactments bringing about the extension of the provincial

[1] (1891), 19 S.C.R. 702. [2] (1905), 35 S.C.R. 550.

boundaries; and the *British North America Acts* of 1867 and 1871. The charter, in the form of letters patent, was, by s. 2 of c. 1, to embrace all authority required to carry the contract into execution, and to confer upon the company the powers and privileges embodied in the draft annexed to the contract. Section 2 declared:

> . . . and such charter, being published in the Canada Gazette, with any Order or Orders in Council relating to it, *shall have force and effect as if it were an Act of the Parliament of Canada,* and shall be held to be an Act of incorporation within the meaning of the said contract.

Chapter 1 was passed on February 15, 1881; on February 16, letters patent issued constituting the Canadian Pacific Railway Company a body corporate and politic. Clause 3 of the letters declared that as soon as certain of the stock of the company had been subscribed, a percentage paid up, and the sum of $1,000,000 deposited with the Minister,

> the said contract *shall become and be transferred to the Company,* without the execution of any deed or instrument in that behalf; and the Company shall, thereupon, become and be vested *with all the rights of the contractors* named in the contract, and shall be subject to, and liable for, all their duties and obligations to the same extent and in the same manner as if the said contract had been executed by the said Company instead of by the said contractors;

and cl. 4 that:

> All the franchises and powers necessary or useful to the Company to enable them to carry out, perform, enforce, *use, and avail themselves of, every* condition, stipulation, obligation, duty, *right, remedy, privilege, and advantage agreed upon,* contained or described in the said contract, are hereby conferred upon the Company. And the enactment of the special provisions hereinafter contained shall not be held to impair or derogate from the generality of the franchises and powers so hereby conferred upon them.

By cl. 16 of the contract, the exemption provision,

> The Canadian Pacific Railway, and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the Company, shall be forever free from taxation by the Dominion, or by any Province hereafter to be established, or by any Municipal Corporation therein; and the lands of the Company, in the North-West Territories, until they are either sold or occupied, shall also be free from such taxation for 20 years after the grant thereof from the Crown.

In the meantime negotiations had been proceeding between the Dominion government and that of Manitoba for the enlargement of the area of the province by the

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annexation of adjacent lands within the then Territories. This question seems to have arisen shortly after the admission of the province to the union and in 1873 the legislature passed an Act, 37-38 Vict., c. 3, declaring the consent of the province to an increase of territory, subject to approval of the terms and conditions of dominion legislation effecting it.

By 33 Vict., c. 3 of Parliament, Manitoba, as of July 15, 1870, had been established out of Rupert's Land and the North-West Territories which, as of the same day, had been transferred to Dominion jurisdiction by an Imperial Order-in-Council. It was evidently considered that having been vested with complete jurisdiction over these territories, Parliament possessed power to carve new provinces out of them. But doubts arose as mentioned in the recital to the Imperial Act of 1871, 34-35 Vict., c. 28, to remove which that statute was passed. Section 2 authorizes Parliament to establish "new provinces in any territories forming, for the time being, part of the Dominion of Canada, but not included in any province thereof" and at the time of that establishment to

> make provision for the constitution and administration of any such province and for the passing of laws for the peace, order and good government of such province and for its representation in the said parliament.

By s. 3, with the consent of the legislature of any province, Parliament may increase, diminish, or otherwise alter the limits of such province "upon such terms and conditions as may be agreed to by the said legislature"; and with like consent,

> to make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any province affected thereby.

By s. 5, the *Manitoba Act*, c. 3, 32-33 Vict., is "to be and to be deemed to have been valid and effectual for all purposes whatsoever". Section 6 declares Parliament to be incompetent, except as provided by the third section, to alter the provisions of the *Manitoba Act* "or of any other Act hereafter establishing new provinces in the said Dominion", reserving to Manitoba certain powers of modification of the *Manitoba Act* not pertinent here. The effect of s. 6 is to give to any Act constituting a province

the character of an Imperial statute. It was under the authority of s. 3 that the enlargement of the provincial boundaries of Manitoba was brought about.

The legislation providing for this consisted of 44 Vict., c. 6 of the province, and 44 Vict., c. 14 of Parliament. Section 2 of c. 14 provided:

2. (*a*) All the enactments and provisions of all the Acts of the Parliament of Canada which have, since the creation of the Province of Manitoba, been extended into and made to apply to the said Province shall extend and apply to the territory by this Act added thereto as fully and effectually as if the same had originally formed part of the province and the boundaries thereof had, in the first instance, been fixed and defined as is done by this Act, subject, however, to the provisions of section three of this Act.

(*b*) The said increased limit and the territory thereby added to the Province of Manitoba shall be subject to all such provisions as may have been or shall hereafter be enacted, respecting the Canadian Pacific Railway and the lands to be granted in aid thereof.

And s. 3:

3. All laws and ordinances in force in the territory hereby added to the Province of Manitoba at the time of the coming into force of this Act, and all courts of civil and criminal jurisdiction, and all legal commissions, powers, and authorities, and all officers, judicial, administrative and ministerial, existing therein at the time of coming into force in this Act, shall continue therein as if such territory had not been added to the said province, subject nevertheless with respect to matters within the legislative authority of the Legislature of the Province of Manitoba to be repealed, abolished, or altered by the said Legislature.

It was argued by Mr. Hoskin that by these sections the exemption is limited to "all such *provisions* as may have been or shall hereafter be *enacted*" respecting the railway or its lands, and that what the company has is only a term of a contract which is not a "provision enacted". By cl. 3 of the charter there was vested in the company "all the rights of the contractors", and by cl. 4

. . . all the franchises and powers necessary or useful to enable the Company to enforce, use, and avail themselves of, every condition, stipulation . . . right, remedy, privilege and advantage agreed upon, contained or described in the said contract.

What was the "right" under cl. 16? Apart from Dominion taxation within existing provinces, it was exemption from taxation by any legislative organ, Dominion or provincial, of the main line of railway and the subsidy lands of the company which as of February 15, 1881, were not then contained within the territory of a province. The effect of the charter as an Act was to declare that exemption legislatively; in the statutory structure for such a national

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work, unless the language does not permit any other interpretation, it is not to be taken that that character of declaration was omitted. The express vesting of the right was more than effecting a contractual novation; that had sufficiently been done by substituting the company for the individual contractors. In the face of that statutory provision neither Parliament nor legislative delegate in the Territories could then have validly imposed taxation without repealing or conflicting with the exemption as law existing within the Territories. As a contractual right the enforcement of the exemption could strictly be by way of injunction only. By an exemption, as it might be called, "in rem", the taxing power is itself modified; and when a contractual right of that nature becomes the subject-matter of a statutory investment in a company, in order to carry out the legislative intent, there is necessarily to be attributed to it the character of enactment. In the Act of 1905 setting up the province of Saskatchewan, s. 24 makes the exercise of provincial powers "subject to the provisions of s. 16 of the contract". No one would suggest that this so far does not abstract legislatively from the taxing power of the province; there would be no question of enforcing that right as purely contractual: there is imported a legislative effect. The same result follows from cl. 4:

> . . . all the franchises . . . necessary or useful . . . to enable them to enforce, use and avail themselves of . . . every right, remedy, privilege and advantage agreed upon . . .

The "franchises" include legislative immunity from taxation.

But even if these two investments by the charter are to be taken in a contractual sense, yet, as being contained in an Act of Parliament, they are *provisions enacted respecting the railway and its lands* within s. 2(*b*) of c. 14. In that sense they are, verbally, of the same apparent character as s. 24 of the *Alberta Act;* and the interpretation given to the latter must be accorded the former.

It is then contended that, although cl. 16 is a "provision enacted", its own terms exclude its application to the situation here; the taxation of land which is to be exempt is that "by the Dominion or by any province hereafter to be established or by any municipal corporation

therein" and since Manitoba was already established it cannot be said that by enlarging its boundaries there was created a new province. Chapter 14 was passed by Parliament on March 21, 1881, c. 6 by the legislature on May 25, 1881, and by proclamations both came into force on July 1, 1881. The latter Act in its preamble recites ss. 2(*a*),(*b*), 3 and 4 of c. 14 (1881), declares the consent of the legislature to the terms and conditions of that Act, and by s. 1 enacts that:

> The territorial boundaries and limits of the province of Manitoba shall be extended and increased as in that Act is mentioned and expressed, subject to the terms and conditions therein contained, and the said Act and all the enactments and provisions thereafter shall have the force and effect of law in this province so enlarged and increased as aforesaid . . .

Section 2 in substance reproduces s. 3 of c. 14 continuing all existing laws in the added territory until

> . . . the same and every of them which are or is within the executive and legislative authority of the province of Manitoba, are or is from time to time, as may seem expedient, by Order in Council to be published in the Manitoba Gazette, altered or changed and brought under and subject to the laws of the province of Manitoba; . . .

The exemption, not, as I construe it, from taxation by a future province but from taxation under future-created provincial power, having become legislative in character, as law was in force in the added territory when the extension became effective, July 1, 1881; by s. 3 of c. 14 it was continued in force, and by its terms it withdrew from provincial taxation the subject-matter which it described. Chapter 14 appears to have been enacted on that assumption.

Section 2(*b*) declares the territory added to be subject to all such provisions "as may have been or shall hereafter be enacted" by Parliament *respecting the railway and the subsidy lands*. The reference to the railway and the subsidy lands could have no other than cl. 16 as subject-matter: all other matters respecting the railway would be independent of "terms and conditions" reserved, and within Dominion powers under ss. 91(29) and 92(10) of the Act of 1867. On the view urged, Parliament used this express language in relation to a situation to which, on its face, cl. 16 could not apply.

But whatever the precise construction we might give to s. 2(*b*) in the context of the contract, as in substance it deals with tax exemption of the property described, as the

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exemption is made a condition of the extension of boundaries, and as we cannot treat it as wholly ineffectual and nugatory, we are bound to take it to be an affirmative enactment withholding taxing powers from Manitoba over the railway works and subsidy lands within the added area; and from that moment, as law of the area, it is continued in force by both ss. 2(*b*) and 3.

It is argued that it was beyond the competence of Parliament to withhold the taxing power furnished the province by s. 92(2) of the 1867 Act. It has already been held by the Judicial Committee in *Attorney General of Saskatchewan v. Canadian Pacific Railway Company*[1], approving *Reference re Constitutional Validity of section 17 of the Alberta Act*[2], that in the constitution of Saskatchewan, which in this respect is identical with that of Alberta, a reservation to that effect was valid; both are provinces set up under the powers conferred upon Parliament by s. 2 of the *British North America Act, 1871*. That section provides for vesting in new provinces power to pass laws for their "peace, order and good government"; s. 3 enables the alteration of provincial limits on "such terms and conditions as may be agreed to". That these conditions embrace the preservation of one of the terms of fulfilling such a vital constitutional obligation as that being carried out in 1881 seems to me to be too clear for debate. The reservation in the case of the new provinces was a direct limitation of taxation power; and I am unable to distinguish that effect when confined to a portion of a province from its applicability to the whole. Considerations justifying such conditions are adverted to in *Attorney General of Saskatchewan v. Canadian Pacific Railway Company, supra.* At p. 615, Viscount Simon says:

> From the time that the North-West Territory was admitted into the Dominion, the Parliament of Canada had the widest powers of legislation under section 5 of the Rupert's Land Act, 1868. It might have caused great inconvenience if the Parliament of Canada, when carving new Provinces out of the added areas, could not make such deviation from section 92 as was necessary to make effective acts done under the powers conferred on it by section 5 of the Rupert's Land Act, 1868, and section 4 of the 1871 Act. These considerations support the conclusion of the Supreme Court in the *Alberta reference,* (1927) S.C.R. 364, and their Lordships are not prepared to differ from it.

[1] [1953] A.C. 594, 3 D.L.R. 785, [1953] C.T.C. 281.
[2] [1927] S.C.R. 364, 2 D.L.R. 993.

The obligation to construct the transcontinental railway was of that character.

A last contention is made in these terms: in the revisions of the statutes in 1886 the provisions of c. 14 (1881) were repealed and re-enacted in somewhat different form as ss. 1, 2 and 6 of c. 47, R.S.C. 1887; the latter, for the purposes of the revision in 1906, were in turn repealed by 6-7 Ed. VII, c. 43, and not re-enacted; by the last repeal the tax exemption ceased to exist.

Section 2(*b*) of c. 14 (1881) as a condition annexed to the legislation enlarging the provincial boundaries became a limitation of the taxing power of the province embodied in its constitution. The *Imperial Act* of 1871, by s. 3, empowered Parliament to "increase, diminish, or otherwise alter" the limits of a consenting province, but nothing in it touches a subsequent modification of conditions. Section 2 enabled Parliament to

> establish new provinces in any territory forming, for the time being, part of the Dominion of Canada but not included in any province thereof;

and by s. 6, subject to s. 3, Parliament is declared incompetent to alter the provisions of the *Manitoba Act* of 1870 so far as they relate to that province or "of any other Act hereafter establishing new provinces in the said Dominion". The Act is significantly entitled *The British North America Act, 1871*.

In enacting the legislation so authorized, Parliament is exercising a delegated power of the Imperial Parliament. Conceivably by reason of the nature of conditions, Parliament could amend or repeal them; but otherwise a unilateral or any modification would call for a clear authorization. When other interests than those of the Dominion and the Province are involved, that result would seem unquestionable; and it may be observed that the right to the exemption here has never been affected in the contract or legislation creating it. Like other constitutional provisions, these terms could, in 1906, be modified legislatively only by the Imperial Parliament; but this is not to be confused with a modification of any such right created by the legislation of Parliament enacted in its own as distinguished from its delegated right.

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It was urged that s. 6 of 6-7 Ed. VII, c. 43, *An Act Respecting the Revised Statutes* (1906), preserving existing rights and immunities as affected by the revision of the statutes, prevented the repeal from having the consequence claimed; but the view I take of the character of the legislation of 1881 dispenses with consideration of this submission.

I agree, therefore, with the answers given by the Court of Appeal to the questions put by the Reference, and I would dismiss the appeal. There should be no costs to any party.

LOCKE J.:—Clause 16 of the contract entered into between the Crown and George Stephen and his associates dated October 21, 1880, read as follows:

> The Canadian Pacific Railway and all stations and station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof and the capital stock of the Company shall be forever free from taxation by the Dominion or by any Province hereafter to be established or by any Municipal Corporation therein; and the lands of the Company, in the Northwest Territories, until they are either sold or occupied shall also be free from such taxation for 20 years after the grant thereof from the Crown.

By c. 1 of the statutes of Canada for 1881 this contract which formed a schedule to the Act was approved and ratified. By s. 2, it was declared that for the purpose of incorporating the persons mentioned in it and those who should be associated with them in the undertaking the Governor might grant to them in conformity with its terms under the corporate name of the Canadian Pacific Railway Company a charter conferring upon them the franchises, privileges and powers embodied in the schedule to the said contract and that such charter, upon being published in the Canada Gazette with any Orders-in-Council relating to it, should have force and effect as if it were an Act of the Parliament of Canada and be held to be an Act of Incorporation within the meaning of the said contract.

The extent of the exemption from taxation afforded to the Canadian Pacific Railway Company in the province of Saskatchewan by s. 24 of the *Saskatchewan Act* of 1905 was considered by this Court in *Canadian Pacific Railway Company v. Attorney General for Saskatchewan*[1], and

[1] [1951] S.C.R. 190, 1 D.L.R. 721, [1951] C.T.C. 26.

the decision rendered was affirmed by the Judicial Committee[1]. In that case the Attorney-General for Manitoba intervened in the proceedings before the Judicial Committee, a circumstance which, in view of the argument advanced, is of some importance in determing the disposition to be made of the present reference.

This reference was made by the Lieutenant-Governor in Council of the province of Manitoba under the provisions of an *Act for Expediting the Decision of Constitutional and other Provincial Questions,* R.S.M. 1940, c. 37, and the following questions were referred to the Court of Appeal for consideration:

1. Does said clause 16 exempt and free from taxation under the said The Municipal Act of Manitoba the main line of the Canadian Pacific Railway Company in the said territory added as aforesaid to the province of Manitoba in 1881?
2. Does said clause 16 exempt and free from taxation under the said The Municipal Act of Manitoba the branch lines of the Canadian Pacific Railway Company constructed pursuant to said clause 14 in the said territory added as aforesaid to the province of Manitoba in 1881?
3. Does said clause 16 exempt and free from taxation under the said The Municipal Act of Manitoba the following property situated in the said territory added as aforesaid to the province of Manitoba in 1881—

   all stations and station grounds, work shops, buildings, yards and other property and appurtenances required and used for the construction and working of the said main line of the Canadian Pacific Railway Company in the said territory added as aforesaid to the province of Manitoba in 1881?
4. Does said clause 16 exempt and free from taxation under the said The Municipal Act of Manitoba the following property situated in the said territory added as aforesaid to the province of Manitoba in 1881—

   all stations and station grounds, work shops, buildings, yards and other property and appurtenances required and used for the construction and working of the said branch lines of the Canadian Pacific Railway Company constructed pursuant to said clause 14 in the said territory added as aforesaid to the province of Manitoba in 1881?
5. Does said clause 16 exempt and free from taxation the Canadian Pacific Railway Company under the said The Municipal Act of Manitoba in respect of the business carried on as a railway on the main line of the Canadian Pacific Railway Company in the said territory added as aforesaid to the province of Manitoba in 1881?
6. Does said clause 16 exempt and free from taxation the Canadian Pacific Railway Company under the said The Municipal Act of Manitoba in respect of the business carried on as a railway on the

[1] [1953] A.C. 594, 3 D.L.R. 785, [1953] C.T.C. 281.

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branch lines of the Canadian Pacific Railway Company constructed pursuant to said clause 14 in the said territory added as aforesaid to the province of Manitoba in 1881?

The Order of Reference was made on September 13, 1949, but the matter was not argued before the Court of Appeal until the year 1955 and the judgment of that Court was delivered on January 16, 1956.

The terms of the legislation which resulted in the large addition to the extent of the province in the year 1881 are stated in other reasons to be delivered in this matter.

The question as to the extent of the powers granted to Parliament by the Imperial statute of 1871 (c. 28, 34-35 Vict.) is the decisive question to be considered in disposing of this reference.

The province of Manitoba had been constituted by c. 33 of the statutes of Canada of 1870.

The preamble to c. 28 of the Imperial statutes, 34-35 Vict., which is described as the *British North America Act, 1871*, recites that doubts had been entertained respecting the powers of the Parliament of Canada to establish Provinces in territories admitted or which might thereafter be admitted into the Dominion and that it was expedient to remove such doubts and to vest such powers in the said Parliament. Section 2 of the Act declared that the Parliament of Canada might from time to time establish such new provinces and at the time of such establishment make provision for their constitution and administration and for the passing of laws for the peace, order and good government of any such province. Section 3 provided that Parliament might from time to time, with the consent of the Legislature of any Province of the Dominion, increase, diminish or otherwise alter the limits of such province upon such terms and conditions as may be agreed to by the Legislature and may, with the like consent, make provision respecting the effect and operation of any such increase or alteration in relation to any province affected thereby. Section 5 declared that the *Manitoba Act* above mentioned, *inter alia*, should be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which it received the assent in the Queen's name by the Governor General of Canada.

With the required consent of the legislature of the province of Manitoba expressed by c. 1 of the statutes of Manitoba for 1881, Parliament, purporting to act under powers vested in it by the *British North America Act, 1871,* enacted c. 14 of the statutes of 1881 which extended the boundaries of Manitoba to the westward so that the westerly boundary thereafter became the centre line of the road allowance between ranges 29 and 30 west of the first principal meridian. The territory thus added to the province was taken from the easterly part of what was then the Northwest Territories.

Section 2 of this Act declared that all the enactments and provisions of all the Acts of the Parliament of Canada which have, since the creation of the province of Manitoba, been extended into and made to apply to the province, shall extend and apply to the added territory as fully as if the same had originally formed part of the province, subject, however, to the provisions of s. 3 of the Act, and subs. (*b*) reads:

> The said increased limit and the territory thereby added to the Province of Manitoba shall be subject to all such provisions as may have been or shall hereafter be enacted respecting the Canadian Pacific Railway and the lands to be granted in aid thereof.

Following the passing of this statute by Parliament, c. 6 of the statutes of 1881 was enacted by the Legislature of Manitoba. Chapter 1 of the statutes of Manitoba of 1881 provided that what was referred to as the increased limits

> . . . shall be subject to all such provisions as may have been or shall hereafter be enacted respecting the Canadian Pacific Railway and the lands to be granted in aid thereof.

A provision to the like effect was repeated in c. 6 of the statutes of 1881 following the enactment of c. 14 of 1881 by Parliament.

The effect of this legislation in exempting properties of the Canadian Pacific Railway Company from taxation in the areas added to the province by the legislation of 1881 has been considered in certain cases decided in the Courts of the province and in this Court. Several of the contentions of the Attorney-General advanced in the present case have been decided adversely to the province in these cases.

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There has, however, been raised on the present reference both before the Court of Appeal and this Court questions as to the power of Parliament to exempt the lands of the railway company referred to in cl. 16 of the contract and of the Legislature to enact those portions of the legislation of 1881 which declared that the lands added to the province should be subject to the terms of the railway contract which were not argued in the Canadian cases or referred to in the judgments delivered. While a very similar issue was raised by counsel representing the Attorney-General of Manitoba as intervener during the argument before the Judicial Committee in *Attorney General for Saskatchewan v. Canadian Pacific Railway Company,* above referred to, that issue had not been raised when that reference was before this Court, and other than the judgment of the Court of Appeal in the present case the matter has not been directly dealt with by any Canadian Court.

The Order of Reference recites that doubts have arisen as to the power of the legislature to enact legislation which provides for the sale of the roadbed of a Dominion railway company such as the Canadian Pacific Railway in the event of default in the payment of municipal taxes. I think there was sound reason for such doubt: *Johnson and Carey v. Canadian National Railways*[1]. It does not otherwise suggest that there were then any doubts as to the validity of the legislation either in Canada or of the Province enacted in 1881. This appears to be an aspect of the matter which had not occurred to anyone until after the time the Order of Reference was made in 1949.

The decisions in Canada which have dealt with the matter must be considered. In the case of the *Canadian Pacific Railway Company v. Burnett*[2], the issue was as to whether lands agreed to be sold by the railway company to one Shiels by an agreement for sale were subject to taxation and to sale for taxes by the municipality of South Cypress. The land in question was part of the land grant made to the railway under the terms of the agreement of 1881 and while the agreement of sale had been entered into between the railway company and Shiels no patent from the Crown had been issued to the railway company

[1] (1918), 43 O.L.R. 10.

[2] (1889), 5 Man. R. 395.

and this contract had been terminated by the vendor for default in compliance with its terms. The matter was brought before the full Court of the province upon a special case. Taylor C.J., who presided, referred to the legislation of 1881 and held that the arrangements made between the Dominion and the province in 1881 as to the exemption of the lands added to the province were in the nature of a contract which could only be varied by mutual consent and that the lands in question had not been sold by the company within the meaning of that expression in cl. 16 of the railway contract of 1881. Killam J., after referring to cl. 16 of the company's contract with the government and to the statutes extending the limits of the province, said in part (p. 415):

> The provisions making the added territory subject to the enactments of Parliament "respecting the Canadian Pacific Railway and the lands to be granted in aid thereof" appear to me to be clear limitations upon the legislative authority of the Legislature of Manitoba and not merely stipulations in a contract or treaty which might be broken by that legislature.

Bain J., (p. 430) after referring to the Imperial Act of 1871, said:

> The Legislature having agreed upon the terms and conditions, and the Parliament of Canada having increased the limits subject to these terms and conditions, it seems to follow at once, that the terms and conditions specified become, as it were, part of the constitution of the added territory, subject to which the Provincial Legislature can alone exercise jurisdiction, and which it cannot alter or vary without the consent of the Imperial or Dominion Parliaments, any more than it could any of the provisions of the Manitoba Act. And in another view, the legislation above detailed may be looked at as an express contract between the Parliament of Canada and the Provincial Legislature, one of the terms of which was, that these lands were to be free from taxation, and neither this nor any other term specified can be varied by one party without the agreement of the other.

In *Canadian Pacific Railway Company v. Municipality of Cornwallis*[1], the company sued to recover moneys paid to the municipality in the following circumstances: several parcels of land within the municipality which lay in territory added to the province by the 1881 legislation had been sold by the railway company under agreements of sale and these had been cancelled. The municipality had assessed these lands for taxes and the railway company had refused payment and the lands were offered at a tax sale at which the municipality became the purchaser. The

[1] (1890), 7 Man. R. 1.

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railway company, before the time for redemption under the provisions of the *Municipal Act* had expired, paid the amount claimed due and asked the repayment of it. At the trial before Bain J. a verdict was entered for the plaintiff and the defendant appealed to the full Court. While the lands formed part of the subsidy granted to the railway company, no patent had been issued until the year 1890. Taylor C.J. considered that the matter was concluded by the decision of the Court in *Burnett's* case and adhered to the opinion he had expressed in that matter and Dubuc J. agreed. Killam J. dissented on the ground that there was no right in the railway company to recover the taxes which had been paid voluntarily. Dealing, however, with the argument that the lands had been sold by the railway company by reason of the agreements of sale that had been made, he referred to the decision in *Burnett's* case as deciding that matter and referring to the judgment in that case said that the Court had held that s. 2 of the Dominion Act of 1881:

> . . . places a limitation upon the authority which otherwise the provincial legislature would possess to impose or to empower municipalities to impose direct taxation upon the lands of the company.

The appeal to this Court was dismissed[1]. While as the report of the case indicates in the argument before the full Court of Manitoba the Honourable Joseph Martin, the Attorney-General of the province, who appeared for the defendant municipality had, in the course of his argument, contended that it was beyond the powers of the province to agree to the exemption granted by the Dominion Act, the point was not mentioned in the judgments delivered in Manitoba and the argument was not repeated by counsel appearing for the appellants in this Court and no mention is made of the matter in the judgments delivered.

In 1903 three actions which had been instituted by arrangement between the Government of Canada and the railway company for the purpose of settling the liability of the company's lands to taxation were considered by the full Court of Manitoba. The actions were brought respectively by the Rural Municipality of North Cypress, the Rural Municipality of Argyle, both municipalities

[1] (1891), 19 S.C.R. 702.

being in that portion of Manitoba added to the province by the Act of 1881 and the Springdale School District No. 263 of the Northwest Territories and had been consolidated for the purpose of trial. The claim of the municipalities was for taxes upon lands forming part of the railway subsidy and the action of the school district was for a parcel of land in the Northwest Territories.

The report of this case[1] shows that in the argument for the municipalities and the school district it was contended that the powers given to the province by heads 2 and 8 of s. 92 of the *British North America Act* to make laws in relation to direct taxation within the province and to municipal institutions were unchangeable, and that while subs. (*b*) of s. 2 of the Dominion Act of 1881 and the Manitoba statutes of that year provided that the territory added to the province should be subject to all such provisions as may have been or should thereafter be enacted respecting the Canadian Pacific Railway and the lands to be granted in aid thereof, this did not include the arrangements made relating to the contract made by the promoters of the railway company and the Dominion Government since this was not an enactment. It was contended then, as it has been contended before us, that the Act (c. 1 of the statutes of Canada for 1881) merely authorized a certain contract to be made and did not enact its terms.

The grounds urged in argument in support of the claim of the Springdale school district need not be considered as in the appeal from the judgment of the Court to this Court which followed it was decided that there had been no jurisdiction in the Courts of Manitoba to entertain the claim.

The actions had all been dismissed at the trial. The Court, consisting of Killam C.J., Dubuc and Richards JJ., were unanimous in holding that the claims of the rural municipalities failed.

[1] (1905), 14 Man. R. 382.

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Killam C.J., holding that all questions as to the effect of the legislation of 1881 in limiting the powers of the provincial legislature had been settled by the decisions of the Court and of the Supreme Court of Canada in the *Municipality of Cornwallis* case, said (p. 402):

> The terms and conditions upon which the extension of the boundaries of Manitoba was made by the Dominion and accepted by the Province imposed constitutional limitations upon the authority of the Provincial Legislature with respect to the added territory, different from those existing with respect to the original Province.
>
> The restriction in the 6th section of The British North America Act, 1871, upon the power of the Parliament of Canada to alter the Act establishing the Province of Manitoba, was subject to an exception of the provisions in the 3rd section relating to the alteration of Provincial boundaries. The expression "terms and conditions" in the latter section was apt to include limitations of Provincial powers, and was accepted by both the Dominion Parliament and the Provincial Legislature as appropriate for the purpose.

Further, the Chief Justice said that the terms of the agreement between the Government of Canada and the promoters of the Canadian Pacific Railway Company and those of the company's charter, in view of the Act of Parliament confirming and authorizing them constituted provisions

> "enacted respecting the Canadian Pacific Railway and the lands to be granted in aid therof."
>
> By these provisions the Parliament of Canada enacted that the powers of taxation of these lands by the Dominion should be limited, and the Dominion transferred the territory to Manitoba subject to that limitation, which must thereafter apply to the Province.

While no question of *ultra vires* had been argued, the Chief Justice added (p. 403):

> It was quite competent for the Government to contract not to tax the property in the hands of the Company, and not to create another authority with power to do so.

The appeal to this Court is reported[1]. The headnote which correctly summarizes what was decided reads in part:

> *Held,* that when, in 1881, a portion of the North-West Territories in which this exemption attached was added to Manitoba the latter was a province "thereafter established" and such added territory continued to be subject to the said exemption from taxation.
>
> The limitations in respect of legislation affecting the territory so added to Manitoba by virtue of the Dominion Act, 44 Vict. ch. 14, upon the terms and conditions assented to by the Manitoban Acts, 44 Vict.,

[1] (1905), 35 S.C.R. 550.

(3rd Sess.), chs. 1 and 6, are constitutional limitations of the powers of the Legislature of Manitoba in respect of such added territory and embrace the previous legislation of the Parliament of Canada relating to the Canadian Pacific Railway and the land subsidy in aid of its construction.

The Court was unanimous in deciding that the appeal of the municipalities should be dismissed and that of the railway company against the judgment in favour of the Springdale school district allowed. Taschereau C.J. adopted the reasons given by Killam C.J. Girouard J. referred to the limitation expressly assented to by the legislature of Manitoba in the legislation of 1881 and considered that the matter had been settled by the judgment of this Court in the *Municipality of Cornwallis* case. Davies J., with whose judgment Sedgewick and Nesbitt JJ. both agreed, expressed his agreement with what had been said by Killam C.J. that the effect of the 1881 legislation was a constitutional limitation on the powers of the provincial legislature *quoad* this added territory. It was contended, apparently, for the first time, in this Court that the province of Manitoba, as its limits were defined by the legislation of 1881, was not a "province hereafter to be established" within the meaning of cl. 16 of the railway contract as the province had been already established in 1870 and the legislation of 1881 merely extended its limits. As to this Davies J. said (p. 566):

> Mr. Riddell argued with great force that even granting such a construction to be correct it could not be applied further or beyond the three specified classes of taxation mentioned in the 16th clause of the section, namely, by the Dominion, by a province thereafter to be established, or by any municipal corporation therein, and that the words "such taxation" refer to these three classes only. I am disposed to agree with him that the word "therein" has reference to a municipal corporation in a province thereafter to be established and that the words "such taxation" clearly refer to the three antecedent specified classes. If that is so, then the exemption can only be upheld by holding that so far as the added territory was concerned the Province of Manitoba was established with respect to it when and at the time it was added to the old province. I have no difficulty in accepting that as a reasonable construction and the more so as its rejection would operate to defeat the plain, clear and obvious intention of the Dominion Parliament and the Manitoba Legislature. Beyond doubt, as Mr. Robinson put it in his argument, the Province of Manitoba as it now exists was not established in 1870 nor before 1881. It was established, as it now exists and is bounded, in 1881. The Province of Manitoba was created in 1870 but its area then was comparatively small and circumscribed, a very large part of the present area of the province was added to it in 1881, and so the whole province as it now stands may fairly and reasonably be said to have been established in 1881. Whether or not apter language might have been chosen I am not prepared to say.

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The land sought to be taxed, if it had remained as part of the Northwest Territories, would unquestionably have been entitled to the exemption and as to this Davies J. said (p. 567):

> Manitoba, therefore, in my opinion, having asked for an addition of lands to its territories, a block of which lands were at the time subject to be exempt from all taxation by any authority having power to tax it for a specified period, and having agreed to accept the added territory subject to the then existing Dominion enactments regarding these lands, is bound by the terms of this 16th clause as being one of those enactments. Being so bound constitutionally, an interpretation must be given to the clause which, while consistent with its language, carries out the object and intent with which it was entered into. This being so, all subsequent legislation by the Legislature of Manitoba, even if broad enough in the language used to cover the exempted block, must be read and construed subject to the exemption and not as an attempt to repudiate or escape from a constitutional limitation the province had openly accepted.

Nesbitt J., in addition to stating his agreement with what had been said by Davies J., said that in his opinion Manitoba had been granted and received the additional territory with the special exemption attached.

With the exception of the argument made by the Honourable Joseph Martin, Attorney-General of Manitoba, in the *Cornwallis* case who had contended that the legislature of Manitoba had been without power to agree to the exemption of the lands in question by the 1881 legislation, no question that the legislation of that year passed by Parliament and the legislature respectively was *ultra vires* was raised in any of the cases originating in Manitoba.

The matter has now been raised on behalf of the province and a further argument not considered in any of the other cases made asserting that the Dominion and the province respectively have, by Acts passed since 1881, expressly or impliedly repealed the relevant portions of the Acts in question.

The contention that the Acts are *ultra vires* may be summarized as follows: since head 2 of s. 92 of the *British North America Act* gives to the legislature exclusive power to make laws in relation to direct taxation within the province in order to the raising of revenue for provincial purposes and head 8 in relation to municipal institutions in the province and since the *British North America Act* of 1871 did not, in clear terms, alter these provisions, Parliament was without authority to restrict these powers

of the legislature by c. 14 of the statutes of 1881; as to the provincial legislation it is said that the province was without power to surrender or agree not to exercise its powers under heads 2 and 8 in the manner provided in the two provincial Acts of 1881.

In the *Reference re section 17 of the Alberta Act*[1], this Court considered the constitutional validity of a section of the *Alberta Act* which varied the provisions of s. 93 of the *British North America Act, 1867* in their application to the province of Alberta.

The *Alberta Act* passed, as the preamble shows, under the powers vested in Parliament by the *British North America Act* of 1871 established the province of Alberta out of part of the Northwest Territories. Section 93 of the *British North America Act* declares the powers of the legislature of a province to make exclusively laws in relation to education subject to certain exceptions in regard to separate schools and s. 17 of the *Alberta Act* amended these provisions in material particulars. Newcombe J., by whom the judgment of this Court was delivered, referred to the fact that s. 3 of the *Alberta Act* declared that the provisions of the *British North America Acts, 1867 to 1886,* shall apply to the province of Alberta to the like extent as they apply to the provinces heretofore comprised in the Dominion as if the said province had been one of those originally united "except insofar as varied by this Act" and that a corresponding provision was contained in s. 2 of the *Manitoba Act, 1870,* and in cl. 10 of the Terms of Union with British Columbia. After pointing out that by s. 2 of the *British North America Act* of 1871 Parliament was empowered at the time of the establishment of new provinces to make laws for the peace, order and good government of such provinces and referring to what had been said as to these powers in *Riel v. The Queen*[2] by Lord Halsbury, Newcombe J. said (p. 372):

> It is useless, in view of the governing cases, to suggest any doubt as to the authority of Parliament to confer these legislative powers. *The Queen v. Burah,* (1878) 3 A.C. 889: *Hodge v. The Queen,* (1883) 9 A.C. 117: *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick,* (1892) A.C. 437: These authorities make it clear that the Parliament of Canada had plenary powers of legislation as large and of

[1] [1927] S.C.R. 364, 2 D.L.R. 993.
[2] (1885), 10 App. Cas. 675 at 678-679.

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the same nature as those of the Parliament of the United Kingdom itself; and, thus construed, so long as there was no repugnancy to an Imperial Statute, there was no limit, operating within the Territories, to the legislative power which the Dominion might exercise for their administration, peace, order and good government, while they continued to be Territories, or, at the time of the establishment of new provinces therein, for the constitution and administration of any such province, and for the passing of laws for the peace, order and good government thereof, . . .

And again:

The Ordinances, as I have shown, derived their force mediately from the Parliament of Canada, which had conferred the territorial legislative powers under which they were directly enacted. It is unquestionable that they had the force of law in the Territories from the time of their enactment down to the constitution of the province of Alberta in 1905, and it seems to be as plain as words can tell that, at the time of the establishment of the province of Alberta, the Parliament of Canada had the power to define and to regulate the legislative powers which were to be possessed by the new province.

This, it will be noted, is in agreement with what had been said by Killam and Bain JJ. in *Burnett's* case, by Killam J. in the *Cornwallis* case and by him as Chief Justice in the *North Cypress* case and by Davies J. in the latter case in this Court.

By a further amendment to the *British North America Act* passed in 1886 (49-50 Vict., c. 35), it was provided that the Parliament of Canada might make provision for the representation in the Senate and House of Commons of any territories which, for the time being, form part of the Dominion of Canada, and s. 2 declared that any Act passed by the Parliament of Canada for the purpose mentioned in this Act shall be deemed to have been valid and effectual from the date at which it received the assent. The concluding clause of this section read:

It is hereby declared that any Act passed by the Parliament of Canada, whether before or after the passing of this Act, for the purpose mentioned in this Act or in the British North America Act, 1871, has effect, notwithstanding anything in the British North America Act, 1867, and the number of Senators or the number of Members of the House of Commons specified in the last-mentioned Act is increased by the number of Senators or of Members, as the case may be, provided by any such Act of the Parliament of Canada for the representation of any provinces or territories of Canada.

Referring to this Act, Newcombe J. said that if the second paragraph of s. 2 was intended to have general application, the case was relieved of any posibility of a suggestion

of doubt, but that in the view which he took of the matter it was not necessary to consider the application of the provision which, having regard to the title of the Act, might suggest that its purpose was limited.

The case of the Attorney General of Saskatchewan to which I have above referred[1] was brought before the Court of Appeal of that province by a reference by the Lieutenant-Governor in Council. The questions submitted were as to whether municipalities created by the province with powers of taxation might impose general municipal taxes or business taxes upon the railway company in respect of its operation of its main line and its branch lines in the province. The answers made by this Court which varied those made by the Court of Appeal are to be found at p. 192 of the 1951 reports[2].

Saskatchewan was created a province in the same year as was Alberta by c. 42 of the statutes of Canada of 1905. As in the case of the *Alberta Act*, the preamble shows that the Act was passed under the powers conferred upon Parliament by the *British North America Act, 1871*.

Section 24 reads:

> The powers hereby granted to the said province shall be exercised subject to the provisions of section 16 of the contract set forth in the schedule to chapter 1 of the statutes of 1881, being an Act respecting the Canadian Pacific Railway Company.

The report of the argument of this case before the Judicial Committee shows that counsel for the Attorney-General contended that when, pursuant to the powers conferred by s. 2 of the *British North America Act, 1871*, Parliament enacted the *Saskatchewan Act* of 1905 it had no power to impose a constitutional limitation upon the right to taxation possessed by the Canadian provinces under s. 92 of the *British North America Act*. Counsel for the Attorney General of Manitoba, intervener, contended, *inter alia*, that the limitation imposed by s. 24 could not be justified under the Act of 1871 or validated under the Act of 1886. It was said that the power given by s. 2 of that statute to:

> make provision for the constitution and administration of any such province and for the passing of laws for the peace, order and good government of such province

did not justify the limitation imposed.

[1] [1953] A.C. 594, 3 D.L.R. 785, [1953] C.T.C. 281.
[2] [1951] S.C.R. 190, 1 D.L.R. 721, [1951] C.T.C. 26.

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These arguments were rejected in the judgment delivered by Viscount Simon. Saying that the question could only be raised on appeal to the Privy Council inasmuch as the question had already in effect been decided, in a sense adverse to the appellant's contention in the judgment of this Court in the *Reference re Constitutional Validity of section 17 of the Alberta Act,* above mentioned, Viscount Simon said (p. 613):

> Section 2 of the Act of 1871 empowers the Parliament of Canada at the time when it establishes new provinces in the added territories to make provision
>
> (*a*) for the constitution and administration of any such province;
>
> (*b*) for the passing of laws for the peace, order, and good government of any such province; and
>
> (*c*) for its representation in the Dominion Parliament.
>
> The words "peace, order and good government" are words of very wide import, and a legislature empowered to pass laws for such purposes had a very wide discretion. But Mr. Leslie and Lord Hailsham emphasized the distinction between section 4 of the Act of 1871, which enabled the Parliament of Canada to provide from time to time for peace, order, and good government in territories not included in a province, and section 2, which only enabled them to provide for the passing of laws for the peace, order, and good government of a province at the time when it was established. Section 2, they argued, enabled the Canadian Parliament to define the machinery for the passing of laws, but not to prescribe what laws might be passed by the province. The prescription, they contended, had been done for good and all by section 92 of the Act of 1867.
>
> But their Lordships would observe that if this argument was well founded the words in section 2 of the Act of 1871 "for the passing of laws for the peace, order, and good government" would be superfluous. The power to make provision for the "constitution" of the new province would be sufficient to enable the Parliament of Canada to provide a restriction on the normal range of taxing power exercised by the provincial legislature. The words under discussion being words of general import, their Lordships do not feel justified in placing on them the narrower meaning for which the appellant and Lord Hailsham contend.

Dealing with an argument that by reason of the terms of s. 146 of the Act of 1867, it should be implied that the structure of new provinces should be analogous to that of the original provinces, he said that so far as the lands comprising Rupert's Land and the Northwest Territories were concerned, s. 146 was exhausted when they were admitted to the union by the *Rupert's Land Act, 1868.*

Viscount Simon further said that there was no complete equality of powers between the four original provinces and that the Act of 1867 contained no such definition of provinces as would involve any conflict between that Act and the 1871 Act. A further passage reads (p. 614):

> The Manitoba Act, 1870, shows that an Act constituting a province might depart from the strict 1867 pattern. No doubt one reason for the passing of the 1871 Act was to remove any doubt as to the validity of the Manitoba Act, but it is noteworthy that a section on the lines of section 2 of the Manitoba Act recognizing variations has been introduced into all the documents creating a province since that date . . .

The question as to whether taxes may be levied in respect of the business carried on as a railway upon the main and the branch lines as distinct from general municipal taxation is settled by the judgment of the Judicial Committee in the *Saskatchewan* case. The further question raised is as to whether by certain legislation passed subsequent to 1881 which authorized various municipal bodies in Manitoba to impose taxation on real and personal property and by certain provisions of the *Municipal Act* the legislature had impliedly repealed the restriction on taxation contained in the federal legislation of that year and as to whether ss. 1, 2 and 6 of c. 14 of the statutes of Canada of 1881 have been repealed by the revisions of the statutes of 1886 and 1906.

As to this I refer to the judgment of Sir Lyman Duff C.J. in the *Minister of National Revenue v. Molson*[1] and to the reference there made to the judgment of Chancellor Boyd in *Licence Commissioners of Frontenac v. County of Frontenac*[2]. As to the suggested repeal by the legislature of the province, that body was without power to pass any legislation which might affect in any way the restriction on its taxation powers provided by the legislation of 1881. I agree with Mr. Justice Coyne that any amendment to this provision of the federal legislation of 1881 would require an Act of the Imperial Parliament.

Sections 2 and 3 of the *British North America Act* of 1871, in my opinion, empowered Parliament to impose the restriction on the powers of taxation of the province of Manitoba as its limits were defined by the legislation of 1881 and the latter section empowered the legislature

[1] [1938] S.C.R. 213 at 218, 2 D.L.R. 481.
[2] (1887), 14 O.R. 741 at 745.

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to agree to this as one of the terms upon which the addition to its boundaries were made and to pass the provincial legislation of that year.

I would dismiss this appeal.

CARTWRIGHT J.:—I agree with the reasons and conclusion of my brother Rand and with those of my brother Locke and would dispose of the appeal as they propose.

Appeal dismissed, no costs to any party.

Solicitors for the appellant: A. E. Hoskin and J. Allen, Winnipeg.

Solicitors for the respondent: H. A. V. Green and H. M. Pickard, Winnipeg.

Solicitor for the Attorney General of Canada, intervenant: W. R. Jacket, Ottawa.

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